



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

DELETE WHICHEVER IS NOT APPLICABLE

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

16/11/2016
DATE

SIGNATURE

CASE NO: 33595/2014

In the matter between:

29/11/2016

DPI PLASTICS (PTY) LTD T/A INCLEDON

Plaintiff

And

**THAMANDLA CONSTRUCTION AND MAINTENANCE
CC (REGISTRATON NO. 2008/091368/2053)**

First Defendant

THABO MOROBELA (ID NO. 771221424081)

Second Defendant

JUDGMENT

M L SENYATSI AJ

Introduction

- [1] The plaintiff instituted action proceedings in terms of which it sought payment in the amount of R1 845 036.68 relating to the goods sold on credit. At the end of the plaintiff's case the first and second defendants (the defendants) launched an application for absolution from the instance.
- [2] The cause of action by the plaintiff is for goods sold and delivered at the instance of the first defendant amounting to R1 845 036.68 and as stated earlier the goods were sold in terms of the credit agreement
- [3]
- [4] The initial credit limit granted by the plaintiff to the defendants was for R200 000 and this credit limit was subsequently increased to R400 000.
- [5] The defendants filed the appearance to defend and excepted to the particulars of claim on various grounds such as the computation of the quantum.
- [6] It was as a result of the notice of exception to the particulars of claim that the quantum was amended to be what is before the court.
- [7] At the hearing of the matter, the parties agreed and it was so ordered by the court that items 8 and 9 of the particulars of claim would be separated.
- [8] In its plea, the first defendant admitted that it applied for a credit facility and was represented by the second defendant as averred. The first defendant denied ever using the facilities it had applied for and that the goods were sold at its instance and delivered to it as averred. It further denied having entered into any sale agreements with the plaintiff and further denied that the plaintiff

was entitled to debit its account and that it made payments to the plaintiff in respect of the account and/or credit facility.

[9] In the alternative, the first defendant pleaded that should the court find that the defendant did indeed conclude any purchase and sale agreements with the plaintiff, which the first defendant denied:

[9.1] the first defendant only applied for a credit facility with a limit of R400 000 which was granted by the plaintiff;

[9.2] the limit was never increased;

[9.3] consequently it is only liable up to R400 000 to the plaintiff.

[10] The plaintiff called two witnesses to testify, namely Robison Mogale Patji and Glynis Vanita Bok.

Robinson Mogale Patji

[11] The first witness to testify in support of the case of the plaintiff was Mr Robison Mogale Patji, who has been in the employ of the plaintiff for the period of 26 years, this includes being as a sale representative for the past seven years. His duties included amongst others seeking business for the plaintiff in particular that which emanated from Black contractors.

[12] The essence of his testimony is that he came to know about the defendant during 2012 when a colleague of his originated its account.

[13] He testified that he never met Mandla Minisi and stated that he knew Thabo Morobela who he met in Mondeor next to the Mondeor Police Station.

- [14] He referred the court to page 49 of the bundle of evidence which contained an order, which on the face of it, came from the first defendant.
- [15] He further testified that the order was made by Godfrey Molema ("Godfrey") in the presence of Thabo Morobela who was silent at the first meeting and that delivery of the goods was at 15823 Stretford Extension 9, Orange Farm. According, to him Godfrey would contact and inform him of the bill of quantities.
- [16] When the first order was made, Godfrey called him to his office. He got lost on his first visit and could not find the address and kept calling Godfrey by phone.
- [17] When he eventually arrived at the address, it was a private house with a wall containing the name Thamandla, which is the first defendant's name. Eggbert Mwale and the tea lady were at the residence.
- [18] He met Godfrey and Thabo and remembered he had met Godfrey before but it was the first time that he met Thabo Morobela.
- A man by the name of Sakkie Monamodi ("**Sakkie**") was introduced as the site manager. He was then informed that Sakkie would be the man to call if there were problems on site.
- [19] Every person present at the meeting was introduced as representing the first defendant.
- [20] The parties agreed, in relation to the order on page 49, that the PVC pipes would be delivered first.

- [21] Mr Patji went on to refer to various delivery notes which were in terms of the orders
- [22] He testified that he was not involved with payments of the customer accounts and that the accounts department of the plaintiff was responsible for payments.
- [23] He was informed by Godfrey that they needed more materials which were in excess of the credit limit.
- [24] Godfrey and Thabo went to the plaintiff's offices and were referred to Glynis Bok in the credit department.
- [25] The two were the same people he had seen at the first meeting in Mondeor.
- [26] He testified that he never saw Thabo again as he dealt more with Godfrey.
- [27] After that meeting everybody at the plaintiff's offices was excited because of the large orders from the first defendant.
- [28] The court was referred to page 153 which was a delivery notice of materials to an address known as 368 Endymion Winchester Hills, Johannesburg.
- [29] The court was referred to page 19 which contains an e-mail by Eggbert Mwale for S. Monamodi & Daughter C.C.. He claimed he did not know S. Monamodi.
- [30] The court was referred to page 20 which was an order by the first defendant to the plaintiff.

