

Reportable:	YES/ NO
Circulate to Judges:	YES/ NO
Circulate to Magistrates:	YES/ NO
Circulate to Regional Magistrates:	YES/ NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHWEST DIVISION – MAHIKENG**

CASE NO: 3205/19

In the matter between: -

VCED MAINTENANCE GROUP (PTY) LTD

PLAINTIFF

and

PHOENIX TANKS (PTY) LTD

DEFENDANT

JUDGMENT

DIBETSO-BODIBE AJ

INTRODUCTION

- [1] This is an action for damages based on breach of contract concluded between the Plaintiff, VCED Maintenance Group (Pty) Ltd and the Defendant, Phoenix Tanks (Pty) Ltd. The Defendant's legal representative has since withdrawn as an attorney of record after the Defendant's Plea and Counterclaim had duly been filed. The Defendant failed to appear on the date of trial and Mr Vermier Donfack, Director of the Plaintiff adduced evidence quantifying the extent of damages allegedly suffered as the result of the breach of contract.

THE PLEADINGS

- [2] The Plaintiff's claim for damages emanates from an "express, alternatively tacit, further alternatively implied terms of the oral contract" entered into with the Defendant during March 2018 as follows:

[2.1] "The Plaintiff will order from the Defendant who would in turn provide to the Plaintiff a Sectional Steel Galvanized Tank,

[2.2] The Plaintiff would pay an amount of 50% of the total purchase price of the Sectional Steel Galvanized Tank, as a deposit (which deposit is to be used to cover the costs of the manufacturing of the tank), once the Defendant issued the Plaintiff with a tax invoice (the tax invoice represented the written part of the contract between the Plaintiff and the Defendant for purposes of this action,...

- [2.3] Subsequent to the manufacturing, delivery at a site to be advised and successful installation of the tank by the Defendant, the full purchase price, for the Sectional Steel Galvanized Tank would be payable,
- [2.4] Until the full purchase price has been paid, the ownership of the Sectional Steel Galvanized Tank would remain the property of the Defendant.”
- [3] The Defendant in its Plea admitted all of the above-mentioned averments by the Plaintiff, however, in the Counterclaim the Defendant in a very illusive manner claimed from the Plaintiff the sum of R87 324.00 alleging that “ the Plaintiff breached the terms of the agreement, in that it cancelled the agreement without making payment of the full purchase price, which breach in the form of repudiation, was a material breach of the contract. As a result of the Plaintiff’s breach, the Defendant suffered damages in the amount of R87 324.00 which constitutes the remainder of the purchase price, which the plaintiff failed and refused to pay.
- [4] This is untenable, the Defendant having admitted in its plea that the Plaintiff was supposed to tender 50% (R87 324.00) of the total purchase price upfront for the manufacturing and installation of the Sectional Steel Galvanized Tank (the Tank) and only then would the outstanding balance become payable.

EVIDENCE OF MR DONFACK

- [5] Mr Donfack testified that he is the Managing Director of the Plaintiff, VCED Maintenance Company since 2014. He met Mr Jordaan, the Sales Manager, in the employ of the Defendant, Phoenix Tank Company, when he was looking for the procurement of the Tank. The Defendant agreed to manufacture the Tank for the Plaintiff on condition that the Plaintiff pay 50% of the total purchase price to enable the Defendant to purchase material for the manufacturing of the Tank. The 50% deposit also covered the installation of the Tank. The installation of the Tank would also be subject to approval by an engineer. The payment of the balance of the purchase price would become payable only after the installation of the Tank.
- [6] The Defendant did invoice the Plaintiff and the latter paid the 50% deposit of R87 324.00 in accordance with the invoice. The Plaintiff expected the Tank to be installed at the site in Rustenburg in two months. Mr Jordaan would occasionally pass at the site and would say that the Tank is being galvanized. He further testified that he was under pressure of performing as the project was supposed to be completed by 26 June 2018. He visited the Defendant's office in Brits and also sent several emails concerning undue delays regarding the installation of the Tank but the Defendant failed to perform part of his obligation. On 11 February 2019 the Defendant sent the Plaintiff an email wherein it promise to refund the Plaintiff the 50% deposit and based on that promised the Plaintiff went ahead and ordered the Tank from another Company, ABECO, in a short period of time and had to pay the full purchase price upfront.

