

SOUTH AFRICA / JUDGMENT

Areff International Ltd v Wild Elements Apparel (Pty) Ltd (21495/15; 21496/15) [2017] ZAGPPHC 210 (25 May 2017)

[2017] ZAGPPHC 210

COURT

North Gauteng High Court, Pretoria

BEFORE

Molopa-Sethosa

CASE / FILE NUMBER

21495/15; 21496/15

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Not

reportable

Not

of interest to other judges

Revised.

25/5/2017

CASE

NO: 21495/15 &

21496/15

In the

matter between:

AREFF

INTERNATIONAL

LTD APPLICANT

And

WILD

ELEMENTS APPAREL (PTY)

LTD RESPONDENT

JUDGMENT

MOLOPA-SETHOSA J

- [1] The applicant has launched applications under case number 21495/15 and case number 21496/15 against the respondent for payment of US\$ 540 000.00 and US\$ 845 285. 42, plus interest thereon at 9% per annum a tempora morae, and costs, respectively.
- [2] At the commencement of the proceedings, the parties by agreement, made an application in terms of Uniform Rule 11 of the Uniform Rules of Court, that case number 21495/15 and case number 21496/15 be consolidated and proceed as a single application. The court granted an order consolidating the two applications aforesaid and the two applications proceeded as a single application.
- [3] The amount claimed in case number 21495/15 represents the deposit paid by the applicant to the respondent for an order of Columbia
- branded Sportswear and apparel; and the amount claimed in case number 21496/15 represents payment made by the applicant to the respondent for an undelivered order of Columbia branded Sportswear and apparel.
- [4] The respondent admits that it is indebted to the applicant in respect of both claims (a total of US\$1 385 285.42), (own emphasis).
- [5] The respondent, however, contends that it has a counterclaim against the applicant in the sum of R365 580 924.28, for damages it alleges it has suffered as a result of some breach by the applicant; which amount it contends, exceeds the aggregate of the applicant's claims.
- [6] The respondent contends that it breached its distribution agreement with Columbia Sportswear as a result of the applicant's failure to timeously pay for its orders; that distribution agreement was as a result thereof cancelled by Columbia Sportswear. The respondent further contends that the applicant's order could not be delivered because Colombia sportswear re-directed the applicant's order to one of its US warehouses, due to applicant's late payment.
- [7] In this regard the respondent states the following in its answering affidavit:

"...the respondent's distribution agreement was terminated as a direct result of the applicant's conduct and as such the respondent intends prosecuting a damages claim against the applicant, which exceeds both the applicant's claims against the respondent.

As appears more fully below, the applicant was at all times material aware of its payment obligations when placing orders with the respondent and that the respondent (on a "back-to-back basis") placed orders on Columbia Sportswear after receiving orders from the applicant. A breach by the applicant of its payment obligations had the necessary effect that the respondent breached its distribution agreement with Columbia Sportswear. As a result of the applicant's failure to

timeously pay for its orders, the respondent breached its distribution agreement, which distribution agreement was as a result thereof cancelled by Columbia Sportswear. ...the respondent has suffered damage (sic) in the amount of no less than R365, 580, 924. 28, which amount exceeds the applicant's claim under both case no's 2149612015 and 2149512015 against the respondent.

During December 2014, Columbia Sportswear goods supplied to the applicant as part of the tender order in a retail outlet in the USA known as Sam's Club. This breach by the applicant (again which constituted a breach by the respondent of its distribution agreement) was the so-called "last straw" which, together with the other breaches outlined above, resulted in Columbia Sportswear finally cancelling its distribution agreement with the respondent.

The respondent admits that it is indebted to the applicant in respect of both claims [i.e. US\$540, 000, 00 = R6, 474, 570.00 and US\$845, 285. 42 = RI O, 562, 263. 96 (total R17, 309,

833. 96)]. The respondent however, has a counter - claim which exceeds the aggregate of the applicant's two claims, which it seeks to prosecute;

The applicant was at all times material aware that should payments be made late that Columbia Sportswear would cancel the order and re-route the order to one of its US warehouse. The applicant was also aware that this would constitute a breach by the respondent of its distribution and license agreement. "

[8] The respondent thus seeks to invoke the provisions of rule 22 (4) of the Uniform Rules of Court, and submits that the applicant's claims be referred to trial to be heard *pari passu*, alternatively that the applicant's claims be postponed *sine die* until judgment is given in its counterclaim.

[9] The issue for determination before this court is whether there is reason for the claim of the applicant to be delayed pending the adjudication of the respondent's counterclaim

[10] The applicant contends that the counterclaim put up by the respondent is contrived and is nothing more than an attempt on its part to avoid effecting payment of the amounts which it admits are due to the applicant, and that it constitutes an abuse.

