LOM Business Solutions t/a Set LK Transcribers/LR

IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG CASE NO: 26092/07

DATE: 16/04/2009

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED

DATE 3/9/2009 SIGNATURE

In the matter between

SA METAL & MACHINERY CO. (PTY) LTD APPLICANT

and

SPANJAARD LTD 1ST RESPONDENT

COPPERMET SA (PTY) LTD 2ND RESPONDENT

J U D G M E N T

WILLIS J: The plaintiff claims damages for breach of contract. The breach is alleged to consist of an unlawful repudiation by the second defendant of a contract which, it is common cause, was entered into between the parties on or about 13 April 2007. At the commencement of the hearing the issues had been considerably narrowed. It was

accepted that the claim was to proceed against the second defendant only. The plaintiff had joined the first defendant as a precautionary measure, by reason of the fact that it was not sure that there may be a defence that it had been the wrong plaintiff who had been sued.

The first defendant is a public company and the second defendant is a wholly owned subsidiary of the first defendant. The leading actors for the second defendant throughout were persons who were directors of the first defendant and bear the same surname as appears in the rubric of the first defendant namely Spanjaard. Furthermore, certain of the correspondence from the second defendant carried on it the logo of the first defendant. I shall deal later in more detail with this aspect, when it comes to the question of costs.

The plaintiff is a family business, having existed for some 90 years. It is based in Cape Town, but has branches elsewhere including Johannesburg. It is the largest dealer in scrap metal in the Western Cape, dealing in approximately four to five thousand tons of scrap metal every month. It is also one of the largest scrap metal dealers in the whole of the Republic of South Africa.

It is common cause that during April 2007 the second defendant had secured what appeared to be a lucrative opportunity with a German manufacturer of brake pads for which the German manufacturer required copper parts. In order to secure its lines of supply, the second defendant approached the plaintiff with whom it had had dealings over a number of years, in order to ascertain whether it could arrange for it to

be given a secure line of supplies of copper.

This is altered in the agreement, which was partly oral and partly written, relating to the sale of copper scrap. On 13 April 2007 Mr Paul Solomons who was the head metals trader for the plaintiff, sent Mr Anthony Spanjaard the son of Mr Robert Spanjaard, the chairman and it appears founder of both the first and second defendant, an email in which he confirmed that there would be a supply of approximately 26 metric tons per month, delivered by the plaintiff to the second defendant from April 2007 to December 2007.

Included in that email was an advice that a payment was to be within 30 days from date of invoice and secured by a bank guarantee to the value of R5 million. Mr Anthony Spanjaard replied on 16 April 2007, via email and confirmed the agreement stating that there was "no problem from our side, with regard to the bank guarantee." Later it transpired that the question of the bank guarantee presented difficulties and indeed objections were made on the part of the second defendant and the payment terms were varied twice in consequence thereof. Initially it was agreed that the account limit would be R700 000.00 and that any amount in excess of that was to be paid within one working day of receipt of invoice, later this was changed to R1 million.

The plaintiff originally claimed the sum of R624 958.02. This amount, on the morning of the trial, was revised downwards to R593 537.15. There is no dispute as to the computation of the quantum of damages. It may be recorded that the quantum was calculated by reference to the agreed price between the parties in the contract

between them and the price that the plaintiff was able to sell the copper for when the second defendant repudiated the agreement.

It is common cause that in April 2007 the defendant had taken delivery of some 26 metric tons of copper in terms of the agreement. In May 2007 the plaintiff tendered delivery of a further 26 metric tons but the second defendant took delivery only of 10 metric tons and refused to take delivery of the balance. In each of June, July, August and September of 2007, the plaintiff, once again, in terms of the agreement tendered delivery to the defendant of a further 26 metric tons of copper but the defendant refused to take delivery of any of it.

At the commencement of the trial, counsel for both sides agreed that the whole case turned on the narrow issue of whether it was a term of the agreement that the second defendant would be entitled to cancel the agreement upon 30 days notice to the plaintiff. The first witness to testify for the plaintiff was a Paul Solomons, who was the head metals trader of the plaintiff. He was an impressive witness. He gave evidence in a calm manner and if I may say so with considerable confidence for a person of his age. He appeared to me to be a young man in his early thirties. It is quite clear that he was thoroughly familiar with his trade. He was adamant that there was no agreement that the contract could be cancelled upon 30 days notice and he said that it would make no sense whatsoever for such an agreement for such a term to be included in the agreement.

The next and last witness for the plaintiff was a Clifford Barnett. He is a director of the plaintiff. He too, although he

was not directly involved with the conclusion of the agreement between the plaintiff and the second defendant, was adamant that there could never have been such an agreement, precisely because it would not have made any sense. In essence, his evidence was to this effect: that to use a colloquial expression the second defendant would want to have its cake and eat it at the same time. In other words, the second defendant would wish to have a secure line of supply of copper but would be free if it ran into any difficulties to vary the arrangement.

