**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 19/39565**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **2 SEPTEMBER 2020**

2/9/20

In the matter between:

| | |
|---|---|
| **KHOZA, R B MAGUDU** | First Applicant |
| **ADI INVESTMENT (PTY) LTD** | Second Applicant |
| **and** | |
| **BAKSONS (PTY) LTD t/a BAKOS BROTHERS (in business rescue)** | First Respondent |
| **RAUTENBACH, GEORGE FREDERICK N.O.** | Second Respondent |
| **SMUTS, ADRIAAN PETRUS N.O.** | Third Respondent |

**JUDGMENT (heard 31 August 2020 remotely on Zoom platform)**

**FA SNYCKERS AJ:**

**INTRODUCTION**

1 This matter concerns the sale of goods, namely furniture and curtains, by Bakos Brothers to ADI (the second applicant company).

2 It is common cause that ADI placed an order with Bakos Brothers for the sale and delivery to it of furniture, to furnish the residence of the Khoza couple, for a purchase price of R2 694 000. There is a discrepancy in the papers on what is admitted and what is alleged concerning whether this occurred in November 2016 or in 2017. Nothing rides on this difference. The evidence of payments confirms the furniture order was placed in 2016.

3 One is told that Mr Khoza, for ADI, signed Bakos Brothers' standard terms and conditions in November 2017 and these are attached to the answering affidavit. The quotation (or order) in relation to this furniture sale does not form part of the papers.

4 In September 2018, Mr Bakos of Bakos Brothers advised Mr Khoza for ADI[1] by means of a letter as follows: *"your furniture order has been completed and ready for delivery and installation. The outstanding balance of R844 976.33 is due as indicated in the reconciliation below"*. The reconciliation shows amounts in

[1] I refer in this judgment to interactions between ADI and Bakos Brothers without drawing distinctions between the Khozas and ADI, or between various representatives of Bakos Brothers and Bakos Brothers itself.

respect of various furniture items and a delivery and installation fee all totalling the amount of R2 694 976.33 and payments received totalling R1 850 000 leaving a balance due before delivery of R844 976.33.

5 On 1 October 2018 Mr Bakos sent an email to Mr Khoza to which was attached *"Quote for Phase 2 of your house"*. The email *inter alia* advised as follows:

> *"We need to get your order in so we can make delivery this year still".*

It also stated the following:

> *"We will need a 50% deposit to start your order (R1 595 000). Also could we please ask for balance payment on your Phase 1 order (R844 976)".*

6 There was, accordingly, before the balance of the purchase price in respect of the furniture order had been paid, such as to enable delivery as intimated in the 19 September communication, a further order in relation to curtains in respect of which a 50% deposit was required *"to start your order"*.

7 This requirement of paying a 50% deposit *"to start the order"* echoes the standard terms which require the payment of a 50% deposit upon acceptance of the quote and which state in clause 3.2 as follows:

> *"We will not process your order until we have received a 50% deposit, a signed copy of the quote and a signed agreement which can be emailed, faxed or delivered to the branch".*

And in clause 3.3 the following:

> *"The prices quoted on the quotation are valid for 30 days from the date of quotation only and will fall away if you do not accept it and pay the deposit".*

8 The quotation for the curtains was amended on 12 November and signed by Mrs Khoza on 15 November 2011. The next day an amount of R300 000 was paid. After the 1 October letter with the quote for the curtains, amounts totalling R800 000 were paid. In total ADI paid Bakos Brothers an amount of R2 650 000 up to and including February of 2019.

9 In March of 2019, a statement was rendered embodying a reconciliation of amounts charged and paid to date. The amounts charged were listed under items headed *"Orders with Bakos Brothers"* and contained the same items that had appeared on the furniture statement on the 19th of September, as well as the amount quoted on 12 November 2018 for curtains, and then an additional amount (the precise categorisation of which was never made clear and does not emerge clearly from the papers) of R529 380 designated as *"media room"*. In the answering papers Bakos Brothers refers to this statement as setting out items for the furniture and the curtaining, but this item of R529 380 for *"media room"* is an item additional to both of these categories.

10 Be that as it may, the total for the orders including the delivery and installation fee that had been mentioned in the September statement came to R5 367 455.23 and payments up to February 2019 of R2 650 000 were reflected leaving a *"balance due before delivery of R2 717 455.23"*.

