

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 22163/21

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

SIGNATURE

...19 JULY 2022.....

DATE

In the matter between:

ASHLEIGH' S MATTRASS MANUFACTURING CC
(Registration No:1996/02134/23)

APPLICANT

and

JOUBERTON FURNISHERS CC
T/A CARNIVAL FURNISHERS
(Registration No:2008/124740/23)

RESPONDENT

JUDGEMENT

NDLOKOVANE AJ

INTRODUCTION:

[1.] This matter concerns two applications. Firstly, is the application for payment and a counter-application for repayment of a loan.

[2.] In the main application, the applicant seeks an order for payment in the amount of R2 927 514.65, interest and costs.

[3.] The counter application, by the respondent is for an order for payment of the sum of R2 526 390.34, interest and costs.

[4.] This court has been called upon, under both applications, to determine whether or not the applicant contracted with the respondent or with Carnival Zambia, one of its branches?

FACTUAL BACKGROUND

[5.] The material background facts of this matter are common cause and can be summarised as follows:

[6.] On or around 1996, the applicant rendered services to the respondent until November 2020. The services upon which payment is being sought is to the value of R5 460 439.10.

[7.] The respondent has branches throughout Southern Africa, including in Pretoria, Botswana and Zambia, with the respondent's head offices based in Centurion, South Africa. The goods were delivered to the respondent's Zambian branch at the request of the respondent.

[8.] The respondent sent the applicant a reconciliation of amounts owed in August 2020, after which the respondent made payment to the applicant in September 2020 in the amount of R 2 526.34, followed by further reconciliation in November 2020.

[9.] The Applicant delivered goods to the value of R 2 927 514.65, to various Carnival Furnishers branches in Zambia, which constitutes the outstanding statement. No payment was received by the applicant from respondent or Carnival Furnishers. This according to the applicant clearly demonstrates that the respondent was at all times indebted to the applicant for services rendered.

[10.] In contrast, this amount is denied by the respondent. Instead the respondent contends that the amount it had paid the applicant of R2 526 390.34 on 30 September 2020 from its Nedbank account was a loan entered into between them orally. This is vehemently denied by the applicant.

[11.] Further, the respondent admits that its central warehouse which is located in Sunderland Ridge indeed places all the orders on behalf of Carnival Botswana, Carnival Zambia and for the respondent itself. Thereafter, the respondent would perform all the accounting, administration, merchandising and marketing on behalf of the respondent, which operates the South African stores, Carnival Botswana which operates the Botswana Stores and Carnival Zambia which operates the Zambian stores.

[12.] In a nutshell, the opposition to the application by the respondent is simply that another entity or one of its branches, Carnival Zambia contracted with the applicant and as such Carnival Zambia, owes the applicant the amount claimed.

[13.] The crisp issues for determination involve the interpretation of the purchase orders and email orders forming annexures to this application and whether from the interpretation thereof, a determination being made as to who is liable to the applicant.

[14.] I will first set out the purchase orders then the email orders .

THE PURCHASE ORDER

[15.] Annexure FA13 attached to the founding papers reflects 16 purchase orders as received from the respondent, for goods to be delivered to Zambia. These purchase orders are titled 'OFFICIAL ORDERS' and carry the respondent's logo. They range from 2017 till June 2020. These further state that the invoices must be delivered to "P.O Box 914003, Postpoint Thaba Tshwane 0143", being the postal address of the respondent as reflected in the Windeed company report marked as annexure FA1.

[16.] These orders are the same orders used by the respondent for goods ordered which are to be delivered at its other branches in South Africa and Botswana, whereby delivery was made in Botswana and South Africa as reflected in FA 14(a) and 14(b) respectively.

[17.] A proper consideration of the purchase orders and conditions set out therein, suggest that all invoices for goods must be invoiced to the Respondent and are subject to the respondent's terms and conditions, irrespective of the delivery address in South Africa, Botswana and Zambia. These read as:

"CONDITIONS OF ORDER:

- 1. Tax invoice must accompany goods.*
- 2. This Order number must appear on your Tax Invoice.*
- 3. Invoice for these goods or services to appear on the statement of the above and to be posted to: P.O BOX 914003, Postpoint Thaba Tshwane 0143.*
- 4. Proof of delivery for goods hereby ordered shall only be against signature as authorised under official Branch name stamp.*
- 5. This order must be delivered on or before the date specified failing which delivery can be refused and the order can be deemed as cancelled*
- 6. Subject to terms and discounts granted to Jouberton Furnitures(Pty)Ltd".*

THE EMAIL ORDERS

[18.] About the emails from respondent and statements from applicant, the respondent annexed the reconciliation of the amount for goods delivered to the respondent's Zambian branch and where payment was made. Proof of payment as reflected in annexure FA15. This further reflects that no payment was made in respect of the reconciliation for October and November 2020. The applicant in its founding papers contends that it was the respondent who contracted with the applicant and is responsible for payment despite the last 2 non-payments.

[19.] Further, the applicant contends that the October and November 2020 orders were placed telephonically or in person by either Bala or Khatib on behalf of the respondent

during meetings with the Applicant's Operations Manager. This is confirmed in annexures FA 15(a) and FA15(b).

