

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

Case No: 1310/2011
3110/2010

In the matters between

(Case No. 1310/2011)

ENGEN PETROLEUM LIMITED

Plaintiff

and

VLOK PETROLEUM CC

Defendant

AND

(Case No. 3110/2010)

ENGEN PETROLEUM LIMITED

Plaintiff

and

JACQUES VLOK TRANSPORT CC

First Defendant

JACQUES VLOK

Second Defendant

JUDGMENT:

KRUGER, J

HEARD ON:

29 & 30 OCTOBER 2013

DELIVERED ON:

22 NOVEMBER 2013

I **BACKGROUND**

- [1] These two consolidated cases concern the sale of fuel to the first defendants. In the second case, 3110 the plaintiff seeks to also hold Jacques Vlok, the second defendant, liable as surety. The fuel was purchased from Afric Oil, who ceded its claim against the defendants to the plaintiff. The cession is not in dispute. In both matters the defendants plead that they paid in advance for the fuel products sold by Afric Oil to them, and that Afric Oil has been paid in full in respect of those petroleum products.
- [2] In the Vlok Petroleum matter, the plaintiff claims payment of R8 697 887,31. The defendant admits delivery of the products listed in invoices D1 – D40 annexed to the plaintiff's particulars of claim, making up the above amount.
- [3] In the Jacques Vlok Transport matter, plaintiff's claim is for payment of R3 572 864,44. A list of invoices on which the claim is based is contained in paragraph 11 of plaintiff's particulars of claim, invoices D1 to D16. Here not all deliveries are admitted.
- [4] The central issue in both matters is whether payments made by the defendants could be allocated to the oldest amounts owing or had to be allocated to each load of fuel in turn. In addition to the defence relating to the allocation of payments, defendants raise defences pertaining to rebates on the fuel which they say were incorrectly calculated. Further, the defendants claim that

they were entitled to indemnities flowing from insurance policies taken out as security for Afric Oil's supply of petroleum to the defendants. The defences regarding the rebate and insurance can be disposed of briefly.

II THE REBATE ISSUE

- [5] Defendants plead that the plaintiff did not allow the correct rebates on fuel purchases. Jacques Vlok testified that the rebate would be at least 25c per litre, which later went up to 27c per litre. Ms Padayachee, on the other hand, said the rebate changed from time to time. In respect of the fuel collected at Wentworth in Durban, a 27c rebate was allowed, and for deliveries in Bethlehem, 25 cents. She said the rebate could vary. Defendants refer to a document in plaintiff's bundle A, page 95 which, in manuscript, records a rebate shortfall of R 261 004,19. It is not clear how this calculation was done. Further, it is not clear on what basis the defendants allege that they were entitled to higher rebates. The amount of the rebate was something which should have been clarified by the defence at an earlier stage. There is insufficient evidence before this court to accept the imprecise evidence of defendants as to rebate.

III THE INSURANCE ISSUE

- [6] Before Afric Oil was willing to provide credit to the defendants, defendants had to enter into a credit guarantee insurance policy. Danny Oosthuizen from Garagesure came to see Jacques Vlok at his office to sign those forms. Jacques Vlok testified that the situation was that, if there was a default in

payment by the defendants, the insurance would step in and pay Afric Oil. Then the defendants would negotiate repayment with the insurance. In cross-examination Jacques Vlok said that where the defendants owned Afric Oil money, the defendants were responsible for payment, and then he and Garagesure would sit around a table to arrange re-payment.

- [7] The defendants conceded that the insurance existed because if the policy was not in place, they could not get credit from Afric Oil. The evidence makes it clear that the insurance did not excuse the defendants from making payment. As Mr Belger points out, if the defendants' plea is correct that the insurance excuses them from payment, it would mean that they were able to insure themselves against their own default. No insurance company would grant such insurance. Mr Belger further points out that the terms and the schedule to the policy make it clear that Garagesure and/or Afric Oil may recover any monies paid out from the defendant. This is borne out by the evidence of Mr Chetty from Garagesure, who testified that Garagesure and the plaintiff came to an agreement that plaintiff would proceed to recover from the defendant. The payment made by Garagesure to the plaintiff is *res inter alios acta*, and does not constitute a defence to the defendants in this matter.