According to him, the Plaintiff would not have approached ABECO but for the Defendant's non-compliance with the conditions of the contract. This non-compliance, according to Mr Donfack, had a negative impact on the Plaintiff's reputation in that it failed to complete the project by over six months after the deadline, a delay which tremendously impacted on the Plaintiff financially as the Plaintiff was penalised thereby in accordance with the procurement conditions of the project.

- [7] In its Pleadings, Plaintiff categorised damages for breach of contract into three viz, repayment of the deposit paid to the Defendant towards the manufacturing and delivery of the Tank, additional damages suffered as a result of the breach and future loss of profit.

1ST CLAIM: REPAYMENT OF THE DEPOSIT PAID TO THE DEFENDANT

- [8] The Plaintiff alleged that the Defendant breached the contract in that it failed: -

[8.1] To timeously manufacture and deliver the Tank as per the terms of the contract,

[8.2] As a result of the breach, which breach was material, Plaintiff proceeded to cancel the contract,

[8.3] Despite due and proper demand, the Defendant failed and/or refused to compensate the Plaintiff the sum of R87 324.00 being the amount paid as the deposit for the Tank.

- [9] “Where one party to a contract, without lawful grounds, indicates to the other party in words or conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to “repudiate” the contract.... Where that happens, the other party to the contract may elect, to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated....” This is the conventional exposition of the operation of the doctrine of repudiation leading to rescission with its emphasis on the guilty party’s acceptance...the test for repudiation is not subjective but objective....The emphasis is not on the repudiating party’s state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do, repudiation is accordingly not a matter of intention, it is matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened breach”¹
- [10] “....in law, in the absence of an agreement to the contrary, a party to the contract who exercises his right to cancel must convey his decision to the mind of the other party and that cancellation does

¹ Datacolor International (Pty) Ltd v Intermarket (Pty) Ltd (2/99) [2000] ZASCA 81(30 November 2000) (Datacolor) at para [16]

not take place until that happens.... since the election to cancel, provided that it is unambiguous need not be explicit ...”²

[11] The Plaintiff was appointed as a service provider for the implementation of a project at Boitekong Community Health Centre (CHC Project) and the installation of the Tank formed part of the project. The Plaintiff’s deadline in terms of the procurement contract was 26 June 2028. The Plaintiff contracted the Defendant to manufacture and install the Tank. As per agreement between the parties, the Plaintiff would pay 50% deposit of the purchase price upfront for the Defendant to purchase the material for the manufacturing and installation of the Tank. The remaining 50% balance of the purchase price would become due and payable once the Tank has been installed and certificate of compliance issued by the engineer.

[12] The Plaintiff paid the 50% deposit of R87 324.00 towards the manufacturing and installation of the Tank and as part of the fulfillment of its contractual obligations. On the other hand, the Defendant failed to fulfill its obligations towards the contract. The deadline for the implementation of the project came and passed and the Defendant, having admitted in its plea that the 50% deposit was for the manufacturing and delivery of the Tank, remained in default thereof.

² Datacolour ibid at para 29

[13] According to the evidence of the Plaintiff's witness, Mr Donfack, he visited the Defendant's offices in Brits in an attempt to get the Defendant to perform in accordance with the contract but to no avail. On 28 January 2019 the Plaintiff's attorneys forwarded a letter of demand per email to the Defendant for the repayment of the 50% deposit stating "we act herein on behalf of VCED Maintenance Group Pty Ltd...we confirm that our client ordered a sectional steel galvanized tank from you for which you required a 50% deposit to be paid. You subsequently issued a tax invoice to our client on 20 March 2018, with tax invoice number 12074, in the amount of R87 324.00, which is 50% deposit payable in respect of the tank. Our client proceeded to pay the aforementioned amount to you on 22 March 2018. Copies of the tax invoice, as well as proof of payment is attached hereto for ease of reference. It is our client's instructions that despite various requests, you have failed and/or neglected to deliver the tank. Therefore, we demand repayment of R87 324.00 to our client within 7 days from the date hereof, failing which we will be left with no other choice than to proceed with legal action against you, in which case we will claim the capital amount, together with interest calculated from 22 March 2018, as well as legal costs.... We trust that the above drastic action will not be necessary and that we will receive your urgent co-operation in this matter."

[14] Subsequent to the letter of demand several emails were forwarded to the Defendant as a follow-up and on 11 February 2019 the Defendant responded to the Plaintiff's attorneys stating "we confirm that we received your correspondence. We are willing to refund the deposit paid by VCED Maintenance. We will forward our refund

proposal soon. On 19 February 2019 the Plaintiff's attorneys requested the Defendant to forward the proposal for the payment as promised. On 19 February 2019 the Defendant responded stating "... We will pay the outstanding amount by not later than 31 March 2019." When no payment was forthcoming, the Plaintiff instituted action against the Defendant on 21 November 2019.

