IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: A565/04

In the matter between:

TRAVELEX (PTY) LIMITED Appellant

and

JUMBO ZIPS CC Respondent

JUDGMENT: 22 OCTOBER 2004

VAN ZYL J:

INTRODUCTION

[1] The appellant instituted an action against the respondent for damages in the amount of R22 578,48 arising from the delivery of latently defective material. The respondent denied liability and filed a claim in reconvention for payment of the price of the material in the amount of R4 223,70. The claim was dismissed with costs and the counterclaim granted as prayed, together with interest and costs. This is an appeal against such judgment.

THE PLEADINGS

[2] In its particulars of claim the appellant averred that, during July 2000, the parties entered into an oral agreement in terms of which the respondent would supply the appellant with four thousand chunky zips. It was a term of the agreement that the zips would be free of latent defects and suitable for the purpose for which they were acquired by the appellant, namely for use in sports bags to be supplied by the appellant to its customers. The respondent was at all relevant times aware of the fact that the zips were to be used for such purpose. The zips were, however, latently defective and unsuitable for that purpose in that the sliders of the zips were prone to stick at certain points.

As a result the two hundred and fifty sports bags in which the zips had been used were returned by the customers to whom they had been sold and the appellant suffered damages in the amount of R27 529,86, representing the profit it would have made on the bags had the zips not been defective. This amount was later reduced to R22 578,48, after deduction of the amounts of R4 223,70, being the purchase price of the material supplied by the respondent, R600,00 received from the sale of thirty of the defective bags at R20,00 each, and R127,68 received from the sale of a single bag.

[3] In its plea the respondent denied having sold four thousand chunky zips to the appellant, averring that the parties had agreed that the respondent would supply it with one thousand five hundred metres of no. 3 zip chain and three thousand no. 3 sliders. The respondent admitted that it was a term of the agreement that the said material would be free from latent defects, but denied that it was defective and likewise denied having any knowledge that it would be used in the manufacture of sports bags. When this use was brought to its attention, it in fact advised against it. The appellant's response, however, was that the customer had insisted that chunky zips be used. For the rest the respondent denied that the appellant had suffered damages as alleged or at all.

[4] In its reply to the plea the appellant admitted that the material in question consisted of zip chain and sliders, but denied that the respondent had not been aware, at the time the contract was concluded, of the purpose for which such material was intended. It likewise denied that the respondent had ever advised against its use for such purpose.

EVIDENCE FOR THE PLAINTIFF (APPELLANT)

[5] Mr Isaac Levy, the Managing Director of the appellant, testified that the appellant had an agreement with Investec Bank to supply it with two hundred and fifty sports bags, fitted with chunky zips. The price was calculated on the basis of material, labour and transportation costs expended, together with a gross profit margin of 120%, which he estimated to be in the region of R16 000,00. As a result of the defective zips the full order had been returned. Investec had indicated that it was not interested in any substituted performance since it no longer had any faith in the appellant's products. The value of the two hundred and fifty rejected bags was no more than R5 000,00, calculated on the basis of R20,00 per bag. The appellant had in fact managed

to sell thirty bags for R600,00 and another for R127,68. It was not prepared to sell any bags to the respondent, however, because Investec had instructed it not to do so in view of the Investec logo on the bags. An attempt by the appellant to remove the logo was abandoned because “it was too costly” and Mr Levy did not have the time. According to Mr Levy the unsold bags were destroyed in that the pockets had been removed from them. What remained of the bags was lying in a warehouse.

[6] Mr R H G Clarke, the general manager of a company that does textile testing, confirmed in his testimony the content of a technical report he had submitted in connection with the zips in question. He had carried out the test and found that the zip sliders were prone to stick at certain points. Close visual examination revealed no foreign matter causing the obstruction, nor was there any inconsistency in the zip tape. He hence concluded that “the critical differences lie in the shape or the spacing of the teeth of the zips at the points where the sticking occurred”. In cross-examination he conceded that he was not an expert in the design of sports bags. He likewise conceded that, if the zip should be mounted on a curve the natural spacing of its teeth would be disturbed. The top part would be widened and the lower part cropped. The extent to which this would take place would depend on the way in which it was inserted, the sharpness of the curve and the rigidity of the tape relative to the rigidity of the material to which it is affixed. In this regard the chunky zip differed from the spiral type of zip composed of individual teeth. Although Mr Clarke was not prepared to concede that the zip stuck only where it was mounted on a curve or bend, he did agree that, if a zip should be mounted at an angle or on a bend or curve, thereby exceeding the limitation of the zip, it would cause the zip to stick.

