

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO 8279/11

In the matter between:

VETPAC ANIMAL HEALTH CC

PLAINTIFF

and

TANTUS TRADING 274 CC

DEFENDANT

JUDGMENT

Date : 06 February 2012

PLOOS VAN AMSTEL J

[1] This is an opposed application for summary judgment.

[2] The plaintiff's claim is for payment of an amount of R 172 916.81, together with interest and costs, arising out of the sale to the defendant of animal health products and feed supplements.

[3] The contract pleaded in the particulars of claim is said to have been an oral one and provided for purchase orders by the defendant, an invoice issued by the plaintiff which was payable within 30 days, and either the collection by the defendant of the product or the delivery thereof to it by a freight forwarding company on behalf of the plaintiff.

[4] It is stated in the particulars of claim that as at 25 July 2011 the defendant owed the plaintiff the sum of R 227 572.81. On 1 August 2011 it made five payments to the plaintiff, totalling the sum of R 54 656.00, leaving a balance owing of R 172 916.81.

[5] Annexed to the particulars of claim is a letter dated 14 June 2011, addressed to the plaintiff by an attorney representing the defendant. It was recorded in the letter that the defendant disputed that an amount of R 462 564.81 was owing to the plaintiff and the attorney requested copies of all invoices referred to in the plaintiff's statement of 30 June 2011. He went on to say that the defendant would "in the interim" pay to the plaintiff an amount of R 236 750.41 by no later than 1 July 2011 and would pay an amount of R 15 064.42 per month on the balance of the account. Also annexed to the particulars of claim is a letter addressed by the plaintiff's attorney to the defendant's attorney on 26 July 2011 in which it was recorded that after the payment of a lump sum and the commencement of monthly instalments the outstanding balance owing by the defendant was the sum of R 227 572.81. It appears from the supplementary affidavit produced by the defendant at the hearing, without opposition, that the lump sum payment was in the amount of R 236 750.00.

[6] In the defendant's opposing affidavit the deponent denies that the defendant is indebted to the plaintiff in the amount of R 172 916.81 "or any other amount on the basis as alleged in the summons or any other basis". The deponent refers to the payments to which I have referred and with regard to the balance claimed by the plaintiff says the following: "The defendant / respondent denies having received the product as set out in the remainder of annexure VP3 and the plaintiff / applicant has not attached any documents to the particulars of claim as proof of the alleged purchases and delivery to the defendant / respondent thereof ". The reference to annexure VP3 is a reference to a statement of account which is annexed to the particulars of claim.

[7] The statement in the opposing affidavit that the defendant denies having received the product is not the same as a statement that as a matter of fact the defendant had not received the product. I pointed the distinction out to counsel for the defendant during argument and asked her whether it was the defendant's case

that the product was in fact not delivered to it or whether the opposing affidavit merely meant that the defendant does not admit that it received the product and requires the plaintiff to prove this. She informed me that as she understood her instructions the defendant's case is that it is not able to determine whether or not it received the goods or what amount is owing in respect thereof.

[8] The deponent to the opposing affidavit does not say that the defendant had not submitted purchase orders to the plaintiff for the goods or that it had not been issued with invoices in respect thereof. The defendant's case seems to be no more than that it does not admit that it received the goods which make up the balance of the plaintiff's claim, and that it is unable to establish whether or not it had received the goods unless the plaintiff supplies it with documentary proof.

[9] The defendant was required in terms of Rule 32(3)(b) to disclose fully the nature and grounds of its defence and the material facts relied upon therefor.

[10] The statement of account annexed to the particulars of claim lists each invoice which makes up the plaintiff's claim, the date and amount thereof, and what appears to be the number of the purchase order. In spite of all this detail in the particulars of claim the defendant went no further in the opposing affidavit than to deny that it had received "the product as set out in the remainder of annexure VP3". No information is provided with regard to purchase orders, the issue of invoices or difficulties experienced with regard to deliveries. What was put up by the defendant does not go far enough. If it did, it would be far too easy to avoid summary judgment. It is not enough for a defendant in summary judgment proceedings to put the plaintiff to the proof of its case. It has to set out facts which demonstrate that it has a *bona fide* defence.

[11] In my view the defendant has failed to allege a proper defence as required by Rule 32(3)(b). See in this regard *Jacobsen van den Berg SA Pty Ltd vs Triton Yachting Supplies* 1974(2) SA 584 (OPD).

[12] It was not suggested by counsel that I should nevertheless in the exercise of my discretion refuse to grant summary judgment, and I see no basis for doing so.

With regard to the defendant's claim for commission against the plaintiff counsel for the defendant submitted that the quantum of the claim is in dispute and that therefore one cannot simply deduct the commission claim from the plaintiff's claim. The claim for commission is on either version less than R 30 000. The nature of the dispute with regard to the quantum thereof does not appear from the papers. Set-off cannot be applied until the amount of the claim has been quantified.

[13] In the circumstances I propose to grant summary judgment on the basis that the defendant's claim for commission must be dealt with in the ordinary course. Counsel were agreed that if summary judgment is granted interest should run from 2 August 2011, which was the date of the letter of demand at page 21 of the papers.

[14] I accordingly grant summary judgment in favour of the plaintiff for:

- (a) Payment of the sum of R 172 916.81;
- (b) Interest thereon at the rate of 15, 5 % per annum from the 2 August 2011 to the date of payment;
- (c) Costs of suit.

PLOOS VAN AMSTEL J

Appearances:

For the Plaintiff : Mr. R.M Van Rooyen

Instructed by : c/o Shepstone & Wylie Attorneys
Pietermaritzburg

For the Defendant : Mrs. K Fitzroy

Instructed by : J Leslie Smith & CO
Pietermaritzburg

Date of Hearing : 2 February 2012

Date of Judgment : 06 February 2012