



IN THE HIGH COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: A645/08

DATE: 1/6/2010

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

25/05/2010
DATE

SIGNATURE

IN THE MATTER BETWEEN

AFGRI BEDRYFS BEPERK

APELLANT

AND

DUVANGILLA BK

RESPONDENT

JUDGMENT

BAM. AJ

- [1] The appellant appeals against the whole of the judgment of the magistrate of Schweizer Reneke, delivered on 25 January 2008 by the Honourable Magistrate Ms L Heyns. In terms of the said judgment the appellant was ordered to pay to

the respondent the amount of R83 170,60 plus interest and costs on a party and party scale.

(The appellant was the first defendant and the respondent the plaintiff in the court *a quo*.)

[2] It was common cause-

- (a) that the respondent's claim against the appellant originated from a credit agreement entered into between the appellant and the erstwhile second defendant (one Barkhuizen), in terms of which the appellant, as creditor, granted a summer production facility to second defendant;
- (b) on 15 December 2004 a letter with the following contents (see volume 1 p11) was forwarded to the respondent (by the appellant):

"Graag wens ek u mee te deel dat 'n somerproduksiefasiliteit vir R893 000,00 aan u kliënt toegestaan is en dat 50% van die gemelde bedrag reeds aan u kliënt beskikbaar gestel is. 'n Bedrag van R178 600,00 word deur Afgri teruggehou, synde kostes asook versekeringspremies. Die saldo van R267 900,00 word tans teruggehou, in afwagting van ons verslae, welke verslae reeds in die komende twee weke beskikbaar behoort te wees.

Op ontvangs van positiewe verslae asook u bestelling sal die nodige oorbetalings aan u gedoen word."

- (d) that the abovementioned letter and its contents referred to the business relationship between the appellant and the respondent; and
- (e) the respondent is a supplier of chemicals to farmers.

[2] On 31 August 2006, the respondent filed its amended particulars of claim. The particulars now read as follows:

- "4. 4.1 Op of ongeveer Desember 2004 en te Schweizer Reneke
het die eerste verweerder, behoorlik verteenwoordig deur
J N Viljoen mondelings teenoor die eiser, behoorlik
vertteenwoordig deur P Louw, belowe en onderneem om
aankope te doen deur S H Barkhuizen by die eiser te betaal.
- 4.2 Voormelde mondelinge onderneming is deur die eiser
aanvaar.
- 5. 5.1 Na ontvangs van gemelde belofte/onderneming en op die
tweede verweerder se spesiale aandrang en versoek en
gedurende die periode 1 Desember 2004 tot 18 Januarie
2005, het die eiser goedere verkoop en gelewer aan die
tweede verweerder soos blyk uit aanhangsels 'A1" tot 'A5"
hiertoe.
- 5.2 Uit hoofde van die belofte/onderneming deur die eerste
verweerder aan die eiser, het die eerste verweerder
aanspreeklik geword vir betaling van goedere gekoop en
gelewer deur eiser aan die tweede verweerder.

5.3 Eiser het die fakture, aanhangsels 'A1' tot 'A5' hiertoe, by eerste verweerder ingedien vir betaling, maar het eerste verweerder in gebreke gebly om enige betalings in die verband te maak.

6. 6.1 In die alternatief het die eerste verweerder, behoorlik verteenwoordig deur J N Viljoen, op 15 Desember 2004 'n skriftelike onderneming aan die eiser verskaf in terme waarvan die eerste verweerder onderneem en/of beloof het om op ontvangs van positiewe verslae asook 'n bestelling, die goedere wat deur die tweede verweerder by die eiser bestel is, te betaal."

[4] The appellant, in its pleadings, denied that it was liable to pay the respondent the amount claimed. The appellant further denied that the respondent placed any orders with the appellant as it was required to do (see p56, paragraph 9.3):

"9.3 Die eerste verweerder ontken dat eiser enige bestellings by eerste verweerder geplaas het, pleit verder dat geen betalings aan eiser gemaak is deur eerste verweerder nie en dat eerste verweerder nie verplig is om enige betaling aan eiser te maak nie."