**THE CONTENDING CASES**

11 In the founding papers ADI's case was that, after receipt of the communication in September 2019, advising of an outstanding balance of just under R845 000 with respect to the furniture order, ADI paid the outstanding amount in full by December 2018. This was also the attitude adopted on behalf of ADI in

correspondence from its attorneys with attorneys representing Bakos Brothers early in 2019.

12 However, the schedule of payments attached by ADI in reply and the reconciliation of payments reflected in the statement in March of 2019 both confirmed, and it was common cause before me, that the total payments made by ADI to Bakos Brothers with respect to all orders relating to this house amounted to no more than R2 650 000, leaving a balance on the original purchase price of the furniture of R44 976.33.

13 In May 2019 Bakos Brothers went into business rescue. A defence invoking a dispute resolution mechanism contained in the business rescue plan was, for various reasons, and on the facts it appeared to me properly, abandoned by Bakos Brothers before the hearing, and nothing need be said about it in this judgment.

14 It is clear from exchanges of correspondence between attorneys acting for ADI and attorneys acting for the business rescue practitioners of Bakos Brothers in June 2019 that the contending positions adopted by the parties were the following: ADI was contending that it had paid for the furniture and that it was entitled to delivery of the furniture and that the order in relation to the curtains was a separate order in relation to which no payments had yet been made. Bakos Brothers was contending that there was a single *"project"* that could not be divided into two separate sale transactions, and that nothing was due for delivery unless and until the full purchase price for the furniture and curtains had been paid. In addition, amounts of interest and storage fees were now being levied that were added to the claimed total balance outstanding. The

standard terms make provision for the payment of storage fees of 5% of the total purchase price per month from 30 days after the so-called *"notification effective date,"* being the date on which notification is given that the goods are ready. The terms also make provision for the levying of interest at 3% above commercial bank prime rates on payments outstanding after 7 days after the notification effective date.

15 The main dispute in this matter was, accordingly, whether the furniture order and the curtain order were sufficiently separate for the purposes of the standard terms to entitle ADI to delivery of the furniture after an amount totalling the purchase price of the furniture had been paid or whether, as contended for by Bakos Brothers, there was only one consolidated *"project"* on a single *"account"* in respect of which full payment needed to be made before any delivery could be effected.

16 Matters came to a head when ADI declined to pay an outstanding claimed balance of over R2 700 000 on the total project to realise delivery of furniture and curtains and when, after demand for such payment was not met, Bakos Brothers on 29 October 2019 through its attorneys gave notification that it cancelled *"any and all orders placed with the company in respect of the furniture items and the curtain items which were, at all relevant times as understood between the parties, dealt with as one and the same project"*. The communication proceeded to threaten to sell the furniture and curtain items to mitigate *"ongoing damages suffered by the company"*.

17 ADI then adopted the attitude that the curtain order had failed for want of fulfilment of a suspensive condition, namely payment of the 50% deposit in

terms of the standard terms (by then curtain hardware such as rails had been installed in the house) and that ADI was entitled to specific performance of delivery of the furniture items, having paid the full purchase price in relation to the furniture. Given the threat to alienate the furniture, ADI instituted urgent proceedings to restrain such alienation pending the outcome of this application. Bakos Brothers formally abided in the outcome of the urgent application, without at any stage undertaking not to proceed with the threatened sale and making it clear on record that it was not giving any consent or undertakings.

18 The interim interdict was granted.

**ASSESSMENT**

19 A consideration of the papers and the communications between the parties makes it clear to me that the contention on the part of Bakos Brothers, that the furniture order and the curtain order had to be combined into a single order for the purposes of the standard terms, such that no item could be delivered until all items had to be paid for, was opportunistic and wrong.

20 The fact that a reconciliation appeared on a statement in a single account is insufficient to undo the clear contracting up to and including the 1st of October of 2018, in terms of which it was undeniable that upon payment of the balance of the purchase price for the furniture order, delivery of the furniture order would be effected irrespective of the fate of the curtain order and whether it proceeded, or was paid for partly or in full.