[7] Mr M Pretorius, the appellant's former travelling bag production manager, testified that Investec had placed an order for sports bags fitted with chunky zips. He thereupon requested Ms G Schroeder, the sales representative of the respondent, to furnish him with a two-metre sample of chunky zip. She showed her a cutting, taken from a so-called "swatch-book", as a sample of the material on which the zip was to be used. Mr Pretorius made up and furnished the sample to Investec, which approved it and subsequently placed its ill-fated order on the strength thereof. During the course of production of the bags, however, the appellant's factory supervisor indicated that they were encountering problems with the slider and requested the respondent to send someone to attend thereto. At that stage some two hundred and forty of the bags had already been completed, leaving only ten requiring completion. Ms Schroeder came to the factory with one of the respondent's experts, Ms Gloria Martin, who demonstrated to the appellant's workers how to work with it. On testing one of the chunky zips Ms Schroeder

observed its sticking action and announced that it did not work because it was not supposed to stick. This prompted the respondent to bring a "slider-puller" to the factory premises and the respondent's expert explained to the appellant's workers how to use it properly by inserting the zips in a different way. No one suggested that the zips should not be used on that type of bag.

EVIDENCE FOR THE DEFENDANT (RESPONDENT)

[8] Mr M C Roeloffze, the owner of the respondent, became involved in the matter only towards the end, after Investec had returned the bags to the appellant. He met with Mr Levy and his father, Mr Levy Snr, at the appellant's factory. One of the bags was on the desk. When Mr Roeloffze saw it, he said: "I will never have used that zip in the bag". Mr Levy Snr responded by saying to his son: "I told you that was the wrong zip, that was the wrong zip". He then left the room. Mr Roeloffze reiterated to the younger Mr Levy that the zip would never work in that bag, whereupon he himself left. This is confirmed in a letter dated 29 August 2000 written by him to the attorneys of the appellant. In it he rejected the appellant's claim and enclosed a letter from Ms Schroeder, dated 1 August 2000, to Mr Levy (see par [10] below).

[9] Mr Roeloffze testified further that the respondent had been acquiring its chunky zip from Taiwan and Shanghai for a period of fourteen years and had never encountered any problem with it. The suppliers had always guaranteed its quality. The respondent manufactured some two thousand chunky zips per day. They were properly made and were definitely not faulty. He was quite prepared to purchase the allegedly faulty bags from the appellant and to sell them at a profit. He would have treated the teeth of the zips with candle wax, thereby rendering them usable for the next five years. The appellant, however, had refused to sell them to the respondent, ostensibly because it was not possible to remove the logo.

[10] Ms G P Schroeder, a sales representative of the respondent, testified that she had been involved with the appellant's order of the zip chain with sliders. At that time she had not known for what purpose the appellant intended using the material. When the appellant experienced problems with the zips, she had gone to see them, taking Ms Gloria Martin, the respondent's supervisor, with her. Ms Martin showed them exactly how to do the job, pointing out that it would have been better to use the zip with spiral teeth, since it would work more effectively. Despite Ms Martin's efforts the problem was still not resolved since the zips continued to stick on certain sections. She herself went to see Mr Levy and suggested to him that it would have been

better to use another kind of zip. Mr Levy responded, however, that their client (Investec) had insisted on the chunky zips. This was confirmed in Ms Schroeder's letter to the appellant (for the attention of Mr Levy) dated 1 August 2000. The relevant portion of it reads:

> Please be advised that we do not sell any faulty zips and that the zips supplied to you is [*sic*] of first quality. You have also accused me or the company of not advising you correctly. Let me just reiterate that as I was not aware what the zips were used for initially, we sold you the zips in good faith. However, when I did come out to help your people on a problem where they were putting the zip in wrongly and showed them how to do it the correct way I did point out to your staff that they should have used our ordinary type 5 zip as I mentioned to you when I came to see you on Friday morning passed [*sic*].

I also do think that you would have picked this up by checking the first few bags that came out of production and thereby would be saving yourself the headache of having all these bags returned.

> At the time that I suggested to your staff that you use the type 5 zip they replied that the customer insists on that particular chunky zip. Let me also advise you that we have so many clients who order zips that we do not know what the application is for and we've never encountered any problems when they wanted to return the products or put in a claim for it as it really is up to the customer to check it out thoroughly and be certain before they order.

