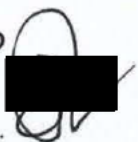


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
Date: 27 November 2024 Signature: 	

Case no. **27703/2020**

In the matter between

SKYNET WAREHOUSING (PTY) LTD

PLAINTIFF

and

UMNOTHOWETHU

DEFENDANT

Coram: Dlamini J

Date of hearing: 6 August and 12 November 2024

Delivered: 27 November 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 27 November 2024

JUDGMENT

DLAMINI J

Introduction

- [1] In this matter, the plaintiff instituted action against the defendant for payment of certain amounts, pursuant to a written agreement between the parties. The matter is opposed by the defendant who also filed a counterclaim against the plaintiff. The plaintiff opposes the counterclaim.

Background facts

- [2] The facts underlying this dispute are largely common and are summarized below.
- [3] Through a tender process, the Gauteng Department of Education (the GDE) awarded a tender to the defendant (Umnothowethu Trading Enterprise) to distribute food parcels to various schools in Gauteng. The defendant then entered into an agreement with the plaintiff (Skynet Warehousing) to provide the defendant with warehousing and distribution services in the Scope of Agreement with the GDE, (the Distribution Agreement).
- [4] The agreement recorded that the plaintiff was only entitled to payment upon production of proof of delivery (POD). The defendant's agreement with the GDE provided that the GDE would only pay the defendant upon the production of an invoice and a signed and stamped POD by the school for which payment is sought.
- [5] The plaintiff contends that it delivered the services to the defendant in terms of the agreement. The plaintiff alleges that it issued invoices to the defendant,

however, the defendant has failed to settle the plaintiff's invoices. The plaintiff says it has cancelled the agreement and issued summons against the defendant for payment in the sum of R2 152 317.63.

- [6] The plaintiff's claim against the defendant is for specific performance. The plaintiff seeks payment of the sum due to it in terms of the agreement concluded between the parties.
- [7] The plaintiff insists that it has delivered in terms of the agreement, that the GDE has paid the defendant and the defendant is simply refusing to pay the plaintiff's invoices. The plaintiff also opposes the defendant's counterclaim.
- [8] The matter is opposed on various grounds by the defendant, for instance, that the plaintiff had breached the agreement. The defendant denies that the plaintiff has complied with its obligation, denies any indebtedness to the plaintiff, and instead counterclaims.
- [9] In the trial, the plaintiff called various witnesses to testify on its behalf.
- [10] The warehouse Manager of the plaintiff, Mr. Kunda testified and laid out the daily functions of how the plaintiff performed its warehousing function for the defendant in terms of the agreement. As far as he was concerned the plaintiff delivered to the letter the distribution agreement and that the plaintiff had ensured that all the goods were delivered to the relevant schools and ensured that the POD's were duly signed by the schools and thereafter were handed over to the defendant for onward payment by the GDE.
- [11] Mr. Kuanda testified that despite repeated demands, the defendant failed and refused to pay the plaintiff's invoice, therefore the plaintiff resolved to cancel the contract. According to him, he is not aware of any notice given to the plaintiff alleging that the plaintiff was in breach of the agreement. He avers that when pressed for payments, the defendant will allege that GDE did not pay its invoices.

- [12] According to Mr. Kaunda, when the plaintiff canceled the agreement, the defendant was notified to come and collect the defendant's remaining items at the plaintiff's warehouse which consisted of a bag of rice and soya. He testified that despite this notice, the defendant never collected the aforesaid items. He insisted that the move by the plaintiff to a new warehouse did not hinder the plaintiff's performance in terms of the contract and that the new warehouse complied with the requirements of the agreement. He submitted that the defendant never informed the plaintiff that the plaintiff's move to the new warehouse was in breach of the agreement.
- [13] In so far as the defendant's counterclaim is concerned, he advised that the plaintiff requested the defendant to collect the remaining goods consisting of a bag of rice and soya, but the defendant never collected the goods.
- [14] The plaintiff's warehouse Supervisor, Ms. Diamond testified that at all material times, she oversaw the preparation and attended to the audit process required of both parties in terms of the agreement. Significantly she testified that one of the representative of the defendant Ms. Pamela, was physically stationed at the plaintiff's warehouse and that she and Ms. Pamela oversaw all the daily operation processes and reporting obligations between the parties. According to Ms. Diamond, the plaintiffs delivered on all the material terms of the agreement and there were no outstanding issues between the parties.
- [15] Nothing negative came out of the cross-examination of Ms. Diamond. In any event, Ms. Pamela of the defendant was never called to testify and challenged the evidence of Ms. Diamond.
- [16] The witnesses from the GDE testified that according to their records, all the invoices that were submitted by the defendant to the GDE were settled in full, and there were no outstanding payments owed by the GDE to the defendant.
- [17] The proper test is not whether a witness is truthful or reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells are true.

