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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 3055/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

SIMPLY WORKWEAR CC

Plaintiff

(Registration No: 2[...])

And

SEVENTH TRADING 643 CC

First Defendant

(Registration No: 2[...])

PUSELETSO CONSOLIDATION MOLUTSI

Second Defendant

HEARD ON:

02 September & 02 November 2022

Written heads of argument delivered on 14 December 2022, 20 & 25 January 2023.

JUDGMENT BY:

DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 31 MAY 2023 at 15H00.

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- [1] The plaintiff issued summons against the defendants seeking payment of the amount of R655 000.00 with interest and costs from the first defendant. In respect of the second defendant, the plaintiff seeks an order authorising the Sheriff of this court to sign all documents necessary for the transfer of the second defendant's immovable property to the plaintiff.
- [2] The claim arises from personal protection equipment and /or gear (PPE) supplied by the plaintiff to the first defendant but not paid for.
- [3] In the Plea, it is undisputed that a consignment of PPE worth R1 614 199.06 was duly delivered by the plaintiff, invoices were rendered and some payments were made by the first defendant except for the balance of R655 000.00. It is also common cause that the second defendant provided security for the due payments.
- [4] The claim is resisted on the grounds that an extension for payment was requested as the plaintiff had oversupplied the orders and it was agreed between the parties that payment will only be made after the first defendant had sold the oversupplied stock to its client (the Municipality). It is the defendants' case that there is also a batch of the order which is not in accordance with the agreed specifications. In this regard, it was agreed that defective goods will be returned to the plaintiff and the first defendant's account will be credited.
- [5] Mr Rehaan Anverali (Anverali) gave evidence for the plaintiff's case. He is the sole member of the plaintiff's business. He testified that during June 2020 he received a call followed by an email from the second defendant requesting a quotation for the supply of PPE. Following the quotation, Anverali met the

second defendant accompanied by her son Mr Lebohang Molutsi (Molutsi). A partly oral and partly cession agreement was consequently concluded between the plaintiff represented by Anverali and the first defendant represented by the second defendant in terms of which, the plaintiff agreed to deliver PPE equipment and/or gear to the first defendant and would thereafter render invoices which the first defendant undertook to pay within ninety (90) days of receipt.

[6] Anverali stated that the written part of the agreement is the cession agreement in terms of which the second defendant ceded her rights to the immovable property situated at erf 1[...] P[...], in Harrismith as security for the due, proper and timeous payment for the goods.¹

[7] The relevant part of the cession agreement is clause 1, it reads thus:

“PURCHASE PRICE

The purchase price is R1 000 000.00 (ONE MILLION RAND) and payable as follows:

1.1 The purchaser will provide the certain goods to the seller for the amount of the purchase price which amount will be confirmed by the seller on the respective invoices.”

[8] In terms of the cession agreement, the second defendant handed over the title deed of the said property to the plaintiff. At that time, the property was valued between R500 000.00 and R600 000.00 and it was also agreed that if the first respondent fails to pay for the invoices by 15 September 2020 the plaintiff would be entitled to receive transfer of the second defendant's immovable property.

[9] Pursuant to the conclusion of the cession agreement, the plaintiff delivered and also issued invoices for various orders of PPE.

¹ Exhibit “A3-12” is a copy of the deed of sale agreement.

- [10] It was his testimony that the first defendant only started making payments from 7 December 2020 by making several staggered payments ranging from R50 000.00 to R200 000.00 and then stopped. A letter of demand was then issued against the defendants on 26 May 2021² at this stage the first defendant was indebted to the plaintiff in the amount of R750 000.00. The letter of demand did not yield any positive results consequently, the plaintiff issued summons prompting the first defendant to pay an amount of R150 000.00. The first defendant still owes the plaintiff R505 000.00.
- [11] Anverali told the court that the first defendant provided no explanation for failing to pay the balance due and at no stage did the first defendant complain about an oversupply or defective PPE.
- [12] Under cross-examination, he conceded that Molutsi is the director of the first defendant's business and that he was not cited as a co-defendant in these proceedings. His explanation was that it was probably a "typing error."
- [13] He was adamant that the cession agreement was duly signed by the second defendant in the presence of both Molutsi and the defendants' attorney of record Mr Ditan who also signed the agreement as a witnesses.
- [14] He disputed the defendants' version that payment could not be made as the first defendant had not received payments from the Municipality by referring this court to the first defendant's bank statements³ which reflect that on 7 May 2021 approximately two weeks before the plaintiff issued a letter of demand, the first defendant had received about R1.3 million from the Municipality.
- [15] At the end of the plaintiffs' case the defendants applied to be absolved from the instance. It was the defendants' case that the plaintiff has failed to adduce

² Exhibit "A13-14".

³ Exhibit "A19-46" and "B".

evidence to prove its claim. I exercised my discretion and refused absolution holding that on the defendants' own version (paragraphs 4 to 7 and 9 to 10 of the defendants' plea) the liability to pay is not disputed. The first defendant has also made some payments pursuant to the issuing of summons therefore, based on these reasons, the defendants should be called to their defence.

