



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Not reportable

Case no: 10313/2012

In the matter between:

J & H BUILDING SUPPLIES CC

PLAINTIFF

And

MASIQHAME TRADING 379 CC

1st DEFENDANT

BONGANI TRUELOVE ZULU

2nd DEFENDANT

Coram: JEFFREY AJ

Heard: 9, 10, 11, 16 September; 1 October 2015

Delivered: 15 March 2016

Summary: Sale – Building materials - Proof of delivery - Agreement - Interpretation – Terms and conditions as to time of payment – whether payment postponed until first defendant paid by its employer, the KwaZulu-Natal Department of Human Settlements

JUDGMENT

Jeffrey AJ

[1] The plaintiff sues the first and second defendants jointly and severally for the payment of the sum of R13 526 254.38, being the balance allegedly due, owing and payable in respect of certain building material sold and delivered by it to the first defendant; interest on the aforesaid balance *a tempore morae* and costs.

[2] The first defendant was appointed in writing as an implementing agent by the KwaZulu-Natal Department of Human Settlements (known at the time of the first defendant's appointment as the Provincial Department of Housing, KwaZulu-Natal) to implement the rectification of 2 086 wire wall houses at Edendale in accordance with an agreed scope of works. In order to fulfil its obligations, the first defendant *inter alia* purchased certain building materials from the plaintiff which, so the plaintiff alleged, it duly delivered to the first defendant's site representative during the period April 2010 to November 2010.

[3] The plaintiff pleaded and it is common cause that the first defendant would pay the plaintiff for all building materials supplied on a 15 day payment cycle calculated from the date of supply of the materials.

[4] Clause 3.1.5 of the parties' agreement provided that: "(The first defendant) agrees to pay (the plaintiff) the invoice amount as presented in stages for the supply of building materials without any deduction whatsoever.' Added in manuscript to clause 3.1.5 were the words: 'When payment is received by (the plaintiff) the corresponding acknowledgment of debt will be cancelled.'

[5] The defendants pleaded that in terms of this clause: '(a) the plaintiff would from time to time submit invoices to the first defendant reflecting the building material supplied and the agreed costs thereof; (b) when progress payments were received by the first defendant in stages from (the KwaZulu-Natal Department of Human Settlements) ... the first defendant would, *from those progress payments received in stages*¹, make payment to the plaintiff against the price of the building materials supplied by the plaintiff.'

[6] The second defendant is the sole member of the first defendant. The plaintiff's cause of action against him is based on two written acknowledgments of debt in terms of which he acknowledged that he was indebted to the plaintiff, jointly and severally with the first defendant, for payment of the sum of R7 418 976.94 and for an additional sum of R6 986 281.14. The second defendant also undertook to pay all legal

¹ Emphasis added

costs occasioned by the Plaintiff in recovering any amounts due in terms of the acknowledgment of debts on the scale as between attorney and own client.

[7] The defendants pleaded that the first acknowledgment of debt executed during July 2010 by the second defendant did not correctly record the agreement between the parties as I have set out in the preceding paragraph and that it was the common intention of the parties that the agreement would contain the following paragraph: ‘The acknowledgement of debt is in regard to building materials supplied to the Edendale Wire Wall Rectification Project. The creditor agrees that payment of the said amount by the debtor would only be effected upon and from payments to the debtor by the Department of Human Settlements KZN pursuant to the contract for the construction of houses for that department’. The defendants pleaded that this acknowledgment of debt fell to be rectified accordingly.

[8] The plaintiff replicated that if it is held that the common intention of the parties was that as pleaded by the defendants, ‘it was nonetheless implicit in such intention that payment would be made within a reasonable time; and the terms contended for by the defendants amounts to a condition, which has been fictionally fulfilled in that the department has not paid the first defendant because the defendants failed to perform their obligations to the department.’

[9] The defendants admitted in their plea that building materials were supplied by the plaintiff to the first defendant but they denied the value of the building materials so supplied.

