

SOUTH AFRICA / JUDGMENT

Barkley-Wes Motors CC v Iceburg Trading 507 CC and Others (1147/2016)

[2022] ZANCHC 30 (27 May 2022)

[2022] ZANCHC 30

COURT

Northern Cape High Court, Kimberley

BEFORE

Lever

CASE / FILE NUMBER

1147/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTHERN

CAPE DIVISION, KIMBERLEY)

Case

No: 1147/2016

Reportable:

NO

Circulate

to Judges: YES

Circulate

to Magistrates: NO

Circulate

to Regional Magistrates: NO

In

the matter between:

BARKLEY-WES

MOTORS CC

Plaintiff

and

ICEBURG

TRADING 507 CC

(trading

as CHRISTAL CARRIERS)

First Defendant

WOOGANATHAN

KRISHNASAMMY

Second Defendant

CHRISTAL

CLARE COLLEEN KRISHNASAMMY
Third Defendant

Coram: Lever J

JUDGMENT

Lever J

1. This is an action to claim the outstanding balance on an account, in the amount of R458 457.49 (four hundred and fifty-eight thousand four hundred and fifty-seven Rand and forty-nine cents), for the sale of petroleum products sold on credit, for the use of the first defendant, from the three defendants cited herein jointly and severally, the one paying the others to be absolved.

2. The defendants have raised two special pleas, the details of which will be set out and dealt with presently. The defendants have also pleaded over on the merits.

3. The first special plea raised by the three defendants reads as follows:

“(a) The Plaintiff’s claim is based on an oral agreement for the sale and supply of petroleum products as defined in the Petroleum Products Act No: 120 of 1997 (as amended) (sic) (it is presumed that the defendants intend to invoke Act 120 of 1977 as amended) by the Plaintiff, as re-seller to the defendant, on terms that amount to a credit sale.

(b) In terms of section (sic) 4(1)(a) of Regulation R2298 governing the sale and/or supply of petroleum products as published in Government Gazette GG9962 of 11 October 1985 (amended), no petroleum products (petrol or diesel oil) shall be supplied by a re-seller to (sic) consumer other than against payment in cash.

(c) The contravention of the above regulation, read with the provisions of section 2(1)(d) and 12(1A) of the Act, imposes a criminal sanction for non-compliance with the regulation.

(d) Accordingly, the agreement relied upon by the Plaintiff is contrary to law, void and therefore unenforceable.”

4. To this the plaintiff replicated as follows:

“1.1 Save to admit that the Plaintiff’s claim is based on an oral agreement for the sale and supply of petroleum products as defined in the Petroleum Products Act 120 of 1997 (sic)(it is also assumed that the plaintiff also intends to refer to Act 120 of 1977) and that the contravention of Regulation 4(1)(a) of the Act (sic) imposes a criminal sanction for non-compliance with the regulation, the remainder of the allegations set out in these paragraphs are denied, as if specifically traversed, and the Defendants are put to the proof thereof.

1.2 The Plaintiff specifically pleads that the oral agreement between the Plaintiff and the Defendants is not void, but enforceable.”

5. The second special plea filed by the defendants reads as follows:

“The Defendants aver that the above Honourable Court does not have jurisdiction to hear this matter in that the amount claimed is less than the monetary jurisdiction of the above Honourable Court. Alternatively (sic) the defendants have paid to the plaintiff through its agent the amount of R208 000 and accordingly the balance owing to plaintiff does not fall within the monetary jurisdiction of the above Honourable Court.”

6. The plaintiff replicated to this special plea in the manner set out hereunder:

“2.1 The Plaintiff denies the allegations set out in these paragraphs.

- 2.2 The Plaintiff specially pleads that:-

- 2.2.1 the Plaintiff’s claim is for an amount of R458 547,97; and

- 2.2.2 this Court has inherent jurisdiction to adjudicate claims, irrespective of the monetary amount thereof.”