We really and truly are very sorry for your financial loss as we too are running a business where we hope that this kind of thing will never happen to us.

[11] Ms Schroeder had no recollection of ever having been shown a sample of the fabric the appellant intended to use in manufacturing the bags. Had this been done, she said, she would have remembered it. She did recollect, however, that Ms Martin had shown the appellant's workers how to ensure that they start with the "leading member" of the zip chain, in which event the others would follow. This was the correct way to execute the work.

[12] Ms Gloria Martin, the respondent's aforesaid supervisor, substantially confirmed the testimony of Ms Schroeder. She testified that she had explained to the appellant's factory workers how to pull the two panels together and to tuck the slider with the zip chain. She had also demonstrated the need to commence the work with the leading member of the zip chain, in which event the zip would not stick. She did, however, comment to Ms Schroeder that the chunky zip was not suitable for use in the sports bags. Ms Schroeder in turn conveyed this to Mr Pretorius.

THE JUDGMENT OF THE COURT *A QUO*

[13] Without furnishing any reasons, the court *a quo* dismissed the claim with costs and granted the counterclaim with interest and costs. When requested by the attorneys of the appellant to furnish reasons, the court complied as follows:

1. Plaintiff failed to prove that he suffered any loss of profit.
2. Plaintiff failed to prove that the zips in issue were latently defective.
3. Plaintiff admitted Defendant's counterclaim.

[14] The appellant promptly filed a notice of appeal directed against these findings. The magistrate was thereupon required, in terms of the provisions of rule 51(8)(a) of the *Magistrates' Court Act* 32 of 1944 *Rules of Court*, to furnish:

(i) the facts he found to be proved;
(ii) the grounds upon which he arrived at any finding of fact specified in the notice of appeal as appealed against; and
iii) his reasons for any ruling of law or for the admission or rejection of any evidence so specified as appealed against.

His response was simply that the court had "nothing further to add to reasons already furnished".

[15] With respect to the learned magistrate this response can scarcely be regarded as constituting reasons for judgment. At the very least one would have expected an evaluation of the evidence in the light of the burden of proof pertaining and with reference to the relevant legal principles relating to latent defects and damages arising from such defects, if proved. The parties to litigation are, in my view, entitled to be accorded the courtesy of sufficient reasons to enable them to consider whether they are satisfied that the findings of the court were justified or justifiable, or whether they should appeal such findings. This would remain the case even if the issues should appear to be simple and the outcome of the litigation should appear to be cut and dried or a *fait accompli*.

PRINCIPAL SUBMISSIONS ON BEHALF OF THE APPELLANT

[16] Ms Heese, on behalf of the appellant, submitted that the appellant's evidence was sufficient to show, on a balance of probabilities, that the zips or

zip chains and sliders provided by the respondent were defective and that the appellant suffered a financial loss as a result thereof. She suggested that the appellant had made out a *prima facie* case for the relief sought in the particulars of claim and that the evidence tendered on behalf of the respondent had been insufficient to refute such case.

[17] On the question of damages Ms Heese submitted that the amended claim, after deduction of the cost of the material supplied by the respondent and of the proceeds of the sale of thirty-one bags, constituted damage suffered by the appellant in the form of net profit lost as a result of the respondent's breach of contract.

[18] In regard to the alleged defect Ms Heese argued that the respondent had not countered the appellant's expert evidence tendered by Mr Clarke except for suggesting that another kind of zip should have been used. This was not sufficient to contradict Mr Clarke's findings.

PRINCIPAL SUBMISSIONS ON BEHALF OF THE RESPONDENT

[19] Mr McLachlan, on behalf of the respondent, submitted at the outset that the appellant had failed to discharge the *onus* of proving that the material supplied to it by the respondent was latently defective, that the respondent had been aware of the purpose for which the material was purchased and that the appellant had suffered damages.

[20] With reference to Mr Clarke's expert evidence Mr McLachlan argued that his evidence did not demonstrate any latent defect in the material supplied by the respondent. Mr Clarke was, in any event, not an expert in the design of sports bags and was unable to comment on the effect of a zip mounted on a curve or bend or at an angle. More importantly, there was no proof that the material supplied by the respondent was in fact that used by the appellant in manufacturing the bags. And even if it were, the possibility could not be excluded that the problems with the bags had been caused by their design, by the faulty insertion of the zips or by the use of the wrong kind of zips.