[10] When the trial commenced, Mr *Mohammed Essop* who appeared for the defendants, informed me that his instructions were to apply for an adjournment only and if an adjournment was not granted by me, he would request the Court for leave to be granted to his instructing attorneys to withdraw as the defendants' legal representatives. The application for an adjournment was made and it was strenuously opposed by Mr *Kissoon Singh SC*, who appeared with Mr *Collingwood* for the plaintiff. The application was dismissed by me primarily because it was clear from the orders of this Court dated 23 March 2015, 21 April 2015 and 12 May 2015 that the true reason for the defendants seeking an adjournment was merely to delay the trial for as long as possible. The second defendant's excuse of a lack of money for not being ready to proceed with trial rang somewhat hollow in the face of the earlier pre-trial procedure before judges in chambers at which the second defendant was specifically advised of the consequences of not being ready for trial or failing to engage legal representation.

[11] Undeterred by my refusal of the application for a postponement, the defendants, represented in person by the second defendant, pressed on with their defence.

[12] The plaintiff, as a consequence, was put to the task of proving the elements of its claim by the defendants. I am indebted to Mr *Kissoon Singh SC*, Mr *Collingwood* and their instructing attorneys for meticulously preparing a spread sheet and cross-referencing this with the relevant delivery notes, invoices and other relevant documents. This reduced the time of the hearing – which exceeded the three days initially

allocated for the trial - and it has made my task in resolving this matter more manageable.

[13] The plaintiff called several witnesses.

[14] First, Mr Shameer Khan testified that he was the sole member of Katsuba Trading CC. He said he was a building contractor who had been employed by the second defendant in respect of the wire wall project at Edendale. Katsuba Trading CC provided the labour that built temporary structures for the residents of the wire wall house to move into while the wire wall houses were demolished and permanent structures were built by Katsuba CC. The building materials were supplied by Competitive Hardware CC. He said that the defendants and the first defendant's project manager, Mr Jameel Shaik, told him that the first defendant's name must never be mentioned on the building site because there would be trouble as the labour that was employed by Katsuba Trading CC was drawn from the local community and they had not been paid by the first defendant. In essence, he said, Katsuba Trading CC was a front for the first defendant - Katsuba Trading CC had a site camp to which building material was delivered and his employees would then distribute this material from the site camp to the individual building sites where they were building. He said that the supplier, Competitive Hardware, stopped delivering building material when it was not paid by the first defendant. It was then that the plaintiff took over the delivery of building materials. The delivery notes were addressed to Katsuba Trading CC because of the aforementioned difficulty that the first defendant had with the local community in not paying them. On the instructions of the second defendant and Mr Jameel Shaik, he employed a storeman to receive,

check and sign for the building materials that were delivered by the plaintiff. He employed Mr Nxumalo – known by his nickname Bux – whom he had known for some ten years and who he regarded as a responsible person. The way the orders were placed, he said, was he would telephonically tell Mr Jameel Shaik what materials were required and Mr Shaik would then tell the plaintiff what materials had to be delivered to the site. The plaintiff would send a truck to the site with the materials that had been ordered. On arrival the materials would be checked and signed off by Mr Bux and the plaintiff's representative. He said he had seen Mr Bux signing off the delivery notes acknowledging receipt on many occasions. He said that he was familiar with Mr Bux's signature and readily and with confidence identified his signature on being taken through the relevant delivery notes by Mr *Kissoon Singh SC* save for a number signed by one Victus (a storeman employed by Katsuba Trading CC in an area known as Buffer), Londiwe Gazu and Nokuthula. He added that Katsuba Trading CC was employed by the first defendant until the end of October 2010 and is still owed approximately R2 400 000.00; and, thereafter, Reclaim Africa was employed in its stead and it received the building materials when they were delivered to site by the plaintiff. He stressed that it was never a term of his agreement with the first defendant that Katsuba Trading CC would only get paid once the first defendant had been paid by the Department of Human Settlements.