7. Turning now to the first special plea set out above, it is clear from the special plea itself that it was based upon the regulation 4(1)(a) R2298 published in Government Gazette GG9962 on the 11 October 1985. This regulation stated in prohibitory terms that sales of petroleum products may only be for cash, and it was clear from the said regulation read with the relevant Act that sale on credit would constitute an offence.
8. Shortly before the matter was argued before me, I pointed out to both Counsel for the plaintiff and the defendant that regulation 4(1)(a) as it was set out in R2298 of the 11 October 1985 had been repealed by regulation R731 published in Government Gazette 32389 on the 9 July 2009. That this new regulation published on the 9 July 2009 applied to the plaintiff’s claim, which according to plaintiff’s Declaration arose during September or October 2015. The wording of Regulation 4(1) clearly no longer created an offence in the circumstances set out in defendants’ first special plea.
9. Ms Stanton, who appeared for the plaintiff and Mr Babuseng who appeared for the defendants were given an adequate chance to confirm the situation and effect of the 2009 regulations repealing the 1985 regulations. At the hearing hereof Mr Babuseng correctly abandoned the first special plea. In these circumstances, the first special plea does not need to enjoy any further consideration.
10. Turning now to the second special plea raised by the defendants, being that the monetary value of the plaintiff’s claim alternatively the amount owed by the defendants does not fall within the monetary jurisdiction of this court being a division of the High Court.

11. The Magistrates Courts derive their monetary jurisdiction from the relevant statutes and regulations promulgated thereunder[1]. In the Magistrates Courts this is usually set as an upper limit and is usually determined and set by the relevant Minister from time to time. This is not the case in respect of any Division of the High Court. The position is regulated by section 21 of the Superior Courts Act[2] (the Act). The High Court also derives jurisdiction from the common-law and it has inherent jurisdiction in other respects.
12. The upper monetary limits created for Regional and District Magistrates Courts cannot and does not create a lower monetary limit for the High Court. This is quite clear from reading the relevant provisions of the respective Acts. Section 21 of the Act sets no monetary limits on the jurisdiction of a High Court either as a minimum or a maximum amount. The upshot of this is that a High Court has concurrent jurisdiction with Regional and District Magistrates Courts with regard to the monetary value of a claim.
13. However, High Courts, when confronted with a monetary claim that falls within the monetary jurisdiction of a Magistrates Court, will traditionally award the successful party who instituted a claim in the High Court instead of the appropriate Magistrates Court, costs on the appropriate Magistrates Court scale. This is however not an inflexible rule, and the High Court has the discretion to award costs to such a litigant on the High Court scale in the appropriate circumstances.
14. I mention the issue of costs because this is the only aspect of the monetary jurisdiction of the Magistrates Court Act that has any application in the High Court.
15. For the reasons set out above, the second special plea relating to the mooted monetary jurisdiction of the High Court stands to be dismissed with costs.
16. Turning now to the merits of the matter. Three issues arise out of the pleadings for determination by this court. Firstly, are all three defendants jointly and severally liable to pay the plaintiff's claim, should it be established. Secondly, the defendants allege that a certain Mr Ross Henderson was the plaintiff's representative and the said Mr Henderson acted as the plaintiff's agent in receiving money paid by the first defendant to the plaintiff and the first defendant paid Mr Henderson the amount of R208 000.00 (two hundred and eight thousand Rand). Thirdly, if the agency of Mr Henderson has been established has the payment of R208 000.00 been established by the defendants.
17. The plaintiff has led the evidence of two witnesses being, Lourens Martinus Van Heerden (Junior) and Gabriel Willem Andries Van Heerden (Senior) the only two members of the plaintiff.
18. On behalf of the defendants', only Wooganathan Krishnasammy, the second defendant, gave evidence on behalf of all three defendants.

19. Turning to deal with the first question set out above. The relevant portions of the plaintiff's declaration dealing with this aspect appear from paragraphs 3 to 6 of the said declaration. The relevant paragraphs read as follows:

"3. On or during September or October 2015 and at Barkly-Wes, the Plaintiff, represented by GWA van Heerden, entered into a verbal agreement with the Second Defendant, the Third Defendant and the first defendant, duly represented by its authorised members, the Second and/or Third Defendants.

4. The relevant explicit and/or implied and/or tacit terms of the verbal agreement were:-

4.1 The Plaintiff would sell diesel to the First Defendant and/or Second Defendant and/or Third Defendant on credit;

4.2 The Plaintiff would render an account to the First Defendant on the 25th day of each month in respect of the diesel sold to the First Defendant in respect of the 1st day to the 24th day of every month;

4.3 The First Defendant and/or the Second Defendant and/or the Third Defendant agreed to pay the account rendered by the plaintiff to the First Defendant on or before the 25th day of the following month; and

4.4 The First Defendant and/or the Second Defendant and/or the Third Defendant agreed to pay interest to the Plaintiff, calculated at the 1,15% per month in respect of any amount not paid on due date thereof.