It has to be borne in mind that the plaintiff itself in order to be able to give the first defendant a secure line of supply of copper, would itself have had to secure its supplies in order to be able to meet its obligations to the second defendant. It should at this stage be pointed out, before dealing with the evidence of the defendant, that the second defendant has certain difficulties in as much as its version has not been consistent. In its plea it contended that there had been no agreement concluded between the parties by reason of the fact that the agreement had been made conditional upon the furnishing by it of a guarantee which guarantee had not been so furnished.

The difficulty however for the second defendant is that the record quite clearly shows, that although it was originally a term that a guarantee would have to be provided, the parties clearly agreed to vary this particular term. The second defendant, during the course of the trial abandoned this defence set out in the plea and relied on its alternative defence namely the right to cancel within 30 days.

The first witness to testify for the second defendant was

Mr Anthony Spanjaard, who as I have already indicated was the son of the chairman of the second defendant. It emerged that during May the German company which it had contracted in relation to the supply of copper was "not playing ball." This is what led to the difficulties namely the second defendant not taking delivery of the supply of copper as had been agreed between the plaintiff and the second defendant.

Mr Anthony Spanjaard said that in the negotiations between himself and Mr Paul Solomons, it had been agreed that there would be a 30 day notice period, which would enable the second defendant to give notice that it no longer wish to proceed with the transaction. There are a number of difficulties that he faced when giving evidence: he could not explain why if this aspect had it been agreed, he had not alluded to it in any of his emails to the plaintiff in response to the plaintiff having recorded the terms of the agreements.

There were three opportunities: the first was when the plaintiff originally sent an email on 13 April and then a further two when the agreement was varied with regard to the terms of the guarantee. He also could not explain why he had not, if this was a term of the agreement, when he realised that there were difficulties with the German company, with which the second defendant had contracted, immediately informed the plaintiff that there were difficulties and accordingly it would have to rely on the clause which allowed it not to proceed with the agreement.

Furthermore it is common cause that relations became strained between the plaintiff and the second defendant, as a result of the

second defendant failing to take delivery of the copper. There were emails, there were meetings and there was indeed even correspondence. On 12 July 2007 Mr Robert Spanjaard, the chairman of the second defendant and the father of Anthony Spanjaard, sent a letter to Mr Clifford Barnett, in which he records *inter alia* the following:-

> "I came to see you, June 14 at 10:30 at your office in Epping. I told you then that the deal that Anthony had negotiated was no longer appropriate but it was several phone calls later that you finally accepted that state of affairs despite this, Paul keeps sending emails with RCP prices and the various percentages thereof."

On 13 July 2007 Mr Graham Barnett the brother of Mr Clifford Barnett who is also a director of the plaintiff immediately send an email to the second defendant marked for the attention of Mr Robert Spanjaard in which the second defendant was in no uncertain terms called upon to comply with its agreement. Mr Anthony Spanjaard accepted that at no stage until after 13 July had he ever raised with his father this so called agreement, that the contract could be cancelled upon 30 days written notice.

It is also not without significance that the second defendants did not on 12 July 2007 purported to rely on any such clause relating to the opportunity or relating to the right to cancel the agreement on 30 days notice. Mr Robert Spanjaard testified. His evidence I am afraid to say, was singularly unhelpful to the second defendant and was inconsistent

with that of his son.

This probably explains why counsel for the plaintiff did not even bother to cross-examine him. His version was that the problem would take care of itself, in other words if the second defendant did not put up the guarantee well then there was no agreement and therefore there was nothing to worry about, alternatively he said, well if the second defendant did not offer to pay, then there was no obligation on it to take delivery. Before going onto another occasion he said he thought it was a "self-liquidating problem."

On another occasion he accepted that there was indeed a contract between the parties but he had never expected that the plaintiff would seek to enforce it, by reason of the very friendly relationship that had existed between the parties. I may recall that it is indeed apparent that there was a cordial relationship between the parties, prior to May 2007 and that they indeed explored even the possibility of embarking on a joint venture for the "atomising" of copper.

Having regard to the principles in criteria set out in *Stellenbosh Farmers Winery Group Ltd & Another v Martell Etcie* 2003 (1) SA (SCA) 5. *African Eagle Life Assurance Company Ltd v Cainer* 1980 (2) SA 234 (W) 237. *National Employers General Insurance v Jagers* 1984 (4) SA 432 (ECD) 440 E - 441 E. *Baring Eiendomme BPK v Roux* [2001] 1 All SA 399 (A) at paragraph 7. *Koster Kooperatiewe Landbou Maatskappy BPK v Suid Afrikaanse Spoorwee en Hawens* 1974 (4) SA 420 (W) 425; *National Employers General Insurance Association v Gany* 1931 (AD) 187 at 199 and *AA Onderlinge*

Assuransie Assosiasie v De Beer 1982 (2) SA 603 (A) 614 H.

