FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Appeal No. : A259/2014

In the appeal between:-

DIRK SAMUEL BOTHA Appellant

and

IVECO SOUTH AFRICA (PTY) LTD Respondent

CORAM: KRUGER, EBRAHIM JJ *et* OPPERMAN, AJ

HEARD ON: 12 OCTOBER 2015

JUDGMENT BY: KRUGER *et* EBRAHIM JJ (*Majority Judgment*)

DELIVERED ON: 22 OCTOBER 2015

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[1] This case arises out of a sale on 21 May 2003 of all the shares in a company whose sole asset was a property. Twelve judges have dealt with this matter. A special plea of prescription was dismissed by Moolla AJ. Rampai J gave leave to appeal to the Supreme Court of Appeal where the dismissal of the special plea was confirmed by five judges. The trial proceeded before Sepato AJ who granted judgment in favour of the plaintiff. Van Zyl J granted leave to appeal the full court of this division.

[2] The appellant, defendant in the court a quo (Botha) sold all his shares and loan account in Duewest (Pty) Ltd (Duewest) to the respondent, plaintiff in the court a quo (Iveco). The only asset of Duewest was a property. The appellant warranted that the only liability of Duewest was his loan account. The appellant, as seller, provided an indemnity to the respondent as buyer in the following terms

> "**9. INDEMNITY:**
>
> 9.1 Without prejudice to the warranties and representations in the Agreement, or of the rights and legal remedies available to the Purchaser, the Seller hereby indemnifies the Purchaser against:
>
> 9.1.1. any obligation of the Company which may exist or arise in any way whatsoever before or in respect of the period before the Effective Date other than the Loans;
>
> 9.1.2. all claims, obligations, damages or losses and/or shortages which may be suffered by the Purchaser and which may arise out of, result from or be caused by a breach and/or non fulfillment of any of the warranties and/or other representations in this Agreement.
>
> 9.1.3. All costs, on the scale as between Attorney and own client, of any opposition in terms of Clause 9.2. against payment of such claims;
>
> 9.2 The Purchaser undertakes to advise the Seller timeously of any claim, which may arise against the Purchaser in terms of paragraph 9.1.2. and should the Seller require the Purchaser to oppose or resist such claim, to do so on condition that:
>
> 9.2.1. The Seller shall first provide the Purchaser with security to the satisfaction of the Purchaser for payment of the said claim

and all costs on a scale as between attorney and own client which the Purchaser may incur or which may be ordered against the Purchaser as a result of the opposition of the Purchaser to the claim;

9.2.2. Should the Seller not require the Purchaser to oppose the claim timeously then the Purchaser will be entitled to pay such claim and recover the full amount thereof together with all costs incurred on a scale as between attorney and own client from the Seller."

In terms of clause 9.1.2 the appellant indemnified the respondent against all claims, obligations, damages or losses which may be suffered by the respondent which may result from a breach or non-fulfilment of any of the warranties given by the appellant.

[3] Subsequent to the effective date of the sale the respondent became aware that Duewest was indebted to the Inner West Municipality in Pinetown in amount of R330 190,48 in respect of duties and levies including penalties and interest. The respondent issued summons alleging a breach of the warranty and invoking the indemnity clause in order to reclaim the amount it had paid to the municipality. At the trial only Mr SG Powdrell, a senior credit controller of the Ethikweni municipality testified for the respondent. The appellant called no witnesses. The parties agreed that the evidence of Mr C Minnie who testified for the respondent during the determination of the special plea would form part of the record of the trial as if it had been tendered in the trial. After the trial Sepato AJ gave judgment for respondent in the amount of R858 286,70 being the reduced amount claimed by the respondent together with an attorney and client costs order because she found

that the appellant had been dishonest in presenting its case before her and Moolla AJ.

[4] Respondent's case is that it paid an amount to the municipality for which it was not liable and which amount had to be reimbursed to it by appellant. Appellant's case is that there was no money due to the municipality at the effective date, alternatively that respondent should not have delayed so long in paying, allowing interest and penalties to accrue.

[5] In its judgment on the special plea the Supreme Court of Appeal held that respondent's claim is based on the indemnity in clause 9. Respondent became entitled to recover the amount it had paid to the municipality from the appellant after it had paid the municipality.

This appeal concerns two principal points: (i) the applicability of the indemnity to respondent, and (ii) the quantum.

I <u>The indemnity under clause 9.2</u>

[6] Mr Zietsman, for appellant contended that on a proper interpretation of clause 9.2 it is only applicable when a "claim" arises against the purchaser (plaintiff/respondent). The claim of the municipality was one against Duewest, not against the purchaser. Thus clause 9.2 cannot be invoked by the respondent.

[7] Mr Vetten, for respondent contended that a claim against Duewest is equally a claim against the purchaser (plaintiff/respondent), because the respondent is ultimately the party who will have to pay

or suffer the loss. He submitted that in order to give business efficacy to clause 9.2 it should be interpreted to also be applicable to instances where there is a claim from a third party against Duewest.

