

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: ✓ |

Date: **11th April 2023** Signature: _____

A handwritten signature in blue ink, appearing to be "P. M. M.", is written over the signature line.

CASE NO: 28897/2017

DATE: 11th APRIL 2023

In the matter between:

IMPERIAL GROUP HOLDINGS (PTY) LIMITED

Plaintiff

and

SIME DARBY HUDSON & KNIGHT (PTY) LIMITED

Defendant

Coram: Adams J

Heard: 19 and 20 September 2022

Closing Argument: 14 October 2022

Delivered: 11 April 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 11 April 2023.

Summary: Contract – services rendered in terms of written agreement – plaintiff claiming amounts invoiced in terms of the agreement – defendant

disputes amounts claimed, pleads set-off and counterclaims for damages from goods damaged, shortages and 'stock variances' – defendant bears the onus to prove his counterclaim and the amounts thereof – factual dispute re 'stock variances' – decided in favour of plaintiff –

Judgment granted in plaintiff's favour – conditional claim in reconvention dismissed.

ORDER

- (1) Judgment is granted against the defendant in favour of the plaintiff for: -
- (a) Payment of the sum of R4 470 174.57;
 - (b) Payment of interest on the amount of R4 470 174.57 at the applicable legal interest rate of 10.50% per annum from date of demand, being 17 July 2017, to date of final payment; and
 - (c) Costs of suit on the scale as between attorney and client, including the costs consequent upon the employment of two Counsel (where so used).
- (2) The defendant's conditional claim in reconvention is dismissed with costs on the scale as between attorney and client, such costs also to include the costs consequent upon the employment of two Counsel (where so employed).

JUDGMENT

Adams J:

[1]. The plaintiff, Imperial Group Holdings (Pty) Limited ('Imperial'), is a logistics company, providing transport, warehousing, storage and other related logistics services to its customers. The defendant, Sime Darby Hudson and Knight (Pty) Limited ('Sime Darby'), which is a producer and a bulk distributor of edible and tropical fats and oils, was, during the period from about 2014 to 2017,

one such customer of Imperial. Sime Darby supplies the fats and oils it produces, including industrial ingredients, pastry fats, industrial margarines, shortenings and frying oils, to a number of customers all over South Africa. And it was assisted in such distribution of its products by Imperial, with whom it had contracted – in terms of and pursuant to a written agreement – to be supplied by Imperial with logistics services.

[2]. In this defended action, which came before me in the Commercial Court of this Division, Imperial claims from Sime Darby the total amount of R4 470 174.54, which it alleges is in respect of invoices relating to logistics services rendered during the period from November 2016 to September 2017.

[3]. Imperial's claim is resisted by Sime Darby on the basis that they hold Imperial accountable and liable, as they are entitled to do in terms of the contract between the parties, for shortages, losses, damages and stock variances that occurred during the warehousing and during the transportation of their products by Imperial. During the period from May 2016 to February 2017, so Sime Darby alleged, there were a substantial number of stock losses and damages in the Imperial warehouse, which were entirely due to the conduct of Imperial and that of its personnel. Sime Darby in fact invoiced Imperial for these losses, which they initially calculated at a total sum of R4 703 355.63, of which total, Imperial acknowledged liability only for the sum of R1 343 315.87.

[4]. In issue in this action is a calculation of the amount owing by Sime Darby to Imperial in respect of services rendered by the latter to the former pursuant to and in terms of the written agreement between them. That calculation is to be done by applying the provisions of the agreement to the facts of the matter and by calculating what sums, if any, are to be set off against such amount due to Imperial. That calculation is to be done and the issues to be decided against the factual backdrop of the matter, the facts being by and large common cause as set out in the paragraphs which follow, and which facts are gleaned from the evidence led during the trial on behalf of both parties, as well as from the documentary evidence introduced via the medium of these witnesses. In that regard, there were two witnesses called on behalf of Imperial, namely its

divisional financial director, Mr Sean Brown ('Mr Brown'), and its Operations Director, Mr Gustav Mertz ('Mr Mertz'), whereas Sime Darby called its Logistics Manager, Mr Barry Donald, as its only witness.

[5]. A convenient starting point for a discussion of the factual matrix in the matter is the written agreement, concluded between the parties during February 2014, which regulated the contractual relationship between them at the relevant time during the period from November 2016 to September 2017, when Imperial rendered the services in question to Sime Darby. It should be borne in mind that during the period from April 2017 to September 2017, Imperial purported to exercise a lien over Sime Darby's stock in its possession at its Warehouse or Warehouses then.