IV ALLOCATION OF PAYMENTS

A. Witnesses

- [8] **Ms Cheryl Padayachee**

She works at Afric Oil. Since 2004 she had been credit controller. She does collections. The two first defendants were clients of Afric Oil and she dealt with them.

[9] At some point in time (which later appeared to be about March 2007) problems arose with regard to the accounts of the defendant. From that point onwards both defendants had to pay in advance for fuel collected by them. At this stage Mr Stoop, for defendant objected to this evidence, because plaintiff alleged non-payment by defendants, not that the payments the defendants made were allocated to the oldest debts in accordance with an agreement. I allowed the evidence. Plaintiff's case is that payments received were allocated to the oldest debts, and that certain debts remained unpaid. I do not believe it was necessary for plaintiff to plead this specifically. There was no prejudice for defendant. All the evidence was led. Mr Stoop did not indicate what else defendants would have done if the matter of allocating of payments had been raised in the plaintiff's replication. Plaintiff's case is that the old debts were not paid. There is a debt.

[10] Ms Padayachee was referred to the correspondence. On 16 October 2007 Marinda Vlok (the mother of Jacques Vlok, both of whom testified in this trial), sent an email:

"Subject: regarding allocation of payments

Hi Cheryl,

Referring to our conversation today 15.10.2007. regarding the allocation of my payments on the following accounts namely VLO 001

AND VLO 002 i like to request that all the payments that is made by me must be allocated to the oldest outstanding balances.

Regards

MARINDA VLOK”

There were three accounts that the defendants had with plaintiff, these were: -

VLO 001 was the account of Vlok Petroleum CC

VLO 002 was the account of Vlok Zenex CC (not before this court)

JVT 001 was the account of Jacques Vlok Transport CC (case 3110).

When she testified, Ms Marinda Vlok said this email only referred to payments she made for Vlok Zenex CC. She could not explain why she mentioned VLO 001 (the account of Jacques Vlok Transport), the defendant in the second case, in the email.

[11] On 25 October 2007 Ms Vlok sent an email to Ms Padayachee of which the body reads:

“Subject: Re: VLOK001 /002 ACCOUNTS

Hi Cheryl,

Refer to the overdue amount on VLO 001:

Arrangement was made with Thabo, Amelia and Deon that we can reconcile the account and that we can still buy on this account provided that we pay for each order taken until we are all satisfied with the amounts outstanding.

We also discussed and agreed that we can allocate all payments including old and future payments, to invoices 60 days and older.

With reference to the amount owing above the creditlimit and allocations on this account, Albie and Johann will send you a E-mail today on how we will handle this issue.

Regards

Marinda.”

[12] On 29 October 2007 an email was sent to Ms Padayachee on behalf of the first defendant in the second case.

“Subject: Re; Account VLO 001

Hi Cheryl

This account is over credit limit with the amount of R747 719,81 according to the aged trial balance dated 24/10/2007 received from you on the 24th of this month.

We are proposing to settle this amount as follows:

A) R400 000-00 to be paid on the 12th of November 2007

B) R347 719.81 to be paid before or not later than the end of November 2007.

We humbly request you that we can still purchase on this account provided of cause that we like always pay for each drop taken until this account is back inline with our credit limit.

We currently appointed a lady to do reconciliations on accounts VLO 001 and 002 to determin if the amounts owing to Afric Oil are what we ordered and received. We already established differences between what we ordered and what you invoiced.

Please we request your assistance that you quote our order numbers on your invoices and that we are not invoiced more than what the order amounts too.