[5] The court *a quo* was informed (see record, p60) that default judgment was granted against the second defendant in the amount claimed.

- [6] Evidence was adduced by both parties pertaining to what seems to have been the only issue remaining, namely whether the respondent in fact placed or filed the necessary orders in accordance with the requirements of the appellant. The issue regarding the positive reports or "positiewe verslae" became common cause (see p61, lines 14-15).
- [7] Mr P J Louw testified on behalf of the respondent, of which he was the sole member. From his evidence it is clear that he was concerned about the payment of the chemicals respondent was supposed to supply to the second defendant. After having received the letter from the appellant signed by Mr Goosen and dated 15 December 2004, he was satisfied that the respondent would get his money and that he should proceed with the supply of the chemicals to the second defendant (see record vol 1, p68, lines 15-20). Mr Louw was satisfied that the tax invoices (see record pp6-10) complied with the required provisions. According to Mr Louw, he regarded the invoices as orders (see record p74 lines 22-24). Pertaining to the fact that he should have registered as a supplier, his evidence was that he only subsequently learnt about that requirement (see record p82 lines 4-7). It is clear in this regard that the registration is nothing more than an administrative requirement and not a condition.
- [8] Ms G J Smit testified on behalf of the respondent. She told the court *a quo* that she, in her capacity as administrative clerk, supplied the invoices in question to the offices of the appellant. She did not know anything about the registration

number, and neither did anybody at the appellant's place of business at that stage inform her that an order number was in fact necessary. What she learnt about was that there should have been a supplier number, but once that was issued, it was kept on the system and did not play any day to day role at all (see record p94).

[9] The appellant adduced the evidence of Mr Lin Truluck, a credit manager with the appellant. This witness informed the court *a quo* of what was required of a supplier before the supplier would have been paid for the services rendered. Mr Truluck's evidence indicated that once an order received by the plaintiff was numbered and there were still funds available, the supplier would be entitled to payment (see pp112 and 113).

[10] The learned magistrate posed certain questions to Mr Truluck, which were recorded as follows (p113, from line 6):

"Just to clear up, do I understand you correctly, you need a supplier number and to get that what is registered on exhibit 'C', that is the supplier number you get? --- That is correct.

But then you need a further number, an order number to actually get your money? --- That is correct.

After you have received your supplier number, how do you get your order number? --- The supplier would then contact the branch they were dealing with.

Yes? --- And request them to give them an order, supply an order number to them which would then reserve the credit against the customer."

[11] I am satisfied that the crux of the situation was summed up by the learned magistrate in putting the afore-quoted questions to Mr Truluck.

[12] It appears to me that the gist of the magistrate's questions to Mr Truluck is that there are several administrative issues to be considered and adhered to, which cannot be termed "conditions" to be complied with before the supplier gets paid. In this regard, I refer to the number issued to the supplier, the order number itself and whether the "order form" should consist of a mere tax invoice or a document clearly marked as "order".

[13] What seems to me to have been the "conditions" for the payment to a supplier, are the following:

- (a) that funds on behalf of the farmer would still be available with the creditor; and
- (b) that order forms issued by the supplier, indicating that specific products and material, and the amount charged, were in fact delivered or furnished to the farmer by the third party, the supplier.

[14] This also appears to me to be consistent with the evidence of Mr Viljoen, who testified on behalf of the appellant, the person who drafted the letter of

15 December 2004 and explaining (on p133) what exactly was meant by the said letter. It is of importance to point out that the "positiewe verslae" as it appears on the said letter, were not an issue anymore on the date the respondent expected payment of the amount in question. It was common cause that the aforesaid reports were in fact supplied to the appellant, before the appellant decided not to pay the respondent.

- [15] The learned magistrate, in considering whether the respondent was in fact entitled to be paid by the appellant, remarked as follows in her judgment (see record p154):

"Die kern van die geskil in hierdie saak is baie duidelik: 'Sou die redelike man met die inligting wat hy (eiser) ontvang het met betrekking tot betaling vir lewering, van oordeel wees dat hy geregtig is op betaling?'"