- [31] He further testified that Godfrey called him on 31 May 2016 and said Sakkie Monamodi needed certain material. This Sakkie Monamodi is probably the same S. Monamodi whom the witness had claimed earlier that he did not know.
- [32] He testified to court that Sakkie Monamodi was also called the "Old man".
- [33] He testified in chief that the list of documents in relation to the statement on page 16 of the bundle of evidence related to every order number as invoiced.
- [34] Mr Patji testified that he had been to the construction site in Orange Farm and noted two boards with the inscriptions Joburg Water and Thamandla, respectively. He visited the site on five occasions and the site foreman was Sakkie Monamodi.
- [35] He met Godfrey and Sakkie at the Christmas party and was surprised that the first defendant contended that it never bought the goods from the plaintiff.
- [36] Godfrey, so the testimony went by Mr Patji, even confirmed, on being confronted telephonically by the attorney for the plaintiff, who had put the phone on speaker that he worked for the first defendant.
- [37] Mr Patji told the court that he even knew about the purchase of three Toyota Fortuner motor vehicles that the first defendant purchased for its team and that Sakkie Monamodi was allocated a blue Toyota Fortuner. He further knew about the purchase of three Mitsubishi LDV's.

[38] Under cross-examination, Mr Patji conceded that he did not complete the credit application form as it was completed before he took over the account and would not know the identity of the person who completed the credit application form.

Mr Patji was, furthermore, unable to identify the member of the first defendant Mr Thabo Morobela who was, according to Mr Myburgh for the defendants, sitting in court. He conceded during cross examination that he never verified Thabo Morobela's identity and simply dealt with someone that Godfrey told him was the same Thabo Morobela who completed the credit application.

[39] Mr Patji would not deny that he never dealt with the correct Thabo Morobela and actually never called Thabo Morobela on the mobile number reflected on the credit application form.

[40] There was a further concession made by the witness that he never visited the defendant's address reflected on the credit application form but visited an address in Winchester Hills, Johannesburg to meet Godfrey as opposed to the address chosen on the credit form which is 11-68 Block G, Soshanguve, in Tshwane.

[41] He further admitted that he never called Thabo Morobela and Mandla Minisi as the only two members of the first defendant who could legally bind the first defendant.

[42] It was further admitted that the telephone number which the witness used to make contact was not the one on the credit application form. The two

members of the first defendant provided their mobile contact numbers to the plaintiff and the witness admitted that he never used these contact numbers.

[43] The witness was shown the registration number of the truck that collected the goods as being MRZ 919 GP and the truck belonged to a Mr Monamudi.

[44] Another vehicle with registration number CN 08 FX GP also collected the goods and that vehicle also belonged to Mr Monamudi.

[45] It was further conceded by Mr Patji that all the goods sold related to water reticulation projects.

[46] Another vehicle with registration number BJ 50 ZBG which also collected the goods belonged to Mr Munyai and it was put to the witness that that person was unknown to Mr Thabo Morobela.

[47] It was furthermore conceded that no enquiries were made that the first defendant was awarded the water reticulation tender in Orange Farm.

[48] All the persons who signed for the goods were never employed by the first defendant and the witness.

[49] The witness conceded furthermore that S. Monamodi & Daughter C.C. probably referred Sakkie Monamodi, who has no relationship with the first defendant and who is the same Sakkie introduced to him by Godfrey as the site manager.

Glynis Vanita Bok:

Glynis Vanita Bok ("**Ms Bok**") was called as the second witness to testify on behalf of the plaintiff. She was the sales credit control supervisor for the plaintiff at the time the alleged sales took place. She had 25 years' experience. Her duties involved the monitoring of accounts on credit and that as soon as an account was over the limit granted in terms of the credit application form, she would call the customer for payment in order for the account to be within the limit.

[50] She had never met Thabo Morobela.

[51] All she remembered was that two gentleman came to her office at the premises of the plaintiff and requested an increase of their credit limit.

[52] The gentlemen claimed to represent the first defendant and the credit limit was increased from R200 000 to R400 000. She confirmed the increase through an e-mail.

[53] She could not identify Thabo and the other gentleman.

[54] She testified that she knew Sakkie Monamodi very well as he held a credit account with the plaintiff but was not allowed any credit limit as he did not conduct his credit properly with the plaintiff.