[8] In considering the application for leave to appeal Van Zyl J opined that clause 9.1 distinguishes between the company on the one hand and the purchaser on the other hand. She pointed out that clause 9.1.1 refers to obligations of the company, whereas clause 9.1.2 deals with losses suffered by the purchaser. Clause 9.2 refers to the purchaser, its wording is restricted to instances where a claim arises against the purchaser. Van Zyl J expressed the view that the agreement throughout draws a distinction between the company and the purchaser, and could not see how the purchaser could be substituted for the company in clause 9.2. If it is accepted that the obligation by the company to the municipality is a claim as contemplated in clause 9.2 then it is a claim against the company, not against the purchaser, and clause 9.2 would not be applicable. On that basis she granted leave to appeal.

[9] In the particulars of claim the allegation is made that the seller gave the purchaser certain undertakings of indemnity, and clause 9 is quoted. The respondent makes the allegation in the particulars of claim that it discharged the appellant's outstanding liability to the local authority on 17 July 2007 and thereafter the respondent became entitled to recover the full amount from the appellant (paragraph 11 of the particulars of claim). In the plea appellant says that the respondent should not have paid the local authority, but should have notified the appellant and then appellant

would have requested respondent to oppose the local authority's request for payment. In paragraph 2.7 of the plea the allegation is made that the respondent allowed the claim of the local authority to increase, and thereby the respondent failed to limit the damage. In the plea to paragraph 11 appellant says it has no knowledge of the allegations therein and puts the respondent to the proof. There is no allegation in line with Mr Zietsman's submission that the indemnity did not cover debts of the company Duewest, as opposed to liabilities of the respondent as purchaser.

[10] In plaintiff's replication to the special plea for prescription, the allegation is made, borne out by the correspondence, that the appellant requested the respondent to postpone the due date for the payment of appellant's indemnity so as to afford the appellant a reasonable opportunity to settle the Duewest liability. The respondent paid the Duewest liability on 17 July 2007.

[11] The reasoning of Mr Zietsman, as adopted by Van Zyl J is artificial. The intention of an indemnity is to provide relief to the other contracting party. Because of the sale the respondent took over the liabilities of the company. The respondent had to pay the debt, and was entitled to an indemnity from the appellant.

II <u>The Quantum</u>

[12] The appellant contends that the respondent failed to prove the quantum of the liability. The respondent on 17 July 2007 paid the municipality R1 176 957,47 in respect of the debt of R330 198,48, the amount that was due on the effective date being 23 July 2003. The respondent subsequently reduced its claim to R858 286,70 as

it admitted that the larger amount could have included penalties on monies due by itself after 23 July 2003. The court *a quo* gave judgment for R858 286,70.

[13] Mr Vetten, for respondent, set out the chronology of events as follows:

(i) 23 March 2000:

The Inner West Local Council (the predecessor of the current municipality) sold the property to a close corporation or company to be formed. That company was then formed as Due West Properties (Pty) Ltd ("Duewest").

(ii) 12 February 2001:

The property was transferred from the municipality to Duewest.

(iii) 6 July 2001:

The shares in Duewest were sold to the appellant. Thus the appellant acquired the company.

(iv) 21 May 2003:

The sale agreement between appellant and respondent, selling the shares and the property of Duewest. The effective date was the date of cancellation of the bond over the property, being 23 July 2003.

(v) 3 June 2004:

Respondent's attorney (Steenkamp Weakley Inc) writes to appellant's attorney (McIntyre & Van Der Post) stating that

there is still a dispute around the payment of rates and taxes.

(vi) 1 December 2004:

Duewest sells the property to respondent, both represented by the same person, being a director of Duewest.

(vii) 17 July 2007:

Transfer takes place from plaintiff to Imperial Properties. Plaintiff paid the rates and taxes. There was an escalation of penalties.

[14] As to the correspondence, Mr Vetten referred to the following:

(i) 12 February 2001:

(The letter referred to above)

Respondent's attorney wrote to appellant's attorney stating that there is still a dispute as to the payment of rates and taxes referring to clause 14.3 of the agreement which says the purchaser is responsible for payment of rates and taxes after the effective date.

(ii) 9 August 2006:

Appellant's attorneys write to respondent's attorneys stating that they have already made enquiries at the local authority and after obtaining particulars from the local authority they will take up the matter with their client, the appellant.

(iii) 20 August 2004:

Respondent's attorneys send details of the calculations by the local authority to appellant's attorneys.

(iv) 8 September 2004:

Letter of demand from respondent's attorneys to appellant's attorneys, demanding appellant to pay the rates and penalties due for the period up to 23 July 2003, giving them 14 days.