[11] From the portion quoted from the respondent's answering affidavit above, the basis for the counterclaim the respondent contends it has against the applicant is the following:

[11.1] firstly, that the respondent's distribution and license agreement concluded with Columbia Sportswear was terminated as a result of the applicant having failed to timeously pay the respondent for orders;

[11.2] secondly, that the applicant sold goods through a retail outlet in the USA, in circumstances where the applicant had allegedly given an undertaking that it would not do so.

[12] The applicant contends that, in relation to the first issue, the respondent's own documentation reveals that the distribution

agreement was terminated, not as a result of the applicant having failed to timeously pay for its orders, but rather because the

respondent had failed to comply with its own contractual obligations owed to Columbia Sportswear, including the delivery of a letter of credit.

[13] The applicant further contends that, in relation to the second issue, the respondent's own documentation reveals that this issue had nothing whatsoever to do with the termination of the distribution agreement.

[14] Counsel for the applicant submitted that there is no basis for the counterclaim whatsoever; that regardless thereof and in so far as there may be any basis, the applicant has consented to the jurisdiction of this court; and that there is no reason why

judgment

should not be granted in favour of the applicant in both claims.

[15] In *Consol Limited t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* and another [2002] 1 All SA 517 (c) at para [21], the test applicable to obtain a stay in terms of Rule 22(4) was set out by Van Zyl J as follows:

"In this regard the court clearly has a discretion. This discretion must be judicially exercised, in accordance with the tenets of justice, fairness and reasonableness, and with reference to all the relevant facts and circumstances. Refer *ERE Foundry (Pty) Ltd v San Sales (Pty) Ltd* 1984

(1) SA 372 (D) at 374G; *NTC Steel Services (Pty) Ltd v Jamar (Pty) Ltd (t/a Steel King)* 1984

(2) SA 629 (T) at 631 H "

[16] The respondent contends that the following are the relevant background facts to its counterclaim against the applicant: That

[16.1] During or about 2010 it had entered into a distribution and license agreement with Columbia Sportswear to exclusively distribute Columbia branded products within the territory defined as South Africa, Botswana, Namibia, Zimbabwe, Mozambique, Angola, Zambia, Kenya, Tanzania and Indian Ocean Islands, for the period 2009 to 2013;

[16.2] It [respondent] later entered into a new distribution agreement with Columbia Sportswear, on virtually identical terms, for the period 2013 to 2016.

[16.3] The respondent required the applicant to pay a deposit of between 15 to 30% of each order terms for orders it placed with the respondent before the respondent would place an order with Columbia Sportswear. The payment of the balance was immediately due

when the order was ready to be collected.

[16.4] The applicant was at all material times aware that if it should payment be made late Columbia Sportswear would cancel the order and re-route the order to one of its US [United States of America] warehouses. The applicant was further aware that late payment would constitute a breach by the respondent of its distribution and license agreement with Columbia Sportswear;

[16.5] The applicant breached its payments obligations with the respondent, causing the respondent to breach its obligations with Columbia Sportswear, resulting in the cancellation of the distribution agreement.

[16.6] The applicant further breached a condition of supply for a particular order that precluded it from selling the product through retail outlets, save in the event of an excess which would be sold in their Mauritian stores; that in December 2014 Columbia Sportswear discovered product sold to the applicant by the respondent in a retail outlet in the USA known as Sam's Club, which constituted a further breach by the respondent of its distribution and license agreement with Columbia Sportswear;

[17] The respondent contends that the two breaches aforesaid resulted in Columbia Sportswear finally cancelling the respondent's distribution and license agreement with it.

[18] On a careful analysis of the respondent's contentions referred to above, and from the reading of the papers filed, there is no confirmation for the respondent's allegations as to the reasons it set out above, for Columbia Sportswear's termination of the

distribution agreement with the respondent. The applicant correctly submitted that this is inadmissible hearsay evidence. There is no evidence under oath, by Columbia Sportswear verifying the reason for its termination of the distribution agreement with the respondent.

[19] From the correspondence addressed by Columbia Sportswear to the respondent, it emerges that Columbia Sportswear seems to have

cancelled the distribution agreement with the respondent for other reasons other than what the respondent alleges are the reasons as set out by the respondent in its answering affidavit.

[20] In a letter dated 9 May 2014, annexure RA2.1 to the respondent's replying affidavit, Columbia Sportswear states the following:

"As mentioned, during the past months we were obliged to send numerous reminders to your account payable departments and we also have had several calls regarding late payments. Payments announced by Wild Elements have very often been delayed and the received amounts were also often lower than expected and announced by you.

Today's statement of your account (see attached) shows an outstanding invoiced amount of USD 1 290 396. 75 of which USD 754 226.46 are overdue ... "

- [21] From this letter [annexure RA2.1], it appears that as at 9 May 2014, the respondent had already been in default with its payments to Columbia Sportswear for a number of months. The statement attached to this letter demonstrates that the respondent's indebtedness had been accruing since July 2013 on several orders it had placed. On respondent's version the earliest of the applicable orders of applicant pertinent to this application seem to be an order placed in February 2014, and invoices applicable to this case (as consolidated) were issued to the applicant in November 2014.
- [22] Furthermore, in terms of paragraph 9.5 of the distribution agreement, the payment obligations of the respondent to Columbia Sportswear appears to be that, upon the respondent placing an order with Columbia Sportswear, the respondent was obliged to establish an irrevocable letter of credit issued by a bank acceptable to Columbia Sportswear "securing payment in full in advance of shipment of all amounts to be paid under the order".
- [23] From the above it there does not seem to be a link between the respective payment obligations vis-a-vis Columbia Sportswear and the respondent on the one hand, and the respondent and the applicant on the other. All the applicant was required to do, on respondent's version, was to pay a 15-30% deposit upon placing an order, whereas the respondent had to pay Columbia Sportswear in full upon it placing an order; it was obviously required to have the working capital/funds to do so, without having to rely on being paid by its customers first.
- [24] In another letter, dated 5 June 2014, annexure RA2.2 to the respondent's replying affidavit, Columbia Sportswear states the following:
- "..the amount of outstanding invoices due has reached an acceptable level so that we do not need to draw on the bank guarantee now ...
- ...the financial exposure remains extremely high in regard to constant late payments, the level of open orders and upcoming due dates for invoiced amounts.
- ..The difficulties we have faced on the financial side of our relationship as illustrated by these letters, demonstrating insufficient financial stability is of great concern. We therefore regret to hereby formally announce that we will not be renewing the agreement with Wild Elements at the end of 2015. "(Own emphasis)
- [25] Again, Columbia Sportswear refers to constant late payments by the respondent, and the due dates for several upcoming invoices and orders. Notably, at the time in question, there was only a single order applicable to the applicant but, more significantly, the applicant had not yet even been invoiced by the respondent for this order. On the respondent's own version, the two invoices for this order were only issued on 12 June 2014.
- [26] It is very significant, to note that the respondent had not attached either of the letters dated 5 May 2014 or 9 June 2014 to its answering

affidavit; the applicant sought and obtained these letters through a request in terms of Rule 35(12), after reference to these letters had been made in annexure A9 to the answering affidavit [a letter dated 21 July 2014).

[27] The two letters aforesaid were then followed by the said letter dated 21 July 2014, from Columbia Sportswear to the respondent, annexure A9 to the answering affidavit, in which Columbia Sportswear informs the respondent as follows:

"As you know the agreement sets out in 14.1.2 that it may be terminated 30 calendar days after Columbia delivers written notice if distributor breaches its payments obligations. We also refer to our letters dated 9 May 2014 and 5 June 2014 respectively and our numerous discussions. We note that Wild Elements has not put in place the Stand-by Letter of Credits (SBLC) obligations stated in our letter of 5 June 2014 and continues to have outstanding debts.

As a consequence, we hereby give you written notice of our decision to terminate the mentioned Distribution Agreement ... "

[28] It clearly appears that in the circumstances, the termination of the distribution agreement came about on account of the respondent's

failure to have put a Stand-by Letter of Credits (SBLC) in place, resultant upon from its own prior unacceptable payment profile. This surely is something that was unconnected to the applicant.

[29] The respondent raises a further alleged breach on the part of the applicant, which it says was committed through the course of a particular order supplied to the applicant having impermissibly been sold through a retail outlet, Sam's Club, in the USA, under circumstances where the applicant had given an undertaking that this would not occur.

[30] The applicant contends that, as to the bona fide of this contention, the respondent offered the applicant no details of this batch of goods despite invitations to do so.

[31] In so far as this alleged breach is concerned, which the respondent contends was the "last straw" that caused for Columbia Sportswear to finally cancel the distribution agreement with the respondent, no where in the letters from Columbia Sportswear referred to above is there any reference to this alleged breach as a reason for the cancellation of the distribution agreement.

[32] Further, the respondent states, on the one hand, that:

"It was a condition of this order (in particular the preferential discount granted to the Applicant) that none of the goods forming part of the tender order would be sold through any retail outlet"

On the other hand that:

"The respondent accepted the undertaking made by the applicant that the product would not be sold in retail outlets, save in the event of an excess which would be in Mauritius stores."

[33] The respondent's allegations above, as to what the obligation concerning selling to retail outlets was, are mutually destructive.

