REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 24287/2017

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
14.01.2020

In the matter between:

DORSTFONTEIN COAL MINES (PTY) LTD Plaintiff

And

WELDWEIT DISTRIBUTORS (PTY) LTD Defendant

JUDGMENT

Windell J:

INTRODUCTION

[1] During July 2017, Dorstfontein Coal Mines (Pty) Ltd ("the plaintiff") launched an action, by way of combined summons against Weldweit Distributors (Pty) Ltd ("the defendant") for the repayment of monies overpaid to the defendant.

[2] Initially, three claims were made out in the amended particulars of claim. Subsequently, at the commencement of the trial proceedings, the plaintiff abandoned claims 2 and 3 and tendered costs in respect of those two claims. The trial proceeded in respect of claim 1 only (hereinafter referred to as the "plaintiff's claim").

FACTUAL BACKGROUND TO THE PLAINTIFF'S CLAIM

[3] The plaintiff, who is a coal mining company, and the defendant entered into two written agreements whereby the defendant would manufacture, deliver and erect two steel structures varying in size on the premises of the plaintiff situated at Rietkuil, Portion [....], Bethal District in Mpumalanga.

[4] The plaintiff relies on two quotations issued by the defendant to the plaintiff on 14 October 2016 as source documents which comprise the written contract regulating the terms and conditions of the agreement concluded between the parties. The written agreements are not disputed.

[5] The larger of the two structures was intended to be used as a workshop. The smaller of the two steel structures was intended to be a warehouse. The salient terms and conditions are set out in the quotations attached to the combined summons as Annexure "S1.1". In terms of the agreement a 50% deposit was to be paid by the plaintiff upon ordering the equipment. 30% of the total amount was then due on delivery of the material on site, and 20% of the total amount was payable upon completion of the erection of the warehouses. The quotation also had the following provision:

> *"Quotation valid 10 days. When order signed and returned to Weldwiet, it will be a legal and binding contract. Amendments to the contract, can only be made in writing, and must be signed by both, Weldweit and the Client. Buyer to supply Sand, Stone Cement, Water or ("Ready Mix and Power Point on site"). Price based on clean, level site, and digging of foundation holes, in dig-able soil. Foundation rain-forcing excluded. (Any mine induction, crane and medical induction excluded). We Weldwiet will not be held responsible for any damage, or theft, after the materials is delivered on site. No steel will*

be erected, if not paid, as per agreement. (Payment details). All materials remains the property of Weldweit until last payment received in full.

All portal frame steel SABS 350WA Undercoat is spray painted. Erection will be done professionally. Delivery ¾ weeks after signed."

[6] As agreed between the parties, 50% of the total amount quoted was paid by the plaintiff to the defendant on 7 November 2016 and on 13 November 2016 to enable the defendant to commence manufacturing the structures. On or about 8 December 2016 the defendant delivered the material to the premises of the coal mine pursuant to which the plaintiff effected further payment to the defendant. The plaintiff however erroneously made payment to the defendant in the full amount of each of the quotations amounting to R886 236-00 and R600 438-00, in addition to the 50% already paid during November 2016.

[7] In its particulars of claim the plaintiff averred that the payments in the amount of R886 236.00 and R600 438.00 had been made in error following the receipt of "irregular invoices" which had been submitted to the plaintiff for payment. During evidence the plaintiff's witness, Mr Poczick, testified that the payment was made in error as a result of "slackness in the accounting department".

[8] It is common cause that the overpayment by the plaintiff to the defendant was in excess of the total amount of the agreement concluded between the parties. It is further common cause that the defendant did not complete the erection of the structures on the coal mine for reasons that will be dealt with later herein.

[9] According to the plaintiff's amended particulars of claim, the plaintiff had therefore overpaid the defendant in an amount of R1 040 672.60.

[10] On 24 May 2017 the plaintiff and defendant held a meeting at the offices of Dorstfontein West Colliery. The plaintiff and defendant, during their evidence, had different versions as to the purpose of the meeting and as to what transpired during the meeting, but it was during this meeting that the plaintiff took the opportunity to inform the defendant that the two payments made during December 2016 in favour of the defendant had been made in error. After the meeting was adjourned, the

attorney of record for the plaintiff addressed a letter to the legal representative for the defendant which confirmed the contents of the meeting in writing and requested that the overpaid amount which had been erroneously transferred to the defendant be deposited into the plaintiff's bank account by no later than 26 May 2017.

[11] The defendant responded to the demand for payment by raising the issue of set -off against the overpayment for equipment allegedly purchased by the defendant and for "attendances on site".

[12] The plaintiff addressed a letter to the defendant and contended that in the event that further equipment needed to be purchased or further work was to be performed by the defendant then a formal quotation for the additional costs should have been made available to the plaintiff to consider and sign. This was never done.