5. During the period 1 March 2015 to 30 January 2016 the Plaintiff sold diesel to the First Defendant and/or Second Defendant and/or Third Defendant on credit to the total amount of R4 135 949.44 as set out in annexure A hereto.
6. The First Defendant and/or Second Defendant and/or Third Defendant failed to make payment of the amount of R458 457.49, which amount remains outstanding, despite demand."
20. In their plea over, defendants pleaded as set out hereunder to the said paragraphs of plaintiff's Declaration:

"5. AD PARAGRAPH 3 THEREOF

The allegations contained herein are not denied.

6. AD PARAGRAPH 4 & 4.1 THEREOF

The Defendants admits (sic) that the plaintiff sold diesel to the First Defendant on credit but avers that the sale of petroleum products on credit is illegal and repeats the averments made in the special plea as if specifically incorporated herein.

7. AD PARAGRAPH 4.2 THEREOF

8. AD PARAGRAPH 4.3 THEREOF

The allegations contained herein are denied. The Defendants plead that only the First Defendant agreed to pay the account rendered by the Plaintiff to the First Defendant on or before the 25th day of the following month.

9. AD PARAGRAPH 4.4 THEREOF

The allegations contained herein are denied and Plaintiff is put to the proof thereof.

10. AD PARAGRAPH 5 THEREOF

The allegations contained herein are denied. The Defendants plead that during the period 01 March 2015 to 30 January 2016 the Plaintiff sold diesel to the First Defendant only. The Defendants admit that the first defendant purchase (sic) diesel in the amount of R4 135 949-44 as set out in annexure "A".

11. AD PARAGRAPH 6 THEREOF

The allegations contained herein are denied. The Defendants plead that the amount of R208 000 was paid by the First Defendant to the Plaintiff's representative, Mr Ross Henderson, who agreed and made arrangements to pay such monies over to the plaintiff. The Defendants plead that Ross Henderson acted as the agent of the plaintiff and undertook all dealings for and on behalf of the Plaintiff and all monies due and payable to the plaintiff were paid to Mr Ross Henderson by the First Defendant, in order that same could be paid over to the plaintiff."

21. Save for a one word response by the plaintiff's first witness, Van Heerden Jnr, to a leading question as to plaintiff's claim being against the first, second and third defendants and a follow up question as to who the negotiations were with and that both the second and third defendants acted in both their personal and representative capacities in the said negotiations and that the diesel was sold to the first, second and third defendants, neither of the witnesses called on behalf of the plaintiff gave any further evidence pertinent to the joint and several liability of the three defendants in their testimony before this court. Save for the reference to the defendants as joint purchasers, there is no evidence as to what the underlying basis was for holding the three defendants jointly and severally liable for what the evidence showed was the use of fuel by the first defendant. The evidence of Van Heerden Jnr went no further than to allege that the three defendants were joint purchasers. The evidence of Van Heerden Jnr that the second and/or third defendants own the first defendant is irrelevant to this question.
22. Accordingly, this question of whether the three defendants are jointly and severally liable for the relevant debt will have to be resolved from the relevant portions of the pleadings, which have been set out above taken together with the evidence already referred to above.
23. At best from the plaintiff's Declaration the three defendants were joint purchasers, but can this position be sustained from the case as pleaded by the parties and the evidence placed before this court?

24. As can be seen from the pleadings as set out above:
- 24.1. Second, third and first defendants entered into an agreement with plaintiff;
- 24.2. First defendant was represented by its duly authorised members being second and third defendants;
- 24.3. It emerges from the plea to paragraph 4.1 of the Declaration that although the indications are that the defendants intended to plead that diesel was only sold to the first defendant, the defendants are deemed to have admitted that the sale of diesel on credit would be to the first defendant and/or the second defendant and/or the third defendant;
- 24.4. Paragraph 4.2 of the plaintiff's Declaration tends to show that diesel was in fact sold to the first defendant;
- 24.5. The said paragraph 4.2 is admitted by the defendants in their plea;
- 24.6. In their plea to paragraph 4.3 of plaintiff's Declaration, defendants specifically plead that only first defendant agreed to pay for the respective diesel;
- 24.7. The clear implication of the plea to paragraph 4.3 of the declaration is that defendants deny the contention that second and third defendants agreed to pay for the said diesel;
- 24.8. Defendants' in their plea to paragraph 5 of plaintiff's Declaration expressly plead that during the relevant period diesel was sold to the first defendant only; and
- 24.9. Defendants' denied the contentions made by the plaintiff in paragraph 6 of the plaintiff's Declaration.
25. The pleadings of both the plaintiff and the defendants could have been drawn with greater precision and clarity. I believe that I must read the respective pleadings contextually and holistically. From such a reading of the pleadings, in my view plaintiff intended to plead that the defendants were joint purchasers who would be jointly and severally liable with each other for payment. It also emerges that the defendants intended to plead that only the first defendant purchased the diesel concerned and that only the first defendant would be liable to pay for such fuel.
26. In the circumstances, the onus of proving its claim was against joint purchasers who contractually agreed that the defendants would be jointly and severally liable to pay for such purchases would fall on the plaintiff. This Onus would need to be discharged on a balance of probabilities. From an analysis of the pleadings and the evidence referred to above, I do not believe that plaintiff has discharged this onus. The probabilities show that the first defendant was the purchaser of the fuel concerned and that the first defendant was liable to pay for such fuel. On the probabilities, plaintiff has not established that second and third defendants were jointly and severally liable with the first defendant to pay for such fuel as was sold to the first defendant.

