



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED NO
DATE:	8 March 2019
SIGNATURE:	<i>eies</i>

Case No. 63577/2016

In the matter between:

TAFRON TRADING CC

PLAINTIFF

And

PORTABLE SHADE (PTY) LTD

DEFENDANT

JUDGMENT

MILLAR, A J

1. This is an action in which the plaintiff sues the defendant for payment in respect of goods sold and delivered by it. The defendant in turn has a counter-claim against the plaintiff. At the commencement of the hearing the plaintiff moved for a separation of issues in terms of rule 33(4) of the Uniform Rules of Court, separating the hearing of the plaintiff's claim from the counter claim, the reason being that if the court finds in favour of the plaintiff on its claim, the counter claim falls to be dismissed. The application was supported by the defendant. I granted the order sought in the terms agreed by the parties in a draft order they handed up.
2. The business relationship between the plaintiff and the defendant commenced at the beginning of 2011 and continued until it was terminated at the beginning of September 2015. During the currency of the relationship, the plaintiff imported from China and sold to the defendant extruded aluminum profiles which the defendant used in the manufacture of the various products it sold. The plaintiff had initially been one of 3 suppliers of aluminum to the defendant but was eventually the sole supplier. Over the period of the relationship, the plaintiff would ascertain from the defendant what its likely purchases would be and then on this basis import the profiles. When profiles were ordered and imported, this was usually in 6-meter containers but also sometimes in 12-meter containers.
3. The aluminum was priced based on profile specific lengths and weight and was subject to the Rand-US Dollar exchange rate. The plaintiff would pay the exporter 30% of the cost of a particular order when it was placed and then had to pay the remaining 70% when the ship which was to bring it to South Africa was loaded. The order would not leave China until it had been paid in full. Once the order arrived in South Africa and had been cleared, the

plaintiff would then calculate the price that it was going to charge for that specific stock based on the cost associated with its purchase and importation.

4. The defendant initially ordered and purchased individual lengths of profile in bundles. This was the purchase of the basic profiles as imported in the specific lengths they had been manufactured. The defendant then requested that the plaintiff perform additional work for it by cutting and drilling the lengths that had been purchased. The business relationship evolved, and the defendant then began purchasing pre-cut pieces of profile. This evolved again to include the plaintiff assembling certain of the pre-cut pieces. When orders were placed, these would either be delivered when they were ready or would be collected on behalf of the defendant by Mick Oosthuizen or another representative.
5. The pricing evolved with the relationship – initially the plaintiff's price-list only provided for lengths but it was expanded to include pieces and at least from August 2013 a fixed "manufacture cost" for drilling, cutting and assembly.
6. The agreement to pay a fixed manufacture cost was reached when Mr. Michael Baron ("Baron"), one of the members of the plaintiff who had been based in Shanghai China, had returned to South Africa to run the plaintiff's factory. On his arrival he had arranged to meet with Mr. Brad Anassis ("Anassis") in order to discuss a fixed cost. They had met to discuss this and an agreement had been struck in terms whereof the defendant would pay a fixed sum of R60 000,00 per month excluding material cost for the manufacture. A month or so later and at the instance of Anassis, they had met again and renegotiated this cost downward to R50 000,00 per month. The plaintiff had invoiced the defendant for the initial amount of R60 000,00 in September but after the renegotiation had agreed that the defendant only had to pay R40 000,00 in October so as to bring this cost in line. After that and until new prices were set, this was what the defendant paid for manufacture.

7. The plaintiff issued new price lists when a container arrived from China. This applied to the stock in that container. During the period of the relationship the plaintiff issued 4 price lists. The first was on 1 February 2011, the second on 2 December 2013, the third on 1 September 2014 and the fourth on 1 May 2015. The price lists were emailed by Mr. Fulvio Tafani ("Tafari"), the member of the plaintiff responsible for its financial management to the defendant's bookkeeper – Heidi. In addition, whenever a new price list was issued, Baron and Anassis would meet and would discuss the price lists. The price lists, besides setting out the prices of lengths, also set out prices for pieces as well as, from 2013, the agreed manufacture price – initially R50 000,00 per month for 2013 and 2014 and then increasing to R55 000,00 in 2015.
8. The defendant had initially attempted to pay the plaintiff's invoices within 30 days, but this had extended to 60 and sometimes 90 days. Anassis had ascribed this to the payment terms of the defendant's blue-chip clients as well as the cash flow constraints experienced as a result of the growth of the defendant's business.
9. During April 2015, a meeting was held between the three members of the plaintiff and Anassis. He informed them that he intended to grow the defendant's business and would be bringing in partners with appropriate skills to assist him in doing so. The defendant's account was at that stage paid on 60 days. The account was duly paid on this basis at the end of June and July 2015.
10. By July 2015, the defendant had brought in persons to assist, one of whom was Stefan Terblanche. He was skilled in financial matters and had worked in a manufacturing environment previously.

11. The July payment was the last one the plaintiff ever received from the defendant. During August, Anassis queried for the first time the basis upon which the plaintiff had been billing the defendant. This was raised with Baron who in turn referred him to Tafani.