[15] The trail of events *in casu* are uncomplicated. The Defendant failed to fulfill its part of its contractual obligations, repudiated the contract and the Plaintiff accordingly rescinded the contract and proceeded to claim damages for the breach of contract.

[16] "The right of a party to a contract to cancel it on account of malperformance by the other party, in the absence of *lex commissoria* depends on whether or not the breach, objectively evaluated is so serious as to justify cancellation by the innocent party"³

[17] "...The test whether the innocent party is entitled to cancel the contract because of malperformance by the other, in the absence of a *lex commissoria*, entails a value judgment by the Court. It is, essentially, a balancing of competing interests – that of the innocent party claiming rescission and that of the party who committed the breach. The ultimate criterion must be one of treating both parties, under the circumstances, fairly, bearing in mind that rescission,

³ Singh v McCarthy Retail Ltd (t/a MacIntosh Motors) (429/98) [2000] ZASCA 41 (14 September 2000) (Singh) at para [12]

rather than specific performance or damages., is the more radical remedy....”⁴

[18] The repudiating act per se constitute a breach, it is the violation of a fundamental obligation to honour the agreement and the Plaintiff elected instead to rescind the contract and claim damages.

[19] In the premises, the Defendant failed to perform part of its obligations towards the fulfillment of the contract. The Defendant’s malperformance was so serious as to go to the root of the contract thus entitling the Plaintiff to claim damages for the breach of the contract being the refund of R87 324.00 plus interest from the date of demand being 28 January 2019.

2ND CLAIM: ADDITIONAL DAMAGES SUFFERED AS A RESULT OF THE BREACH

[20] The Plaintiff alleged in respect of this claim that as a result of the malperformance on the side of the Defendant, it had to purchase a Tank for the sum of R404 969.63 from another company, ABECO and accordingly suffered damages in the tune of R230 321.62 being the difference between the purchase price of the Tank from ABECO and that of the Defendant which was the sum of R174 648.00.

[21] The Plaintiff failed to quantify the said damages but from the glimpse of the invoices provided by the two companies, the description of the product (the tank) is not the same let alone other specifications

⁴ Singh ibid at para [13] the SCA quoting from Van der Merwe et al (Contract General Principles 1st ed 1993 at 255).

which affects pricing such as the quality of the product *et cetera* which are not apparent on the face of the invoices. In respect of the Defendant's invoice, the description of the Tank is "Sectional Steel Tank Galvanized 4. 88m x 2.5m x 2.4m. Volume of 29 00 Litres," whilst the description of the Tank from ABECO is "1 only Galvanized ABECO pressed Steel Tank Size 4.88m x 2.44m (or 4*2*2 panels) with standard cover, and no division. 1 only 10m High Galvanized Structural Steel Tower with walkway with Landing Platform Including: Safety file, includes Walkway and Landing platform, 1xVortex, Extra connections, 29kl Elevated Fire and Domestic, Civil works and Pipe Works: No, by others, Delivery and Erection: yes, by ABECO"

- [22] The only real evidence entitling the Plaintiff to damages is the fact that it incurred more expenses when purchasing the Tank from ABECO as a result of the Defendant's failure to deliver the lesser expensive Tank as was originally planned. This cannot be sufficient justification to claim damages against the Defendant in relation to the quantification and/or proof of damages generally as, it is trite that the innocent party's damages would be in the sum necessary to place it in the position financially in which it would have been had there been proper performance of the contract.
- [23] The Plaintiff chose to purchase the Tank at more than double the purchase price to that of the Defendant and cannot, in the circumstances, succeed in its 2nd Claim against the Defendant for the payment of damages as alleged as no causal link between the loss suffered by the Plaintiff (i.e. the additional expenses which were

incurred by the Plaintiff) and the breach by the Defendant has been established.

3RD CLAIM: FUTURE LOSS OF PROFIT

[24] In this Claim the Plaintiff alleges damages for future loss of profit as follows:

[24.1] That as a result of the Defendant's breach of contract the Plaintiff suffered an estimated loss of future profit in the amount of R105 535.24 which is calculated according to the CHC procurement contract in that the Defendant failed to deliver the Tank as per the contract.

