REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

CASE NO: 26820/04

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

12/11/15
DATE

SIGNATURE

In the matter between

RHAM EQUIPMENT **PLAINTIFF**

and

SAMANCOR LTD **DEFENDANT**

J U D G M E N T

VICTOR J:

[1] The plaintiff sues for damages of R5 694 734 arising out of an agreement of sale, alternatively a lease in respect of certain equipment

used by the defendant at its Millsell mine.

Relevant aspects of the pleadings

[2] The plaintiff pleads that in September 2000 the parties concluded a partly oral and partly written agreement of sale alternatively lease in respect of certain mine equipment being long haul dumpers used underground primarily. The material terms of the agreement were that the plaintiff would manufacture and deliver to the defendant eight long haul dumpers and three utility vehicles. Plaintiff would supply and deliver one lot of spares for the machines and the defendant would pay the sum of R185 000 per month plus vat for sixty months, commencing on the first day of the month after the machine and spares had been delivered.

[3] The written portions of the agreement were attached to the particulars of claim. These are contained in two letters. The first letter is POC1, dated 31 July 2000 and deals with a cost breakdown for the maintenance component of the equipment, the capital price for tyres and oil lubrications. All these would be increased over time and the equipment operators would be trained by the plaintiff. This was one option.

[4] The proposal also has the following heading: '**CAPITAL-LABOUR- SPARES**'. The capital portion refers to the price of the equipment and spares and repayment is fixed at 12% per annum. There is a labour component and spares are referred to as consumables. The second aspect again refers to capital, labour, oil, grease, spares and tyres and describes the five year contract in those terms.

[5] The plaintiff also relies on the second letter annexure PO2 to the particulars of claim, in terms whereof the defendant, then represented by Mr Niemand, refers to a telephone conversation and confirms the order for eight LHD loaders and three utility vehicles. The plaintiff duly supplied and delivered the machines. The plaintiff contended that the defendant accepted the terms of the agreement. It accepted the equipment and made monthly payments in the amount of R185 000 plus VAT for the period June 2001 until September 2002 and utilised the machines.

[6] The defendant pleads that the agreement was a full maintenance lease in terms of which it would lease the above equipment and the plaintiff would maintain the fleet, provide labour, lubricants, spares and tyres. The Plaintiff would also make the machines available 85% of production time with one machine being spare and on standby. The machines would be utilised 22 days a month, 16 hours a day over 2 shifts and there would be a monthly payment of R360 000 per month. On 1 November 2002 the parties orally varied the contract and defendant took over cost of replacing tyres and plaintiff's artisans would continue to fit replacement tyres. The plaintiff would increase permanent staff and would fit lift cylinders on all machines and would replace bucket tips on the equipment. The issue of whether damages to the equipment was caused by defendant's operators would be mutually agreed between the parties. When the above items were fitted the rental would be R512 000 per month.

[7] It is defendant's case that the plaintiff breached the above terms and despite being given an opportunity failed to remedy the breaches. The defendant claims that it was therefore justified in reducing the monthly payment by R50 000.

[8] There was general discord on the part of both parties about the

agreement. On 13 December 2002 the plaintiff took away the keys of the equipment and in that way forced the defendant into a situation where the machinery could not be utilised and that part of the mining operation ceased.

[9] On 13 December 2002 the plaintiff wrote a letter of general dissatisfaction to the defendant and in the post script added the following

> 'In view of Mr Wagner's attitude towards my employees on site during the last two days and threats to further reduce payments to Rham Equipment, I have issued instructions to stop our machines immediately. I am fully aware of Mr Wagner's intention to frustrate me to the point of taking this rash step, in order to motivate his desired choice of machine, but he leaves me with no choice."

[10] The stopping of the machines and the removal of the keys resulted in the defendant accepting that conduct as a repudiation and within four hours the defendant cancelled the agreement in writing. The defendant's letter confirmed the repudiation, alternatively, breach of the contract, as the plaintiff prevented the defendant from using the machines and removed the keys. The defendant cancelled the agreement as found in annexure POC3. It is signed by Mr Wagner, the general manager and states the following:

> 'We regard your fax as a repudiation of any agreement that may have existed with Western Chrome Mines, which repudiation we hereby accept and record that any agreement that may have existed between our organisations is now terminated. As a result of the aforesaid, we hereby call on you to remove all your equipment from the premises within three days, from 17 December 2002, failing which, we will do so at your own

cost. We reserve our right to claim damages."