[15] The plaintiff's second witness was Mr Haroon Franks. He testified that he was the sole member of Reclaim Africa CC. He was a building contractor, he said, and Reclaim Africa CC was employed by the first defendant at the Edendale Wire Wall Project to demolish and reconstruct dwelling units at the site. He said that he did not finish constructing the

seventy double storey dwellings he was engaged to build because he was not paid. He went to see the Department's official, Mr Cele, who told him that there was no money for the project meaning that the Department had overspent on the project. He said he was owed R7 200 000.00 by the first defendant. The plaintiff would deliver materials to the site which were received by his elder brother, Alpha, and his assistant, Londiwe Gazu, as well as Nontula. These people were employed by Reclaim Africa CC. He knew and confirmed the signature of Alpha on various delivery notes put to him but he said he was uncertain of and could not identify the signatures of the other two employees.

[16] The plaintiff's third witness was Mr Thokozani Eric Magagula, a representative of the Department of Human Settlements. He said he was employed by the Department as a senior project manager responsible for low cost housing in the Tugela area. The Edendale Wire Wall Project fell under this area. He referred to a cession agreement between the first defendant and the Department concluded on 20 August 2009 in terms of which the first defendant instructed the Department to make payment to a minimum value of 1000 houses directly to Amawele Joint Venture. He said that the total value of the project was R90 810 710.16 and after the cession was concluded the first defendant's invoices were paid. In December 2010 the funding for the project was increased by R34 150 092.00 raising the total value of the project to R124 034 128.36. The total sum paid to the first defendant according to the Department's records was R27 960 047.46 (R31 874 454.11 including VAT) and Amawele Joint Venture was paid R74 873 070.09 (R85 355 299.90 including VAT). The total sum including VAT paid to both the first defendant and Amawele Joint Venture was R117 229 754.01. He denied

the suggestion by the second defendant that the project had been undervalued.

[17] The plaintiff's fourth witness was Ms Nomusa Primrose Sibisi. She testified that she was the proprietor of Uqotho Projects and Construction and was employed as a building sub-contractor by Katsuba CC on the Edendale Wire Wall Project during 2009 and 2010. She said that she saw building materials being delivered to the site on many occasions and she continued building housing units until November 2010 using the building materials that had been delivered. She identified the persons who delivered the building materials and said they were known to her as Osman and Abdul and that she had seen them outside the Court room. She denied the suggestion put to her under cross-examination that she had sat with Osman and Abdul outside the Court room. She added that she recognised them from the Edendale building site.

[18] The plaintiff's fifth witness was Mr Yunus Suleman Mansoor. He testified that at material times he was employed by the plaintiff doing administrative work and visiting building sites. He said that he was responsible for preparing the invoices for the building materials supplied to the Edendale site and that he also assisted in delivering the materials but the person who was responsible for all the deliveries was Mr Abdul Mansoor. He identified his signature – signed as Yunus - on all the relevant delivery notes and said that he had received the materials from the supplier on behalf of the plaintiff and that Mr Bux had received the materials. He confirmed that Mr Bux had signed the relevant delivery notes in his presence. Victus also received delivery from him and signed the relevant delivery notes in his presence.

[19] The plaintiff's sixth witness was Mr Osman Mansoor. He testified that at material times he was employed by the plaintiff and accompanied Mr Abdul Mansoor in delivering the materials to the Edendale site. He said that the suppliers' trucks would deliver the materials to the site, they would check the material on behalf of the plaintiff and sign off the delivery notes and he saw Mr Bux signing the delivery notes on behalf of Katsuba Trading CC. He identified the relevant delivery notes that he and Mr Bux had signed as well as those signed by him and Londiwe Gazu.

[20] The plaintiff's seventh witness was Mr Abdul Mansoor. He testified that he was employed by the plaintiff doing receiving and dispatching. He said the plaintiff's supplies delivered the materials to the site camp at the Edendale site. A delivery note was prepared and signed by him or sometimes Mr Osman Mansoor or Mr Yunus Mansoor. Mr Bux received the materials on behalf of Katsuba Trading CC and when Reclaim Africa took over from Katsuba Trading CC, Victus, Londiwe Gazu or Nokuthula received delivery of the materials on behalf of Reclaim Africa. He identified all these signatures.