Cheryl, I also need your assistance to resolve the monies owing to us by yourselves for product taken by Afric Oil customers amounting to R62 550.14 outstanding on our debtors for ages now.

We hope that you can assist us with all these requests and also want to take this opportunity to thank you and all the Afric Oil personnel for the professional service and loyalty we receive.”

- [13] Ms Padayachee also referred to an email of 3 March 2008. Albie Pieterse, on behalf of Jacques Vlok Transport sent an email to Ms Padayachee, under the title “Allocations”:

“Subject: Allocations

Hi Cheryl please use the monies paid on our accounts to allocate from old to new.

Regards”

- [14] In cross-examination it was put to Ms Padayachee that the defendants wanted to pay in advance for the specific litres loaded. It was put that the account went over to a cash basis because the defendants were dissatisfied because they could not reconcile the account. They wanted to see what would happen to the account if they stopped purchasing in May 2009, because the account kept on going up.

Amelia Sadie

- [15] She works as a credit controller at Afric Oil. She has been working for Afric Oil since 2003, apart from the period March 2007 to October 2007. She knows the defendant’s account. She was in charge of the account for the period 2005 – 2007. From October 2007 she has been working in the sales department. She is now the area sales manager.

- [16] The account had a set credit limit. When defendants breached the credit limit, it was agreed that payments made on orders were to be applied to older orders. So as to reduce the outstanding amount or keep the account within the credit limit, payments were allocated to the oldest invoices outstanding. Invoices were paid 30 days after receipt.
- [17] In cross-examination Ms Sadie said there were numerous meetings with representatives of the defendants. The full payment was allocated to the oldest debt. The defendants would pay additional amounts to reduce the older debts.

Defendant's witnesses on the allocation issue

- [18] For the defendants Mr Jacques Vlok, the second defendant in the second case, testified. In 2007 they started paying cash for loads of fuel ordered because there were always disputes.
- [19] Juan Vlok was the member of defendant in the first case during February 2007. From the time he started to work there, each load was paid cash. He denied that Afric Oil could use payments as credits for old debts. He paid for each specific load.
- [20] In cross-examination Juan said he did not work with invoices. He said he knew nothing of agreements. His mother, Marinda Vlok was the one who made agreements. His view was that he paid for each load he took. This was done because the account just kept on going up.

Ms Marinda Vlok

- [21] She testified that the agreement as to the account was that they paid per load. Where they paid more than was due for the load, the “over and above” amount, as she put it, would be allocated to amounts on the disputed account. Her email of 25 October 2007, quoted above, refers to this arrangement. According to Ms Vlok the arrangement was that the agreement had two elements: (i) They bought each load for cash; (ii) All additional amounts could be applied to the accounts in dispute.
- [22] Ms Vlok agreed in cross-examination that the email of the “over and above” amounts could be allocated to the older accounts. Ms Vlok also said that Vlok-Zenex (the VLO 002 account) never paid for the account of the defendant in the second case.

B. Appropriation of Payments

- [23] Where there are several debts between parties the debtor can give an express intimation to which particular debt that payment should be applied, or the circumstances can imply that the debt is to be applied to the discharge of some particular debt (Lee and Honore, **The South African Law of Obligations** 2nd Ed. by Newman and McQuoid-Mason (1978) par 170). If neither party makes an appropriation the law provides that, if there is a current account between the parties, the payment must be credited to the oldest sums owing (Lee and Honore par 171).
- [24] When a debtor falls into arrears, and exceeds the applicable credit limit, it is natural for the creditor to say: “We can still do business, but your debt cannot increase. Whatever you buy

now, you must pay cash.” This does not mean that the creditor writes off the existing or old debt. The intention is to maintain the credit level and to gradually bring it down. The effect of the arrangement is that all payments received reduce the old debts, but the debt level does not go up because new products are taken. The creditor does this to preserve the relationship and to allow the debtor to trade itself out of its arrears.