[24.2] The work for the CHC Project was divided into two sections. Section one had to be completed by 12 December 2017 and section two had to be completed by 28 June 2018. Should the applicable section not be completed on the specified date, the Plaintiff would be penalised by 1.5 cent per R100 of the sub-contract value of R3 517 841.36 which amounts to R52 767.60 per section. Therefore, both sections were penalised for R105 535.25.

[25] The procurement contract which was only signed by the Plaintiff on 02 March 2018 was a sub-contract for the Plaintiff to procure services for the "take over and completion of mechanical installations" under the main contract "Repairs and Renovation Works at Boitekong CHC" (the CHC Project) under the contractor GS Fencing and Construction.

- [26] The intended dates of completion of the sub-contract were categorised into two sections. Section one had to be completed on 12 December 2017 whilst the completion date for section two was 27 June 2017 and the practical date of completion in terms of the principal Agreement was 27 June 2018. The penalty for non-compliance with completion dates was 1,5 cents per R100 of the value of the sub-contract of R3 517 841.86.
- [27] It is not clear on the face of the procurement contract what the value of each section was, however, what is critical is that although the Tank is not been categorically specified, it would seem according to the Plaintiff's evidence that the installation of the Tank formed part of the delivery of the sub-contract. It is equally not clear as to which of the sections the delivery and therefore the completion date of the Tank formed part.
- [28] What is more difficult about the Plaintiff's claim is the formula to quantify the alleged damages. The Plaintiff alleges that since both sections which forms the sub-contract as whole were not completed in time and therefore penalised, the amount subtracted from the value of the contract equals damages incurred as result a the Defendant's breach of contract to deliver the Tank and that those damages should under the circumstances be quantified as future loss of profit incurred but for the Defendant's breach of contract.
- [29] I cannot fathom this line of reasoning in relation to proof of damages for loss incurred and/or future loss of profit. It is not clear from the procurement contract what services formed part of "Mechanical installations" apart from the Plaintiff's testimony that the installation

of the Tank formed part of the procurement contract. But the end of it all is that the Defendant cannot for whatever reasons bear the responsibility for the penalties incurred as a result of the late completion of the services that were supposed to have been delivered by the Plaintiff under the sub-contract. This, in my view, is untenable.

[30] Where a party asserts that a breach of contract has caused it to lose profit it would otherwise have made, the first question to ask is whether or not on the particular facts that type of loss is recoverable as a matter of law. Lost profits must be reasonably certain. In most cases the goal of contractual damages is restorative. In other words, the aggrieved party should be placed back in the position it would have been had the contract not been breached. The restorative goal requires a recovery for the loss of any consequential damages that stem from the breach. Ultimately any argument addressing the issue of damages must justify the calculus it advocates. Therefore, an articulation of the underlying presupposition concerning the purpose of awarding contractual damages is demanded.

[31] In *casu*, the alleged future loss of profit is not projected based on the breach of contract between the parties but rather emanates from the procurement contract between the Plaintiff and a third party. In the circumstances, the Plaintiff failed to establish any casual connection between the breach of contract and damages it allegedly suffered. I am therefore not satisfied that the Plaintiff succeeded in proving the damages allegedly suffered against the Defendant under this Claim.

COSTS

[32] The general rule in matters of costs is that the successful party is entitled to be awarded costs and this rule should not be departed from except where there are good grounds for doing so. The Plaintiff has been successful in respect of the 1st Claim of breach of contract against the Defendant and unsuccessful in respect of the other two claims. The Plaintiff has requested for cost of suit on an attorney-and- client scale but I am of the view that costs on an party and party scale would be reasonable under circumstances.

ORDER

[33] I make the following order:

[33.1] The Defendant is ordered to pay the Plaintiff the sum of R87 324.00 plus interest at the prescribed rate effective from the date of demand being 28 January 2019 in respect of the 1st Claim.

[33.2] The Plaintiff's 2nd and 3rd Claims are hereby dismissed.

[33.3] The Defendant is ordered to pay the Plaintiff's costs on a party and party scale.

**O.Y DIBETSO-BODIBE
ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA NORTH-WEST DIVISION, MAHIKENG**

Delivered: This judgment is prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties or their legal representatives by email and by release to SAFLII

DATE OF HEARING : 30 AUGUST 2023

DATE OF JUDGMENT : 14 JANUARY 2025

APPEARANCES

FOR THE PLAINTIFF : Adv JH Lerm

**INSTRUCTED BY : Steenkamp Van Niekerk Attorneys
C/O Maree & Maree Attorneys**

FOR THE DEFENDANT : No appearance