THE PLEADINGS

[13] The plaintiff's claim is for an overpayment, which the plaintiff pleaded at paragraph 7 of its amended particulars of claim, to wit:

> "*On or about 13 DECEMBER 2016 the plaintiff erroneously made payment of the full contract price of both warehouses in an amount of R886 236.00 (EIGHT HUNDRED AND EIGHTY-SIX THOUSAND TWO HUNDRED AND THIRTY-SIX RAND) and R600 438.00 (SIX HUNDRED THOUSAND FOUR HUNDRED AND THIRTY-EIGHT RAND) respectively. <u>These payments had been made in error following receipt of irregular invoices submitted by the defendant</u>."* (emphasis added)

[14] Counsel for the plaintiff contends that the pleaded cause of action was a claim for the repayment of monies overpaid to the defendant and that the nature of its claim was not the *condictio indebiti*. Counsel however argues that should this court find that it was the *condictio indebiti*, that the elements had been fulfilled.

[15] The legal nature of the plaintiff's cause of action can be concluded from the plaintiff's pleaded facts. The only conceivable cause of action is that of a *condictio indebiti*.

[16] In response thereto, the defendant pleads (at paragraph 9.1 of its amended plea) that:

> *"The contents of this paragraph are denied. It is submitted that the Plaintiff overpaid the defendant in the amount of R223 497.28, which amount was repaid to the plaintiff on or about 7 June 2017."*

[17] Pleadings must be read as a whole. The established legal principle is that a pleading is about facts from which legal conclusions may be drawn. It is clear from the defendant's plea that the defendant admitted that there was an overpayment, but denied that the payments were made following irregular invoices. It however raised a defence of set-off. As basis for its defence the defendant relied on the quotations that formed the basis of the agreement between the parties. It is alleged that the quotation for the erection of the two warehouse on the plaintiff's property was based on a clean and level site and digging of foundation holes in "dig-able" soil. The defendant avers that it was an express, alternatively tacit term of the agreement that the amounts quoted in the agreement would be valid only – and relevant to – circumstances wherein the site would be clean and level and where the soil would be dig-able. The defendant contended that the parties expressly, alternatively tacitly, agreed that the price was subject to increase in circumstances where the site was not clean and/or level, and where the soil was of such consistency that it was capable of being dug into without the assistance of power tools. As a result, extra costs were allegedly incurred by the defendant and invoices were submitted to the plaintiff for costs associated with the additional work that was carried out on the site by the defendant.

1 Costs related to the erection of the steel structures in the amount of R501 600.00 was invoiced to the plaintiff on 18 May 2017;

2 Two jackhammers were hired from Hire All at an additional amount of R5130.00;

3 As agreed between the parties, 16 clear sheets were installed at the plaintiff's premises at the cost of R13 109.72.

[18] According to the defendant's records, and after the extra costs were set off, it is alleged that the plaintiff had overpaid the defendant in the amount of R223 497.28

which amount had been repaid to the plaintiff on 7 June 2017. The defendant denied that there are any outstanding amounts due and payable.

[19] The plaintiff contended that the defendant had unilaterally amended the terms of the agreement, and that defendant is only entitled to payment of the two jackhammers and 16 clear sheets.

THE ONUS

[20] The defendant does not dispute that the plaintiff has pleaded a cause of action, but however contends that the plaintiff has been unable to prove its pleaded claim.

[21] The onus is on the plaintiff to prove its claim.[1] The defendant however admitted in its plea that there was an overpayment made in error and in fact paid back an amount of R223 497.28 to the plaintiff on 7 June 2017, after it was confronted with the overpayment. This specific amount was paid back because, on the defendant's version, it was entitled to set-off an amount against the overpayment for extra costs incurred and according to its calculations that was the specific amount that was overpaid. The only issue placed in dispute was that it was not paid as a result of an irregular invoice, but it was never disputed that the payment was made in error. The defendant's witness, Mr Claassen in any event admitted that there was an obligation to repay overpayments and an undertaking to do so. His evidence is that he is not obliged to pay any money back as he is entitled to set off the money owed to the plaintiff against money owed to him for work done. It was never the defendant's case that the plaintiff's conduct was so slack that it does not deserve the protection of the law, and that it should, as a matter of policy, not receive it. The plaintiff's case was on a predicated common cause obligation to repay the monies overpaid to the defendant. As was correctly pointed out by the plaintiff in its heads of argument, as set out in *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 898 F- J:

> "… *Each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made*."

[1] *Recsey v Reiche* 1927 AD 554 at 556

Accordingly, the contention advanced in oral argument that the plaintiff failed to prove its claim and the reliance on the matter of *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another*,[2] is misplaced.

