THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 430/2011
Not reportable

In the matter between:

DIRK SAMUEL BOTHA **APPELLANT**

and

IVECO SOUTH AFRICA (PTY) LTD **RESPONDENT**

Neutral citation: *Botha v Iveco SA (Pty) Ltd* (430/11) [2012] ZASCA 78 (28 May 2012)

Coram: Mthiyane DP, Cloete, Cachalia and Tshiqi JJA and Ndita AJA

Heard: **7 May 2012**

Delivered: **28 May 2012**

Summary: **Prescription – Sale of shares agreement – Claim arising from breach of warranty – Relief in terms of indemnity clause – Debt due and payable not on date of breach of warranty but on date of payment in terms of indemnity clause.**

ORDER

On appeal from: Free State High Court, Bloemfontein (Rampai J sitting as court of first instance):

(a) Paragraph 2 of the order of the court a quo is deleted.

(b) The appeal is dismissed with costs.

JUDGMENT

TSHIQI JA (MTHIYANE DP, CLOETE AND CACHALIA JJA AND NDITA AJA CONCURRING):

[1] The appellant was previously the sole shareholder in a company called Duewest Properties (Pty) Ltd (Duewest). The sole asset of the company was an immovable property called Erf 23859, Pinetown, KwaZulu-Natal. On 21 May 2003 the appellant, Duewest and the respondent concluded a written tripartite sale of shares agreement in terms of which the appellant sold 100 per cent of the shares as well as his loan account in Duewest to the respondent. The contract contained both a warranties clause (clause 5) and an indemnity clause (clause 9). In terms of the warranties clause read with annexure A to the agreement the appellant warranted to the respondent that 'as at the Effective Date … the only liability of the Company will be the Loans'. The effective date was 23 July 2003 and the definition in the agreement of 'Loans' was 'All the Seller's claims against the Company as on the Effective Date' ie the appellant's loan account. In terms of paragraph 9.1.2 of the indemnity clause the appellant indemnified the respondent against inter alia 'all claims, obligations, damages or losses … which may be suffered by the

Purchaser and which may arise out of, result from or be caused by a breach and/or non-fulfilment of any of the warranties in this Agreement'.

[2] Subsequent to the effective date, the respondent became aware, during January 2004, that Duewest was indebted to the Inner West Municipality in Pinetown in the amount of R330 190.48 in respect of duties and levies (including penalties and interest) imposed by the local authority. The respondent notified the appellant through his agents several times during 2004, both verbally and in writing, of the municipality's claim and the consequent breach of the warranty. The appellant requested time to resolve the matter with the municipality. Such request was granted, and so were further extensions that were sought by the appellant to resolve the matter, until a notice was given that no further extension would be given beyond 15 December 2005. After this the respondent attempted to resolve the dispute with the municipality itself. Its attempts were also not successful and it eventually paid the outstanding amount on 17 July 2007. On this date the amount had increased to R1 507 147.95 and comprised the outstanding capital in the amount of R330 190.48 together with penalties and interest thereon in the sum of R1 176 957.47.

[3] The respondent subsequently issued summons in the high court alleging a breach of the warranty and invoking the indemnity clause in order to reclaim the amount it had paid to the municipality. The summons was served on 17 September 2008. The appellant raised a special plea of prescription alleging that the claim by the respondent against the appellant had become prescribed, and pleaded to the merits. The high court (Moolla AJ) ordered a separation of issues in terms of rule 33(4) and directed that the appellant's special plea be heard and decided separately from, and before, the other issues and that those issues be stayed in the meantime. After hearing evidence, the court dismissed the special plea with costs but subsequently granted the appellant leave to appeal to this court.

[4] The high court's reasoning was that prescription began to run in January 2004 when the respondent acquired knowledge of the breach of the

warranty but that it was interrupted on 8 September 2005, when the respondent gave the appellant an opportunity to resolve the dispute with the municipality. In coming to this conclusion the high court relied on the breach of the warranty clause but failed to take into account the fact that the respondent had in its pleadings invoked the indemnity clause for the relief sought. In that regard it misconstrued the true cause of action by the respondent.