[55] She called someone called Thabo and discussed the payment of the account. She admitted knowledge of the e-mail from Eggbert Mwale to Mr Patji relating to payment of the account.

[56] As far as she was concerned only members of a close corporation would be able to bind the close corporation.

- [57] She also testified that a resolution agreeing to the increase of the credit limit of the account of the first defendant ought to have been required by the plaintiff.
- [58] The witness never verified the identities of the two gentlemen who came to her office to ask for the increase of the credit limit of the first defendant. She did not make copies of the identity documents.
- [59] She had been informed by Kobus who these gentlemen were. She never varied the terms of the agreement in terms of clause 21 of the credit application form.
- [60] The approval of the increase of credit limit was done, according to her, by someone in the department of the plaintiff.
- [61] When asked to comment about the e-mail from Eggbert Mwale to Mr Patji, she conceded that on the face of it, if the e-mail had come to her attention, she would have been concerned.
- [62] She further conceded that nobody called the members of the first defendant to verify the identity of Eggbert Mwale and whether Eggbert had the authority to bind the first defendant.
- [63] The witness stated to court that had Mr Sakkie Monamodi come and asked for an increase of the credit limit of the first defendant this would not have been granted.
- [64] She conceded that the goods were delivered to Mr Monamodi through a company called S Monamodi Water Reticulation and Sewer Construction.

- [65] She was never shown the founding documents the first defendant and has never met the members of the first defendant.
- [66] The demand letter sent to the first defendant was, according to her, sent to Eggbert Mwale.
- [67] It was put to her that the members of the first defendant never ordered any of the goods claimed to have been sold to the first defendant and that the goods were in any event not delivered to the address indicated on the credit application form.
- [68] The court also heard from this witness that when an increase of credit limit application is made and approved, the identity copies of the people seeking such increase on behalf of the company are never required.
- [69] After the witness had completed her testimony, Mr Hitchings for the plaintiff asked to be permitted to call his instructing attorney to testify.
- [70] The application was opposed by Mr Myburgh on behalf of the defendants on the ground that the attorney had sat throughout the proceedings and heard all the evidence led by the plaintiff's witnesses.
- [71] The application was not granted and the plaintiff closed its case.

Legal principles on absolution of the instance:

- [72] In this the case, the plaintiff carried the burden of proof on a balance of probabilities to make a *prima facie* case that the goods were sold and delivered to the first defendant.

- [73] The court has to assess the evidence presented thus far to determine whether or not a *prima facie* case has been made out by the plaintiff to which the defendants must answer.
- [74] If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable court could find for the plaintiff, the defendant is entitled to absolution.¹
- [75] At the end of the plaintiff's case, the defendants applied for absolution from the instance.
- [76] It is trite law that the test to be applied in determining the question whether the defendants' application for absolution from the instance should be granted is not whether the adduced evidence required an answer, but whether such evidence held a possibility of a finding for the plaintiff, that is say whether a reasonable court can find in favour of the plaintiff.²
- [77] The court has the power, which it may exercise in its discretion, to allow a party who has closed his case to re-open it.³
- [78] Such power may be exercised in favour of a plaintiff even after the defendant has closed his case, and *a fortiori* it may be exercised immediately after the plaintiff has closed his case.⁴

1 See *Gascoyne v Paul and Hunter* 1917 TPD 170.

2 See *Bulld-A-Brick Bk en 'n Ander v Eskom* 1996 (1) SA 115 (O).

3 See *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A).

4 See *Claude Neon Lights (SA) Ltd v Daniel supra*.

- [79] A court will refuse an application for absolution from the instance at the close of the case for the plaintiff unless it is satisfied that no reasonable man would draw the inference for which the plaintiff contends.⁵
- [80] Where more than one defendant is sued, the court has applied guidance in ***Putter v Provincial Insurance Co Ltd and Another* 1963 (4) SA 771 (WLD)** at 772A–D. The fact that more than one defendant is joined in an action is not a circumstance of itself justifying departure from the principles governing the proper exercise of the court's discretionary powers. Each case depends upon its own merits.⁶
- [81] In ***Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd* 1971 (4) SA 90 (RA)** the court held that if the defence raised by the defendant is something peculiarly within the knowledge of the defendant and the plaintiff has made out some case to answer, the plaintiff should not lightly be deprived of his remedy without first hearing what the defendant has to say.
- [82] It is common cause that a credit application form out which an agreement ensued was concluded by the parties in this case.
- [83] It is also common cause that the main witness of the plaintiff was not involved at the opening of the credit line account by the first defendant.
- [84] The evidence led demonstrated that the initial account sales representative who was assigned to the first defendant's account never introduced Mr Patji

⁵ See ***Gandy v Makhanya* 1974 (4) SA 853 (N)** at page 856B.