21 In the answering affidavit one reads (in paragraph 22) the following:

> *"The applicants contend that the furniture and curtaining constitute separate transactions. The applicants know this contention to be incorrect. In support hereof, I refer to correspondence, in the form of Whatsapp messages between the first applicant and representatives of the first respondent, copies of which are attached hereto marked 'GRA4.1' and 'GRA4.2' respectively".*

22 The Whatsapp exchanges certainly do not indicate to me that the furniture order and the curtain order had now been agreed to become one order such that payment for the full amount was required before any items could be delivered. It is true that, as was to be expected, there would be talk of a total current outstanding balance and payments that had been made, but that is neutral as to whether one is dealing with severable transactions and whether anything had happened drastically to alter the character of the furniture sale as confirmed in writing up to and including 1 October 2018.

23 In fact, a Whatsapp message on the 25th of February from Ryan Bakos to Mr Khoza, if anything, confirmed the understanding of separate orders with separate delivery dates with respect to payments of their separate balances as follows:

> *"We are starting yr curtain installation today. We are only going to do the rails and hardware, we will only hang the curtains when you live in. Your house isn't ready yet and we are worried about dirt and damage. Could you let me know when we can expect payment? Also the balance for the rest of your order please … as most of your goods are ready for delivery."*

24 Counsel for Bakos Brothers insisted that the following evidence in the answering affidavit at the very least created a factual dispute about whether there was an agreement to turn the two orders into a single order which, on the principles

applicable to motion proceedings, could not be decided against Bakos Brothers as respondent – I quote from paragraph 51.2 to 51.4 of the answering affidavit:

> *"51.2 I reiterate that the curtaining 'was not a separate transaction, but was a separate order forming part of the same project as the furniture'.*
>
> *51.3 At the time that the first quotation in respect of the curtain items was sent to the first applicant on 1 October 2018, it was envisaged that the financial aspects in respect of the two phases would be dealt with separately.*
>
> *51.4 By the time that the first respondent sent the revised quotation for the curtaining, Bakos agreed with the first applicant that the charges for both phases be consolidated. Thus that the totals (purchase prices and deposits paid) be consolidated. This is however, neither here nor there, as the curtain 'was accepted on the 15th of November 2018 and a deposit of R300 000 paid on the 16th of November 2018."*

25 The above hardly amounts to a forthright allegation that there was an agreement between the parties that what undeniably were two separate orders, the first of which was capable of finalisation by way of payment and delivery, were converted into a single order, in terms of which there would be no entitlement to delivery until the last cent had been paid. The most these allegations amount to is an understanding or an agreement that there would be payment administered on one account, which is not strange. The guarded language relating to separate orders on the same *"project"* appears deliberately chosen, and these allegations cannot, in my view, suffice to create a dispute of fact as to the existence of an agreement that the character of the furniture order had altered into forming part of an indivisible sale transaction between the 1st of October 2018 and March 2019.

26 It may be noted that Myrtle le Roux, who was the sales consultant acting for Bakos Brothers and the contact person, apart from Mr Bakos himself, who dealt with Mr Khoza in relation to these sales, submitted a confirmatory affidavit for Mr Khoza in which she confirmed that it had always been her understanding that the two transactions were separate transactions. This by itself is not decisive and, if there were a true factual dispute on the papers, would be insufficient to have an applicant's version prevail over that of a respondent. But in circumstances where the material in the papers favouring a single transaction over separate transactions is so thin, such evidence is not without some significance.

**ALLOCATION OR APPROPRIATION OF PAYMENTS**

27 I have mentioned that ADI's case in its founding papers and in attorney's correspondence was to the effect that it had paid off the full purchase price in respect of the furniture and was entitled to delivery – i.e. that all payments made were towards the furniture sale and that the furniture sale had been fully paid.

28 It is entirely unclear from the communications between the parties whether the payments were to be appropriated towards the furniture sale or towards the curtains. It is true that the amount of R300 000 was paid the day after the curtain order was placed, but all payments made towards the furniture sale were in round amounts and the R300 000 bore no relation to 50% of the curtain order to serve as any kind of a deposit. Even Bakos Brothers did not unequivocally allege that this payment was made towards the furniture deposit. The allegation

in paragraph 33 of the answering affidavit was instead speculative, indicating the absence of any indication either way:

> *"On 16 November 2018 the applicants made a payment in the amount of R300,000.00 in respect of the project (inclusive of curtaining), alternatively part payment of the deposit in respect of the curtaining order."*

29 I asked the parties to address me on the principles relating to appropriation and was referred to the discussion in *Christie* in this regard. I also considered the authority of *Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd & Others* 2008 (4) SA 325 (SCA). In general, subject to certain exceptions, the debtor may indicate its allocation or appropriation when making a payment, which the creditor is not bound to accept but which, if taken without demur, would govern the appropriation. If the debtor simply makes a payment without indicating an appropriation or allocation, the creditor may posit an appropriation but must notify the debtor to give the debtor the opportunity to decline to make the payment on the terms stipulated by the creditor. In the absence of any such agreed appropriation between the parties, the general principle would be to apply the appropriation that is least burdensome or most favourable to the debtor.