[5] The crux of the claim by the respondent is simply that whilst it is so that the breach of the warranty came to its attention by January 2004, the debt at that stage had not become due and payable. It contends that it was only on 17 July 2007, the date on which it discharged the outstanding liability in terms of the indemnity clause, that it became entitled to recover the amount it paid from the appellant. In a nutshell, the respondent contends that although its claim was dependent on the breach of the warranty, its consequent relief was not based on the breach itself but on the indemnity clause, which it could invoke only after it had paid the municipality. This in my view is correct for the reasons that follow.

[6] The claim by the municipality which the respondent paid is what is envisaged in clause 9.1.2 quoted above. That (and the other indemnities given in clause 9) were expressly stated to be 'without prejudice to the warranties … in the Agreement, or of the rights and legal remedies available to the Purchaser … '. Thus, whatever rights the respondent had for breach of a warranty, it had a separate, specific remedy for an indemnity in terms of clause 9 inter alia if a warranty was breached.

[7] Clause 9.2 requires the respondent to advise the appellant timeously of a claim or obligation covered by clause 9.1.2. In terms of clause 9.2.1 the appellant could require the respondent to oppose the claim in which event he would be obliged to provide the respondent with security to cover the full claim together with attorney and own client costs which the respondent might incur or which might be ordered against the respondent as a result of such opposition. In terms of clause 9.2.2, should the appellant not require the

respondent to oppose the claim timeously, the respondent would 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 appellant. There is some dispute about whether the appellant required the respondent to oppose the claims in terms of clause 9.2.1 but it is clear that the appellant did not comply with its obligations in terms of that clause.

[8] Clause 9.2.2 is not ambiguous. In order to claim under the indemnity, the purchaser had to pay the debt and only thereafter could it 'recover the full amount thereof' from the seller. To state the obvious: you cannot 'recover' money without first paying it out. Accordingly, it is only after payment to the municipality had been made that it can be said that the indemnity obligation owed by the appellant to the respondent became due, and it is from that date that prescription commenced running. The payment was made on 17 July 2007. The summons claiming the debt was served less than three years later, on 17 September 2008. The special plea of prescription was therefore correctly dismissed by the high court. That court, however, because of the reasoning it adopted, made a further order that '2. The Court hereby issues a declaration that the period of prescription in relation to the Defendant's breach of warranties as contemplated in Section 11 of the Prescription Act commenced running on the **15 DECEMBER 2005**'. The declaratory order just quoted must be deleted.

[9] This then brings me to the question of costs. The deletion of paragraph 2 of the high court's order is of no moment in this context. What requires consideration is the argument by the respondent's counsel that the costs of appeal should be awarded to his client 'on a scale as between attorney and own client' as provided for in clause 9.2.2 of the Agreement. On reflection, I cannot agree that this clause is of application. Clause 9.1.3 provides that the seller indemnifies the purchaser against 'all costs, on the scale as between attorney and own client, of any <u>opposition in terms of clause 9.2 against payment of such claims'</u> (my underlining). Clause 9.2.2 forms part of clause 9.2. The structure of clause 9.2 is that the purchaser is required to inform the seller 'timeously' of any claim under clause 9.1.2. If the seller does

require the purchaser to oppose the claim, he has to provide the purchaser with security for ‘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’ ie the claim of the third party (my underlining). That accords with clause 9.1.3 ─ the costs referred to in both clauses are the costs of opposing a claim by a third party. Clause 9.2.2, the clause relied on by the respondent’s counsel, provides that if the seller does not require the purchaser to oppose the claim timeously, then the purchaser can recover the ‘costs incurred’ on the scale mentioned. The costs envisaged are in my view again, as in the immediately preceding clause and clause 9.1.3, the costs incurred by the purchaser in opposing a claim by a third party. The rationale behind clause 9.2.2 is this: if the purchaser has advised the seller of a claim, and the seller does not ‘timeously’ require the purchaser to oppose the claim, with the result that the purchaser incurs costs viz-a-viz a third party claimant, the seller must reimburse the purchaser for such costs on an indemnity basis - because it was the seller’s tardiness that caused the purchaser to incur such costs. The clause has no application to costs incurred by the purchaser in suing the seller. Costs of the appeal must therefore be on the ordinary scale.

[10] The following order is made:

(a) Paragraph 2 of the order of the court a quo is deleted.

(b) The appeal is dismissed with costs.

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JUDGE OF APPEAL

APPEARANCES:

For Appellant:	P Zietsman SC Instructed by: McIntyre & Van der Post, Bloemfontein
For Respondent:	D J Vetten Instructed by: Lovius-Block, Bloemfontein