[21] The plaintiff's eighth witness was Mr Hassan Yacoob Mansoor. He testified that he was sole member of the plaintiff that he started in 2008 doing the supply of building materials. He said he had passed grade 10 and then went to work in the family businesses. In 2010 he met the plaintiff's project manager, Mr Jameel Shaik, and they discussed the supply of building material to the Edendale site. Mr Shaik told him that the first defendant was involved with 2 080 somewhat units and the

plaintiff would be required to supply building materials from foundations to roofs for about 700 units. This was the first time that he had been involved in such a large project. He was given a bill of quantities by Mr Shaik and he was able to prepare two quotation that he gave to Mr Shaik – one for single storey dwellings and the other incorporating double storey dwellings. He believed Mr Shaik who told him that this was a good opportunity to get involved in other projects that the first defendant had and, if he proved himself on the Edendale project, the plaintiff would be given further lucrative work. Mr Shaik told him that the first defendant had a CIDB rating that it had the financial capacity and means to execute the type of large contract that the Edendale was and that he should rest assured that the first defendant was financial stable and would be able to pay for the plaintiff. The plaintiff, he said, would order building materials from its suppliers but, because it was a very small business and did not have any of its own trucks, its suppliers would deliver in their own trucks to the Edendale site and the goods would be received and checked by the plaintiff's representatives on site and then delivery was given to Katsuba Trading CC's or later, Reclaim Africa's, representatives. With regard to payment of the plaintiff's invoices, he testified that by the end of May 2010 the sum of R3 087 681.00 was payable but the plaintiff only received an amount of R600 000.00. When he queried this with Mr Shaik he was told that Mr Shaik had R600 000.00 on hand so he had paid this amount but the balance would be forthcoming 'within a week or two'. Mr Shaik asked him to carry on supplying the first defendant with building materials giving him the assurance that the first defendant would be good for payment. Further materials were supplied by the plaintiff but by 8 June 2010, R2 865 793 was payable by the first defendant and only R200 000.00 was received by way of the first

defendant's cheque that, after a complaint about the clearance period made by Mr Mansoor, Mr Shaik agreed to deposit in his own account and pay the plaintiff provided the plaintiff kept on supplying building materials to the first defendant. Mr Mansoor said that supply was halted because the plaintiff was not being paid. A meeting was then arranged between himself and the second defendant. At this meeting on 22 July 2010 Mr Shaik made a number of amendments to a so-called acknowledgment of debt that was prepared by him and that the second defendant signed. The plaintiff then continued supplying building material to the first defendant because, according to Mr Mansoor, he was lulled into a false sense of security that the second defendant and his wife, whom Mr Shaik told Mr Mansoor, also had numerous contracts with the Department and earned large sums of money, were good to pay the plaintiff should the first defendant default in its obligations. But, Mr Shaik also assured Mr Mansoor with promises that payment would be forthcoming shortly and that he – Mr Mansoor – should not be concerned. But Mr Mansoor said that plaintiff's suppliers from whom the building materials were purchased for delivery to the first defendant, were putting pressure on the plaintiff to settle what was due to them. In late November 2010 the plaintiff declined to make any further deliveries to the first defendant. Mr Mansoor complained once again to Mr Shaik about non-payment. They discussed the matter and agreed that they would hold the matter over until January 2011 after the annual builders' shut-down period. When they met in the New Year the second so-called acknowledgment of debt was signed by the second defendant after Mr Shaik had once again assured Mr Mansoor that payment would be made shortly by the first defendant. But only an amount of R600 000.00 was paid to the plaintiff. At no stage, Mr Mansoor testified, did the second

defendant or Mr Shaik inform him that the plaintiff did not effect all the deliveries or that some of the delivery notes were false. He said he first heard about the suggestion by the first defendant that some of the delivery notes may have been fabricated and that this was being investigated by the police, about two weeks prior to the hearing.

[22] The second defendant conducted the cross-examination of the plaintiff's witnesses. The first defendant, of course, is not a trained lawyer and I have made allowance for that. But despite his best efforts, his cross-examination was not effective at shaking their evidence. Indeed, if anything, it served to underscore the veracity of their evidence in chief. The demeanour of all the plaintiff's witnesses was satisfactory. The members of the Mansoor family who gave evidence about the delivery of the building materials that were supplied by the plaintiff to the first defendant, gave this evidence as they understood the position to be. They did not prevaricate and directly answered the questions put to them both in chief and under cross-examination. The manner in which they conducted themselves in the witness box was such that I am able to confidently accept their evidence as to what transpired.