The gist of the learned magistrate's decision in this regard is that the respondent in reading the letter forwarded by the plaintiff dated 14 December 2006, acted reasonably. Any reasonable person who would have read the said letter would have been in a situation to accept that what was contained in the letter was in fact correct.

- [16] The agreement entered into by the appellant and the second defendant is a credit agreement, or more commonly known, a money lending transaction. In terms of the result of the agreement between the aforesaid two parties, a sufficient amount

was still available to cover the amount claimed by the respondent, R83 117,60, for the goods sold and delivered by the respondent to the second defendant. The "remaining condition" was that the respondent should furnish the appellant with order forms reflecting the abovementioned amount as value of the goods delivered to the second defendant. In this regard the documents furnished by the respondent were in the form of tax invoices. The appellant contended that tax invoices do not satisfy the requirement of orders in this matter. However, speaking for myself, I am satisfied that in view of the contents of the tax invoices, referring to the detail of the transaction, complied with the requisites of an order form.

- [17] It was the respondent's first and primary aim to ascertain who would be responsible for the payment of its fees. I am satisfied that in the event of it being correct that the appellant needed "order forms" and not the tax invoices, that the respondent, without question, would have supplied "order forms" in accordance with the appellant's requirements. After all, as I have remarked above, the respondent was concerned about the question of who was going to pay his fees. The respondent would on the probabilities have complied with any condition which the payments were subjected to.
- [18] Mr Goosen, appearing for the appellant, referred to several decisions pertaining to the interpretation of the language used in a document and the "golden rule" of interpretation in that regard. [See *Coopers and Lybrand & Others v O'Briant* 1995 3 SA 761 (A).] Mr Goosen's submissions pertaining to the law seems to be

correct. However, I do not deem it necessary to consider all the issues in that regard, save to say that I am satisfied that the respondent objectively complied with the condition by furnishing the tax invoices as order forms reflecting delivery of the goods in question by the respondent to the second defendant, as well as the amounts due to the respondent.

[19] In view of the fact that an agreement existed between the appellant and the first defendant regarding the advancing of the capital to the second defendant and that on all probabilities a sufficient amount was still available to the second defendant to pay his suppliers; I am of the opinion that the *onus* rested on the appellant to prove on a balance of probabilities that it was not in the circumstances liable and obliged to pay the amount in question to the respondent. In this regard, I am further of the opinion that the appellant failed.

[20] Ms M Janse van Nieuwenhuizen, who appeared on behalf of the respondent, referred to the case of *Pieters & Co v Salomon* 1911 AD 1921 regarding the conduct of the party who is sued for the compliance with the terms of a contract like the one *in casu*. In this regard, counsel submitted that the correct interpretation of the *Pieters* matter, and to make it applicable to this case, should be as follows:

"The whole business was conducted in a very slip shod manner, and there is much force in the contention that Afgri never intended to make themselves responsible for payment of the invoices, but if their course of

dealing with the respondent was such as reasonably to lead it to believe that they intended to pay Duvangilla the full amount of its invoices, Afgri's unexpressed intention to pay only upon the issue of an order number cannot avail them."

With reference to what I have quoted above, I am of the opinion that Ms Van Nieuwenhuizen's submission in this regard is fair and a reasonable summary of the issue referred to.

[21] I am therefore inclined to find that the learned magistrate was correct in her finding in favour of the respondent and I suggest therefore that the appellant's appeal against the said finding should be dismissed with costs. I would further add that the appellant and the second defendant should be held liable to the respondent, jointly and severally, the one paying the other to be absolved.



A J BAM
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree and it is so ordered.



N P MNGQIBISA-THUSI
JUDGE OF THE NORTH GAUTENG HIGH COURT

A645-2008

HEARD ON:

FOR THE APPELLANT:

INSTRUCTED BY:

FOR THE RESPONDENT:

INSTRUCTED BY: