

**IN THE SOUTH GAUTENG HIGH COURT  
JOHANNESBURG**

**CASE NO: 2009/19042**



**WHICHEVER IS NOT APPLICABLE**

- (1) REPORTABLE: YES/NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED:

A handwritten signature in black ink, appearing to be "M. H. S.", is written over the text of item (3) and extends into the right margin.

In the matter between:

**MERCHANT COMMERCIAL FINANCE (PTY) LTD**

Plaintiff

and

**KATANA FOODS CC**

Defendant

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JUDGMENT

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SATCHWELL J

## INTRODUCTION

1. Plaintiff was the victim of a scam perpetrated by its own client, Black Ginger 81 (Pty) Ltd, ("Black Ginger"), working in conjunction with a member and employee of defendant CC ("Nahman").
2. Plaintiff provides factoring services for a number of clients in terms whereof it opens an account for the client after performing appropriate credit checks on both client and its purchasers. Such account is then used by the client to obtain advance payment for goods sold and delivered by the client prior to payment being made and received by the ultimate purchaser. In the present case, Black Ginger was one such client and Defendant was one such purchaser. Over a period of several months, Black Ginger purported to have sold and delivered goods to defendant; Black Ginger presented invoices to plaintiff; plaintiff checked with defendant and was assured by its "buying officer", "sales representative and member"<sup>1</sup>, Nahman, that the goods had been delivered and received; plaintiff then made advance payment to Black Ginger.
3. During May 2006, plaintiff and Black Ginger concluded a factoring agreement<sup>2</sup> which provided for Black Ginger to sell all Black Ginger's *claims "in respect of transactions entered into by Black Ginger for the sale of goods and/or the provision of services to any customer in the ordinary course of Black Ginger's business"*. Plaintiff paid to Black Ginger the invoice price, less certain fees and discounts and thereafter *"Black Ginger's debtors would pay plaintiff directly in respect of any receivable so ceded to plaintiff in terms of the factoring agreement"*<sup>3</sup>. Defendant was purportedly one such "customer" of Black Ginger and was *"formally notified in writing of the existence of the factoring agreement between plaintiff and Black Ginger and that all debts owing by defendant to Black Ginger had been ceded to plaintiff"*<sup>4</sup>.
4. However, in the course of an application for the liquidation of defendant it was conceded that Black Ginger had never sold or delivered any goods to defendant, that Nahman was party to a deception of plaintiff in terms whereof Nahman

<sup>1</sup> Confirmatory affidavit to liquidation application.

<sup>2</sup> Annexure PC1 to the Particulars of Claim

<sup>3</sup> Paragraph 5.5 of particulars of claim.

<sup>4</sup> Paragraph 7 of particulars of claim.

misrepresented to plaintiff that goods had been received thereby causing payments to be made by plaintiff to Black Ginger:

*"[Defendant] had a longstanding business relationship with Nurasiaha. ....business with Nurasiaha was conducted between Black Ginger and the [defendant]... Nahman is not only a sales representative in the employ of the [defendant] but a member of the [defendant] holding a minority member's interest in the [defendant].*

*"During or about April 2006, Nursiash, on behalf of Black Ginger, approached Nahman and suggested to him that:*

*"Black Ginger would invoice the [defendant] for goods and which would not be delivered to the [defendant]. After the invoice aforesaid had been raised, the [defendant] would be issued with a credit note to the value of the invoice so raised by Black Ginger on the [defendant].*

*"During the period September 2006 to May 2007 the arrangement between Black Ginger and Nahman was conducted on the same basis in that Black Ginger would invoice the [defendant] with goods allegedly delivered to it and whereafter the [defendant] would be issued with a credit note by Black Ginger to the same value....*

*"As is evident from what is stated herein, no goods as reflected in [the] annexures] were ever sold and delivered by Black Ginger to the [defendant]...<sup>5</sup>"*

5. As I understand the scam, Black Ginger and Nahman had conspired to have Black Ginger offer fake invoices to plaintiff, Nahman would pretend that goods had been sold and delivered, plaintiff would make payment to Black Ginger, the same monies would then be recirculated from Black Ginger but purporting to come from defendant. The ultimate reward hoped to be reaped by this scam would presumably be advance payments by plaintiff to Black Ginger which would not be recirculated back to plaintiff.

#### CHECKING PROCEDURES

6. The procedures followed and the documentation created at plaintiff were established in evidence by the credit manager, Gail Bester ("Bester") and verification clerks, Caron Brink ("Brink") and Wendy van Wyk ("Van Wyk").
7. Black Ginger made application, credit checks were performed, an account was opened and a credit limit was approved and the factoring agreement concluded. The

<sup>5</sup> Extracts from paragraph 9 of the Liquidation Application.

proposed debtor, defendant was informed and advised all payments were to be paid directly to plaintiff. As and when Black Ginger would submit an invoice for factoring then *"each and every invoice would be verified... a check would be done with the customer [defendant] that the goods were delivered"*. The invoice and the offer contained therein would not be accepted until such time as the underlying transaction had been checked with the customer. On receipt of the invoice, Brink or Van Wyk, would telephone Nahman and confirm that defendant *"had received the goods in good order, not on consignment and that they knew they were to pay [plaintiff]"*. Once the verification had been telephonically concluded with Nahman, the terms of the transaction were also confirmed in writing with defendant.

8. Ten such transactions over a period of some eleven months were dealt with in evidence to show that plaintiff had been led to believe that goods had been received in good order by defendant from Black Ginger, that Black Ginger had been paid out and that plaintiff had, in turn, received payment from defendant.

#### THE ALTERNATIVE CLAIM

##### Invoices 105156, 105331, 105332

9. Plaintiff's alternative claim avers that Nahman had falsely represented to plaintiff over the period 19 June 2006 to 31 May 2007 that *"Black Ginger had in the normal course of its business sold and delivered goods on credit to defendant"*. As a result of such misrepresentations, plaintiff was *"induced to purchase the fictitious claims as set out in three invoices, to take cession of these fictitious claims and to pay Black Ginger the amount of R 404,557,26 in respect thereof.."*<sup>6</sup>
10. Three particular transactions were purportedly reflected on invoices 105156, 105331 and 105332, Black Ginger approached plaintiff for early or advance payment based on the representation that it, and therefore plaintiff, was entitled to and expected to receive payment from defendant in respect of certain invoices.
11. Invoice 105156 dated 12<sup>th</sup> April was issued by Black Ginger to defendant. The invoice reflects the usual advice that the account had been ceded to plaintiff. The invoice reflects thereon that the goods were received by defendant in good order on 30<sup>th</sup> April and signed by Nahman. Records indicate that, on 3<sup>rd</sup> May, Brink spoke to Nahman

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<sup>6</sup> Paragraph 16.5 of particulars of claim.

who “*confd all goods recvd in order on inv 105156*”<sup>7</sup>. That verbal advice from Nahman was confirmed in the usual letter<sup>8</sup> sent by plaintiff.

12. Invoices 105331 and 105332 were both dated 24<sup>th</sup> May from Black Ginger to defendant. The invoices reflect the usual advice that the account had been ceded to plaintiff. The invoices reflect thereon that the goods were received by defendant in good order on 29<sup>th</sup> May and signed by Nahman. A telephone call of 31<sup>st</sup> May was made by Van Wyk and Nahman returned her call on that day to “*conf gds del on above invs*”<sup>9</sup>.
13. In the case of all three of these invoices, the Schedule of Invoices’ indicates that each invoice was ‘offered’ by defendant to plaintiff with the following guarantee – “*in relation to the said invoices the warranties contained in the Factoring Agreement have been complied with and in particular the goods and/or services have been delivered and/or performed prior to the data hereof hereof and all invoices bear the notice of cession*”.<sup>10</sup> Each one of these schedule records that it has been checked and ‘accepted’ by plaintiff.

#### Authorisation prior to verification

14. In the course of cross-examination pertaining to the client statements, it emerged that Preggy ( who was the conduit for Black Ginger) had made a request for early payouts. These requests were not made to Bester and were apparently taken to the directors. It appeared that the financial manager, Craig Nain, and/or the managing director, had authorized<sup>11</sup> payment in respect of invoice 105156. Further, it appeared that the financial manager and/or the managing director had authorised<sup>12</sup> payment in respect of invoices 105331 and 105332.
15. The factoring schedule for the week of 2<sup>nd</sup> May indicates that the value of this invoice was processed and effectively ‘credited’ to Black Ginger’s account<sup>13</sup>. On the strength of this schedule a payout was made to Black Ginger in respect of this invoice – one payment of R 650 000 included invoice 105156<sup>14</sup>. The factoring schedule for the week of 6<sup>th</sup> June indicate that the values of these two invoices were processed and

<sup>7</sup> Page 127 of trial bundle.

<sup>8</sup> Page 129 of trial bundle. The date is incorrect but this was explained and nothing turns on it.

<sup>9</sup> Page 127 of the trial bundle.

<sup>10</sup> Pages 137 and 144 of the trial bundle.

<sup>11</sup> On page 139 in respect of the schedule 89 which refers to invoice 105156.

<sup>12</sup> Pages 147 and 150 authorise the daily payouts which cover these invoices.

<sup>13</sup> Pages 138 of the trial bundle.

<sup>14</sup> Page 140 of the trial bundle.

effectively 'credited' to Black Ginger's account<sup>15</sup>. On the strength of these schedules payouts were made to Black Ginger in respect of these invoices - one payment of R 186 000 included invoice 105331<sup>16</sup> and one payment of R 165 000 included invoice 105332<sup>17</sup>.

16. It was pointed out by counsel for defendant that these three payments were each authorized **before** the required and customary verification was performed by the verification clerks. In the case of invoice 105156 the payment on page 139 was authorized on 2<sup>nd</sup> May<sup>18</sup> whereas the verification was only performed by Brink on 3<sup>rd</sup> May. In the case of invoices 105331 and 105332 the payment on page 147 was authorized on 25<sup>th</sup> May whereas the verification was only performed by Van Wyk on 31<sup>st</sup> May.
17. In other words, it appears that Black Ginger made an approach to defendant's management/directors requesting advances and being granted such advances against certain schedules prior to any check being performed by the verification clerks that deliveries had been made or received by defendant. This state of affairs was not in dispute.

