



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 2456/2014

In the matter between:

KIMATE INVESTMENTS (PTY) LTD

Plaintiff

and

DVN BOERDERY CC

Defendant

HEARD ON: 29 MARCH 2016

JUDGMENT BY: C. REINDERS, J

DELIVERED ON: 23 JUNE 2016

- [1] It is common cause that an agreement for the sale of livestock and moveable assets was concluded on 16 May 2012 between the plaintiff, represented by Mr YM Jadwat, and the defendant, represented by Mr DS van Niekerk.

- [2] On 30 May 2014 summons was issued by the plaintiff for payment in the amount of R 1 108 858,00 together with interest at the rate of 15,5% per annum with effect from demand, alternatively date of service of summons, to date of final payment.
- [3] The defendant raised two special pleas, namely that the incorrect written agreement was attached to the summons, and secondly that no allegation was made to establish jurisdiction. In its plea to the plaintiff's summons the defendant annexed the correct written agreement (hereafter "the agreement") concluded between the parties and furthermore relied on the agreement in its counterclaim to establish its cause of action. Neither of the special pleas were persisted with, however I will revert later to the incorrect written agreement attached.
- [4] It was not denied by the defendant in its plea that the purchase price for the livestock and moveable assets amounted to R 1 849 200.00 plus 14% Value-Added Tax ("VAT") in the amount of R 258 888.00, totalling R 2 108 888.00 (the "purchase price" as referred to in clause 4 of the agreement). It is common cause that the total purchase consideration was payable in instalments as follows: R 500 000.00 on 7 May 2012; R 500 000.00 on 1 June 2012; R 500 000.00 on 1 December 2012 and R608 888.00 on 1 February 2013. That

only an amount of R 1 030 000.00 were paid by the defendant, is common cause.

[5] The plaintiff averred in its summons that it complied with its obligations in terms of the agreement and that the defendant breached the agreement by failing to pay the remainder of the total price consideration in the amount of R 1 108 858.00 to the plaintiff. The defendant denied that the plaintiff complied with its obligations and pleaded that it was entitled to a reduction in the purchase price in the amount of R 246 040.00 as a number of livestock and moveable assets were removed from the plaintiff's farm since the last date of inspection. The defendant also averred that the plaintiff was not registered for Value-added Tax (VAT), alternatively did not provide it with a VAT invoice and consequently may not claim the amount of R 258 888.00. In its counterclaim the defendant claims a reduction in the purchase price in the aforementioned amount (Claim A, hereafter "counterclaim A"), as well as an amount of R 48 000.00 being the reasonable and necessary cost to re-register certain moveable assets in its name (Claim B, hereafter "counterclaim B").

[5] The plaintiff called Mr Mohammed Abba, the son-in-law of Mr Jadwat who had since passed on. Although he himself did not conclude the agreement, he was closely involved and a witness thereto. A couple of months prior the conclusion of the sale agreement his father-in-law fell ill and the family decided that

they should get involved in the selling of the livestock and moveable assets of the plaintiff. As he was familiar with Mr Van Niekerk who was interested in purchasing the livestock and moveable assets, he introduced the latter to Mr Jadwat. The amounts as contracted in the agreement for the goods sold, were determined upon valuation by Mr Van Niekerk.

- [6] Although referring to an email in which Mr Van Niekerk indicated the discrepancies in the livestock which added up to a total of R 246 040.00, Mr Abba admitted that to his knowledge no amendments to the agreement were ever reduced to writing. In terms of clause 7 of the agreement it is stated that, if any of the listed items mentioned in the annexures to the contract has been removed from the farm since the last inspection by the purchaser, the annexure on which the goods appear and the purchase price will be amended accordingly on the day when the goods are removed from the property. The last inspection of the goods by Mr Van Niekerk occurred when he removed the goods. On the invoice from the plaintiff with a description of all the livestock and moveable assets (being farming implements) purchased by the defendant, no VAT registration number of the defendant is indicated, it does not state that it is a tax invoice and he bore no knowledge of the basis on which VAT was paid by the plaintiff. To his knowledge no VAT number was provided by Mr Van Niekerk to the plaintiff either. The VAT registration number of the plaintiff however appears from the SARS document, the so-called VAT103-form, indicating that the

plaintiff was indeed registered for VAT. Adv Jagga on behalf of the defendant conceded that Mr Abba was an honest witness who made concessions where he had to. The defendant closed its case without calling any witnesses.

