IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO 5117/2007

In the matter between:

STAC PLASTIC MACHINERY AGENCY (PTY) LTD **PLAINTIFF**

and

SWAN PLASTIC CC **DEFENDANT**

JUDGMENT

Date: 4 November 2011

PLOOS VAN AMSTEL, J

[1] The plaintiff, as its name suggests, does business as an agent in the plastic processing industry. The defendant is a manufacturer of PVC piping, which it produces on extrusion lines from raw material. The plaintiff claims commission from the defendant in respect of a consignment of raw material, referred to in the particulars of claim as 'PVC Polymer Grade 66/67'. The second claim relates to the

purchase price of a belling machine and a belling tool which the plaintiff claims it sold to the defendant. The function of a belling machine is to create a socket at the end of a pipe, which is used to accept the end of another pipe, thereby creating a joint.

[2] The defendant says the amount of the commission in respect of the raw material was to be negotiated, but was never agreed. With regard to the second claim it says the contract was between it and Zhoushan Jinhai Machinery Co Ltd (Zhoushan), a Chinese company which was represented in South Africa by the plaintiff, as its agent, and that the plaintiff cannot claim the purchase price. It also says the belling machine was defective and that on that basis also it is not liable to pay the purchase price.

[3] The claims and the defences to them must be considered against the background of the matter, which is important to establish the context in which the evidence and the probabilities must be assessed. It is convenient to deal with the second claim first.

[4] In 2004 the plaintiff introduced the defendant to Zhoushan in China, pursuant to which the defendant bought from Zhoushan an extrusion line which included a belling machine. The contract of sale was concluded between the defendant and Zhoushan and the latter paid the plaintiff a commission on the deal. Payment of the purchase price was effected by the defendant by way of a letter of credit in favour of Zoushan.

[5] It was not disputed before me that the belling machine gave problems from the start which, in spite of continued efforts over a period of about twelve months, could not be sorted out. It broke down frequently and could not cope with the defendant's twenty four hours production cycle. The defendant was in regular contact with the plaintiff in connection with these problems, until eventually it was decided that the belling machine had to be replaced. Zoushan agreed to pass a credit for the purchase price of the belling machine, which amounted to a sum of USD 32 000, and sourced a replacement which was of a better quality, and more expensive. The defendant agreed to pay the difference.

[6] The second belling machine was delivered in about November 2006. It was

commissioned by the defendant but presented with basically the same problems as the first one. That led to the defendant refusing to pay for it, and the plaintiff issuing summons for the purchase price.

[7] I must decide first of all whether the plaintiff was a party to the contract relating to the second belling machine. It does not claim to have acted as an agent for an undisclosed principal. It claims that it was the seller. In the absence of a finding that it was the seller the claim for payment of the purchase price cannot succeed.

[8] Mr Naicker, a director and shareholder of the plaintiff, confirmed in his evidence that the plaintiff acted as agent for Zoushan when the defendant bought the first belling machine as part of an extrusion line. He also confirmed that the belling machine was problematic and that the defendant wanted it to be replaced. He said he was keen to maintain the relationship with the defendant, which is a major producer of PVC pipes, and impressed upon Zoushan that it needed to keep the customer satisfied if it wanted to expand its business operations in Africa, which was the case. Zoushan agreed to pass a credit in respect of the first machine and to source a replacement one.

[9] Mr Naicker said in October/November 2005, in China, a discussion took place between him, Mr Swanson (a member of the defendant) and Zoushan, in the course of which it was agreed that the plaintiff would pay Zoushan for the replacement machine and would in turn sell it to the defendant. The reason for this arrangement, according to Mr Naicker, was that Zoushan was not prepared to let the machine leave China unless the purchase price was paid or secured, whereas Mr Swanson was not prepared to pay the purchase price until the machine had been installed in the defendant's premises and operated satisfactorily.

