REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 312/03
Reportable

In the matter between:

L KOTZÉ **APPELLANT**

and

SUIDWESTELIKE TRANSVAALSE LANDBOUKOÖPERASIE **RESPONDENT**

CORAM: HARMS, FARLAM JJA et VAN HEERDEN AJA

HEARD: 5 MARCH 2004

DELIVERED: 26 MARCH 2004

SUMMARY: Acknowledgment of indebtedness and undertaking to pay in specified instalments – whether creditor which rejects undertaking may sue on the acknowledgment.

JUDGMENT

FARLAM JA

[1] This is an appeal from a judgment given by Majiedt J, with whom Williams AJ concurred, in the Northern Cape Division, in which the respondent's appeal against a judgment given by an additional magistrate for the district of Vryburg (Mr ES Morolong) in favour of the appellant was upheld.

[2] The respondent, which was at the relevant time an agricultural co-operative, sued the appellant, who farmed in the Vryburg district, for payment of an amount of R191 028.32, together with interest.

[3] Two causes of action, a main claim and an alternative claim, were set out in the respondent's summons. The main claim was in respect of goods sold and delivered on credit. The alternative claim was based on a written acknowledgment of debt signed by the appellant on 4 March 1994. As the amount claimed was beyond the normal jurisdiction of the magistrate's court in the case of both claims, the respondent alleged in its particulars of claim that the appellant had consented to the magistrate's court's jurisdiction.

[4] It is not necessary to say much about the respondent's main claim. At the trial the respondent did not succeed in proving its case in respect of this claim against the appellant. The judgment in favour of the respondent given on appeal by the court *a quo* does not refer in terms to the main claim and clearly relates only to the alternative claim.

[5] The alternative claim was based upon a document signed by the

appellant on 4 March 1994, which was handed in at the trial as exhibit 'A'. It was headed 'Ooreenkoms om Skuld te Betaal' and purported to be an agreement between the appellant and the respondent. Its opening words were:

'Die partye kom soos volg ooreen'.

Then followed a paragraph headed:

Bedrag Verskuldig en Betaalreëling'.

This paragraph contained four subparagraphs. The first read as follows:

'1 Ek erken hiermee dat ek waarlik en wettiglik die bedrag van R191 028.32 aan Suid-Westelike Transvaalse Landboukoöperasie Beperk (hierna die SKULDEISER genoem) verskuldig is soos aangedui in gemelde Suid-Westelike Transvaalse Landboukoöperasie Beperk se maandstaat aan my gerig gedateer –.'

The second subparagraph read as follows:

'Die skuldenaar onderneem om die voormelde skuld tesame met die koste wat hierna gemeld word, te betaal by die kantore van die skuldeiser, Voortrekkerstraat, Posbus 5, Leeudoringstad en wel as volg:

1. 4 (Vier) Paaiemente op 30 September 1994, 30 September 1995, 30 September 1996, 30 September 1997.
2. Rente teen 8% per jaar terugwerkend van November 1992.'

The portion following on the words 'en wel as volg' in the second subparagraph and the amount (R191 028.32) in the first subparagraph were handwritten; the remaining words were part of a cyclostyled form.

Subparagraph 3 of the document was irrelevant as it provided for a

situation where payments were to be made monthly. Subparagraph 4 provided that in certain circumstances the full balance of the debt and the costs would become claimable and payable immediately.

[6] The second paragraph was headed: 'Die skuldenaar onderneem om'. Four subparagraphs followed. The first three dealt with the respondent's costs in recovering the debt. In the fourth subparagraph the appellant renounced certain special defences available to debtors. The third paragraph dealt with the allocation of payments made by the debtor, first to interest then to capital. The fourth paragraph provided that the agreement was not to be a novation of any existing obligation and gave the respondent the choice of holding the appellant liable 'op grond van hierdie ooreenkoms' or for any other judgment, debt, or cause of action. Paragraph 6 of the document contained a consent to jurisdiction. It read as follows:

'Die skuldenaar stem kragtens Artikel 45 van Wet 32 van 1944, soos gewysig, toe dat die skuldeiser enige regsgeding wat betrekking het op hierdie kontrak na eie keuse kan instel in die Landdroshof van enige distrik wat kragtens genoemde Wet ten opsige van die skuldenaar jurisdiksie het.'

[7] The appellant contended that the evidence relating to exhibit 'A' was inadmissible as it had been sent by his attorney to the respondent as part of a settlement proposal, which had not been accepted by the respondent. Instead, the respondent had made a counter-offer of

settlement to the appellant, which he had not accepted.

[8] At the end of the respondent's case in the magistrate's court, the appellant's attorney applied for his client to be absolved from the instance. This application was granted by the magistrate who held that he had no jurisdiction to hear the matter as the consent to jurisdiction, which was contained in paragraph 6 of exhibit 'A' had been part of an offer made to the respondent which it had rejected. This being so, no agreement had been concluded between the parties and the respondent could not rely on 'portions' of any such 'agreement'.