[6]. In terms of the agreement between the parties for the provision of logistics services by Imperial to Sime Darby, the latter was granted a credit facility by Imperial in the amount of R3 million, and the maximum insurance cover granted, in respect of goods in transit was for an amount of R850 000 per full load. And 'goods' were defined as anything 'to be handled, conveyed or stored by Imperial'.

[7]. The other material provisions of the agreement were the following:

- (a) In terms of clause 3.1 of the Standard Terms, payment of the 'rates' charged by Imperial for its services, was to ('shall') be made within thirty days from date of Imperial's monthly statements. And, in terms of clause 3.2 '[a]ll payments to [Imperial] [was to] be without delay, deduction or set-off and no amount may be deferred or withheld by reason of any claim or counterclaim'.
- (b) In the event that Sime Darby did not pay any amount on the due date, then the total amount in respect of all contracts would ('shall') immediately become due, owing and payable irrespective of due dates for payment of such amounts.
- (c) Apart from any lien Imperial may be entitled to exercise over the goods, Sime Darby agreed that all goods and documents relating to a contract which came into the possession or under the control of Imperial, on Sime Darby's behalf, are pledged to Imperial as security for all monies due to it

by Sime Darby.

- (d) Imperial accepted the risk of the goods 'during transit' at the cost price thereof, limited to the amount of R850 000 per load, and the risk during warehousing at the cost price thereof, subject to the proviso that Imperial would only be liable in respect of damages to or losses of the Goods as a result of Imperial's wilful conduct or negligence. Such liability was accordingly to be on the basis of delictual liability.
- (e) Clause 5.2 provided that all undisputed claims for damages to the goods whilst in Imperial's possession, would be payable to Sime Darby within sixty days from the date of receipt of Sime Darby's tax invoice for such damages / losses. Furthermore, unless the delivery note on delivery of the goods was endorsed accordingly, Imperial would not ('shall not') be liable for damages or losses of the Goods during transit. And any claim for damages / losses not lodged in writing within thirty days of its occurrence, would have lapsed automatically.
- (f) In terms of clause 5.5 of the Standard Terms, Imperial could ('may') exercise a lien over all such goods in its possession in respect of any overdue payments by Sime Darby which lien would only be capable of being relinquished by payment to Imperial of the amount due and not through the furnishing of security. During the exercise of such lien, Imperial was not to bear any risk in respect of such Goods.

[8]. With those provisions of the agreement in mind, I now turn to deal with the calculations on behalf of the parties. As already indicated, in its particulars of claim, Imperial claims the total sum of R4 470 174.54, and in support of that amount, a ledger card of sorts as at 30 September 2017 is attached, being a schedule of transactions – mainly debits / invoices – for the period from 07 April 2016 to 21 September 2017.

[9]. The individual invoices would have represented the final stages in the transactions before payment. The process which would have been followed up to that point in summary is as follows. Sime Darby would initiate the process by issuing a written instruction, usually via email, to Imperial for the collection of

stock. The stock would be collected from Sime Darby's packaging sites and transported to Imperial's warehouse. The industry term for this process is 'inbound transport'. The stock would then be stored at the warehouse of Imperial pending a further instruction from Sime Darby that the Goods are to be delivered to its customers. The transporting of the goods from the warehouse to Sime Darby's customers is termed 'outward transport'.

[10]. Sime Darby utilised the SAP system to manage its stock and it would issue an instruction for the collection of goods from the packing sites to Imperial's warehouse by issuing a 'stock transfer order'. On arrival of the stock at its warehouse, Imperial's staff would confirm the stock by conducting its own stock count. Thereafter, Imperial would issue a 'goods receipt note' or a 'GRN' on the system, referred to as a '101 transaction', whereafter the system would reflect an increase of the stock in Imperial's possession. In the event that there was a discrepancy between the stock transfer order and Imperial's verification, Imperial would inform Sime Darby of the discrepancy via email.

[11]. A similar process was followed for the delivery of stock to customers. Sime Darby would instruct Imperial to deliver stock to its customer via email. Sime Darby would then issue a 'sales order' or an 'SO' on the system, which would trigger the delivery of certain of the stock to the customer of Sime Darby. Imperial would then issue a 'delivery note' on the Sime Darby's SAP system, referred to as a '601 transaction'. The details in the delivery note included the description of the stock to be delivered, the quantity of pallets to be delivered as well as the name and address of the customer. Once a delivery note was issued, the system would reflect a decrease in the quantity of stock held by Imperial on behalf of Sime Darby. Imperial separately produced its own delivery note, which was not given to Sime Darby and it served as Imperial's internal check.