I am of the view that it must be accepted that the plaintiff's version is correct and that there was no agreement, then further there was no term of the agreement, that the second defendant could cancel upon 30 days notice to the plaintiff. In *Ocean Accident and Guarantee Corp Ltd v Cogh* 1963 (4) SA 147 (A) 159 C, Holmes J A said:

> "As to the balancing of probabilities I agree with the remarks of Selke E J in *Govan v Skidmore* 1952 (1) SA 732 (N) 734, namely "...in finding facts or making inferences in a civil case it seems to me that one may as Wigmore conveys in his work on evidence, third ed paragraph 32, by balancing probabilities select a conclusion which seems to be the more natural or plausible conclusion from amongst several conceivable ones even though that conclusion is not the only reasonable one."

This dictum has been referred to with approval in innumerable cases, see for example *South British Insurance Company Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) 713 E – G. *Smith v Arthur* 1976 (3) SA 378 (A) 386 B – D. *Cooper & Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) 1023 B – C. *Hülse-Rutter & Others v Gödde* 2001 (4) SA 133 (6) (SCA) 14. *Jordaan v Bloemfontein Transitional Local Authority* 2004 (3) SA 371 (SCA) 379. *De Maayer v Serebro; Serebro v Road Accident Fund* 2005 (5) SA 588 (SCA) at paragraph 13.

It hardly needs to be said that "plausible" is not here used as negative sense of *specious but in the connotation which is conveyed* by words such as (acceptable, credible or suitable see the Oxford Dictionary). Having regard to the facts, disputed and undisputed set out above, I consider the most:

> "Voor die hand liggende en aanvaarbare afleiding"
>
> (*See AA Onderlinge Assuransie Assosiasie v De Beer* 1982 (2) SA 603 (A) 614 H)

and the more plausible, acceptable and credible conclusion on a balance of probabilities, is once again that the version of the plaintiff is to prevail over that of the second defendant.

Mr Fagan who appears for the plaintiff, *submitted* that furthermore even if indeed there was a clause or a term in the contract between the parties that allowed the second defendant to cancel upon 30 days notice the second defendant had failed to prove that it had given such notice, by reason of the evidence which has been outlined above.

I may at this stage recall that it was accepted by counsel for both sides that the onus in regard to proving that there was no clause relating to the right of the second defendant to cancel upon 30 days notice, rested upon the plaintiff and that in regard to whether such notice had been given, the *onus rested on the second defendant*.

Mr Beaton accepted that on the second defendant's own version of events it did not purport to give a 30 days notice. He submitted however that the notice arose *ex lege* when on 12 July 2007

Mr Robert Spanjaard wrote to Mr Clifford Barnett. The difficulty that I have with this proposition is I cannot see how one can rely upon something upon which one did not intend to rely at the time. It seems to me to make no sense. Be that as it may, I have already found that on the probabilities there was no such clause entitling the second defendant to terminate on 30 days notice.

I simply record this latter aspect of the argument of *Mr Fagan* in order to make it clear that he was confident that he had a further string to his bow. The plaintiff is entitled to the damages in the sum as computed and as agreed between the parties, in the event that the defence relating to the 30 day notice of cancellation fail.

It is common cause that the summons was served on 29 October 2007 and that that is the date from which interest is *tempore morae* should run in regard to this sum. Insofar as costs is concerned, I do not think that the plaintiff can be criticised for being unduly cautious in joining the first and the second defendants. As I have already indicated the relationship between the two is so close that the opportunity for being confused as to with whom one is dealing can easily arise.

It certainly cannot be described as reckless conduct on the part of the plaintiff, to have joined the first defendant in the action and furthermore throughout one set of attorneys and counsel have been acting for the two defendants jointly. The first defendant has not been put to any needless or additional expense. Accordingly I can see no reason to make a cost order against the plaintiff, for having joined the

first defendant, although of course the order that I shall now make shall prevail against the second defendant only.

The following order is made: The second defendant is to pay the plaintiff:-

(i) The sum of R593 537.15 as or for damages arising from the breach of contract entered into between the parties on or about 13 April 2007.

(ii) Interest on the aforesaid sum calculated at the rate of 15.5% per annum, from 29 October 2007 to date of payment.

(iii) Costs of suit.

Counsel for the plaintiff Advocate E W Fagan (SC).

Attorneys for the plaintiff Bernadt Fukic Potash and Getz.

Counsel for the defendants Advocate R G Beaton.

Attorneys for the defendants Helena Strijdom.

Date of hearing 15 April 2009.

Date of judgment 16 April 2009.