- [18] The plaintiff's witnesses came out as credible and honest witnesses. They gave precise timelines and daily processes of how they executed the agreement between the plaintiff and the defendant. They corroborated each other in all material respects and provided documentary proof to support their evidence.
- [19] After the plaintiff had closed its case, the defendant did not call any witnesses to testify on its behalf. The defendant also closed its case. I pause here to mention that at the commencement of the trial, the defendant went on record to confirm that it intends to call 5 witnesses to testify on its behalf. Surprisingly at the close of the plaintiff's case, the defendant closed its case and did not call any witnesses. I will deal with this issue below.

Issues for determination

- [20] The issues that stand to be determined are the following; -
- 20.1 Whether the plaintiff performed its obligation in terms of the agreement and is entitled to payment ; or
 - 20.2 Whether the plaintiff committed any of the breaches alleged by the defendant resulting in the damages claimed by the defendant which may be set off against the plaintiff's claim, the counterclaim.
- [21] Before I deal with the issues that stand to be determined in this matter, I want to touch on the defenses that have now been raised by the defendant in its heads of argument for trial.
- [22] In sum, the defendant submits that there are at least three periods in terms of which certain terms and rates are to be applied, that is the first, second, and third periods. These periods can be summarised as follows:

FIRST PERIOD

- [23] The case made by the defendant is that the plaintiff's claim for the first period is premature on the basis that the plaintiff was not permitted to claim any payment nor was it permitted to allocate any payment for this period. Further that the plaintiff was not entitled to claim VAT for this period.

SECOND PERIOD

- [24] The defendant argues that the plaintiff was not entitled to claim any monies due to the plaintiff on the basis that the plaintiff did not fulfill the conditions. Also, that the plaintiff claimed charges for transport, overtime interest, and charges which were not pleaded by the plaintiff.

THIRD PERIOD

- [25] According to the defendant, the agreement contains agreed rates and volumes for the third period. The defendant avers that such an agreement is not enforceable unless the agreement contains a deadlock-breaking mechanism. The defendant submitted that the plaintiff did not plead a deadlock-breaking mechanism and therefore there is no agreement in respect of the third period.
- [26] The plaintiff contends that its claim against the defendant is for payment in contract and not based on an acknowledgment of debt. The plaintiff submits correctly so in my view, that there are no allegations in its summons or in the defendant's plea or counterclaim relating to the so-called first, second and third periods. In my view, these periods were never pleaded and only made their first appearance in the defendant's heads of argument for trial. These are meritless but will nevertheless deal with them in my reasons for judgment below.
- [27] It is common cause that the plaintiff's claim is based on specific performance, the plaintiff thus bears the onus of proving its case and the defendant bears the onus of proving its defenses raised in its plea and counterclaim.
- [28] The principles relating to specific performance are now well established. A party claiming specific performance must necessarily allege and prove (a) the terms

of the contract and (b) compliance with any antecedent or reciprocal obligations or must tender compliance. Also, the plaintiff must allege non-performance by the defendant.

- [29] The determination of this issue turns primarily on the plaintiff's version that it complied with the terms of the agreement. It is trite that the technique generally employed by the courts in resolving factual disputes of this nature was set out eloquently by the SCA in **Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others**¹ Thus to determine the disputed issue and come to a conclusion, the Court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. Finally, in light of its assessment of (a), (b), and (c) the Court must then determine whether the plaintiff has succeeded in discharging its onus.

Whether The Plaintiff Performed Its Obligation

- [30] The plaintiff argues that it performed its obligations in full and therefore is entitled to its payment as it has claimed.
- [31] The defendant, in sum, admits the conclusion of the agreement and that initially, the plaintiff complied with the terms and conditions thereof. However, the defendant avers that the plaintiff subsequently breached the agreement, denies that the plaintiff has complied with its obligations, and denies any indebtedness to the plaintiff.
- [32] In my view, the plaintiff's witnesses gave a clear concise testimony of how the plaintiff executed the contract between the parties. The plaintiff's witnesses testified how the goods were received and processed at the plaintiff's warehouse. The goods were then packaged and delivered in the various schools as per the agreement. Once the goods were delivered and received, the principal of the school will then sign the POD. The plaintiffs testified that the

¹ [2202] JOL 10175, 2003 (1) SA 11 (SCA)

POD would then be handed over to the defendant for onward forwarding and payment of the POD by the GDE.