[9] The respondent successfully appealed against this judgment to the Northern Cape Division. In its judgment, which was given by Olivier AJ, with whom Malherbe J concurred, it was held that the second subparagraph of paragraph 1 of exhibit 'A' could be severed from the remaining portions thereof. The judgment is reported as *Suidwestelike Transvaalse Landboukoöperasie v Kotzé* [2000] 1 All SA 170 (NC).

[10] After this judgment was given the trial proceeded in the magistrate's court and the appellant and his brother testified.

[11] At close of the appellant's case the magistrate gave judgment, dismissing both the respondent's main claim and the alternative claim. He found that the whole of exhibit 'A' was privileged and that evidence thereof was inadmissible.

[12] The respondent appealed for the second time to the court *a quo,*

which once again upheld the respondent's appeal. It found, as had Olivier AJ in the earlier appeal, that the subparagraph containing the admission of indebtedness as well as the consent to jurisdiction were not part of the settlement negotiations between the parties.

[13] Majiedt J quoted with approval the following passages from the judgment of Olivier AJ:

'Daar kan myns insiens nie twyfel daaroor bestaan nie dat dit wat deur die appellant onaanvaarbaar gevind is in die dokument wat voorgelê is deur die respondent inderdaad net die wyse van betaling was. Oor die res van die dokument was daar geen verskil of geskil tussen die betrokkenes nie. Die wyse van betaling, soos voorgestel deur die respondent, was klaarblyklik 'n onderskeibare gedeelte tot die erkenning van die verskuldigheid en die onderneming om te betaal, saamgelees met die orige paragrawe van die dokument. Die respondent se gebondenheid by wyse van 'n erkenning van skuld en onderneming om te betaal (sien ook *Chapman Dyer Miles & Moorhead Inc v Highmark Investment Holdings CC and Others* 1998 (3) SA 608 (D) op 612G), verdere ondernemings en afstanddoening, insluitende die toestemming tot jurisdiksie van die Landdroshof, kan gevolglik met reg onderskei word van die betalingswyse soos deur die respondent voorgestel aan die appellant. (Sien in hierdie verband *Vogel NO v Volkerz* 1977 (1) SA 537 (T) op 548F).'

'Gevolglik stel die onderhawige dokument soos deur die respondent op 4 Maart 1994 onderteken 'n geldige en afdwingbare erkenning van verskuldigheid met 'n onderneming om te betaal daar, welke dokument ook skriftelike toestemming deur die respondent tot jurisdiksie van die Landdroshof ingesluit het.'

[14] After also referring to *Polverini v General Accident Insurance Co*

South Africa Ltd 1998 (3) SA 546 (W) at 550I-J and 551C Majiedt J said:

'Die erkenning van verskuldigheid kan hoegenaamd nie deel wees van skikkingsonderhandelinge nie. Dit is gemenesaak dat die Appellant [the present respondent] die erkenning van verskuldigheid aanvaar het.'

[15] He then referred to *Kapeller v Rondalie Versekeringskorporasie van Suid-Afrika* 1964 (4) SA 722 (T) and continued:

'Wanneer bepaal moet word of 'n dokument self vatbaar is vir privilegie, word 'n objektiewe uitleg toegepas, d.w.s wat die dokument vir 'n redelike leser sou beteken het;

Sien: *Naidoo v Marine & Trade Insurance Co. Ltd.* 1978 (3) SA666 (A) te 675.

Op sò 'n objektiewe uitleg kan bewysstuk A na my mening glad nie vatbaar wees vir privilegie nie.

Vir die redes voormeld is ek die mening toegedaan dat die landdros gefouteer het deur te bevind dat bewysstuk A skikkingsonderhandelinge daarstel. Bygevolg meen ek dat die appèl gehandhaaf behoort te word.'

[16] The appellant's counsel contended that as the respondent did not accept the offer made to it by the appellant no contract came into existence between the parties on the basis of which the respondent could hold the appellant liable. It was contended further that it was not open to the respondent unilaterally to amend the offer (by only relying on the acknowledgement of indebtedness) and to accept it in an amended form.

Counsel also submitted that it was clear that exhibit 'A', which the appellant sent to the respondent, emanated from settlement negotiations

and with the object on the part of the appellant to make a settlement proposal. On the basis of these circumstances it was argued that the document constituted a privileged document, which the respondent obtained during privileged settlement negotiations. In view of the fact that the document was privileged, evidence thereof was inadmissible and it followed that the respondent could not rely upon it for the purposes of its claim. In support of this contention reliance was placed on the decision of this Court in *Naidoo v Marine & Trade Insurance, supra.*

[17] Counsel also argued that the approach of the court *a quo* (following in this regard the judgment given in the first appeal, after the appellant was absolved from the instance at the end of the respondent's case), that the contents of exhibit 'A' were severable, so that the respondent was entitled to accept only the acknowledgement of debt portion and not also the proposals for payment was not correct. He submitted that the acknowledgement of indebtedness portion of exhibit 'A' was not severable from the rest. *Ex facie* the document, he contended, it was clear that the intention of the appellant was to acknowledge his indebtedness and to agree to pay it in the manner set out therein if his offer as a whole was accepted. The agreement to pay, which is contained in subparagraph 1.2 of the document, was specifically qualified by the manner of payment which clearly constituted an essential term of the agreement and it could not be separated from the preceding admission of liability contained in

subparagraph 1.1.

