

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, PIETERMARITZBURG

CASE NO: 9962/08

In the matter between:

STEINHOFF TIMBER GROUP (PTY) LIMITED PLAINTIFF

and

CACHECORP PROCUREMENT (PTY) LIMITED DEFENDANT

J U D G E M E N T

GOVINDASAMY AJ:

This matter comes before me on exception.

The Defendant filed a conditional counterclaim together with its plea.

The material paragraphs of the Defendant's counterclaim relevant for the purpose of determining this exception are as follows:

- "1. The Defendant's counterclaim is premised on the Plaintiff proving that it is the entity which contracted with it as alleged, for it had but one contract to purchase timber for export from a company (or companies) bearing as part of its name the word "**Steinhoff**".

2. During or about late 2005, the Defendant represented by T Tomaszewski entered into a partly oral, partly written agreement with a group of Steinhoff

companies which consisted of Seinhoff Timber Industries, Seinhoff African Sourmilling (Pty) Ltd, Steinhoff Southern Cape Ltd and PG Bison, represented by their duly authorized representatives, in terms of which these entities (the supplier) would supply the Defendant (as purchaser and exporter) with timber, against payment of the agreed prices (the supply agreement).

Copies of the communications between the parties evidencing part of the supply agreement in writing are annexed hereto marked “A1” – “A14”.

3. Further material, express, alternatively implied, alternatively tacit, terms of the supply agreement were:

(a) The supplier would supply timber poles to the Defendant during 2006 in the following volumes:

20,000m³ from Point Noire

30,000m³ from Langmore Plantation and Woodlines (to be delivered to Port Elizabeth for export).

(b) The deliveries would take place as and when required by the Defendant, after reasonable notice to the supplier, so as to allow export by sea.

(c) The Defendant would pay the agreed alternatively reasonable prices for the timber.”

The Defendant then pleaded that as a result of the failure by the supplier to deliver timber in accordance with the supply agreement and requests the Defendant suffered damages in the sum of R20,296,382.74.

The Plaintiff excepted to the Defendant’s counterclaim. The Plaintiff excepted on three grounds but it was agreed at the hearing that the first exception was the “main exception”. The Plaintiff did not, however, abandon the remaining exceptions.

The first ground of exception is set out as follows:

- “1. The defendant’s conditional counterclaim proclaims in its paragraph 2 to be *‘premised on the Plaintiff proving that it (the Plaintiff) is the entity which contracted with’* the defendant.
2. However, in paragraph 3 of the conditional counterclaim the defendant pleads an agreement between the Defendant and entities other than the Plaintiff and refers to such entities as *‘the supplier’*.
3. In the subsequent paragraphs of the conditional counterclaim the Defendant pleads the terms of the agreement pleaded in paragraph 3 of its conditional counterclaim and alleges breaches of that agreement as a result of which it is alleged the Defendant has suffered damages at the hands of *‘the supplier’*.
4. If the agreement was one between the Plaintiff and the Defendant, which is the premise upon which the conditional counterclaim is based, then the Defendant does not have a claim for damages against the Plaintiff because the Defendant’s claim as pleaded is a claim against those entities described as *‘the supplier’*.
5. The conditional counterclaim is vague and embarrassing in that the Plaintiff does not know whether the Defendant relies upon a contract between the Plaintiff and the Defendant, or a contract between the Defendant and those entities described in paragraph 3 of the conditional counterclaim as *‘the supplier’*.
6. Further, Annexure “B” to the conditional counterclaim purports to set out the components of the Defendant’s damages. In that annexure, it is alleged that:
 - a. The defendant worked with *‘Steinhoff Southern Cape and Woodline...’*;
 - b. *‘Steinhoff entered into the following contracts with Cachecorp...’*;
 - (i) The Defendant was to be paid a commission *‘... for facilitating the transaction in a JV ...’*;
 - (ii) Steinhoff had entered into a contract for the delivery of poles from Port Elizabeth;
 - c. *‘Steinhoff reneged on their delivery on both contracts ...’*

7. It is not clear from Annexure “B” whether, or how, the contract or contracts referred to there relate to the Defendant’s claims against *‘the supplier’* or the Plaintiff, particularly in light of the allegation in paragraph 2 of the conditional counterclaim to the effect that the Defendant *‘...had but one contract to purchase timber ...’*
8. The allegations in the conditional counterclaim do not sustain a claim for commission and to that extent Annexure “B” is incompatible with the conditional counterclaim.
9. Further, and in any event, the documents (Annexures “A1” to “A14”) annexed to the conditional counterclaim as being *‘communications ...evidencing part of the supply agreement ...’* do not reasonably allow for an identification of the terms of the alleged agreement to be made.
10. The Defendant’s conditional counterclaim is therefore vague and embarrassing in the respects set out above.”

At the hearing Mr Kemp SC for the Defendant submitted that on a proper reading of the counterclaim it cannot be faulted as being vague and embarrassing. His submissions in this regard went along the following lines:-

- a. The Defendant denies that it is liable to the Plaintiff for the purchase price of timber poles.
- b. The Defendant did not contract with the Plaintiff.
- c. The Defendant contracted with other corporate entities which also bear the name “Steinhoff” as part of their names.
- d. The Defendant only concluded one contract to purchase timber and its counterclaim is based on that contract.
- e. If the Plaintiff is that contracting party the counterclaim arises out of that contract.