[20.] To this extent, the applicant is claiming specific performance against respondent.

[21.] In contrast, the respondent in its opposing papers contends that the purchase orders to annexures FA13 and FA 14(a) and FA 14(b) are official' orders received from the respondent's warehouse in Centurion. The orders, however, specify the country and store where the goods ought to be delivered to. These official orders were placed on behalf of either Carnival Zambia or Carnival Botswana and the respondent contends further that pursuant to those orders, invoices were issued by the applicant to the branch delivered to and payments were made in terms of annexure C2 by the recipient of the goods. If it is accepted that each branch made payment for its goods received, then there is no privity of contract created by these official orders as alleged by the applicant. Instead, the contracting parties to the claim forming the subject matter of the application is Carnival Zambia.

[22.] Also, the reconciliation which reflects an amount owing by Carnival Zambia to applicant in the sum of R2,9 million, same was paid in two tranches. The respondent submits that no case is made out by the applicant for specific performance. In fact, the matter as it stands, raises a dispute of fact which in the respondent's view cannot be decided on papers in terms of the *Plascon -Evans* rule. In conclusion, the respondent prays for an order in terms of its counter-application. I will return to the issue of dispute of facts later in my judgement. I now turn to examine the annexures in support of both claims as they relate to the issues for determination.

ANALYSIS OF ANNEXURES SUPPORTING THE CLAIMS UNDER REVIEW

[23.] For the determination of issues in this matter, a proper consideration of annexures (only those material to the issues *in casu*), supporting the claims becomes essential and will be considered hereunder as follow:

23.1 FA3 is a screenshot taken from respondents' website which refers to the respondent's history in business and states that it has a few of its stores operating as boutique stores under Creation Furnitures.

23.2 FA4 annexed to the applicants founding papers indicates proof of payment of an amount of R2,5 million on 20/9/20 at 12:19:08 PM from the Respondent's account, Joubertina Furnishers with description Loan Zambia Ash Aug20, with beneficiary statement description: Carnival Furnishers Zambia. Further, FA4 also has carnival statements for Aug 2020 adding up to an amount of R2,6 million subtracting credit notes to an amount of R81 000.00. All these amounts add up to R2,5 million. These transactions reflected thereon are ranging from the period July 2020 to September 2020.

23.3 FA5 shows period between 4 June 2020 to 01 Dec 2020 and payment received in that period is R7 243.860. This annexure FA5 indicates a statement dated 28/2/21, on applicant's letterhead to the Respondent, Joubertina t/a Carnival furniture's showing amount due to the value of R2,9mil and an amount paid as R7.2 million.

23.4 Annexures FA6 and FA7 are letters of demand for payment. To be exact, FA6 is a letter of demand by Naidoo to Carnival Zambia not the Respondent. The letter is dated **28 January 2021** under subject - outstanding payment, for an amount of R2,9 million. In this letter penned by Logan Naidoo, who is also sympathetic of fraud within the company

of Bala Pillay, being the respondent. Not only this, the author also commends them for the sterling service over the period of 25 years.

Further, annexure FA7 is another letter of demand dated **25 February 2021** sent electronically to Lesego and Collin, who are in the respondent's finance department on the same date, with subject-outstanding invoices. The letter of demand is from the applicant's attorneys of record to the respondent. This letter of demand is post FA12 which is the letter of acknowledgment of debt by Carnival Zambia dated 18 February 2021, wherein the applicant was further informed that the company was about to be liquidated. I am of the view that this could be the reason the attorney must have advised the applicant to rather demand from the respondent as opposed to its earlier demand from Carnival Zambia.

23.5 Subsequent to the letter of demand, FA8 is a letter which denies Respondent trades as Carnival and does not trade outside South Africa and says payment of 2.5 million was a loan to the respondent. On 6 March 2021, the respondent through FA8 responded to the letters of demand as aforesaid, wherein, it distanced itself from the Zambian branch. In fact it is claiming a payment made on 30 Sept 2021 of the amount of R2,5mil was a loan to the applicant. I hasten to mention that this loan is denied by the applicant in FA9.

23.6 FA11 reflects statements for the period August 2020 for Carnival Furniture, the respondent which is dated 18 September 2020. It is

Indicative of payments by Carnival Zambia not the Respondent. Whereas, annexure FA12 as referred to above shows a letter from Morris Pokroy Attorneys dated 18 Feb 2021 addressed by the legal representatives of Carnival Furnishers Zambia wherein it acknowledges its client's indebtedness of an amount of R2,9 million in favour of the applicant and also states in the same letter that its client is about to be liquidated. Further to this, the letter also indicates that the orders were stopped for goods delivery due to unavailability of foreign currency during lockdown which led to finding impossible to trade. FA12 the letter of admission of indebtedness was by Attorneys of Carnival Zambia, although it's by same attorneys that represent respondent, here it writes for Zambia.