[18] In this regard counsel pointed out that the respondent's cause of action is not constituted by the admission of liability alone but by that admission together with an undertaking to pay in terms of a proposal to be accepted by the creditor. For this proposition he relied on the *dictum* of Jansen JA in *Adams v SA Motor Industry Employers Association* 1981 (3) SA 1189(A) at 1198B-G, which is in the following terms:

'There is ample authority to the effect that an acknowledgment of debt, *provided it is coupled with an express or implied undertaking to pay that debt,* gives rise to an obligation in terms of that undertaking when it is accepted by the creditor; and it does not matter whether the acknowledgment is by way of an admission of the correctness of an account or otherwise. (Cf *Divine Gates & Co Ltd v Beinkinstadt & Co* 1932 AD 256; *Somah Sachs (Wholesale) Ltd v Muller Phipps SA (Pty) Ltd* 1945 TPD 284; *Mahomed Adam (Edms) Bpk v Raubenheimer* 1966 (3) SA 646 (T).'

(The emphasis is mine.)

[19] **O**n the other hand, counsel for the respondent contended that subparagraph 1.2 of exhibit 'A' was severable from the rest of the document, that it was accordingly open to the respondent to accept the rest and that an agreement between the parties came into existence, which included the consent to jurisdiction contained in paragraph 6.

[20] On the privilege point he submitted that it was important to ascertain the ambit of the settlement negotiations and that the intention of the parties in respect thereof had to be determined on the application of

an objective test. In this regard the only admissible evidence before the Court was contained in the correspondence which led up to the signing of the document, the document itself and the letter together with which it was sent by the appellant's attorney to the respondent. He contended that it was clear from this evidential material that only the manner of payment was the subject of the negotiations and that the admission of indebtedness, the undertaking to pay and the consent to jurisdiction stood totally apart, as he put it, from any settlement negotiations. These portions of the document were accordingly not privileged and evidence could be led regarding them.

[21] In view of the conclusion to which I have come on the first point argued by counsel for the appellant it is unnecessary to decide whether the magistrate was correct in holding that the evidence regarding exhibit 'A' was inadmissible because it was privileged or whether Majiedt J was correct in holding in the court *a quo* that the acknowledgement of indebtedness and the accompanying consent to jurisdiction contained in the document did not fall within the ambit of the settlement negotiations.

[22] Before I deal, however, with the first point argued by counsel for the appellant it is necessary to say something about the judgment given in the court *a quo* when the case came before it for the first time. Although that judgment (which was not taken further on appeal because the appellant was refused leave to appeal both by the court *a quo* and this

Court) contains a passage in which the point presently under discussion was considered and decided in favour of the respondent, it must be remembered that that judgment was given after the magistrate had absolved the appellant from the instance at the end of the case for the respondent. All that was relevant at that stage was whether there was evidence on which a court could (not should) reasonably find in favour of the respondent. Regarding the interpretation of a document the test at that stage is whether the document can have that meaning and not what it actually means. It follows that the ratio of that judgment cannot extend beyond a finding that the document was capable of being so interpreted (cf the test regarding the interpretation of a document at exception stage, as formulated by this Court in *Theunissen en andere v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493(A) at 500E). Whether it should be so interpreted was a matter for the Court at the end of the trial.

[23] In the judgment in question Olivier AJ rejected the point presently under consideration by holding (at 175d-e) that, if one looked at the appellant's conduct taken as a whole, one could be satisfied that by acknowledging liability the appellant also undertook to pay. Reference was made to a *dictum* of Miller JA in *Chemfos Ltd v Plaasfosfaat (Pty) Ltd* 1985 (3) SA 106 (A) at 115F where the following was said:

'In the absence of any indications to the contrary the mere fact of an acknowledgment of debt might in certain circumstances justify a conclusion that a debtor making the

acknowledgment intended thereby to signify that he undertook to make payment of the sum admitted to be owing.'

[24] In my view, however, there are 'indications to the contrary' present in this case. After acknowledging liability, the appellant undertook to pay 'die voormelde skuld tesame met die koste was hierna gemeld word … by die kantore van die skuldeiser . . . *en wel as volg* . . .' (The emphasis is mine.)

The undertaking to pay thus does not arise by implication but from express words in the document which indicates how the appellant proposed to do so. That proposal, which was in my view an inseparable part of the undertaking, was rejected by the respondent. The express undertaking to pay having been rejected, I cannot see on what basis one can find that in addition thereto there is room also for an implied undertaking which provides the respondent with its alternative cause of action.

[25] In the circumstances I am satisfied that the respondent did not succeed in establishing its cause of action on its alternative claim and that the magistrate correctly dismissed its action.

[26] The following order is made:

The appeal succeeds with costs and the following order is substituted for the order made in the court *a quo:*

'The appeal is dismissed with costs.'

……..
IG FARLAM
JUDGE OF APPEAL

CONCURRING
HARMS JA
VAN HEERDEN AJA