30 In the circumstances of this particular matter, apart from the timing of the payment of the R300 000 on 16 November 2018, one would expect the payments made to be towards discharge of the furniture sale to liberate the furniture delivery as intimated in September 2019, before payments would be allocated towards the curtains. There is nothing in the exchanges between th

parties that disturbs this allocation sufficiently to indicate a contrary intention and at the very least the position is sufficiently ungoverned by agreement between the parties for the principle enunciated in *Miloc* to apply, namely to allocate in accordance with the benefit of the debtor such as to allocate towards a furniture sale.

31 The problem, however, is that ADI has not paid the full purchase price for the furniture, such as to entitle it to delivery.

32 The application sought declaratory relief with respect to the curtain sale – that it had failed, i.e. that the curtain quotation was now null and void for failure of a suspensive condition, and also sought specific performance of the furniture sale on the faulty supposition that the full purchase price had been paid.

33 In the answering affidavit the attitude was adopted that the curtain sale formed part of the furniture sale and that it had not failed for want of a suspensive condition. The answering affidavit certainly created the impression that the attitude of the respondent was that the sale was still executory, and capable of implementation and enforcement through payment of the balance outstanding on the curtains and furniture as a whole (including storage fees and interest). In argument, however, counsel for Bakos Brothers adopted the attitude that as far as Bakos Brothers was concerned, this sale had been cancelled as intimated in the cancellation letter, but that Bakos Brothers was amenable to effecting delivery upon payment of all outstandings both for the furniture and the curtains.

34 In the replying affidavit Mr Khoza for ADI makes the following statement (paragraph 40):

> *"It is clear that the second respondent's main gripe is about the arrear interest and storage costs, which was never disclosed to me and I was never made aware of these amounts. I was never quoted nor requested to pay the amounts as stated by the second respondent. I nonetheless am willing and able to settle that amount if needs be in order for my furniture to be delivered".*

35 In argument before me it appeared that the applicant was intending, by its reference to "*that amount*", to refer to the amount in respect of storage fees that had been quantified in the letter of 28 June 2019 from the attorneys for Bakos Brothers, namely R268,372.76. The letter indicates that this is a monthly amount, yet the applicant appears to have been under the impression that it was a total amount. More about this below.

**LEGAL POSITION**

36 In my view, the purported cancellation on 29 October 2019 of the *"project,* based on a failure to pay the demanded outstanding balance on the project as a whole, namely an amount of over R4 400 000, is not an effective cancellation of the furniture sale. There was no entitlement to demand payment of any amount with respect to the curtains in order to procure delivery of the furniture, and certainly not the amount of R4 400 000 that was demanded. This is so despite the fact that an amount of some R44, 776 remained outstanding on the furniture sale, including whatever amount had properly accrued in respect of storage. I do not believe that the purported cancellation on the strength of the illegitimate demand could effectively terminate the furniture sale.

37 Where does that leave the applicant? According to the respondent its "notification of effective date" letter was dated the 10th of March 2019 and

storage charges started accruing from the 10th of April 2019 – this is set out in the attorney's letter of 28 June 2019.

38 It is also clear to me that, by the latest by the date of this letter of the 28th of June 2019, Bakos Brothers was repudiating the furniture sale by demanding payments of amounts in relation to the curtain sale before it would make any delivery in relation to the furniture sale. For as long as this repudiation lasted, Bakos Brothers could not invoke the running of storage charges in terms of its standard terms on the furniture sale.[2] Payment of the outstanding balance on the furniture sale from that moment on would not have yielded delivery of the furniture given the repudiation, yet storage charges would have been incurred from 30 days from the notification effective date to the date of this repudiation. The 5% storage fee provided for in the standard terms amounts to R134, 748.81 per month or R4, 491.63 per day. That means legitimate storage fees accumulated in the amount of R350, 346.91 in respect of the furniture sale between the expiry of 30 days from the NED to the latest day for repudiation on 28 June 2019.