In dealing with the criticism levelled at paragraph 3(a) of the counterclaim, the Defendant's submission is effectively captured in its heads of argument as follows:

"The Defendant then indeed pleads the identity of such other party or parties which underlies its defence of not having contracted with the Plaintiff but simply pleads that if it is mistaken about that, it contracted with the Plaintiff and its counterclaim lies against the Plaintiff. There is nothing vague about this and nothing embarrassing about this. Indeed, the Defendant's case cannot be clearer. A condition does not introduce vagueness or embarrassment."

At this point it is perhaps appropriate to have a proper understanding of the Plaintiff's allegations.

It would appear from the particulars of claim that there are two relevant relationships. The first is between Steinhoff Africa Holdings (Pty) Ltd ("the holding company") and its subsidiary companies and the Respondent. This relationship arises from the credit application. The holding company and its subsidiaries are described as "the Supplier".

The standard conditions of that agreement provide in the preamble that:

"These terms and conditions shall apply to any contract for the sale of any goods and rendering of any services by the Supplier to the Applicant, whether that contract arises out of:

- (i) any offer made by the Supplier and accepted by the Applicant, or
- (ii) any offer made by the Applicant and accepted by the Supplier, or
- (iii) any such offer made by the Applicant in response to a quotation from the Supplier".

The standard conditions contemplate the conclusion of contracts **in future** for the supply of goods. That contract **could be concluded** with any of the subsidiaries.

The Plaintiff alleges in paragraph 8 of the particulars of claim that a contract was **then concluded** between the Plaintiff (a subsidiary of the holding company) for the delivery of poles. The effect of that allegation must be that the right to receive payment for the poles vested in the Plaintiff and not in the holding company.

In its plea the Defendant pleaded that it had no contractual relationship with the Plaintiff, did not purchase any goods from it and did not owe it any money.

In amplification of its counterclaim and notwithstanding that it conditionally accepted the Plaintiff as the contracting party the Defendant pleads a contract with various entitles none of which includes the Plaintiff. Now while it is correct that the Plaintiff is part of the Steinhoff Group it does not follow that any contract actually concluded for the sale of timber with any of the subsidiaries automatically created legal relationships with each and every subsidiary. It seems to me that this is precisely where the Defendant has it wrong. That much appears further in paragraph 5 of the Counterclaim where the Defendant states that:

“The Defendant requested the delivery of timber in terms of the agreement, but in respect of the Point Noire Timber no deliveries took place and in respect of Port Elizabeth only 5,3930.57m³ were delivered.”

The Defendant certainly does not make it clear who exactly he requested delivery from. Was it the holding company? Was it any one or more of

the subsidiaries? Its allegations cannot by any interpretation mean the Plaintiff, having regard to the Supplier defined in paragraph 3 of the Particulars of Claim.

In my view the Plaintiff is entitled to complain that the conditional counterclaim is vague and embarrassing to the extent that it is prejudiced in pleading thereto. That being the case I do not consider it necessary to deal with all the additional complaints set out in the first exception.

The remaining exceptions became largely academic following upon the finding in respect of the first exception. I nevertheless deal with them briefly.

The second exception is that the Defendant has not alleged all the material facts necessary to sustain the conditional counterclaim.

The exception arises from the Defendant's failure to specifically plead that reasonable notice was given to the Supplier to make deliveries having regard to paragraph 4(b) of the conditional counterclaim.

In this regard Mr Kemp submitted that this exception should not be upheld on the following grounds:

- (a) In paragraph 7 of the conditional counterclaim the Defendant alleged that there were repeated demands for specific deliveries of timber and therefore that allegation should be interpreted widely enough to comply with paragraph 4(b); and
- (b) In any event the failure to make the specific allegation does not prejudice the Defendant.

I agree with Mr Kemp in this regard. Accordingly the exception cannot be upheld on this ground.

The third ground of exception is based on a failure by the Defendant to set out its damages in such a manner as to enable the Plaintiff reasonably to assess the quantum thereof.

Both counsel did not seriously pursue this ground in argument. Mr Kemp pointed out that certain outstanding information was subsequently provided.

In any event Mr Marnewick properly conceded that in the normal course the proper approach in respect of a complaint of this nature was to invoke the rules regarding irregular proceedings.

I therefore need say no more save to confirm that I would not uphold the exception on this ground.

As regards costs I am satisfied that the Plaintiff has been substantially successful. Mr Marnewick argued that I specifically direct that the costs of senior counsel should be awarded in respect of the exception including the costs of the Rule 23(1) Notice. Mr Kemp did not object thereto. In my view the determination of the exception was important to both parties and sufficiently complex to warrant the services of senior counsel.

In the circumstances I make the following order:

- (a) The exception is upheld with costs;
- (b) The Respondent is granted twenty (20) days to amend the Conditional Counterclaim if it is so advised; and
- (c) The costs referred to in paragraph (a) shall include the costs of engaging senior counsel in respect of the exception and the drafting of the Rule 23(1) Notice.

M GOVINDASAMY AJ

Date of hearing	:	7 September 2009
Date of delivery	:	25 September 2009
Counsel for Plaintiff	:	Advocate CG Marnewick SC
Instructed by	:	Woodhead Bigby & Irving Inc c/o Stowell & Co.
Counsel for Defendant	:	Advocate KJ Kemp SC
Instructed by	:	Lister & Co. c/o Dawsons Attorneys