

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. 118/2009

In the matter between:

UMZUMBE MUNICIPALITY

PLAINTIFF

AND

THE GREAT SUPPLY CC

DEFENDANT

J U D G M E N T
(Delivered on 15 April 2013)

BALTON J

[1] The plaintiff instituted action against the defendant in which it claims repayment of an amount of R336 528,00, interest and costs.

[2] It is common cause or not in dispute that -

2.1 On 27 May 2008 the plaintiff and Zanusi Trading Enterprise CC trading as National Energy Solutions ("NES") entered into an agreement in terms of which NES undertook to supply lamp oil and fire gel to the plaintiff in an amount of R1 332 000,00 excluding VAT. This was as a result of NES having successfully bid for the tender.

- 2.2 NES had an option to deliver on their own or request a partner, in which event an agreement of cession would be entered into between the plaintiff, NES and the partner.
- 2.3 NES would then invoice the plaintiff and indicate the amount to be paid to the partner.
- 2.4 On 7 July 2008 the defendant and NES entered into a cession agreement in terms of which the plaintiff was to pay R336 528,00 to the defendant for lamp oil and fire gel in terms of the contract between the plaintiff and NES. The cession agreement was signed by the plaintiff.
- 2.5 An invoice from NES¹ indicates that an amount of R574 560,00 was due to it and an amount of R295 200,00 (excluding VAT), was to be paid to the defendant.
- 2.6 The payment was processed and approved² and a cheque requisition³ was made out for an amount of R574 560,00 to NES and a further cheque requisition⁴ for an amount of R336 528,00 to the defendant.
- 2.7 On 16 July 2008 the plaintiff paid R336 528,00 to the defendant.
- 2.8 On 30 July 2008 the plaintiff paid the defendant a further sum of R336 528.00.

¹ Page 18 of exhibit A.

² Page 19 of exhibit A.

³ Page 22 of exhibit A.

⁴ Page 23 of exhibit A.

[3] The plaintiff alleges that the payment to the defendant on 30 July 2008 was made in a bona fide and reasonable but mistaken belief that a further cession agreement existed between the defendant and NES and that the payment was *sine causa*.

[4] **Mr Mbhele**, the local municipal manager of the plaintiff at the time, testified on behalf of the plaintiff:

- 4.1 That the plaintiff received a delivery note⁵ from NES dated 18 July 2008 for 704 20 litres fire gel and a delivery note⁶ from the defendant dated 18 July 2008 for 704 20 litres fire gel.
- 4.2 On 21 July 2008⁷ the plaintiff received a delivery note⁸ dated 18 July 2008 from the defendant for 1 440 litres lamp oil and 736 20 litres fire gel.
- 4.3 A delivery note⁹ dated 21 July 2008 from NES for 1 445 litres lamp oil and 736 20 litres fire gel was stamped by the plaintiff on 21 July 2008.
- 4.4 The defendant forwarded an invoice¹⁰ to the plaintiff for the three delivery notes¹¹. The invoice states “as per cession agreement”.
- 4.5 This was a misrepresentation as there was no cession agreement between the defendant and the plaintiff in respect of the second delivery on 21 July 2008. The defendant was not entitled to payment. The plaintiff then received

⁵ Page 24 of exhibit A.

⁶ Page 25 of exhibit A.

⁷ As per the stamp on page 26 of exhibit A.

⁸ Page 26 of exhibit A.

⁹ Page 27 of exhibit A.

¹⁰ Page 28 of exhibit A.

¹¹ Pages 25 and 26 of exhibit A.

an invoice¹² from NES for 1 445 litres of lamp oil and 2 768 20 litres of fire gel for an amount of R500 505,00 which was paid to NES upon a letter of demand from NES.

4.6 He conceded that it was an error on the part of the officials of the plaintiff as they were not supposed to have had two delivery notes from two different companies, especially if one was not a main contractor.

[5] Mbhele was requested to add the total of oil and gel delivered in terms of the invoices¹³ from the defendant and compare it with the amount¹⁴ claimed.

[6] He conceded that the amounts were not the same. The total for fire gel was 1 440 and the total for the oil was 1 200 and that there was a shortage of 240 litres of oil.

[7] The figures did not tally and Mbhele was able to see the problems as per the different delivery notes and the final invoices submitted, but was unable to offer any explanation for the problem.

[8] He tried to explain that the officials at Umzumbe Municipality did not have the capacity to follow the due diligence process.

¹² Page 35 of exhibit A.

¹³ Pages 25 and 26 of exhibit A.

¹⁴ Page 36 of exhibit A.

[9] The plaintiff closed its case.

[10] **Mr Lesley Boulanger**, the financial manager of the defendant, testified that the defendant had not been enriched and that the invoices to the plaintiff were supported by delivery notes.

[11] I will now proceed to evaluate the evidence.