[10] Mr Swanson was adamant in his evidence that no such meeting took place. He said the defendant bought the first belling machine from Zoushan, together with an extrusion line, and as far as he was concerned it was Zoushan who had to replace the defective belling machine. This was achieved by Zoushan agreeing to pass a full credit in respect of the purchase price of the first belling machine and the

defendant agreeing to pay the difference in price because the replacement machine was of a better quality and more expensive. He said although these arrangements were made through Mr Naicker, as before, as far as he was concerned he was dealing with 'the Chinese' who had sold the defective machine to the defendant.

[11] In arguing that the plaintiff was the seller of the second belling machine counsel for the plaintiff placed considerable reliance on a document which was signed by Mr Naicker and Mr Swanson on 13 March 2006.[1] The letter is on the plaintiff's letterhead and is addressed to the defendant. It reads as follows:

"Dear Mike
Re: Placement of Belling Machine
I have arranged for the replacement of the belling machine according to the following:

1. The replacement machine will be able to use existing Sica belling tools. The factory will supply an adapter to enable this. The cost of this machine will be USD 55,000.00 with PLC control delivered to your premises. The machine is scheduled to be ready for commission in China at the end of this month and you will have to send someone there to be trained and accept delivery.
2. The machine you have at the moment cost USD 32,000.00 FOB China, in addition to USD 5,000.00 for the PLC. Please note that you have as yet not paid for this.
3. On commissioning of the replacement belling machine in your factory, you agree to pay USD 19,000.00
4. The old machine needs to be connected and we will do the necessary modifications at our cost to do belling of 110 and 160mm sewerage pipes. When this machine is set up to run as required, you will make a offer to purchase it. We will give you a discount of 20%. I have had to put in a lot of pressure on my Principals to effect a solution and i hope you will accept the above conditions.

[12] Counsel argued that the fact that Mr Naicker signed the letter of 13 March for 'Stac Plastic Machinery Agency (Pty)Ltd' demonstrates that he was then acting as seller and no longer as agent for Zoushan. I think this is a non sequitur. He signed the letter on behalf of the plaintiff because he was not acting in his personal capacity. It was the plaintiff who was in business as an agent, not Mr Naicker. There is

1 P 43 of exh B

nothing in the letter to indicate that the plaintiff had replaced Zoushan as the seller. Counsel argued that the sale of the second belling machine should be seen as a separate transaction and not as a continuation of the first one. In other words, the assessment of who the seller of the second machine was should not be clouded by the fact that Zoushan was the seller of the first one. I do not believe that this is a realistic approach. Zoushan agreed to pass a credit in respect of the purchase price of the first machine because, as a matter of probability, they accepted that the machine was giving problems and they did not want to jeopardize the expansion of their business in Africa. They were willing to pass a credit in respect of the first machine and supply a replacement, with the defendant paying the difference in price. Why would it be necessary in those circumstances for the plaintiff, who at all times acted as the go-between, to be the seller of the replacement machine? It is noteworthy that the letter of 13 March ends with the following: 'I have had to put in a lot of pressure on my Principals to effect a solution and I hope you will accept the above conditions'.

[13] In a letter dated 29 November 2006[2], addressed to the defendant, Mr Naicker said, inter alia, the following: 'The replacement belling machine was supplied as per the conditions stated in the letter dated 13th March, 2006. It was commissioned in presence (sic) of your Engineer and we have a signed note authorising my Principals to ship. Note that this machine was imported and supplied through the above Company and as such remains its property until paid for. As you are not happy with the machine, I am quite willing to remove it immediately.' The company referred to in the letter was Zhejiang Jinhai Plastic Machinery Co., which, as I understand the position, also supplied the first belling machine to Zoushan.

[14] The plaintiff placed no reliance on the letter of 13 March in the pleadings. It pleaded an oral agreement. It was the defendant who relied on the letter in its counterclaim. It pleaded, in the alternative and in the event of it being found that it contracted with the plaintiff, that the plaintiff breached the terms contained in the letter. In its plea to the counterclaim the plaintiff denied that the letter formed part of the agreement and averred that it was a without prejudice settlement proposal in order to resolve a dispute between the defendant and the plaintiff's principal.