[23] The first witness called by the defendants was Mr Jameel Shaik, the first defendant's project manager. He denied that he had 'solicited' the plaintiff and testified that, on the contrary, the plaintiff had offered its services to deliver building material to the first defendant. He conceded that building materials had been delivered to the first defendant and houses had been built, but he said that difficulties arose when an official from the Department, Mr Cele, refused to pay the first defendant's invoices that had been submitted to it. After much delay and a

commission investigating the problems on the site the Department informed the first respondent that, unless it was ordered by a Court to do so, it refused to pay the first defendant's invoices. He said that the plaintiff 'became a statistic and a casualty in this whole process.' The first defendant was suing the Department, he added. As far as the placement of orders was concerned he denied, contrary to what was said by the plaintiff's witnesses, that he – Mr Shaik – had placed the orders with the plaintiff. He had the unfortunate habit of not answering questions directly succinctly that were put to him during cross-examination. For instance, when asked a simple question: if he had a problem with the invoicing done by the plaintiff, did he write to the plaintiff setting out how the invoice had to be prepared, he set off on a long, rambling and irrelevant discourse. This manner of answering questions and his haughty demeanour in the witness box left me with the distinct impression that he was trying to avoid giving direct answers and this raised serious doubt in my mind as to the veracity of his evidence.

[24] The defendants' second witness was Mr Sthembiso Absolem Nxumalo. He testified that he was also known as Bux and that he was employed by Katsuba CC during 2010. He said that he received building materials from the plaintiff at the Edendale site. He identified his signature on various delivery notes but either did not recognise his mark or denied that the mark was his on several of the delivery notes. Disturbingly, he said that he had retained the original delivery notes after his employment by Katsuba CC came to an end. He did not give a satisfactory explanation in this regard. He was evasive as to when his employment came to an end and the reason for his retaining the original delivery notes. He said that he had deposed to an affidavit during July

2015 regarding the delivery notes and in it he alleged that the signature or mark on certain delivery notes was not his. His evidence was unsatisfactory. It runs contrary to the inherent probabilities of the matter.

[25] I am satisfied that the plaintiff has established on the balance of probabilities that all the building materials as alleged by it were delivered to the first defendant and that it has established the amount of its claim.

[26] With regard to the issue of when payment was to be effected the starting point is, of course, the terms of the parties' agreement. As Wallis JA said in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 (6) SA 520 (SCA) para 16: '... the developments in the interpretation of written documents reflected in *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* and *Natal Joint Municipal Pension Fund v Endumeni Municipality* ... make it clear that in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset.' The wording of clause 3.1.5 of the parties' agreement is clear that the plaintiff would not be obliged to wait for the first defendant to be paid by the Department of Human Settlements before payment to it was due by the first defendant. This is underscored by the context in which this agreement was concluded as this emerged from the evidence at the trial and as I have outlined above.

[27] The defendants' defence to the contrary cannot, therefore, be sustained. Nor can the defendants' claim for rectification of the first acknowledgment of debt since this claim is predicated upon an interpretation of clause 3.1.5 of the parties' agreement that I have rejected.

[28] In the premises, I grant judgment for the plaintiff against the first and second defendants jointly and severally for:

1. Payment of the sum of R13 526 254.38.
2. Interest thereon *a tempore morae* from 22 March 2012 to date of final payment.
3. Costs of suit, save that as against the second defendant such costs shall be on the scale as between attorney and client.

A G JEFFREY
ACTING JUDGE

Appearances

For plaintiff:

Mr A K Kisson Singh SC (with him Mr
A D Collingwood)

Instructed by:

Bandulal & Pillay Attorneys

Ref. Mr R P Bandulal

For 1st and 2nd defendants:

1st defendant in person

Application for adjournment only – Mr
A A Mohammed Essop

Instructed by: Abdul Shaikjee Attorneys

Settlement negotiations only – Mr V
Badri

Instructed by: Vinesh Badri & Partners
Attorneys

Closing argument only – Mr J P Broster

Instructed by: Cox Yeats Attorneys

Ref. Mr Peter Barnard