[11] Mr Alcaraz of the plaintiff had the weekend to consider the matter and wrote a letter dated 17 December 2002, in terms of which Mr Alcaraz now denies that he stopped the workers from using the equipment by removing the keys and that there was no intention to repudiate the contract. He says that he withdrew the machines from working because of the conditions of the mine face in the area in which the machines were operating. This evidence contradicted the contents of his letter. The working conditions have been a constant refrain in the evidence of Mr Alcaraz throughout, namely that the machines had to run at levels which they were not designed for. In particular, in this letter of 17 December 2002 reference is made to the lack of air which resulted in overheating and too much dust at the underground surface where these machines had to operate. This had not been pleaded and I disallowed evidence on this.

[12] Mr Alcaraz of the plaintiff states in the same letter that at 8h30 Monday morning he wanted his workers to go down the mine and to continue working. Mr Daniels, on behalf of the defendant, prevented the artisans from going to the workplace. Apparently Mr Daniels, so Mr Alcaraz writes, wanted to know why they should go underground because there was no longer any need for them to work on the machines.

[13] Mr Alcaraz testified and was cross-examined extensively. There was a slight language problem. However, that language problem did not detract from the nature, ambit and interpretation of how he saw the contract and the events that I have referred to in this trial. He states in that same letter that he wishes to reiterate that Rham had not repudiated the agreement, nor is in any breach of the agreement with the defendant and should Mr Wagner proceed to cancel the agreement and have the machines removed from site, these instructions must be put in writing, so that the necessary arrangements

can be made. Such instruction was received in writing.

Was the agreement one of sale or an indivisible maintenance agreement?

[14] The defendant pleads that the agreement was an indivisible maintenance agreement. The plaintiff has pleaded a sale or lease an aspect of importance in assessing the above issue. The defendant pleaded that the equipment was not sold and in this regard, the terms of an oral maintenance lease were specifically pleaded. Mr Alcaraz, admitted all the terms except denied that the agreement was an indivisible full maintenance agreement but contended that the agreement was one of sale and a standalone maintenance lease. This distinction was raised in evidence for the first time. The standalone maintenance lease was not specifically pleaded by the plaintiff. However, on behalf of the plaintiff, it was submitted that this did not matter as a sale and lease can be embodied in the same document. One could infer that from the wording.

[15] Mr Alacaraz having admitted all the terms save for the indivisible lease agreement by way of example admitted that the defendant would use the machines for twenty two days a months, sixteen hours over two shifts a day at the Millsell mine. The defendant would supply drivers to operate the machines and that the rental would be R360 000 per month and this was confirmed in the letter date 7 March 2001 and on 1 November 2001, there was an oral variation where the defendant was allowed to use the machines for an additional four hours a day and the total rental was increased to R448 101.37.

[16] Mr Alcarz admitted that the agreement was varied orally on 22 March 2002, in terms of which the defendant would take over the costs of tyres to

be fitted to the equipment and that the plaintiff's artisans would continue to fit replacement tyres on the vehicle. There would be a foreman. The plaintiff would fit lift cylinders on all machines. They would replace the bucket tips on the LHDs and there would be a procedure if there was damage and of course, that procedure would incorporate both the employees of the plaintiff and the defendant, to determine such damage and that it would be on a case by case basis and the new rental which was agreed to, was R512 000 per month.

[17] It is of importance to note that the essential issue on the first part of this trial is whether there was a sale or a lease agreement. If there is a lease agreement in place, then the question of repudiation is relevant. However, if it is simply a sale agreement, then the question of whether the terms of the sale agreement were complied with arises.

Failure to call witnesses

[19] A further feature is that the defendant did not call any witnesses and the plaintiff contends that the failure to call these witnesses really is fatal to the defendant's case and proves that the transaction was a sale and not an indivisible maintenance agreement as Mr Niemand and Mr Viljoen of the defendant were available to testify and did not. This requires closer examination. The plaintiff relies on a number of letters to prove that the agreement was a sale. Reference was made to letters leading up to the conclusion of the contract. The first letter is 20 June 2000 and that marks the opening of the negotiation between the parties. The negotiations became a lot firmer by 31 July 2000, where again there is no distinction made between whether the contract was one of sale or lease. However, as matters developed, it would appear that the plaintiff needed to raise finance with the bank and a letter dated 22 September 2000 is written where the defendant confirms the order. There is no reference to a sale or lease of equipment.

The letter of cancellation dated 13 December 2002 calls on the plaintiff to remove its equipment. There is no response from the plaintiff contradicting that fact of the equipment is the defendant's equipment. The letter of demand dated 3 January 2003 from the plaintiff's attorney raises for the first time the question of the sale of the equipment. It was put in cross examination that at no stage did it agree that the contract would be one of sale.