2 P 52 of exh B

Further, in the defendant's list in terms of rule 37(4) it requested the plaintiff to admit that the terms and conditions under which the second belling machine was supplied were recorded in the plaintiff's letter of 13 March. The plaintiff declined to make this admission. In response to a question whether any of the terms of the alleged oral agreement were recorded in writing, the plaintiff referred to its invoice which was rendered after the sale of the machine. It also stated in its reply that it had given no warranty that the machine would be able to use SICA belling tools.

[15] Mr Naicker's explanation as to how and why the plaintiff became the seller of the second machine appears to me to be improbable. It seems more likely that he persuaded Zoushan to let the machine go on the basis that the plaintiff would ensure that it got paid. At one stage in his evidence he said that the plaintiff guaranteed the purchase price. This seems to accord with what he said to Mr Swanson in a letter dated 1 December 2006[3]: 'With regards to accountability, I would like to know who has taken responsibility for the payment of the replacement machine, sea-freight, insurance, clearing and delivery costs to your factory?'

[16] The defendant can only be bound to the plaintiff, as a purchaser to a seller, if it had agreed to contract with the plaintiff on that basis. It is clear from Mr Swanson's evidence that he never regarded the plaintiff as the seller. He had no animus contractus vis-a vis the plaintiff. He regarded Zoushan as the seller. That also accords with the probabilities. The plaintiff could not thereafter invoice the defendant for the purchase price as if it had become the seller through a unilateral declaration to that effect. The fact that Zoushan never invoiced the defendant for the second machine is probably explained by the fact that it set the purchase price off against the plaintiff's commissions, as Mr Naicker suggested. That however did not entitle the plaintiff to sue as seller. If it paid a debt which was owing by the defendant then, in principle, it would have had an enrichment claim for its recovery. That is however not its case.

[17] If the plaintiff were the seller it would have faced the further difficulty that the purchase price would only be payable once the machine had been installed at the defendant's premises and operated satisfactorily. It was not seriously disputed that

3 P 58 exh B

that never happened. The defendant offered to return the second machine against a refund of the USD 32 000 which it had paid for the first one, and which became part payment for the second one. In cannot be said that in doing so it accepted the machine with its defects and became liable to pay the purchase price.

[18] The plaintiff's claim for the purchase price can therefore not succeed.

[19] The claim for the commission relates to a consignment of raw material. It was not disputed that the plaintiff put the defendant in touch with the supplier, that the defendant bought and received the raw material from the supplier and that the defendant had agreed that, in principle, the plaintiff was entitled to be paid a commission. The dispute before me related to whether there was a binding agreement for the payment of commission.

[20] Mr Naicker testified that on 16 November 2005 he handed to Mr Swanson a written quotation[4] for the supply of the raw material, which included the following: 'Commission: To be paid locally at a flat rate of R5000 per 20 ft. container.' He said Mr Swanson did not expressly agree to the commission but went ahead and ordered the raw material from the supplier in China without indicating to him that the commission was unacceptable. He agreed that on a later date Mr Swanson said to him that a commission of R5000 per container was too high, and that they agreed to negotiate a more acceptable commission later. It seems clear that Mr Naicker agreed to that in the hope that the defendant would order further machinery through it. As it turned out they did not later negotiate or agree the amount of the commission, nor did the defendant order further machinery through the plaintiff. The suggestion by Mr Naicker that they had agreed that the commission of R5000 per container would stand if there were no further orders was disputed by Mr Swanson and does not seem to me to be probable. It is more likely that Mr Naicker agreed that they would negotiate an acceptable commission later because he wanted to preserve and strengthen the relationship between the plaintiff and the defendant. The fact that in those circumstances the plaintiff is unable to enforce any claim for commission may seem unfair, but that is the result of the plaintiff not ensuring that there was a binding agreement in place.

4 P 26 of exh B

[21] The result is that the plaintiff cannot succeed on either of the two claims. They are both dismissed with costs.

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PLOOS VAN AMSTEL J