


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

11/8/15

CASE NO: **51620/2009**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
 SIGNATURE	11.08.2015 DATE

In the matter between:

GLAZING BOTSWANA (PTY) LTD

Applicant

And

ROYAL AFRICA TRUCK SALES

Respondent

JUDGMENT

MATOJANE J

- [1] Plaintiff instituted an action against Defendant claiming cancellation of an agreement based on repudiation thereof and payment of the purchase price in the sum of R150 000.00 plus interest thereon and payment of the amount of R120 000.00 towards damages plus interest thereon.
- [2] It is alleged in the particulars of claim, as amended that in August 2007 the Plaintiff, duly represented by its Managing Director, Cuzen Mesotlo and Defendant, duly represented by Mr Megs Moodley, entered into oral agreement of sale in terms whereof the Defendant sold to Plaintiff two trailers being a double axle front link and tri-axle rear link trailer.
- [3] It is common cause from the facts and the documents before court that the purchase price payable by the Plaintiff to the Defendant for the trailers was an amount of R200 000.00. The Plaintiff paid the Defendant R200 000.00 for the trailers. The Defendant did not charge VAT on the purchase price of the two trailers because they were being exported to Botswana. Notwithstanding the fact that the Defendant did not charge VAT on the transaction it was agreed that the Plaintiff should deposit with Defendant an amount equivalent to the value of the VAT pending export of the trailers.

[4] The Plaintiff took delivery of the tri-axle trailer comprising the rear part of the super link on 8 August 2007. The double axle trailer was not delivered, Plaintiff contend that the double axle trailer was never ready for collection and Defendant on the other hand contend that the Plaintiff had failed to collect the trailer which was ready for collection.

[5] During April 2009 the parties concluded a second agreement in terms whereof:

5.1 The double axle trailer was traded in on a tri-axle.

5.2 The purchase price of the second tri-axle trailer would be R150 000.00.

5.3 The Plaintiffs would pay the additional amount of R19 067.19 for certain modifications and Tyres to be paid on collection of the trailer.

5.4 The double axle trailer would be traded in at a sum of R114 000.00, being the original purchase price of R100 000.00 and R14 000.00 VAT deposit.

5.5 The Plaintiff would pay in the difference of R36 000.00.

5.6 The purchase price amounted to R150 000.00 being the trade in of R114 000.00 on the double axle trailer and the R36000.00. It was agreed that Plaintiff would pay an additional amount of R19 067.19 for certain modifications

and tyres to be fitted to the tri-axle trailer. The amount of R19 067.19 was payable on collection of the trailer.

5.7 Defendant undertook to deliver the second tri-axle trailer to the Plaintiff at the Defendant's premises on no later than 30 June 2009.

5.8 Pursuant to the second agreement Plaintiff paid the additional amount of R36 000.00 and undertook to pay in the R19 067.19 on collection of the trailer.

[6] The Plaintiff pleads that the Defendant breached the agreement by failing to deliver or make available for collection the second tri-axle flat-bed trailer by the end of June 2009 and further, failed to deliver all the necessary documentation to enable the Plaintiff to export the trailer to Botswana despite having received payment from the Plaintiff. The Plaintiff pleads that in consequence, the Defendant's breach of the agreement constituted repudiation of the agreement and the Plaintiff was entitled to cancel the agreement.

[7] In her plea, apart from putting Plaintiff to the proof of certain averments, Defendant admits the conclusion of the agreement, the payment of the purchase price and the sum of R36 432.81. The Defendant specifically pleads that he has complied with his obligations in terms of the contract by making the trailer available for delivery at his premises, that it was the Plaintiff who breached

the agreement in that the Plaintiff neglected to collect the second tri-axle flat bed trailer from the Defendant's premises and /or to effect payment in the sum R19, 067.19 being the costs of the modifications requested by the Plaintiff. The Defendant pleaded further that Plaintiff has failed alternatively neglected to pay the R14, 000 due on the trade-in trailer which amounts remains due and payable.

- [8] In the counter claim, Defendant tenders delivery of the tri axle trailer against payment of the amounts of R96 317.19 payable to him in terms of the agreement and payment of further storage costs calculated at R50 00 per day from 11 December 2012 until the date of collection of the trailer, plus interest of the above amounts.

The issues

- [9] The Plaintiff contends that it complied with all its obligations, paid all the amounts due, that it attended to the Defendant's premises in order to collect the second tri-axle and pay the remaining R19 067.00 but the Defendant breached the agreement by not having the trailer available for collection.
- [10] The Defendant for its part, avers that Plaintiff never paid the additional R14 000.00 deposit for the VAT on the double axle trailer

and accordingly Defendant denies that Plaintiff complied with its obligations. The Defendant further contends that Plaintiff never came to its premises to collect the second tri-axle trailer and pay the remaining R19 067.19 for the modifications and that Plaintiff agreed that it would pay the Defendant R50.00 per day in respect of storage of the tri-axle trailer in the event that it was not collected.