[12]. It bears emphasising that the only stock control transactions processed by Imperial on Sime Darby's SAP system were the '101' (goods received) and the '601' (goods issued) transactions, which were transactions Imperial verified by reference to their own records. What is more is that, in certain instances, these transactions would also be processed by employees of Sime Darby, which ideally

should not have happened and which explain to a great extent the disputes between the parties.

[13]. Part of the difficulty in this matter, which gave rise to the dispute between the parties relates to the SAP system and the fact that Imperial's access to it was limited to generating goods receipts, delivery notes and invoices. Most, if not all of the other transactions on the system were generated and processed by transaction codes by employees of Sime Darby. All the same, on delivery, the customer would sign the delivery note as acknowledgment of receipt of its stock and this would be the so called 'proof of delivery' or 'POD'. PODs were sent to Sime Darby by Imperial, together with their invoices, on a bi-weekly basis. These invoices and Sime Darby's liability to pay them are the subject of this action.

[14]. Sime Darby, as already indicated, disputes liability for the amount claimed by Imperial and they do so on the basis that certain sums, representing damages as a result of damage to their stock, stock shortages and failure by Imperial to provide them with POD's in respect of certain alleged deliveries to their customers, should be set off against any claims by Imperial. The total sum of the amount to be set off, according to the Sime Darby, is calculated as follows: R3 387 204.33 in respect of stock damaged during the period from 7 April 2015 to 30 July 2017, which also includes invoices rendered by Sime Darby for what they term 'stock take variances' and 'missing PODs'. In support of this averment that Imperial owes them R3 387 204.33, Sime Darby attached to their plea a statement dated 30 April 2018, which is in fact a list of the invoices which were rendered to Imperial by Sime Darby in respect of these stock shortages. Additionally, Sime Darby claims an amount of R153 548.52 which relates to claims over the period from January 2015 to November 2016 arising from the fact that Imperial did not provide them with PODs, which means that they were not able to invoice their customers. A similar claim for an amount of R91 003.68 is made by Sime Darby also in respect of the period from February 2015 to June 2017, with some undated individual claims. The grand total claimed by Sime Darby is the sum of R3 631 756.53.

[15]. As regards the period between April 2017 to September 2017, during

which period Imperial exercised a lien over Sime Darby's stock, Sime Darby contends that Imperial cannot and should not be rendering invoices for that period as it did not render any logistics services to it during that period, but was instead was holding onto the stock in the exercise of its lien. The total amount of those invoices, being R1 163 073, so Sime Darby avers, should also be deducted from the amount claimed by Imperial, which means that an amount of R4 794 829.53 stands to be set off against the claim of Imperial, in effect wiping out their claim.

[16]. When the matter was argued before me on 14 October 2022, Mr Motau SC, who appeared on behalf of Sime Darby, acknowledged that R153 548.68, referred to supra and which relates to 'missing PODs', as well as the total of R91 003.68, relating to disputed deliveries, were duplications as these amounts were already included in the amount of R3 387 204.33, as per annexure 'B' to defendant's plea, being a schedule of damages arising from damaged stock, stock shortages and so called 'stock variances'. This then means that I need only consider whether Sime Darby is entitled to have set off that amount or any portion thereof against Imperial's claim of R4 470 179. 57.

[17]. Mr Motau also conceded, rightly so, in my view, that the remainder of Sime Darby's counterclaim and related amounts, notably the claim for damages relating to the 'holding over' of their goods by Imperial during the lien period, are inconsistent with the interpretation of the agreement and/or is not supported by the evidence. These claims were therefore not pursued.

[18]. The question remains whether the R3 387 204.33 or any portion thereof can and should be set-off against Imperial's claim. A large portion of this claim is based on what is referred to as 'stock variances', which are disputed by Imperial. These stock variances arose from Sime Darby's reconciliation of the stock held on their behalf by Imperial at their warehouses and this exercise they did, from time to time, based on 'MB51' reports, which they compiled with reference to their SAP system, which did not correlate to the records of Imperial and which the latter disputed all along. So, for example, in an email dated 3 March 2017 from Imperial's Mr Mertz to Sime Darby, the following was stated:

'Thank you for your mail.