- [33] According to the plaintiff's witnesses, whenever any issues arose in the course of business, these will be attended to by the plaintiff. The plaintiff's witnesses insisted that there were no disputes or any issues that remained unresolved between the parties during the substance of the agreement. The defendant never issued any notice nor indicated its unhappiness regarding the plaintiff's execution of the agreement.
- [34] Skynet's witnesses succinctly clarified how the amount claimed against the defendant was quantified. That the parties had initially agreed on a lump sum payment, and thereafter the parties agreed that the plaintiff would charge the defendant an agreed flat rate tariff.
- [35] Significantly, Ms. Diamond alluded to the crucial aspect that the defendant's representative Ms. Pamela was at all material times stationed at the plaintiff's office. She insists that she and Ms. Pamela engaged daily concerning the processing and execution of the agreement. I am satisfied that Ms. Diamond compiled and completed various reports, and audits relating to the daily operations of the plaintiff's delivery of the agreement.
- [36] Many years ago, the court had this say on this issue In ***Ex parte Minister of Justice; In re V v Jacobson and Levy***,² the court held that; "*Prima facie evidence in its sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus.*"
- [37] As it is the position in the present case, the defendant has not given any evidence to rebut the plaintiff's version. As a result, it thus my finding that the

² 1931 AD 466 at 478

plaintiff's prima facie proof is conclusive proof that it had delivered materially all its obligations as per the agreement

Non-payment and the amount claimed

- [38] The next question for determination is whether the defendant has made payment to the plaintiff in terms of the agreement.
- [39] The case made by the plaintiff is that having delivered in terms of the agreement and having invoiced the defendant, the defendant has failed and refused to pay the plaintiff. Skynet avers that the defendant has continuously submitted that it has failed to pay the plaintiff's invoices on the grounds the GDE has not paid the defendant's invoices.
- [40] According to the defendant there were various breaches of the agreement by the plaintiff, for instance, there were late deliveries, and there were short deliveries occasioned by incompetence and pilferage on the part of the plaintiff. As a result of these breaches argues the defendant that the GDE delayed effecting payments to the defendant and because of such non-payment the defendant was unable to effect payment to the plaintiff.
- [41] The defendant's submission is meritless and stands to be dismissed. This is simple because the officials from the GDE testified and submitted documentary evidence to the effect that according to their records all the defendant's invoices were paid in full. That there were no outstanding invoices and payments due to the defendant. In any event the defendant never testified or submitted any evidence to support its defence.

The counterclaim

- [42] I now turn to deal with the defendant's counterclaim.
- [43] The defendant has filed a counterclaim alleging that because the plaintiff has admitted that it had not complied with all its material obligations in terms of the contract, for instance, that the plaintiff made late deliveries, made short deliveries, it moved premises which is a breach of the agreement.
- [44] As a result, so the argument goes, the defendant counterclaims and pleads that it suffered damages in the sum of R2 598 709. 26.
- [45] However, in its heads of argument before this court the defendant now changes tune and argues that the plaintiff was the party who had control and possession of the defendant's stock, therefore the argument goes, the plaintiff was aware of the identity and quantity of the stock and therefore the quantum of the defendant's claim.
- [46] It is a trite principle of our law that the defendant bears the onus to prove its defences and its counterclaim. In its opening address the defendant submitted that it intended to call approximately 5 witnesses to testify on its behalf, at the close of the plaintiff's case, strangely without much, the defendant elected not to call any witnesses neither to rebut the plaintiff's case nor support its counterclaim. No doubt this court has therefore drawn a negative inference on the failure of the defendant to call its witnesses, despite the witnesses being present in court.
- [47] The general rule is that the parties must prove their cases by evidence. In the matter of **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd**,³ the court explained the distinction between the burden of proof properly so called and the evidential burden thus: "*As was pointed out by Davis AJA in Pillay v Krishna and Another 1946 AD at 952-3, the word onus*

³ 1977 (3) SA (AD) at 548

has often be used to denote, inter alia two distinct concepts: (i) the duty which cast on the particular litigant, in order to be successful, of finally satisfying court that he is entitled to succeed on his claim or defence, as the case maybe; and (ii) the duty cast upon the a litigant to adduce evidence in order to combat a prima facie case made by his opponent”.

[48] In spite of the two different versions of the defendat's counterclaim, the defendant's counterclaim is meritless as no evidence was placed before this court to sustain this counterclaim and to support the amount that it has counterclaimed. Consequently, the defendant's counterclaim is dismissed.

[49] Having regard to all the circumstances that I have alluded to above, I am satisfied that the plaintiff has discharged the onus that rested on its shoulders and is therefore entitled to the order that it seeks.

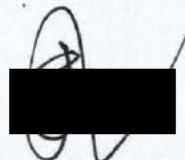
Costs

[50] I find no reason not to make an order that cost must follow the event. Based on the quantum of the claim and counterclaim, and the issues raised in the matter, I am of the view that costs must be granted to the plaintiff on the party and party scale C.

I therefore make the following order.

ORDER

1. The defendant is ordered to pay the plaintiff the sum of R2 152 317.63.
2. Interest on the aforesaid amount of R2 152 317.63 at the rate of 7.75% per annum *a tempore morae*.
3. The defendant's counterclaim is dismissed with costs.



J DLAMINI

*Judge of the High Court
Gauteng Division, Johannesburg*

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