- [25] I accept the evidence of Ms Padayachee and Ms Sadie as confirmed by the emails they referred to, that there was an express agreement that the money paid was to be credited to the oldest debts. I reject the evidence of Jacques Vlok, Juan Vlok and Marinda Vlok that there was another arrangement. The agreement as testified to by the plaintiff's witnesses makes commercial sense and accords with the correspondence. The plaintiff was entitled to appropriate payments to the oldest debts, as it did.

V THE DELIVERIES TO JACQUES VLOK TRANSPORT CC

- [26] Plaintiff claims R3 572 864,44 from Jacques Vlok Transport CC. That amount is calculated by adding the deliveries set out in invoices D1 – D16 attached to the particulars of claim.
- [27] In respect of the transactions on D13, D14 and D16 the plaintiff could not produce any proof of delivery. In his evidence Jacques Vlok said he could find no documents substantiating any of those transactions. The plaintiff has failed to prove its claim in respect of those three transactions. In respect of D15, Jacques Vlok admitted delivery with reference to the requisition

contained in plaintiff's trial bundle at page 53, where the driver Enoch signed for the delivery.

- [28] The amount in respect of these three invoices should be deducted from plaintiff's claims against Jacques Vlok Transport. The amounts outstanding on invoices D13, D14, D16 are the following:

D13 = R 233 980,04

D14 = R 233 785,02

D16 = R 220 183,59

R 687 948,65

- [29] In respect of invoices D1 and D2, which were in the plea disputed by the defendant, Jacques Vlok in cross-examination conceded delivery but could not find proof of payment. The defendant is therefore liable for these amounts.

VI THE SURETYSHIP

- [30] The suretyship on which plaintiff relies is contained in clause 8 of the "Terms and conditions applicable to fuel supply agreement" which is attached to the "Governing Schedule to Fuel Supply Agreement", which was signed by Jacques Vlok on 10 September 2007.

- [31] Clause 8 reads:

"Each partner, director and/or member of THE BUYER is bound jointly and severally as surety and co-principal debtor with THE BUYER for the due fulfilment by THE BUYER of its obligations in

terms of this agreement and, by signing this agreement and/or the governing schedule thereto, each such partner, director and/or member of THE BUYER accepts such liability, duly renouncing the benefits of excussion, division and cession of action, non causa debiti, errore calculi, revision of accounts, no value received and also the benefit non numeratae pecuniae, the full force, meaning and effect of which they declare themselves to be fully acquainted.”

[32] Jacques Vlok signed at the end of the terms and conditions, at page 10 under “The Buyer”, “Duly Authorised”.

[33] Jacques Vlok testified that Danny Oosthuizen, the representative of Garagesure, which dealt with Afric Oil brought the documents to him to sign, in his office in Frankfort. That was the first Vlok heard of Garagesure. Garagesure was insurance. Vlok understood the agreement to mean that if his close corporation defaulted in its payment, the insurance provided by Garagesure would step in and make payment. Then the CC and Garagesure would negotiate repayment.

[34] Vlok understood his signing above the words “Duly Authorised” meant that the close corporation authorised him to sign the agreement. Referred to Clause 8, quoted above, Vlok said he does not know what “In Solidum” means. Oosthuizen did not point out the clause to him. If he realised he was signing as surety he would under no circumstances have signed the document.

[35] In cross-examination Vlok testified that he is 39 years old. He has been in the business for several years. He has an

agricultural diploma. He has no idea who filled in the two pages of the contract. He suspects or assumes that the pages were filled in when he signed, he did not know by whom. He did not read the terms and conditions. Oosthuizen told him to sign in order to get insurance and open the account. He knew that it was an agreement with contractual terms. He read nothing, he just signed. He was told the documents were for the close corporation, and if the close corporation defaulted, the insurance would pay. Oosthuizen told Vlok that he had to sign because Afric Oil did not want to lose out. Vlok told Oosthuizen that he did not have security, and that Oosthuizen told him the insurance was his security.