Please note that we do not accept this result and will not accept an invoice raised against us. We

have no input into areas of your system and question the integrity of the system at this stage. In order to try and resolve these variances and to understand the issues I suggest you and your team do a recon of your system.

At every stock count, we supply you with our count. The December count was confirmed and we will use our count as our opening stock.

- Please supply the capture of the December 2016 count (MB52 after count) that matches what we counted.
- In order to bring some sanity to this, please supply the MB51 movement report from after the count up to this count. The simple methodology of opening count plus receipts minus despatches to get to the closing stock before this count
- MB52 before January 2017 count should match MB52 count after previous count plus all movement for the month to this count (MB51)). If our opening stock agrees (SAP and our count) and we can account for all receipts and despatches, then our closing stock should agree. If we then have variance based on this, we will investigate these and if found that there are stock that we cannot account for we will take responsibility for those.'

[19]. This extract from the communiqué from Imperial to Sime Darby, in my view, captures the essence of Imperial's case relative to the amounts claimed from them by Sime Darby. Imperial also demonstrates, by way of an example, that Sime Darby's MB51 report is inaccurate in that they had processed a 1296 negative adjustment for a particular product (Crispa Gold 20L), whereas, based on attached supporting documentation (GRNs, tax invoices and DO's), the reconciliation required no adjustment. This example alone generated an incorrect negative adjustment of R473 260.

[20]. The total 'stock variances', so the case on behalf of Imperial goes, is based on the MB51 reports, which, in turn, are based on Sime Darby's own figures as per the SAPS system, which are not supported by the facts in the matter. This was the evidence of Mr Brown and Mr Mertz, and it was not gainsaid by Sime Darby. This then means that Sime Darby has failed to present evidence in support of their claims, which, in turn, translates into their claims having to be rejected.

[21]. In effect, what Imperial avers is that Sime Darby plucked figures out of the air and processed those as part of their stock control reports in any given period. In his witness statement, Mr Brown stated that the relevant MB51 report contained thirteen transaction types, which transaction codes were not known to Imperial. Moreover, so the testimony of Mr Brown went, for the period between

August 2016 and February 2017, a net inflow of 1470 transactions or 9437 items of stock were represented in the report by the unknown transaction codes. At an average price of say R375 per item of the most common product line of all the stock items handled by Imperial, this represents R3 538 875 of stock that has appeared (or was 'plucked out the of the air') as stock that Imperial should have had in the warehouse according to the SAP system.

[22]. The point about Mr Brown's uncontested evidence is that very little, if any reliance can and should be placed on Sime Darby's calculations. It is not supported by the facts in the matter and was at variance with the documentary evidence.

[23]. That, in my view, spells the end for the case of Sime Darby. Without these items, there would not be stock shortages and there would also not be a claim by Sime Darby that Imperial did not properly deal with the stock.

[24]. The first question to be considered, that being whether the total amount R3 387 204.33 stands to be set off against Imperial's claim, should therefore be decided in favour of Imperial. In my view, it is immaterial whether or not these sums fall to be set off on the basis of any particular provision of the contract. The point is simply that Sime Darby has not made out a case nor presented any credible evidence, supported by documentation, that it has a valid claim for these sums. That, in my view, is a factual issue to be decided on the basis of the evidence before me. Imperial's liability, save for liability for damages to or losses of the Goods during transit and/or liability arising from breach of the agreement, was always to be delictual liability to be determined in accordance with normal legal principles for determining delictual liability. Moreover, under no circumstances was Imperial to be liable for any indirect, consequential, special and/or punitive damages.

[25]. Imperial denies Sime Darby's complaints in respect of the stock shortages. It did so not for the first time during February 2017, when it pointed out to Sime Darby that its claims for stock shortages were based on transactions recorded on its SAPS system over which Imperial and its staff had very little control. Imperial did not accept Sime Darby's assertion that there were shortages based on their

reconciliation, which, in turn was not based on Imperial's system. Imperial made extensive enquiries in their endeavour to understand how Sime Darby arrived at the amounts of the shortages. They were concerned that transactions were processed on the Sime Darby's side, as per the so-called MB51 Report, which had not been agreed upon and which were not supported by the physical stock takes compared to the '101' and the '601' transactions. According to the evidence, none of these queries were addressed at all let alone addressed adequately. The point made by Imperial then and during the hearing of the matter was that there was no legal basis for any of the supposed shortages.