12. An email was addressed to Tafani on 31 August 2015 by Anassis in which he stated that:

"Further to my discussions with Mike, with regards to your invoices and monthly charges I am sure that he mentioned this matter to you. I found lasts (sic) months invoices strangely high so I looked into the invoices and found that we had been overcharged somewhat according to your price list. Heidi has conducted a 12-month recon using the correct relevant price list "per sector" to correct the charges accordingly, and to be honest I did not know that you increased the prices every three months, we keep our price lists firm for 12 months so this came as a surprise to me when I saw this. Attached is the breakdown of overcharges per month, in total we have been overcharged R1134528,26"

13. Three witnesses testified in the trial. Baron and Tafani for the plaintiff and Anassis for the defendant. Their evidence was largely common cause and uncontentious as to the genesis and ongoing nature of the business relationship between the plaintiff and the defendant.

14. Anassis testified that while he had never ever seen the price lists that had been emailed to Heidi but that he had met and discussed the price lists with Baron as and when they had been issued. His evidence was that for the almost 5 years of the business relationship he had never looked at any of the plaintiff's invoices and had simply authorized these for payment when Heidi had presented them to him. He explained his reason for this as being because the relationship had been "good pure business" between the plaintiff and the defendant.

15. He remained adamant that the basis for the price was the "per meter" or length basis that had been charged initially when only manufactured lengths had been purchased. He testified that he had only come to understand that the plaintiff had been overcharging the defendant when this had been explained to him by Stefan Terblanche in July 2015. His evidence in this regard was at odds with the email of 31 August 2015 which in itself misrepresented the frequency with which the plaintiff had revised its prices.

16. It is not in dispute between the parties that the defendant ordered the goods from the plaintiff or that the goods ordered were delivered to the defendant. The dispute turns on whether the price for the goods was in accordance with the whole of the plaintiff's price lists or whether it was on a "per meter" basis, extracted from the prices per length on the price list as contended by Anassis.

17. It was stated in *Westinghouse Bank and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* that *"It is a general rule of our law that there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price. They may do so by fixing the amount of the price in their contract or they may agree upon some external standard by the application whereof it will be possible to determine the price without reference to them."*¹

18. The evidence establishes that the defendant placed orders with the plaintiff. The orders were filled, and the goods delivered to the defendant. The evidence also establishes that prior to the order of goods, over the entire period of the business relationship between the

¹ 1986 (2) SA 555 (A) at 574B-C, approving Colman J in *Burroughs Machines Ltd v Chenille Corp S.A Ltd* 1964 (1) SA 669 (W) at 670C-D

parties, the defendant was in possession of a price-list from the plaintiff and knew the plaintiff's prices for the specific goods that it ordered, before such orders were placed. This was over the entire period of the business relationship between the parties.

19. The evidence of Anassis that notwithstanding his knowledge of the whole of the price-list, the defendant ordered and paid the invoices for the orders under the mistaken belief as to the basis upon which they had been prepared – for a period of almost 5 years. Given his business experience and the importance of the plaintiff as the sole supplier of aluminum to the defendant and the inconsistency between his evidence and the email of 31 August 2015, I find his evidence is contrived and is so improbable as to be untrue. The version of the defendant is rejected.
20. During argument, Mr. Vetten urged me to find that the plaintiff had, in its declaration failed to plead a proper agreement between the parties. He argued that the plaintiff had failed to make material allegations which in effect rendered the declaration excipiable. He urged me to find, in the event that I was not persuaded to find that the defendant's version as to the determination of the price should be upheld, that the plaintiff's claim should in any event be dismissed on this basis.
21. *"It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to a trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made"*²

² Trope v South African Reserve Bank and Another 1992 (3) SA 208 (T) at 210G-H

22. The defendant did not prior to the filing of its plea take issue with the case pleaded in the plaintiff's declaration. In fact, the defendant pleaded to the declaration, made material admissions and in consequence of this and agreement reached at the pretrial conferences held in the matter, the case came before court for the determination of the issues. The defendant knew the case it had to meet and was not taken by surprise. For this reason, in my view this argument has no merit.
23. For the reasons set out above, the plaintiff's claim succeeds, and the defendant's counterclaim is to be dismissed.
24. In the circumstances I make the following order:
- 23.1 The defendant is ordered to pay to the plaintiff the sum of R1 594 906,27;
- 23.2 The defendant is ordered to pay interest on the sum of R1 594 906,27 from 16 August 2016 to date of payment at the rate of 10,25% per annum;
- 23.3 The defendant's counterclaim is dismissed with costs;
- 23.4 The defendant is ordered to pay the plaintiff's costs of suit



A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:
JUDGMENT DELIVERED ON:

4, 5 & 6 MARCH 2019
8 MARCH 2019

COUNSEL FOR THE PLAINTIFF:
INSTRUCTED BY:
REFERENCE:

ADV W PIENAAR SC
COETZER & PARTNERS
MR F COETZER

COUNSEL FOR THE DEFENDANT:
INSTRUCTED BY:
REFERENCE:

ADV D VETTEN
MARTINI-PATLANSKY
MR M MARTINI