[20] Mr Alcaraz on behalf of the plaintiff relied heavily on the fact that the defendant did not want this equipment to be reflected in its asset register and therefore, the plaintiff contends that it was for the convenience of the defendant, that these documents leading up to the conclusion of the agreement, were not reflected as a sale.

[21] In analysing the various proposals made by the plaintiff, it is necessary to analyse how the offer was set out by the plaintiff. Quite clearly, in one of the proposals, the nature of the contract was referred to as rental per month and then, although there is reference to capital fixed, the whole breakdown is really referred to as a rental and this has carried through for the five years period. A further letter of importance is that of 7 March 2001, written by Mr Alcaraz of the plaintiff where he refers to the deal as a rental contract and throughout that paragraph there is reference to rental charges and acceptance of the order on a rental basis and in particular, the equipment on a rental basis. In the illustrative proposals, again full reference is made to aspects of rental and not sale.

[22] The plaintiff submits that, in the absence of the defendant calling any witnesses, Mr Alcaraz's reference to the agreement as being one of sale is the only version before the court and therefore the court must accept that it was indeed one of sale and not rental. However, on a close analysis of all the documentation preceding the agreement and subsequent to the

agreement, it is quite clear the objectively ascertainable facts show the intention of the parties was that of rental.

[23] Mr Alcaraz's conduct after terminating the use of the machinery, must also be analysed. If the plaintiff indeed understood the agreement to be one of sale, it is incomprehensible as to why the plaintiff, after the termination of the agreement, would have offered to sell the equipment back to the defendant and why Mr Alcaraz did not simply, when Mr Wagner told him to come and fetch his equipment, say: 'No, I have sold the equipment to you and therefore, I am not coming to fetch the equipment. You have already purchased it and you are obliged to pay the balance of the purchase price.' This would have clarified the question of sale and not rental. The various minutes also suggest that, in complaining about the various operational issues no issue of sale emerged. In addition if regard be had to the invoices issued by the plaintiff at the material time, the invoice is also headed 'contract maintenance' and the entire amount are ranging from R360 000 per month to finally R512 000 per month, each of those invoices refers to a rental agreement.

[24] In *South African Post office v deLacy and another* 2009 (5) SA 255 (SCA) Nugent JA at para 38 in relation to the failure to call a witness stated :

> ' But it seems that what counsel had in mind is that we should find that, because the appellant failed to call witnesses who were in a position to disprove the accusations of dishonesty, we should find the accusations to have been proved. I think it bears repeating that the respondents bore the onus of proving their case and it was not incumbent upon the appellant to present witnesses for cross-examination merely because they happened to be on hand. When there is evidence properly before a court that on the face of it establishes a particular fact, it might well be inferred from the failure to call a witness in rebuttal that the evidence is not capable of being challenged, but that is another matter.'

[25] In *Van der Spuy v Minister of Correctional Services* 2004 (2) SA 463 (SE) Leach J as he then was stated:

> 'What is clear, however, is that an inference adverse to the party who fails to call a material witness can only be drawn where that which it is sought to infer can, in truth, be regarded as an inference and not mere speculation. There can, of course, be no inference unless there are objective facts from which to infer the other facts which it is sought to establish, but, if there are no positive facts proved from which inference can be made, the method of inference fails and one is left with speculation or conjecture '.

[26] It was therefore unnecessary for the defendant to call witnesses to assist the plaintiff in discharging the onus that it bore. The parties urged upon the court to find for their respective interpretations of the agreement. It is necessary to consider the evidence as a whole and in my view the contract cannot be compartmentalised in the way that the plaintiff contends for. In particular, it did not plead a standalone agreement. I have also been referred by the plaintiff to various cases, for example *Nash v Golden Dumps Pty Ltd* 1985 (3) SA 1 (AD), where an employment contract and an option to purchase shares was divisible and one could, despite the wording of the agreement, find that the employment aspect of the agreement was separate from the option to purchase. This principle is followed through in another case of *Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA) 287. I was referred to paragraph 10 and I quote:

> "At the outset it must be remembered that there is a distinction between the severance of portion of a contract, e.g. on the grounds of vagueness, or illegality and recognising that a contract may contain several distinct and separate agreements divisible from each other."

[27] I am mindful of those two cases and the analysis found in those cases. However, on a proper analysis of the contract between the parties, I find based on the conspectus of all the evidence that there was an indivisible contract of maintenance which the parties concluded.

[27] In any event, throughout the evidence of Mr Alcaraz and in the documentation, Mr Alcaraz relied on a gentleman's agreement. In other words, when it suited him, he relied on the terms of the letters, but when it did not suit him, he would just say: 'Well, there was a gentleman's agreement and that it was really a very flexible agreement'. I was not persuaded that this was indeed a sale agreement, for the reasons already stated.