39 As for interest, by the NED date the full amount, save for R44 976, had been paid. ABSA prime at the time was 10% and therefore 3% above prime would have been 13% annually. Payment was due 7 days from the NED which was therefore the 18th of March 2019. Interest accrued on the amount of R44, 976 from the 18th of March to the 28th of June 2019 at 13% annually. In my calculation that is an interest amount of R1, 624. The accumulated storage costs were never liquidated for purposes of the calculation of overdue interest and I

[2] See *Erasmus v Pienaar* 1984 (4) SA 9 (T).

do not believe it would be fair or in accordance with the terms of the contract to levy interest on the storage costs between the 18th of March and the 28th of June 2019.

40 Accordingly, in my view, ADI is entitled to delivery of the furniture listed in Annexure "FA2" (the communication of 19 September 2018) against payment of the amount of R396 947.24 (the outstanding amount on the purchase price, storage costs to date of repudiation and interest).

41 The notice of motion seeks an order declaring the quotation relating to the curtain sale as lapsed and null and void. I have my doubts whether it can be said that the curtain sale failed as a result of non-fulfilment of the suspensive condition relating to the payment of the deposit. Both parties were content to implement the sale despite the fact that the deposit had not been paid within the 30 days, as was also the case with the furniture sale.

42 Nevertheless, the parties before me are *ad idem* that there is no curtain sale. The applicant contends the sale has lapsed and the respondent for its part contends that the sale, as part of a larger transaction, has been cancelled. The curtain sale has accordingly been effectively abandoned by both parties. The rails remain in place in the Khozas' residence and presumably fall to be returned or some agreed arrangement made as to their fate.

**COSTS**

43 The costs of the interim urgent proceedings were reserved for determination in this application. I can see no reason why the respondent ought not to bear the

costs of the interim urgent proceedings. It threatened to sell the furniture despite being bound in an executory contract to deliver the furniture against payment of the outstanding portion of the purchase price, while demanding payment in relation to the curtain sale before any delivery would be effected with respect to the furniture. It declined to give any undertakings that it would not sell the furniture.

44 Leave to sue in terms of section 133(1)(b) of the Companies Act 71 of 2008 (given that Bakos Brothers is in business rescue) has already been granted in the order in the urgent application handed down by Judge Fischer on 26 November 2019.

**ORDER**

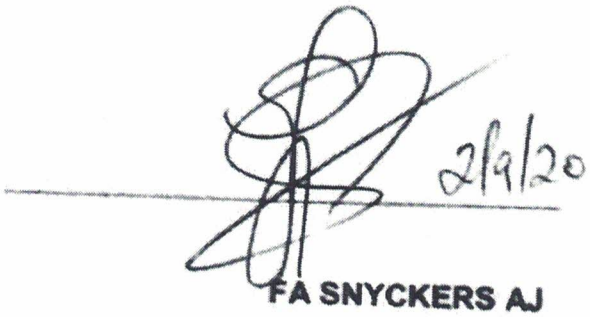
45 In the circumstances I make the following order:

1. The quotation annexed to the founding affidavit marked "FA3" is no longer of any force and effect;

2. The respondents are directed, against payment by the second applicant of an amount of R396 947.24, forthwith to release the goods set out in the invoice attached to the founding affidavit marked "FA2" from storage and to deliver the goods to the second applicant.

3. The first respondent (the company in business rescue) is directed to pay the costs of this application including the costs of the urgent application

under the same case number that yielded the order of Judge Fisher on 26 November 2019.




**FA SNYCKERS AJ**

**JUDGE OF THE HIGH COURT**

**2 September 2020**

**Date of Hearing: 31 August 2020**

**Judgment Delivered: 2 September 2020**

**APPEARANCES:**

| | |
|---|---|
| **On Behalf of the Applicants:** | **O Mokgotho** |
| Instructed By: | ENSAfrica Inc |
| | Sandton |
| **On Behalf of the Respondents:** | **C de Villiers-Golding** |
| Instructed By: | Richter Attorneys |
| | Johannesburg |