[12] The plaintiff has relied on the *conditio sine causa* for the payment made to the defendant. In terms of the *condictio sine causa*, a plaintiff is entitled to sue a defendant where money has come into the hands or possession of another for no justifiable cause, that is to say, not by gift, payment discharging a debt, or in terms of a promise or some other obligation or lawful ground for passing of the money to the recipient. The money may be recovered to the extent that the recipient has been enriched at the expense of the person whose money it was.¹⁵

[13] Mr Mhlanga, on behalf of the plaintiff, argued that the plaintiff has established that the defendant was not entitled to receive payment. The defendant took advantage of the inadequacies in the plaintiff's fold. Payment had been made in error and had been induced by the defendant.

¹⁵ GOVENDER v STANDARD BANK OF SOUTH AFRICA LTD 1984(4) SA 392 (C).

[14] Mr Tobias, on behalf of the defendant, submitted that once it is established that the second payment was made for the supply of goods, then irrespective of whether there was a contract or cession, the plaintiff's claim must fail since the defendant was not enriched.

[15] It is fundamental, both in regard to the *condictio indebiti* as well as the *condictio sine causa*, that:

The plaintiff can only recover an amount representing the extent to which the defendant has been enriched at his expense.¹⁶

[16] Mr Mbhele agreed that the plaintiff's case was that

In a bona fide and reasonable but mistaken belief that a further cession agreement existed between defendant and National Energy Solutions, on 30 July 2008 plaintiff paid to the defendant a further sum of R336 528,00 when the payment was in fact sine causa.¹⁷

and agreed that the payment was made as an error due to negligence on the part of the plaintiff.

[17] It is common cause that the defendant delivered the goods and received payment. Mr Mbhele confirmed in cross-examination that the defendant has not been enriched. He conceded the plaintiff's negligence in receiving the goods and explained that the plaintiff's internal control was weak and the staff had not been exposed to a situation like this before. He agreed that it was possible that the

¹⁶ TRAHAIR v WEBB & CO 1924 WLD 227 at 234 [per Tindall J [as he then was]].

¹⁷ Paragraph 3 of the Particulars of Claim on page 3 of the Pleadings.

official who authorised the payment did not check whether there was a cession. Non-enrichment is a defence to the action.¹⁸

[18] The plaintiff alleged that it paid because it believed a further cession existed.

[19] Under the *condictio indebiti*, a plaintiff must prove that the payment made by him was made *indebiti*, that is, that there was no legal or natural obligation or any reasonable cause for the payment. In addition, the mistake of the plaintiff must be excusable and not caused through grossly negligent conduct or inexcusable slackness.¹⁹

[20] In any event, regardless of whether the action is determined according to the *condictio indebiti* or *condiction sino causa* of the above, the failure to prove that the defendant has been enriched is fatal for the plaintiff.

[21] Mr Boulanger stated in cross-examination that at no stage was he under the impression that there was a cession for the second payment. He added that the fact that the cession had been mentioned on page 25 of exhibit B, was possibly because of Mr Vince, the owner. He only saw the first cession. In his opinion the

¹⁸ AFRICAN DIAMOND EXPORTERS (PTY) LTD v BARCLAYS BANK INTERNATIONAL LTD 1978 (3) SA 699 (AD).

¹⁹ AFFIRMATIVE PORTFOLIOS CC v TRANSNET LTD t/a METRORAIL 2009 (1) SA 196 (SCA).

first cession applied to all the transactions. He understood it to apply to four deliveries and that each delivery would accompany the same cession document.

[22] At this point the Court raised the question as to the whereabouts of the pro forma invoice which was mentioned in the cession and neither of the parties had a copy of it. Mr Mhlanga informed the Court that a pro forma document does not exist.

[23] In his opinion the defendant delivered the goods and ought to be paid. The instruction to pay in terms of the first delivery would have come from Mr Dumer, the owner.

[24] On the evidence, the plaintiff conceded that the goods were received and that its employees were negligent in receiving the goods. The plaintiff has failed to submit the pro forma invoice referred to in the cession.²⁰ The cession specifically refers to:

....as per attached pro forma invoice being the order placed with The Great Supply CC by [Nes].

[25] I am satisfied on the evidence that due to the negligence of the plaintiff's employees, the defendant has not been enriched. If they had acted with due diligence they would not have accepted the goods. Mr Mhlanga's argument that

²⁰ Annexure A to the Particulars of Claim, page 6 of the pleadings.

there was a concerted effort by the defendant to mislead the plaintiff into making payment is without foundation.

[26] The plaintiff has failed to provide the pro forma invoice referred to in the cession agreement. This would have obviated any doubt as to whether the defendant was entitled to payment. Mr Boulanger's evidence that the cession extended to four deliveries, could not be rebutted by the plaintiff. The plaintiff has accordingly failed to establish that the defendant was enriched either under the *condictio indebiti* or the *condictio sine causa*.

[27] The plaintiff's claim is dismissed with costs.

COUNSEL FOR THE PLAINTIFF: MR MHLANGA

(Instructed by:

Mhlanga Incorporated
917 Sangro House
417 Smith Street
DURBAN
4001.)

COUNSEL FOR THE DEFENDANT: MR TOBIAS

(Instructed by:

Lockhat & Associates
P O Box 48353
QUALBERT
4078.)

DATE OF ARGUMENT: 4 FEBRUARY 2013

JUDGMENT DELIVERED ON: 15 APRIL 2013