'Course of Conduct'

18. Counsel for plaintiff argued that the court should uphold plaintiff's alternative claim based on the 'course of conduct' established and developed by both Black Ginger and defendant over a period of time which had *"lulled plaintiff into a sense of false security"*.
19. I queried in argument that the verification process appeared to be entirely irrelevant to these three payments and that, in other words, Nahman had had no opportunity to make any misrepresentations in respect of these invoices and these payments. Counsel submitted that there had been a series of misrepresentations made over time by both Black Ginger and Nahman which induced plaintiff to make these payouts to which Black Ginger was certainly never entitled. Payment was made before verification simply because plaintiff was "under the impression" that Black Ginger and defendant were acting "in the ordinary course of business".

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<sup>15</sup> Page 145 of the trial bundle.

<sup>16</sup> Page 145 of trial bundle.

<sup>17</sup> Page 150 of the trial bundle.

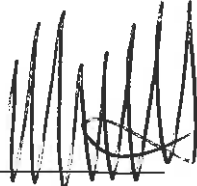
<sup>18</sup> See also page 141.

20. I accept that Black Ginger and Nahman, sales representative and a member of defendant, had created a scam – there was a series of misrepresentations which were made intentionally and with knowledge of their untruth and that such misrepresentations were made in order to induce plaintiff to make a series of payments in the period preceding these three invoices.
21. However, in the case of these three invoices Nahman made no misrepresentations prior to payment. He did so after payment. It was not his specific misrepresentations on these particular dates which induced the payments. It was the assessment made by plaintiff's financial manager and managing director that advance payments could be made to Black Ginger before receiving any information as to purported receipt of delivery by Nahman.
22. The difficulty with this alternative claim is that I have not heard any evidence from those who were involved in the decision to make the advance payments. I do not know what was said by Preggy on behalf of Black Ginger (if indeed, it was Preggy who made the request for special treatment) to the decision-makers – whether promises were made, pleas advanced, undertakings given. I do not know who made the decisions. I do not know who held discussions, what documents were considered, what factors influenced the decision-makers to exercise their discretion in a particular manner. I have not heard a decision-maker aver that he or she was "lulled into a sense of false security". I do not know what weight was given to the fact that Black Ginger was over its credit limit on one occasion. I do not know if such advances are frequently or infrequently made and the basis upon which such advances are granted.
23. I can speculate that the financial records all indicate that Black Ginger and defendant had created a "façade of ordinary business" as submitted by plaintiff's counsel and that this played a part in the decision-makers, whether financial manager or managing director or both, granting a favourable answer on apparently three occasions to the special request by Preggy (if it was he) on behalf of Black Ginger. The probabilities certainly suggest this to be the case.
24. However, it is clear that the decisions to make the payments were not in the 'ordinary course of business'. The payments were authorized prior to verifications being done as required and the payments were made earlier than would normally have been the case. These were special payments presumably made as a result of a special request and whatever considerations impacted upon the minds of those who made the decisions to respond favourably and out of the ordinary to the special requests are unknown to me.

CONCLUSION

25. I cannot find that Nahman induced defendant to make the payments on these three occasions. He made no misrepresentations prior to authorization and payment. He certainly made a series of misrepresentations in respect of other transactions. But there is no evidence before me of the role played by those misrepresentations in the decisions made by management of plaintiff. They did not give evidence. They are the only persons who know whether or not Nahman's earlier misrepresentations created a façade of commercial endeavor, business probity and financial reliability which induced the directors who made decisions so to do.
26. I have not found against plaintiff in this matter. I am finding that plaintiff has failed to discharge the onus resting upon it. Accordingly, I am granting absolution from the instance.
27. Defendants alternative plea was a denial that Nahman *"had defendants authority to make such representation on behalf of defendant or that he did so in the course and scope of his employment with defendant."*<sup>19</sup>. By reason of my finding on the main issue, I do not need to determine defendant's liability (if any) for Nahman's misrepresentations.
28. In the result, an order is made as follows:
- a. Absolution from the instance is granted.
  - b. Plaintiff is to pay defendant's costs including the wasted costs of the earlier postponement.

DATED AT JOHANNESBURG ON THIS DAY THE 25<sup>TH</sup> NOVEMBER 2013.



K. SATCHWELL

Counsel for Plaintiff: Adv. F. Van Zyl SC

<sup>19</sup> Paragraph 10 of defendant's plea.



Counsel for the Defendant: Adv. H. A. Van der Merwe

Attorneys for Plaintiff: Werksmans Attorneys

Attorneys for Defendant: Jeff Donenber & Co

Date of hearing: 31<sup>st</sup> November 2013

Date of Judgment: 28<sup>th</sup> November 2013