[21] Mr McLachlan submitted further that the appellant's claim, being based on loss of profit, was directed at a form of special damages. This could be claimed only if it had been within the contemplation of the parties at the time the contract was concluded. Ms Schroeder's evidence that she did not know, at the time the oral agreement was concluded, for what purpose the appellant

required the material ordered from the respondent, could not be contradicted. No basis could hence be laid for special damages.

[22] In the alternative Mr McLachlan submitted that the appellant had failed to establish the *quantum* of its damages. The amount claimed could not constitute loss of profit since it clearly included costs other than those incurred in respect of the material supplied by the respondent. The bulk of the material used in manufacturing the bags was not that forthcoming from the respondent and no value was attached to such material. In any event the net profit could be calculated only with reference to overhead expenses such as labour, electricity, transport and the like. Mr Levy's estimate of a gross profit of approximately R16 000,00 (120%) did not assist the appellant since there was no indication that this was the profit margin applicable in the present case. The appellant simply failed to place the necessary evidence before the court.

[23] Finally Mr McLachlan argued that, even if it should be held that the appellant had proved damages, it had failed to mitigate such damages. It had been suggested by Mr Levy that the sale of the bags could realise at least R5 000,00 (two hundred and fifty bags at R20,00 per bag), yet when the respondent offered to purchase them it was turned down purportedly because of time constraints and the Investec logo's on the bags.

THE RELEVANT LEGAL PRINCIPLES

[24] In any claim for patrimonial damages arising from breach of contract it must be proved not only that there was a breach of contract, but also that the damages claimed were caused by such breach. See *Swart v Van der Vyver* 1970 (1) SA 633 (A) at 643C; *Everett and Another v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C) at 204D; *Sommer v Wilding* 1984 (3) SA 647 (A) at 664D-F; *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 696F and 700H-I; *Visagie v Gerryts en 'n Ander* 2000 (3) SA 670 (C) at 682C-E.

[25] The party claiming damages must demonstrate that they flow naturally and generally from the breach by the defaulting party in the sense that they

constitute foreseeable loss within the contemplation of the parties at the time of conclusion of the contract. In assessing damages the court is required to place the party suffering such damages in the position he would have been had the contract been properly performed, provided this can be done in monetary terms without causing the defaulting party undue hardship. This means that the claimant must take reasonable steps to mitigate his loss or damage. See *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687C-H.

[26] Where special damages are claimed, the claimant must prove that special circumstances pertained at the time of conclusion of the contract, from which circumstances it must be assumed or inferred that the parties actually or presumptively contemplated that special damages would probably result from a breach of contract. See *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 550C-E. For a general discussion on damages in contract see *LAWSA* 7 (1st reissue 1995) par 25-27 and 44-61; R H Christie *The Law of Contract* (4th ed 2001) 629-644; A J Kerr *The Principles of the Law of Contract* (6th ed 2002) 737-788 (with particular emphasis on causation).

[27] A contractual party is regarded as being in breach of contract if he has failed to perform, adequately or at all, the obligations imposed on him by the contract. See Christie (*supra*) 575-577; Kerr (*supra*) 601-602.The party alleging a breach of contract must, in general, prove it. See *Strydom v Van der Merwe* 1951 (3) SA 81 (T) at 83G; *Culverwell and Another v Brown* 1988 (2) SA 468 (C) at 475A; *Culverwell and Another v Brown* 1990 (1) SA 7 (A) at 14E-F and 24I-J.

[28] In contracts of purchase and sale (*emptio venditio*) the seller *venditor*) is in breach if the thing sold (*res vendita*) is defective. The edict of the *aediles curules*, Roman officials charged with the supervision of public markets,

introduced a warranty against latent defects with a view to protecting the interests of the purchaser (*emptor*) who could not be expected to be aware of such defects. In terms of this aedilitian edict the seller was liable for any defect that wholly or substantially impaired the utility or effectiveness of the thing sold. The purchaser could claim full restitution by means of the *actio redhibitoria* or a diminution of the purchase price by means of the *actio quanti minoris*. In later Roman law the *actio empti* (the action arising from the purchase) could be used instead of the aedilitian actions. See the full discussion in *Norman's Purchase and Sale in South Africa* (4th ed 1972 by C I Belcher) 308-304; *MacKeurtan's Sale of Goods in South Africa* (5th ed 1984 by G R J Hackwill) 123-163. See also *LAWSA* 24 (1st reissue 2000) par 99-105; *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A); *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C).