- [6] It is common cause between the parties that the purchase price that the defendant was indebted to the plaintiff amounted to R 2 108 888.00 (inclusive of R 258 888.00 VAT); that the defendant paid an amount of R 1 030 000.00 and that there should be a reduction in the purchase price due to short delivery of livestock in the amount of R 246 040.00. Adv Jagga pressed hard upon me to find that the plaintiff is premature in that it did not fulfil its obligations in terms of the agreement (vide clause 7).
- [7] Adv Jagga furthermore submitted that the plaintiff bears the onus to show it did comply with the provisions of VAT legislation by providing a proper tax invoice; that there was no evidence that the defendant was ever asked to provide a VAT number and consequently there is no obligation on the defendant to pay the VAT amount. I do not find any merit in this submission. In **Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another 2001 (1) SA 1109 (CC)** it was confirmed by mouth of Kriegler, J in par [17] that vendors are in a sense involuntary tax-collectors. Furthermore, sec 20(4) of the **Value-Added Tax Act 89 of 1991** (the "Act") sets out the particulars that should be contained in a tax

invoice, but in terms of sec 20(7) of the Act the Commissioner can direct that certain particulars not be contained in the tax invoice or even that a tax invoice is not required at all. This is indicative of the fact that even if the plaintiff did not comply with the provisions of sec 20(4), it does not entitle the defendant to withhold payment of the agreed upon VAT amount of R 258 888.00. Even if I am wrong in the above conclusions, the principle of *pacta sunt servanda* is applicable. The amounts payable is to be ascertained from the contract itself.

- [8] The defendant's allegation that an amount of R 246 040.00 should be subtracted, is not only uncontroverted but has become common cause in the evidence of Mr Abba. It is the only deduction that can be made from the original purchase price. In testimony was referred to an email by Mr Van Niekerk dated 24 March 2014 to one Dr Bobat (page 21 of the exhibit bundle). The essence of the email at the time was to inform Dr Bobat of the difference in the livestock adding up to an amount of R 246 040.00. It also referred to the re-registration fees of R 48 000.00 that Mr Van Niekerk had paid. On a reading of the email the only conclusion that can be made is that the rest of the livestock and moveables were indeed delivered and that Mr Van Niekerk at the time wrote the letter to explain that he disputed with reference to the livestock, payment of R 246 040.00. Put differently, save for the stated amount he admitted liability for payment of the remainder of the amount. In passing by it may be mentioned that Mr Abba testified that the

original values were in fact calculated by Mr Van Niekerk himself. I am on a preponderance of probabilities satisfied that the amount to be deducted is to be reduced in accordance with defendant's counterclaim A.

[9] The purchase price in terms of the agreement amounts to R 1 849 200.00 (excluding VAT). After deducting the common cause short delivery of livestock in the amount of R 246 040.00, an amount of R 1 603 160.00 is owing. VAT calculated at 14% amounts to R 224 442.40, thus totalling R 1 827 602.40. The admitted payment in the amount of R 1 030 000.00 stands to be deducted, leaving an amount of R 797 602.40 still due and payable. It follows that there should be judgment in favour of the plaintiff for payment of R 797 602.40.

[10] The defendant claimed in its counterclaim B payment of R 48 000.00 for the licensing fees. No evidence was adduced in this regard (defendant bearing the onus) and the said claim stands to be dismissed. Clause 3.5 of the written agreement in any event stipulates as follows:

“Registration The Seller shall sign such forms and deliver to the Purchaser such documents as may be necessary **to enable the Purchaser to register the Vehicles that forms part of the moveable assets in his name**”. (my emphasis)

[11] Summons was issued in May 2014. Annexed thereto was an agreement of sale that has nothing to do with the dispute

herein. Defendant in its counterclaim annexed the common cause agreement between the parties. It is difficult to fathom why plaintiff did not amend and rectify its summons before the trial or at all. It proceeded on the incorrect pleadings. In its counterclaim the defendant claimed inter alia a reduction in the purchase price due to the short delivery of certain livestock. This was done as far back as July 2014. In essence the claim by defendant for reduction of the purchase price is successful and Mr Abba readily conceded that, from the outset, plaintiff realised that defendant was entitled to a price reduction. The plea filed by plaintiff to defendant's counterclaim wherein it sought that defendant's counterclaim be dismissed was opportunistic. Counterclaim A is not dismissed. On the contrary, it is same that leads to judgment for payment to plaintiff. Counterclaim B of the defendant is however dismissed. To show my displeasure I intend to have each party pay its own costs.

[12] In the result the following orders are granted:

1. Judgment for plaintiff in the amount of R 797 602.40 together with interest a *tempore morae* calculated from 12 June 2014 until date of payment.
2. Each party to pay its own costs.

C. REINDERS, J

On behalf of Plaintiff:

Adv. M. Desai
Instructed by:
Matsepes Incorporated
BLOEMFONTEIN

On behalf of Defendant:

Adv. N. Jagga
Instructed by:
Lovius Block
BLOEMFONTEIN