[26]. As for the period from April to September 2017, when Imperial exercised a lien over Sime Darby's stock, the latter also claims damages in the amount of R1 094 166.38 for refining costs incurred in its attempt to salvage approximately R5 000 000 worth of stock. Imperial contends that, in terms of the agreement between the parties, it was authorised to exercise the lien and during that period it bore no risk in respect of the Goods. I find myself in agreement with that contention. Clause 5.5 of the agreement states that Imperial shall not be liable for any risk in respect of goods. The expiry of the stock constitutes a risk in respect of the stock. Accordingly, Sime Darby cannot hold Imperial liable for the refining of the stock. In any event, the undisputed evidence of Mr Brown was that these invoices related to all services rendered to Sime Darby, including warehousing costs, logistical services and other related costs. And this would be specifically in terms of the agreement between the parties.

[27]. In sum, the point is simply that, for the most part, Imperial's liability (if any) to Sime Darby for damages as a result of damaged and/or lost goods and/or shortages would be based on delict and Sime Darby would bear the onus to prove such losses and the other elements of the delict on a balance of probabilities. Sime Darby has failed to discharge that onus, which would have required It to prove *inter alia* the quantum of its damages. And its claims fall to be rejected.

[28]. That brings me to the next question whether Imperial was entitled to invoice Sime Darby during the period from April to September 2017, when Imperial was exercising its lien over Sime Darby's stock. The total amount for the

invoices that were rendered to Sime Darby in respect of the lien period was R1 878 404.40. Of that amount, warehousing costs amount to the sum of R1 308 478.00 and the remaining R294 043.42 being for other related costs within the lien period.

[29]. Mr Van der Merwe, who appeared on behalf of Imperial with Ms Reddy, submitted that Sime Darby should be held liable for these charges. For the period in question, that is from April to September 2017, so the argument goes, the contract was still in force. In terms of the contract, Imperial was entitled to claim the warehousing fee. To earn the warehousing fee, the plaintiff has to keep the goods in its warehouse – that it did. This is not a case where the plaintiff acquires a lien over the defendant's goods, as would for instance a repairer of a car, and then claims storage fees for the period that he retains the car under the lien. Imperial does not make such a claim. It claims the warehousing fee under the contract, not its costs to store the goods.

[30]. I find myself in agreement with these submissions. Moreover, Sime Darby was invited to provide security as a replacement for Imperial's lien during June 2017, but it was not until 22 September 2017 that it requested Imperial to allow it to take possession of its goods, without tendering replacement security, which request was acceded to by Imperial. Sime Darby is therefore liable to pay the invoices raised after April 2017.

[31]. Imperial is therefore entitled to a judgment in its favour against Sime Darby, as well as to an order dismissing the claim in reconvention.

Costs

[32]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*¹.

[33]. I can think of no reason why I should deviate from this general rule *in casu*. Furthermore, in terms of the agreement between the parties, in the event of

¹ *Myers v Abramson*, 1951(3) SA 438 (C) at 455

Imperial instituting legal action it, Sime Darby is liable for Imperial's costs on the scale as between attorney and client. I therefore intend ordering costs on said scale in favour of Imperial against Sime Darby.

Order

[34]. In the result, the order which I grant is as follows: -

- (1) Judgment is granted against the defendant in favour of the plaintiff for: -
 - (a) Payment of the sum of R4 470 174.57;
 - (b) Payment of interest on the amount of R4 470 174.57 at the applicable legal interest rate of 10.50% per annum from date of demand, being 17 July 2017, to date of final payment; and
 - (c) Costs of suit on the scale as between attorney and client, including the costs consequent upon the employment of two Counsel (where so used).
- (2) The defendant's conditional claim in reconvention is dismissed with costs on the scale as between attorney and client, such costs also to include the costs consequent upon the employment of two Counsel (where so employed).



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	19 th and 20 th September 2022
CLOSING ARGUMENT ON:	14 th October 2022
JUDGMENT DATE:	11 th April 2023
FOR THE PLAINTIFF:	Advocate H A Van der Merwe, with Advocate K Reddy
INSTRUCTED BY:	J L Badenhorst Attorneys, Brackenhurst, Alberton
FOR THE DEFENDANT:	Advocate Terry Motau SC
INSTRUCTED BY:	Snyman Attorneys, Melrose Arch, Johannesburg