EVALUATION OF THE EVIDENCE

[29] This court, of course, did not have the benefit of observing the demeanour of any of the witnesses who testified before the court *a quo*. That court, as mentioned before, failed to furnish any evaluation of the witnesses or their evidence. We are hence limited in our evaluation to the evidence actually recorded at the trial. Suffice it to say that, even if all the witnesses for the appellant had been impeccable, their evidence came nowhere near assisting the appellant in discharging the *onus* of proof resting upon it. This conclusion is reached on the basis of the following considerations.

[30] In the first place the material sold was described in the particulars of claim as four thousand chunky zips. In its reply to the plea the appellant conceded, however, that the material consisted of one thousand five hundred metres of zip chain and three thousand sliders. In their evidence Mr Levy and Mr Pretorius appear to have accepted that this material was used to make up the zips which were eventually mounted on the bags. What is not clear, however, is whether only the appellant's material was used for this purpose. At no stage was the material specifically identified.

[31] It was not, in my view, proved that the material furnished to the appellant by the respondent was defective in any way. At worst it was unsuitable for the purpose for which it was purchased. If I understand Mr Clarke's evidence correctly, the zip chain and sliders were neither patently nor latently defective. His close visual examination revealed no obstructive "foreign matter" or inconsistency which could account for the inclination of the zips to stick at certain points. He in fact attributed it to "the shape or the spacing of the teeth of the zips at the points where the sticking occurred" and conceded that this might relate to the mounting of the zips at an angle or on a curve or bend. The sticking might in fact have been the result of the incorrect procedure followed in mounting the zips, or simply from having used the wrong kind of zip (chunky instead of spiral) for the purpose for which the zips were required. This is supported by the evidence of Mr Roeloffze, Ms Schroeder and Ms Martin. In short, none of the testimony tendered by either party was indicative of any defect in the material supplied by the respondent to the appellant.

[32] Even if the material were in fact latently defective, the appellant failed dismally in its attempt to prove any form of damages, let alone special damages, allegedly suffered by it. More particularly it failed to prove that the respondent was aware of the purpose for which the material was required. Ms Schroeder's evidence in this regard, as fortified by her letter of 1 August 2000, makes this abundantly clear. There is no reason to reject her evidence that, at the time the oral agreement was concluded, the respondent's representatives were not aware of the use to which the appellant proposed to put the material. It was only after the appellant had drawn their attention to the problems being encountered that they realised that the wrong kind of zip was being used for mounting on sports bags and, in any event, that the wrong process of mounting was being employed.

[33] Even should the appellant have been able to surmount these difficulties, it was quite unable to prove loss or damage as claimed in the original or amended particulars of claim. The amount claimed certainly did not constitute loss of profit in that it totally ignored costs and expenses necessarily incurred. I refer here to the cost of the fabric used for the bags, of which the zips would eventually constitute only a minor part, and overhead expenses relating to labour, electricity, transport and the like. I fully agree with Mr McLachlan that the appellant simply failed to place the necessary evidence before the court.

[34] I likewise agree with Mr McLachlan's submission that, even if the appellant had managed to get past all these obstacles, it had clearly failed to mitigate its damages. The excuses tendered by Mr Levy for not having attempted to sell the bags, with or without the logo's, were lame in the extreme and fall to be rejected out of hand.

CONCLUSION

[35] It follows from these considerations that the court *a quo* quite correctly dismissed the appellant's claim and granted the respondent's claim in reconvention.

[36] In the event the appeal is dismissed with costs.

D H VAN ZYL
Judge of the High Court

I agree.

D M DAVIS
Judge of the High Court

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JUDGMENT	**:**	**JUDGE D H VAN ZYL**
FOR THE APPELLANT	**:**	**ADV A E HEESE**
INSTRUCTED BY	**:**	**MICHALOWSKY, GELDENHUYS & HUMPHRIES (Cape Town)**
FOR THE RESPONDENT	**:**	**ADV H McLACHLAN**
INSTRUCTED BY	**:**	**DU TOIT & COMPANY (Stellenbosch)**
c/o VISAGIE VOS & PARTNERS (Cape Town)		
DATE OF HEARING	**:**	**15 OCTOBER 2004**
JUDGMENT DELIVERED	**:**	**22 OCTOBER 2004**