(v) 17 September 2004:

Appellant's attorneys write to respondent's attorneys stating that they are giving attention to the question of rates and taxes but request more time:

> "Geagte meneer
>
> **VERKOOP VAN AANDELE DUEWEST PROPERTIES (PTY) LTD /IVECO SA (PTY) LTD OP 21 MEI 2003**
>
> U skrywe gedateer 8 September 2004 gerig aan ons kliënt mnr DS Botha is aan ons oorhandig met opdrag om daarop te antwoord.
>
> Soos reeds telefonies aan u mnr Steenkamp meegedeel is ons tans besig om die hele kwessie van die korrekte verskuldigheid van die Maatskappy aan die Plaaslike Owerheid ten opsigte van erfbelasting uit te klaar.
>
> Alhoewel ons reeds ver hiermee gevorder het, sal ons nie in staat wees om binne die keertyd van u skrywe van 14 dae na 8 September 2004 hierdie proses te voltooi nie. Ons versoek u dus om die keertyd van u skrywe te verleng na 8 Oktober 2004 asseblief.
>
> Ons bevestig dat ons kliënt sy verpligtinge in terme van die koopkontrak sal nakom. Indien daar enige fout is in die finansiële

state wat aan u kliënt oorhandig is, sal dit dan daarna reggestel kan word sodra die korrekte bedrag bepaal is.

Die uwe"

(vi) 5 October 2004:

Mr Medalie, an attorney in Pinetown appointed by appellant's attorney, reports to appellant's attorney that he has started enquiries and will revert.

(vii) 11 October 2004:

Full report by Medalie to appellant's attorneys. He says the officials at the local authority could find no proof of payment by appellant, and the reduction of penalties, or interest could only be considered if proof of payment by appellant could be provided.

(viii) 7 March 2005:

Medalie writes to appellant's attorneys. In the letter he says he will consult appellant's attorneys before submitting a request to write off penalty amounts.

(ix) 24 March 2005:

Medalie writes a long letter to the local authority. In the closing paragraph Medalie makes it clear that the appellant is willing to pay accounts which were properly delivered (not to a street address where there is no postal delivery):

> "We further confirm that should you see your way clear to cancel any interest and penalties levied against our client it will result in immediate payment thereof. Kindly do not see this in a negative context, as it only demonstrates our client's goodwill, all along, to make payment of outstanding amounts, once it was received and explained."

[15] Mr Vetten says the gravamen of the correspondence is that the respondent was aware of its liability towards the local authority, accepted such liability, and wanted interest and penalties to be reduced if possible. He further points out that in terms of clause 9.2.2, if the appellant does not pay, the respondent is entitled to pay "such claim" and the appellant can then recover "the full amount thereof" from the appellant. The clause requires the respondent to notify the appellant of the claim. The respondent must afford the appellant an opportunity to dispute the claim or try to reduce it. If the appellant does not pay or succeed in getting the claim reduced, the respondent pays and recovers the amount of the claim from the appellant. That is what happened here: The appellant caused the claim to be investigated and failed to make any payment to the local authority. Because transfer had to be effected and a rates clearance certificate had to be obtained, respondent paid the claim of the local authority. Respondent is now entitled to recover the amount of the claim of the local authority from the appellant.

[16] Mr Vetten pointed out that Mr Powdrell was called by the respondent not to prove the quantum of its claim, but only to show what the municipality said was due. The *prima facie* evidence of

the respondent was not countervailed. The appellant chose to call no witnesses.

[17] Mr Zietsman, for appellant relies on the rates clearance certificate dated 8 November 2001 stating that rates have been paid in full. Thus the municipality could not demand payment of rates prior to October 2001, because that is contrary to the rates clearance certificate. Mr Zietsman says this rates clearance certificate was the basis of the appellant's defence. My view is that the appellant should have taken this point up with the municipality when the payment of the rates was being investigated by Medalie. The appellant cannot now raise the quantum.

CONCLUSION

[18] A contract of indemnity creates a primary obligation. It is not a suretyship which is dependent upon non-payment by the principal debtor (**List v Jungers** 1979 (3) SA 106 (A) at 119). Clause 9 embodies an original and unqualified undertaking by the appellant. Being an indemnity, quantum is assessed in a different manner to the situation where the plaintiff institutes a claim. The ordinary position is that the plaintiff bears the onus to prove its claim which includes quantum. Where one is dealing with an indemnity, the terms of the indemnity must be considered. The purpose of the indemnity is to ensure that the party receiving the indemnity has no claims it must pay. If there are claims, it tells the furnisher of the indemnity about them, who then has to investigate the claim and pay it. If the indemnity giver does not pay after having been afforded a reasonable opportunity, the indemnity-taker pays the claim, and, in terms of the contract, recovers what was paid. That

is what the respondent did here. The subtraction of amounts it felt were the liability of the respondent was an act to the benefit of the appellant. The respondent proved its quantum. There is no merit in the appeal.

[19] As to costs, it is not clear from the judgment of Sepato AJ in what manner she regarded the appellant as having been dishonest. Often evidence emerges in a case upon which liability is based in the judgment. The fact that a defence is without merit does not mean it is dishonest. Senior counsel advanced the argument with great gusto. This case did not call for a punitive costs order.

ORDER

The appeal is dismissed with costs, save that the costs order of the court a quo is amended to be a normal costs order.

A. KRUGER, J

I agree.

S. EBRAHIM, J

On behalf of appellant:	Adv P Zietsman SC Instructed by: McIntyre & Van Der Post BLOEMFONTEIN
On behalf of respondent:	Adv D Vetten Instructed by: Lovius-Block BLOEMFONTEIN

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