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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 1747/2013

DATE: 19/9/2016

In the matter between:

REINFORCING STEEL CONTRACTORS (PTY) LTD
(CK Number: 19..)

Plaintiff

and

TRANACON CONSTRUCTION
(CK Number: 20...)

First defendant

SHIRLANE MOSTERT
(ID Number: 7...)

Second defendant

JUDGMENT

AC BASSON, J

- [1] The plaintiff instituted action against the first and second defendants (hereinafter collectively referred to as "the defendants" where applicable) for payment in the amount of R 219 588.17 with interest.
- [2] It is common cause that the plaintiff and the first defendant have concluded a written agreement in terms of which it was agreed that the plaintiff would sell and deliver to the first defendant certain steel products and render certain services related thereto from time to time at the first defendant's specific instance and request. It was a salient term of the contract that ownership in respect of the goods will remain vested with the plaintiff until the full purchase price has been paid. The second defendant signed as surety on behalf of the first defendant.
- [3] It was not in dispute that orders that followed upon a pro-forma invoice and which reflected a reference number provided by the first respondent (the so-called "TRC" reference number) were paid for by the first respondent. It was, however, in dispute whether the first defendant had placed two orders referred to in the delivery notices as "CH2760" and "Jean Email 21/5". It was the defendant's case that these two orders were not placed by it and consequently the deliveries in respect of these two orders were incorrectly made.
- [4] On 10 August 2012 the first defendant informed the plaintiff in writing that the steel was incorrectly delivered and that the first defendant is therefore not liable for payment.
- [5] It is further common cause that on 17 August 2012 the plaintiff collected the steel that was delivered from the first defendant. Mr Lauw on behalf of the plaintiff testified that the steel was placed in a demarcated area and that approximately 80% of the steel is still on the premises. Approximately 20% of the steel was sold as scrap metal presumably in an attempt to mitigate the losses suffered by the plaintiff as a result of the alleged non-payment.

[6] It is clear from the summons as well as the submissions to the court that the plaintiff is seeking specific performance from the defendants in the form of payment. It is trite that a party seeking specific performance must - (i) allege and prove the terms of the contract; (ii) allege and prove compliance with any antecedent or reciprocal obligations, or tender to perform them; (iii) allege and prove non-performance by the defendant(s) and, (iv) claim specific performance.

[7] In this matter it is common cause that the plaintiff delivered goods (steel) to the first defendant: Steel was delivered on 4 June 2012 and on 25 June 2012. There is a dispute about whether the defendants have ordered the steel that was delivered on these two dates. According to the defendants they did not order the steel and accordingly the steel was incorrectly delivered. It is also not in dispute that the defendants did not pay for the steel that was delivered on these two days.

[8] Can the plaintiff claim specific performance in circumstances where it is in possession of the product (or what is left of it) and in circumstances where it concedes that it has sold part of the product (approximately 20%) and thus unable to return the product to the defendants? I am of the view that this is a case where the plaintiff should have instituted an action for damages and should not have sought an order for specific performance. I should also point out that the particulars of claim do not contain a pleading for damages nor does it include a pleading of retention of the steel as a penalty.

[9] It is trite that a court has a discretion to refuse a claim of specific performance and to thereafter leave it to the plaintiff to claim damages. Each case must be decided on its own merits. In this particular case the court cannot ignore the fact that the plaintiff had already collected all the steel that was delivered at the time when the summons was issued and has in fact sold some of it as scrap metal. In these circumstances I am of the view that "the cost to the defendant in being compelled to perform is out of all proportion to the corresponding benefit to the plaintiff and the latter can

equally well be compensated by an award of damages." ¹ In this particular case damages would have adequately compensated the plaintiff and was in light of the circumstances the obvious cause of action. See in regard to the court's discretion *Haynes v King Williamstown Municipality*:²

"It is, however, equally settled law with us that although the Court will as far as possible give effect to a plaintiff's choice to claim specific performance it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quod interest*. The discretion which a Court enjoys although it must be exercised judicially is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.

As examples of the grounds on which the Courts have exercised their discretion in refusing to order specific performance, although performance was not impossible, may be mentioned: (a) where damages would adequately compensate the plaintiff; (b) where it would be difficult for the Court to enforce its decree; (c) where the thing claimed can readily be bought anywhere; (d) where specific performance entails the rendering of services of a personal nature.

To these may be added examples given by Wessels on *Contract* (vol 2, sec. 3119) of good and sufficient grounds for refusing the decree, (e) where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances.

In a recent case in this Court SCHREINER, J.A., dealing with the question of the Court's discretion where specific performance is claimed expressed himself as follows:

'In our law a grant of specific performance does not rest upon any special jurisdiction; it is an ordinary remedy to which in a proper case the plaintiff is entitled. But the Court has a discretion whether to

¹ *Haynes v King Williamstown Municipality* 1951 (2) SA 371 (A) at 3808 - C.

² *Ibid* at 378F - 378G.

grant the order or not (*Farmers' Co-op. Society v Berry*, 1912 AD 343 at p. 350). So in contracts for the sale of shares which are daily dealt in on the market and can be obtained without difficulty specific performance will not ordinarily be granted (*Thompson v Pullinger*, 1 O.R. 298 at p. 301). More generally, specific performance will be refused where it would be 'inequitable in all the circumstances' (*Wessels Contract*, sec. 3119, quoting *Lawson*; *Story Equity Jurisprudence*, sec. 769), 'or where from a change of circumstances or otherwise it would be unconscientious' to enforce the contract specifically. (*story, op. cit.*, sec. 750 (a); see, too, *Fry Specific Performance*, 5th ed., secs. 422 - 424; *Mackeurtan Sale* 3rd ed., pp. 386/7.)'

See *Rex v Milne and Erleigh* (7), 1951 (1) SA 791 at p. 873.

The matter is so well put by Story (*Equity Jurisprudence*, sec. 742) that I give the whole paragraph:

'In truth the exercise of this whole branch of Equity Jurisprudence respecting the rescission and specific performance of contracts is not a matter of right in either party, but it is a matter of discretion in the court: not indeed of arbitrary or capricious discretion dependent upon the mere pleasure of the Judge, but of that sound and reasonable discretion which governs itself as far as it may by general rules and principles, but which at the same time withholds or grants relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties. On this account it is not possible to lay down any rules and principles which are of absolute obligation and authority in all cases; and therefore it would be a waste of time to attempt to limit the principles or the exceptions which the complicated transactions of the parties and the ever-changing habits of society may at different times and under different circumstances require the Court to recognise or consider. The most that can be done is to bring under review some of the leading principles and exceptions which the past times have furnished as guides to direct and aid our future inquiries.'

[10] In the event the following order is made:

The claim is dismissed with costs.

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AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff

Instructed by

Adv Maschwitz

Pagel Schulenburg Attorneys

For the 1st and 2nd defendants

Instructed by

Adv A Visser

Van Zyl Smith & Associates