[11] The central issue to be decided is whether the Plaintiff did in fact pay the amount of R14 000.00 as pleaded and if so whether or not the Defendant delivered the trailer to the Plaintiff because that is when the sum of R19 067.19 becomes due.

[12] When, as in this case, the court is faced with two irreconcilable versions, the proper way to determine the facts is to consider the credibility of the witness in conjunction with the probabilities in order to determine where the truth probably lies. In **Stellenbosch Farmers Winery Group Ltd and Another v Martell ET CIE and Others**¹ the Supreme Court of Appeal stated:

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b)

¹ 2003(1)SA 11 (SCA)

their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candor and demeanor in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

The evidence

[13] The Plaintiff called Mr Cuzen Mesotlo and Mr. Willie Tintenger as witnesses. Mr Mesotlo testified that he met Mr. Megs Moodley from the Defendant in 2007 after he came to Johannesburg from Botswana to buy a link of trailers. They agreed that the double and tri-axle trailers would be sold for R200 000.00. No VAT was mentioned, the reason being the trailers were going to be taken across the border to Botswana. Delivery was to take place in seven days. He paid the R200 000.00.

[14] After paying the R200 000.00 it was a nightmare throughout. The trailers were never ready as both trailers had problems on the bedding and he requested that they be refurbished. The bedding was never done and ultimately after four months the bedding was done on the tri-axle. He took the tri-axle across the border without the police clearance. The double axle was never made ready and in December 2007 it was still standing without tyres and some axles taken off. Even in 2008 it was still not ready.

[15] According to Mosotlo, in April 2009 the double axle was traded in on a tri-axle because the Defendant could not get documentation for the double axle that was still standing on jacks with no tyres and the axle on it. He paid the R14 000.00 which he had with him as a

deposit on the second tri-axle trailer. He instructed Mr Tintinger to pay the balance of R36 000.00.

[16] Mr Mesotlo testified that subsequent to the payment of R36 000.00 on 16 April 2009 the Defendant had undertaken to have the second tri-axle ready for delivery within seven days. The Defendant failed to make the trailer available for delivery and Mesotlo had Moodley commit in writing, on behalf of the Defendant, to having the second tri-axle ready for delivery by 30 June 2009. The Defendant still failed to have the trailer ready for delivery.

[17] Mr Mesotlo testified that he came to Johannesburg from Botswana on numerous occasions throughout July, August and September 2009 to try and obtain delivery of the trailer and on each occasion Moodley would give further undertakings to have the trailer ready.

[18] Ultimately in September 2009 Mesotlo asked Tintinger to instruct Webber Wentzel attorneys to take up the matter on behalf of the Plaintiff.

[19] Webber Wentzel Attorneys addressed letters to the Defendant's Attorney on 14 October 2009 and 2 November 2009 recording their instructions that Plaintiff had paid for the second tri-axle and has on numerous occasions attempted to take delivery to no avail.

[20] No response was received from the Defendant or its Attorneys and on 4 December 2009 Webber Wentzel Attorneys addressed a letter to the Defendant in which they communicated the Plaintiff's election to cancel the agreement and institute proceedings.

[21] Mr Tintinger confirmed the agreement between the parties and his involvement in delivering the cheque for R36 432.81 and confirmed that the amount of R19 067.19 was still to be paid.

[22] He testified that Mesotlo came down to ask for assistance after the Defendant had failed to deliver the double axle. He ultimately approached Moodley on the 10 June 2009 to get a commitment in writing from him on the Defendant's behalf that the trailer would be ready for collection by 30 June 2009.

[23] He maintains the trailer was not delivered. He saw Mesotlo on numerous occasions during the period July, August and September 2009 and which time Mesotlo had advised him that he was trying to obtain delivery of the trailer.

[24] The Defendant called two witnesses, George Moodley and Megs Moodley. George Moodley testified that the Defendant undertook to have the trailer ready for collection in about a week's time and that round about the 27th July 2007 the Plaintiff's driver arrived at the

premises to collect it. He testified that he overheard the driver and the mechanics speaking to each other in their own language and that he learned that the discussion was about the horse of the Plaintiff not being strong enough to pull the link which was estimated to weigh about 40 tons when loaded. He testified that the driver must have spoken to Mesotlo because he was then informed that they decided to take the tri-axle only.

[25] George Moodley testified that he prepared the papers for the export of the tri-axle and obtained the police clearance on 1 August 2007, the roadworthy certificate on 2 August 2007 and a copy of the registration certificate on 3 August 2007. Mr Moodley testified that Plaintiff's driver was allowed to collect his load with the trailer, but due to the fact that the balance of the purchase price and VAT which was required as security was not yet paid at that time, the papers were not released to the driver until the payment was cleared.

[26] He testified that the trailer was released on 8 August 2007 and that it left the Defendant's yard one day after the Plaintiff's further electronic payment of R100 000.00 towards the double axle was cleared. He denied that there had been a failure on the part of the Defendant to deliver during the period 16 April 2009 to 10 June

2009 and this was the reason why he had given the written undertaking that delivery would take place by 30 June 2009.