Repudiation

[28] Once I find that it is a rental agreement, the question of repudiation is relevant. In this regard, I was referred to the case of *Schlinkman v Van der Walt 1947 (2) SA 900 (E)* and Mr Suttner SC urged upon the court to really regard the letter of cancellation by Mr Alcaraz, as a mere spontaneous reaction to the fact that the defendant had reduced the monthly amount by R50 000. However, the postscript is clear in its terms and I do not regard that as an emotional fit of pique. Mr Alcaraz did intend to refuse use of the equipment.

[29] In the case of *Schlinkman v Van der Walt* supra the assessment of the repudiation is the determination of the intention of the party alleged to have repudiated. The true question is whether the acts or conduct of the party evinces an intention to no longer be bound by the contract. On 13 December 2002 Mr Alcaraz certainly did not intend to be bound by the contract. He obviously had remorse over the weekend and by 17 December

2002 he refuted the fact that he had repudiated the agreement.

[30] In applying that principle in this case the question of repudiation must of course be applied in a just and reasonable manner. It was submitted on behalf of the plaintiff that the contract was ongoing for some five years and it could hardly be terminated within four hours of Mr Alcaraz switching off his machine. The parties quite clearly should have negotiated further and in doing so, they would possibly have come to a different conclusion. The case law indicates that in every case, the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts, assertions and the intention indicated by such acts, words and the deliberation or otherwise with which they are committed, or uttered and the general circumstances of the case.

[31] In this case, the equipment was used in an operating mine. The defendant was running many shifts and the plaintiff could have had no doubt in his mind that by switching off the machines and taking away the keys, the defendant would not have been able to continue any mining operations for the rest of the weekend, or indeed, in perpetuity, because nowhere in Mr Alcaraz's correspondence does he say that he is switching the machines off for the weekend simply for maintenance purposes. He tried to claim that after the event. He simply switched them off and the defendant was left with no indication as to how they would continue the mining on the following day.

[32] The defendant has submitted that the pique of temper displayed by Mr Alcaraz was really because the defendant had failed to accept the counter proposal about the ninth machine. It is common cause that on the day of cancellation, or repudiation, only five of the eight machines were working. It is also common cause that there was never 85% availability of the machines. It was also common cause that the machines could simply not

do the work that was required of them and it is not necessary for the purposes of evaluating the justifiability of the repudiation on the part of the plaintiff, whether it was justified, or not. It is not necessary to go into the question of the alleged abuse of their machinery by the defendant. It was not pleaded. What was absolutely clear that there always had to be a spare machine. The eighth machine had to be spare and on standby. It was undisputed that, for many months, that was not the case.

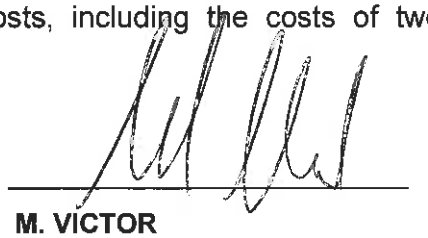
[33] In the cases of *Inrybelange Edms Bpk v Pretorius* 1966 (2) SA 416(A) at 427, *Metalmil Pty Ltd v AECI Explosives and Chemicals Ltd 1994 (3) SA 673 (A)* and *Datacolor International Pty Ltd v Intamarket Pty Ltd* 2001 (2) SA 284 (SCA) 295, the principles make it quite clear that repudiation is a matter of perception and it must be judged objectively and not subjectively. The test is whether a notional reasonable person would conclude that there was not proper performance of the agreement and in my view the defendant has demonstrated unequivocally that, running a mine where it is necessary for a number of shifts to be worked albeit over the weekend, only five machines were operational on that day and there was no suggestion prior to the switching off of the machines, that those particular machines required maintenance.

[34] Therefore, I do not accept Mr Alcaraz's evidence that he switched off the machines simply to attend to the maintenance. There is the other aspect and that is, he said his workers were prevented from going down the mine on the Saturday and in none of the correspondence that emanated from Mr Alcaraz at the time, was there any reference to his workers being prevented on the Saturday from going to do maintenance work. Instead, the only objective written evidence is the letter from Mr Alcaraz that the workers were prevented on the Tuesday. By then, the defendant obviously had to make a number of arrangements to keep its mining operations in place and it was too late for Mr Alcaraz to change his mind.

34 In the result, I find that the repudiation by the plaintiff was not justified and the defendant was justified in cancelling the contract.

I make the following order:

The plaintiff's action is dismissed with costs, including the costs of two counsel.



M. VICTOR
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

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Date of hearing:	2015-01-28
Date of judgment:	2015-02-05