[34] It is trite that the grant of a stay of the nature sought by the respondent here is one that is within the discretion of the court. In *Van Den Bergh & Partners Ltd v Robinson* [1952] All SA 77 (SR) at 78, the following guidance was provided as to when a stay of the applicant's claim ought not to be granted:

"The authorities dealing with the proper approach by a court faced with this situation were fully considered in the case *Abbott and Another v Nolte*, 1951

(2) SA 419 (C). It would seem that both in England and South Africa the practice is the same and that in such cases the judgement is not entered for the plaintiff, or if judgement is entered, execution is stayed, unless there are special reasons justifying the contrary. In *Mersey Steamship Company v Shuttleworth & Co.*, 52 L.J., Q.B.D. 522, it was held that the defendant has a right to resist judgement "unless the counterclaim set up by such defendant is shown to be frivolous, unsubstantial and to be pleaded for the mere purpose of the delay".

Refer also: *Polverini v General Accident Insurance Company South Africa Limited* [1998] I All SA 588 (W) at 594 - 595.

[35] It was submitted on behalf of the applicant that this is a case where rule 22 (4) is sought to be exploited, in a bid to delay the applicant's claims. From the facts set out above, this court is inclined to agree with the applicant's submission.

[36] On a conspectus of all facts, and from the reading of two (2) letters aforesaid, annexed to the applicant's replying affidavit as annexures RA2.1 [letter dated 9 May 2014], and RA2.2 [letter dated 5 June 2014], which letters, as already stated, were obtained by the applicant through a request in terms of Rule 35(12); which letters were not even disclosed by the respondent in its answering affidavit, I do not see any reason why the payment of the applicant's claims, which is clearly admitted by the respondent, should be delayed. These letters suggest that the Colombia distribution license agreement was terminated as a result of the respondent's indebtedness to Colombia Sportswear in respect of about 150 transactions concluded between the respondent and Colombia Sportswear over a period 2013 and 2014; as opposed to two (2) transactions

concluded between the applicant and the respondent.

[37] As can be seen in the termination letter, dated 21 July 2014, annexure A9 to the answering affidavit, it appears that Colombia Sportswear terminated the distribution agreement with the respondent due to the respondent's breach of its contractual obligations owed to Colombia Sportswear; i.e. due to the respondent's failure to comply with its own payment and other contractual obligations owed to Colombia Sportswear; and not on the grounds that the applicant had failed to effect payment to the respondent timeously.

- [38] In its answering affidavit the respondent contends that its counterclaim is based on an actuarial report which purports to set out the respondent's loss of profit projected/forecast for the period 2014 to 2019. It is difficult to comprehend how the forecast goes up to 2019 when the distribution agreement that was cancelled was due to expire in 2016.
- [39] The report by one Leonard Bruhns, annexure X2 to the respondent's answering affidavit, is entitled "Investment opportunity" and seems to have been prepared for purposes of raising funding for the respondent. The report does not seem to be a damages calculation but rather an investment forecast.
- [40] In any event, the document purporting to be the affidavit [annexure XI] of the said Leonard Bruhns, who allegedly prepared the aforesaid report entitled Investment opportunity, is not even commissioned. It can thus not even be regarded as evidence before this court. In any event the said report does not assist the respondent.
- [41] As at present, and as already stated above, the debt owed by the respondent to the applicant in respect of both claims is not in issue. The debt is clearly admitted by the respondent. On the facts before this court, and in my considered view, there is no reason why the applicant should not, at this stage, be entitled to payment of the monies owed to it in respect of the two claims in issue herein. Nothing stops the respondent to, at any time convenient to it, and/or whenever it is ready to proceed with its alleged claim against the applicant, to institute an action against the applicant for such damages it contends it suffered due to the applicant's alleged conduct. The respondent still remains free to pursue its counterclaim; but on the facts before this court, there exists no reason to justify the claims of the applicant being delayed pending the adjudication of the respondent's alleged counterclaim.
- [42] The protest of the respondent in having to pursue a separate claim was that it would have difficulty in establishing the jurisdiction of this court and would have to litigate in a foreign court under circumstances where South African law applies. For the former of those reasons the respondent also sought to attach the claims of the applicant to found jurisdiction. Those apprehensions no longer exist because the applicant has submitted to the jurisdiction of the South African courts, and so too it has put up security for the respondent's costs.
- [43] On the facts before me I am satisfied that the applicant has made out a case for the relief sought. I however do not see any reason why the respondent should be penalized with costs.
- [44] In the result I make the following order:
1. The application(s) of the applicant is upheld.
 2. The respondent is ordered to pay the amounts of US\$540 000 and US\$845 285.24 respectively, to the applicant.
 3. The respondent is ordered to pay interest on the amounts of US\$540 000 and US\$845 285.24 aforesaid at the rate of 9o/o per annum a tempora morae.

4. The respondent is ordered to pay the costs of the applicant on a party and party scale.
5. The respondent's counter application is dismissed with costs.

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

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