⁶ See ***Hummerstone and Another v Leary and Another* (1921) 2 KB 664** at 667.

to the two critical members of the first defendant, namely Mr Thabo Morobela and Mr Mandla Mnisi.

- [85] It is furthermore, common cause that upon being called by Godfrey, who claimed to represent the first defendant, Mr Patji simply accepted that Godfrey had to have authority to transact on behalf of the first defendant without verifying the details of the identity copies of the members from the first defendant's records with the plaintiff.
- [86] It is also common cause that Mr Patji himself, in his own evidence, never verified that he was actually dealing with the correct duly authorised employee or representative of the first defendant.
- [87] Mr Patji simply accepted, without verifying, on visiting a private house in Winchester Hills which purportedly had the first defendant's name, that that had to be the first defendant's premises and that the people he met had authority to act on behalf of the first defendant.
- [88] Mr Patji did not lead evidence to show that he used the contact details provided for in the credit application form and that he was indeed dealing with the members of the first defendant with the actual or ostensible authority to bind the first defendant.
- [89] He could not deny that all the trucks that collected the goods did not belong to either the first defendant or agents duly authorized by the first defendant.
- [90] Ms Bok, the second witness for the plaintiff could not assist the court insofar as the identity of the members of the first defendant was concerned.

- [91] When the application for the increase of the credit limit was dealt with by Ms Bok, she made no attempt to verify the identities of the two people ostensibly acting on behalf of the first defendant. She had all the resources at her disposal to ensure that they were the people they claimed to be. No acceptable explanation was provided as to why this was not done.
- [92] It is common cause from the evidence that in fact the goods were delivered to one S. Monamodi who was not employed by the first defendant. The only inference to be drawn is that this was Sakkie Monamodi, who was not allowed to transact for his own account.
- [93] It is also common cause that various goods were sold on credit and debited to the first defendant's account with the plaintiff.
- [94] What has become apparent to this court, is that the goods sold could possibly not have been at the instance of the first defendant or its members.
- [95] The authority of Godfrey and another person linked to him was contested by the defendants.
- [96] The plaintiff has failed to plead in its pleadings that the said Godfrey either had actual or ostensible authority to bind the first defendant.
- [97] Furthermore, the plaintiff has not only failed to plead ostensible authority as alleged but has failed to further plead in replication to the defendants' plea, that they were estopped from denying the authority purportedly given to Godfrey or Eggbert Mwale.

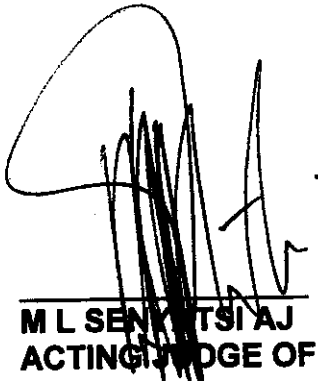
- [98] The plaintiff has furthermore not pleaded undue enrichment or led evidence showing that the defendants were unduly enriched at its expense.
- [99] What is apparent to this court is poor administrative oversight by the representatives of the plaintiff, which in my view, led to people not linked to the first defendant being allowed to transact on the account of the first defendant.
- [100] No evidence was led to show how the identity of their customers is dealt with. This was demonstrated by the evidence of Ms Bok from the credit control office when she admitted to this court that as process, the plaintiff never makes copies of the identities of the people representing their customers on matters of credit adjustment. This is a gap that in my view, can ensure that fraud is adequately managed.
- [101] It has been established that in fact, Godfrey, Sakkie Monamodi and Eggbert Mwale embarked on a scheme to use the first defendant's credit account with the plaintiff without authority of the first defendant.
- [102] Even if I am incorrect, in reaching the conclusion in paragraph 114 above, it could still not be explained by the plaintiff as to why a proper hand over of the account was not done from the previous sales representative to Mr Patji. There does not appear to have been an introduction of Mr Patji to the members of the first defendant by his own colleague and no reasons or information were provided to this court.
- [103] As a consequence of these factors and applying the test on application for absolution from the instance, this court is not persuaded that at the close of

the plaintiff's case, there is sufficient evidence upon which a reasonable court can find in favour of the plaintiff.

[104] In the result, the following order is made: —

Order

The application for absolution from the instance is granted with costs.



M L SENYETSI AJ
ACTING JUDGE OF THE HIGH COURT

For the Plaintiff Advocate **BD Hitchings**
Instructed by **Breytenbach Mostert Skosana Inc (011 726 7222)**

For the Respondent Advocate **JL Myburgh**
Instructed by **Thengu Fakude Incorporated (012 323 531)**