[27] Mr Megs Moodley testified about the procedure regarding VAT and confirmed that although the VAT transaction was zero rated, the Defendant demanded payment of Vat as security the reason being it was reliant on the Plaintiff to return the stamped documents with the SAD500 to him in order to enable him to close the VAT transaction and refund the Plaintiff.

[28] He testified that due to the risk of the driver crossing the border, he was not prepared to release the trailer's papers until the full purchase price was secured which was done only on 7 August 2007 when payment of the further R100 000.00 cleared and that the driver was allowed to remove the vehicle and the papers given to him the next day.

[29] Mr Megs Moodley testified that when he was contacted by Plaintiff's attorney in Botswana about the double axle, his attorney Manfred Jacobs sent a letter in September to advise that the double axle was ready for collection against payment of his invoice. He further testified that he consulted with his attorney telephonically about the letter dated 14 October 2009 from the Plaintiff's attorneys and informed him that his payment was still

outstanding. He could not explain his attorneys lack of communication to the Plaintiff's attorney but explained that both he and his attorney were busy and he recalled that his attorneys son was very ill at the time.

[30] Mr Moodle was adamant that he did not receive payment of the R14 000.00 and that the Plaintiff did not contact him about the payment of the balance of R19 067.18.

Discussion

[31] It is not in dispute that on 16 April 2009 the Defendant represented by Mr. Tintinger, delivered a check in the amount of R36 432.81 to the Defendant under cover of letter. This letter recorded in typed writing that the payment of R36 432.81 was in full and final payment for the tri-axle trailer. It is stated on the letter, in manuscript that R19 067.19 had to still be paid in full settlement. The letter had been signed by Tintinger and Moodley.

[32] Mr. Moodley testified that he signed this letter because the R14 000.00 related to the previous deal and was a separate issue. Mr. Moodley testified that it had always been the Defendant's version that the R14 000.00 was outstanding. This is contradicted by an affidavit deposed to by him in support of a rescission application wherein he had stated that the Plaintiff did in fact pay all amounts

due to the Defendant for the purchase of the second tri-axle flatbed trailer. Mr. Moodley told the court that the events took place some 8 years ago and he did not recollect them well.

[33] It is significant that the defence that the R14 000.00 was outstanding all along was not raised in the initial plea. This defence was introduced into the Defendant's plea by way of a notice of intention to amend a year after the trial had commenced.

[34] In cross examination of Mosotlo it was never disputed that he had attempted to obtain delivery of the trailer on numerous occasions. It was put to Mosotlo that it was strange that there had been no communication regarding the failed delivery of the trailer during the period July 2009 to October 2009. Mr Mosotlo explained that there was not correspondence during this period because he had been personally coming to Johannesburg to try and obtain delivery of the trailer.

[35] In my view, the evidence of the Plaintiff's witnesses is more credible and the Plaintiff version is more probable on the disputed issues. I agree with the Plaintiff's submission that the probabilities favour the Plaintiff's version because it is improbable that the Plaintiff would have paid the Defendant R100 000.00 in advance prior to even seeing the trailer, thereafter paid the next R100 000.00 for the

double axle trailer, thereafter paid the R36 000.00, acknowledged that it still needed to pay the additional R19 000.00 obtained written confirmation from the Defendant as to the full and final settlement due on delivery of the trailer, arranged for consultations with its attorneys while failing to collect the trailer which was allegedly ready.

[36] I find that the Plaintiff complied with its obligations and made payment of the R14 000.00 and was at all times willing to pay the remaining R19 067.19 in order to take delivery of the trailer but the Defendant breached its obligations by failing to have the trailer ready for collection.

[37] The Plaintiff testified that it suffered damages flowing from the Defendant's breach of the agreement by having to rent a trailer to conduct his business. Mr George Moodley testified that R800 per day was a reasonable rate for the rental of a trailer in 2007 and that the Defendant would have rented a horse and trailer to the Plaintiff at R25,000.00 per month.

[38] If the damages are calculated on the basis that the Plaintiff would have to rent a horse and trailer at R25 000.00 per month for the period 30 June 2009 to 4 December 2009 this equates to a similar figure of R125 000.00 claimed by Plaintiff as damages. It follows

therefore that the sum of R125, 600.00 claimed by Plaintiff as damages is fair and reasonable.

[39] In the circumstances, judgment is granted in favour of the Plaintiff for:

39.1 Payment of the sum of R150 000.00.

39.2 Interest on the sum of R150 000.00 at the rate of 15.5% per annum from 4 December 2009 to date of payment.

39.3 Payment of the sum of R125 000.00.

39.4 Interest on the sum of R125 000.00 at a rate of 15.5% per annum from 19 January 2010 being the date of service of summons.

39.5 Costs of the suit.



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JUDGE OF THE HIGH COURT