[36] The only evidence relating to the suretyship was that of Jacques Vlok. He testified that Danny Oosthuizen, a representative of Garagesure gave him documents to sign which emanated from Afric Oil. Oosthuizen acted as agent of Afric Oil (the cedent in this case) when Jacques Vlok signed the document. Oosthuizen was not a third party, as was the case in **Slip Knot Investments 777 (Pty) Ltd v Du Toit** 2011 (4) SA 72 (SCA) para [2].

[37] The facts of this case are akin to those in **Brink v Humphries & Jewell (Pty) Ltd** 2005 (2) SA 419 (SCA). As in the **Brink** case, there is no reason why Jacques Vlok's evidence should be rejected (para [7]). The question is whether a reasonable man would have been misled. This is an objective enquiry (para [8]). In the **Brink** case the form proclaimed that it is a credit application from, not, as the learned judge of appeal put it, a

credit application and personal suretyship (para [10](1)). In this case the document on which plaintiff relies is headed “Governing Schedule to Fuel Supply Agreement”. It has a schedule on pages 1 and 2 thereof. The parties are defined as Afric Oil and The Buyer, Jacques Vlok Transport BK. That document was signed by Jacques Vlok duly authorised by The Buyer (at p 2). Vlok signed page 10 (the last page) “...on behalf of THE BUYER”. He signed above “Duly Authorised”.

[38] As in the **Brink** case, Vlok was not required to sign twice, once in his capacity as representative of the CC and also in his personal capacity. Vlok only signed in his representative capacity. In the **Brink** case, clause 3 on the first page, just above the signature of the surety, made provision for the suretyship. Cloete JA found that the two clauses preceding the suretyship diminished the emphasis on the suretyship clause. In the present case the suretyship is contained in a paragraph headed “Liability in Solidum” at page 7 of the 10 page document. Vlok testified that he does not know what “In Solidum” means.

[39] Just as in the **Brink** case, the form was a trap for the unwary, and Vlok was justifiably misled by it (para [11]). The facts upon which Mr Belger relies, that Vlok knew that the form contained contractual terms and that he admitted that he did not read it, do not assist the plaintiff because Vlok, objectively speaking, had no reason to believe that the form contained a suretyship. Mr Belger submits that Afric Oil made no misrepresentation to Vlok, neither was Vlok actually misled. I disagree. Just as in

the **Brink** case, the form was misleading and induced a fundamental mistake by Vlok. The suretyship obligation was *void ab initio* (**Brink** para [12]).

[40] Mr Stoop points out that clause 8 on which the plaintiff relies, deals with liability “in terms of this agreement”. “This agreement” refers to the Fuel Supply Agreement and that agreement was inchoate and not signed by Afric Oil. The plaintiff relies on an oral agreement between the parties. I believe there is some merit in Mr Stoop’s submission, but even apart from it, there is no basis on which Vlok can be held liable as surety. Vlok was misled or, at the very least, he made a reasonable mistake, and cannot be held liable as surety. The suretyship obligation was *void ab initio*.

VII **ORDER**

- [41] A. Case No. 1310/2011 (against Vlok Petroleum CC):
1. The defendant is ordered to pay the plaintiff R8 697 887,31.
 2. Interest on the above amount at 15.5% p.a. from 4 March 2010 to date of payment.
 3. Costs of suit.
- B. Case No. 3110/2010 (against Jacques Vlok Transport CC and Jacques Vlok):

1. The first defendant is ordered to pay the plaintiff
R 3 572 864,44 – R 687 948,65 = R 2 884 915,79
plus costs.
2. Interest on the above amount at 15.5% p.a. from 4
March 2010 to date of payment.
3. The plaintiff's claim against the second defendant is
dismissed with costs.

A. KRUGER, J

On behalf of the plaintiff: Adv. P.W. Belger
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

On behalf of the defendant: Adv. B.C. Stoop
Instructed by:
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