Disputes of facts

[24.] Now that the annexures have been analysed, I now turn to the issue of disputes of facts. The respondent in its answering affidavit raises the following dispute of facts:, whether Respondent is the same as Carnival Zambia and which company was responsible for payments, who was invoiced for payments and where the payments for Carnival Zambia orders were coming from? In addressing those issues as they are pleaded in both applications.

[25.] The relief sought in the main application, is to obtain the payment sought in the notice of motion. It is common cause that the applicant manufactures and supplies mattresses and base sets. In the founding papers the applicant disputes that same were supplied and delivered to Carnival Zambia. Carnival Zambia is a company with registration number: 43778 and registered in accordance with Zambian laws. The

goods were exported, delivered, invoiced and paid by the Carnival Zambia branch. It is on this basis that the respondent contends that the claim should be against Carnival Zambia not Carnival South Africa. In amplification, Carnival SA's role is to assist all its branches with the administration duties. This legally implies that each branch carries its own liability and profit, if not, it gets liquidated.

[26.] Again annexures AA3 and AA4 shows that Mr Bala has 1% shareholding of Carnival Zambia and 49% shares belong to another company. It is unclear who owns the remainder. Whereas, the respondent is owned by Bala alone.

[27.] The manner in which the business was conducted is reflected in annexure FA16 and confirmed in paragraph 3.3 of the answering affidavit. In that the orders are made through purchase official orders via email or orally by Carnival SA and Zambia.

In paragraph 44 of the founding affidavit, the applicant on its own version is aware that Bala is being sued by Zambian employees. It is worth noting that Bala is sued and not the respondent. This alone shows, the two are separate entities.

[28.] In respect of orders, they are indeed placed by the respondent but invoiced to Zambia or Botswana. This is indicative of only administrative assistance. Paragraph 19.1 contends that all Carnival stores, Zambia and Botswana operate independently of the respondent. Further in paragraph 3.3 of the answering affidavit invoices suggest Carnival Zambia and paragraph 3.5 suggests that not only were invoices issued to Carnival Zambia, payments were also made from Carnival Zambia's account. Paragraph 6.3 refers to the only one payment "loan" which was made by the respondent otherwise the rest were made by Carnival Zambia.

[29.] From the analysis of annexures it is indicative that Carnival Zambia is a registered entity on its own with company registration number: 43778 under the laws of Zambia. It cannot be disputed that the Respondent is a different entity being Joubertina Furniture's Creation furniture. Annexure FA13 shows 16 separate orders for mattresses and base sets to be delivered to the Zambian branch. In as much as all these purchase orders are done by the same person Khathib of the respondent on its logo and letter head, I accept that it is simply for administrative purposes on behalf of its branches and was not to create a contractual obligation between the applicant and the respondent.

[30.] FA3 being an extract of webpages extracted directly from the respondent's website is no proof of the respondent's proof of registration. A proper consideration thereof indicates the history of the respondent's business and its numerous branches across the globe. This alone cannot be sufficient proof of company registration. FA4 has invoices but these are small amounts which are not quite explained and therefore confusing, it would be good to double check them with delivery invoices, same are not annexed to the papers.

[31]. The amount alleged in FA5 to have been delivered is R5 million plus. In my view this amount seems to be the difference between the R7 million paid less the R5 million goods delivered but not for the respondent. Be that as it may, it is acknowledged that this amount is owed by Zambia not the respondent.

[33.] In the event it does appear that there are such disputes, the SCA in the judgment of ***National Director of Public Prosecutions v Zuma*** restated the important ***Plascon Evans***- rule:

“[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon- Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version”.

[34.] I am of the view that, the respondent's contention that the dispute of facts can be resolved on papers is not misplaced. I agree that the present case indeed presents foreseeable dispute of facts which the Applicant ought not to have ignored. These are highlighted from paragraphs 26-33 above. It is for this reason that the main application must fail.

[35.] I now turn to consider the counter application;

35.1 In paragraph 2.4 of the answering affidavit mention is made about a loan to applicant. Respondent contends that it loaned the applicant an

amount of R2,5 million. The annexure proving this shows Loan-Zambia-Ash. Because Carnival Zambia was the one unable to make payment of its own debt, as a result Carnival South Africa responded and advanced an amount of R2.5million. This is highly improbable. On the respondent's own version it is hard to believe that it would loan applicant and not Zambia which is its other branch, besides the Proof of payment shows and includes "ZAM" reflecting that could have been to Zambia not applicant. Otherwise, why include "ZAM" in the Proof of payment as reference. It is for this reason that the counter -application too must fail.

ORDER

[36.] The following Order is made in relation to the two applications:

- (a) The main and counter applications are dismissed.
- (b) No order as to costs.

A handwritten signature in black ink, appearing to be 'N Ndlovane', is written over a horizontal line. The signature is stylized with a large initial 'N' and a cursive 'Ndlovane'.

N NDLOKOVANE AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal

representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be 19 July 2022

APPEARANCES

FOR THE APPLICANT: ADV. B D STEVENS

FOR THE RESPONDENTS: ADV AG SOUTH SC

HEARD ON: 17 FEBRUARY 2022

DATE OF JUDGMENT: 19 July 2022