- [16] In denial of their liability the defendants led the evidence of Molutsi who confirmed that he is the sole director of the first defendant and that the second defendant is his mother. He admitted that the transaction was initiated by the second defendant who had contacted Anverali for quotations and placement of orders. He also confirmed that pursuant to the said communication, the first defendant ordered PPE gear from the plaintiff for an amount of R1 614 199.06.
- [17] He stated that the invoices issued in that regard were paid except for the balance of R650 000.00 and the reason for the outstanding payment is attributed to the plaintiff's failure to deliver the goods in accordance with the agreed specifications and for also oversupplying or delivering double the quantity of the goods ordered and it is in that regard that it was agreed between the plaintiff and the first defendant that the orders with incorrect specifications will be returned for credit and with regard to the oversupplied orders the plaintiff will be paid once these orders were sold to the Municipality.
- [18] The validity of the cession agreement is also disputed. Mr Molutsi denied that the second defendant signed the said agreement on the date and at the place alleged by the plaintiff. It was also his testimony that the second defendant was in any event not authorized to conclude any agreement on behalf of the first defendant.
- [19] Under cross-examination, Molutsi admitted that since then, no items were returned or even tendered back to the plaintiff.

[20] That was in short the evidence tendered by the respective parties' witnesses in addition thereto, documentary evidence was also handed in by the concurrence of both the parties as Exhibit "A", "B" and "C".

[21] After all the evidence has been proffered the issue of whether the first defendant is indebted to the plaintiff is in my view, neatly resolved by Anverali's concise and convincing evidence pertaining to the circumstances under which the agreement to deliver the PPE was concluded by the plaintiff and the first defendant duly represented by the second defendant. His version that the plaintiff has performed its obligations in terms of the said agreement by supplying the PPE and that the first defendant defaulted on its payments with the result that the first defendant is currently indebted to the plaintiff in the amount of R550 000.00 is indisputable.

[22] On the other side, the defendants' case is riddled with inconsistencies. In the plea it is averred that an indulgence was requested for the payment to be made once the first respondent had received payment from the Municipality. At the trial, when Molutsi was confronted with evidence (Exhibit "A19-46" and "B") that at the time the first defendant defaulted on the payments the Municipality had already paid over R1.3 million he raised a new defence by alluding to an agreement concluded by the parties in terms of which the first defendant would return some of the goods as they were not in accordance with the agreed specifications and this is despite the fact that:

22.1 The allegations about the plaintiff's failure to fulfil its obligations in terms of the agreement were not pleaded;

22.2 Anverali's evidence that at no stage did the first defendant complain about the delivery was uncontested; and

22.3. There was no attempt made even after the action was instituted to return the supposedly faulty and oversupplied goods instead, the first defendant made a payment of R150 000.00 after summons was issued.

- [23] Molutsi's evidence was also vague and contradictory. He sought to dispute the validity of the agreement pertaining to the sale and delivery of the PPE on the basis that it does not exist and the second defendant had no authority to conclude same on behalf of the first defendant on the other side, he admits that the plaintiff delivered the PPE at the first defendant's instance and request.
- [24] The cession agreement is disputed on the grounds that the second defendant did not sign such an agreement. It is important to note that the second defendant who is privy to the facts surrounding the conclusion of the cession agreement elected not to testify. The defence's case rested on Molutsi's testimony who on his own admission, he was not privy to the facts peculiar to the conclusion of the cession agreement. Furthermore, in terms of paragraph 4 and 5 of the plea no dispute exists regarding the cession agreement and its provisions.
- [25] Evidence is either probable or not. Having regard to the discrepancies and the improbabilities that exist in the defendants' version, I have come to the conclusion that their defence is false, clearly a contrived afterthought concocted to avoid liability.
- [26] I am satisfied that the plaintiff has adduced sufficient evidence to prove its claim against the first defendant on a preponderance of probabilities. It follows therefore that the plaintiff's case ought to prevail.
- [27] Regarding the plaintiff's entitlement to the transfer of the second defendant's immovable property, I am not persuaded that this relief is available to the plaintiff as ancillary to the order sought for the due payment but in the alternative for the reason that, it is common cause that the second defendant's liability arises from the accessory obligation for "the due, proper and timeous payment" of the plaintiff's account in the event of non-payment by the first defendant. It is trite that "payment usually serves to extinguish a debt" and "a debt is after all fulfilled and extinguished through payment". See

*Brayton Carlswald (Pty) Ltd and Another v Brews.*⁴ A cession cannot stand where the principal debt has been extinguished by payment.⁵

[28] In conclusion, I am of the view that the plaintiff has substantially succeeded in its claim accordingly, the first defendant should bear the costs of this suit.

[29] I make the following order:

1. The first defendant is ordered to pay the plaintiff the amount of R505 000.00 (FIVE HUNDRED AND FIVE THOUSAND RAND) together with interest at the rate of 7% per annum, from date of demand to date of final payment.
2. The first defendant shall pay the costs, including the costs reserved on 17 May 2022 and 31 August 2022.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of Plaintiff:

Instructed by:

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N. Moola Incorporated

C/O Honey Attorneys

BLOEMFONTEIN

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⁴ **2017 (5) SA 498** (SCA) at 505 para 19C-D.

⁵ *Grobler v Oosthuizen* **2009 (5) SA 500 (SCA)** ([2009] 3 All SA 508; [2009] ZASCA.