[22] A defendant may plead non-enrichment as a defence. Once a payment *indebite* has been established, the onus is on the defendant to prove that the payment did not enrich the defendant. This issue was not raised in the pleadings and the defendant is not entitled to raise it during argument.

SET-OFF

[22] The only issue left for determination is the defendant's defence of set -off. Set-off takes place when two parties (a) are mutually indebted to each other and (b) both debts are liquidated and fully due. If a creditor claims payment the defendant must plead and prove set-off. To rely on set-off the defendant must allege and prove (a) the indebtedness of the plaintiff to the defendant; (b) that the plaintiff's debt to the defendant is due and payable; (c) that both debts are liquidated and (d) that the parties are indebted to each other in the same capacity.[3]

[23] The written agreements provided that payment of the quoted amounts must be made in three stages: 50% on accepting the quote, 30% on delivery of the material and 20% on finalization of the work. It is common cause that the work was never finalized. The defendant was therefore not entitled to payment of the 20% before the work was not finalized. The agreements contained a non-variation clause namely amendments to the contract, can only be made in writing, and must be signed by both parties.

[24] The defendant's argument is that, in addition to the *Shifren* clause, the written quotes were subject to the following provisions:

1. "*Price based on clean and level site, and digging foundation holes in dig-able soil*";

2. *"foundation rain-forcing excluded";*

3. *"Any mine induction, crane and medical induction excluded"*

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[2] [1992] 4 All SA 62 (AD)
[3] Amlers Precedents of Pleadings 9th Edition p336.

[25] Counsel for defendant further contends that if regard is had to the totality of the evidence, the purpose of the agreement could never have been that the parties agreed upon an absolute fixed price for the provision of a finished product. This was a dynamic and interactive construction project, in respect of which the plaintiff also bore certain reciprocal obligations. Viewed in its proper context, and the purpose of the agreements, there can be little doubt that the plaintiff's obligations were to be fulfilled within a reasonable period of time; and failing such timeous fulfilment of its obligations, the price quoted would increase. Relying on *Bank v Grusd*[4]*,* it is contended that it would be absurd, let alone business-like, if the price was not be subject to change in circumstances in which the plaintiff did not timeously uphold its obligations in terms of the agreement. Such an interpretation would place the defendant in an invidious position, capable of being significantly prejudiced by a lackadaisical plaintiff.

[26] In *Bank v Grusd,* the court held as follows:[5]

> "*It seems to me, therefore that if the defendant proves that the plaintiff agreed that the extra work should be done or, knowing that the defendant regarded the work to be performed as falling outside the contract, stood by and allowed him to do this work, well knowing that she was going to get the benefit, she ought not to be heard when she says "I refuse to pay because I had given no written authority to the defendant to supply these extras*……
>
> *The preponderance of probability is in favour of the defendant's evidence that the particulars (a), (b), (c), (d), (e), (g) and (h) were done and supplied at the request of the plaintiff, who verbally undertook to pay a reasonable price for them. The prices given by Mr. Kaplan in evidence have not been seriously challenged, and we propose accepting them."*

[27] The facts in *Bank v Grusd* are wholly distinguishable from the facts in the present matter. There was no oral agreement between the parties and no invoices were presented to the plaintiff as and when "extra work" and "additional costs" were incurred. The work was not finalised and the defendant was not entitled to full payment of the contract price. The plaintiff denied any liability in respect of further

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[4] 1939 TPD 286
[5] At page 288.

expenses incurred by the defendant on the basis that there was no cause for same. Although there were initial issues in respect of the condition of the site, the defendant commenced work and testified that any issues in existence were cured by the plaintiff at its own instance and costs. There is no evidence to suggest that because it took longer to finalize the project that there was any consensus between the parties that plaintiff would be liable for any additional costs incurred as a result of the delay. As far as the jackhammers and the clear sheets are concerned: These expenses were incidental to the contract and the plaintiff tenders payment for these additional items.

[28] The defendant *in casu* relied on an express and/or tacit agreement between the parties. On a conspectus of the evidence presented the defendant failed to prove any such terms. Its defence of set-off must therefore fail. There is no basis upon which to set aside the provision of the *Shifren* clause

[29] In the result the following order is made:

29.1 The defendant is ordered to make payment to the plaintiff in the amount of R1,040,672.60;

29.2 Interest on the above amount in paragraph 29.1 at the rate of 10.5% per annum a tempore morae from date of demand;

29.3 Costs are awarded to the plaintiff on a party and party scale.

L. WINDELL

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

Attorney for the plaintiff: Warrener De Agrela and Associates Inc.

Counsel for the plaintiff:	Advocate L. Morland
Attorney for the defendant:	BDK Attorneys
Counsel for the defendant:	Advocate B. Edwards
Date matter heard:	16 September 2019
Judgment date:	14 January 2020