27. Turning now to the second question to be determined on the merits, being whether the defendants have established that Mr Ross Henderson was appointed as the plaintiff's agent to receive payment on plaintiff's behalf.
28. At this juncture the credibility and reliability of the respective witnesses called on behalf of the plaintiff and the defendants comes into consideration. Although at one point Van Heerden Snr appeared to be confused about the total sales of diesel to the first defendant, he otherwise impressed the court as a reliable and honest witness. There was no confusion in regard to his evidence that Mr Ross Henderson played no role in the plaintiff's transaction with the defendants. Mr Van Heerden Snr's evidence was not shaken in cross-examination.
29. Mr Van Heerden Jnr, the first witness for the plaintiff also impressed this court as a reliable and honest witness. His evidence was that he knew Mr Henderson by sight as Mr Henderson was an acquaintance of his father, Van Heerden Snr. He and his father discussed important business decisions as they had been in business together for some 15 years. Mr Van Heerden Jnr's evidence was also not shaken in cross-examination. There were no material inconsistencies between the evidence of Van Heerden Jnr and Van Heerden Snr. On this aspect, the evidence of Van Heerden Snr and Van Heerden Jnr that Ross Henderson did not act as the plaintiff's agent to collect outstanding amounts due by the first defendant is not in any way inherently improbable.
30. The second defendant, Wooaganathan Krishnasammy, gave evidence on behalf of the defendants. His evidence was not reliable in a number of respects. In his evidence-in-chief he contended that he was instructed by Van Heerden Snr to make all payments due to the plaintiff to Mr Ross Henderson. Mr Krishnasammy further testified in his evidence-in-chief that after the summons was served on the defendants the first defendant made no further payments to the plaintiff at all. It is common cause that the summons commencing action was served on all three defendants on the 21 July 2016.
31. The defendants discovered and produced in court eight documents that the second defendant maintained evidenced payments by the first defendant to Mr Ross Henderson for the benefit of plaintiff. In his evidence-in-chief, as set out above, he maintained there were no payments after summons commencing action was served on the defendants. In cross-examination Ms Stanton directed Mr Krishnasammy's attention to the dates of such purported payments. Mr Krishnasammy was constrained to admit in cross-examination that the dates of all of these purported payments was after the date that summons commencing action was served. His explanation that he was confused by the dates, in such circumstances is not convincing at all, nor is it plausible.

32. In cross-examination Mr Krishnasammy was asked again why he paid Mr Henderson after summons was served. Mr Krishnasammy's answer to Ms Stanton's question simply did not make sense. The only conclusion that I can reach from this situation is that Mr Krishnasammy had no credible answer to the question why he paid any amount to Mr Ross Henderson after the summons commencing action in this matter was served on all three defendants.
33. A further indication that Mr Krishnasammy's evidence was not reliable is that during the evidence of the plaintiff it emerged that there was a further payment in the amount of R50 000.00 (fifty thousand Rand) made directly to the plaintiff after the matter had been handed to the plaintiff's attorney for collection. This appears from a statement of amounts received at page 45 of the plaintiff's bundle. This was confirmed by Van Heerden Jnr. This was never challenged in cross-examination. It was also never dealt with by Mr Krishnasammy in his evidence. In these circumstances, this court can safely accept that such payment was made by the first defendant. This runs counter to Mr Krishnasammy's evidence that Van Heerden Snr had during that time frame instructed him to make all future payments to Mr Ross Henderson. The failure to challenge this evidence in cross-examination or deal with it in the evidence-in-chief of Mr Krishnasammy renders the defendant's version on the agency of Mr Ross Henderson as improbable.
34. Another difficulty with the evidence of Mr Krishnasammy is that he acknowledged that even if the payment of R208 000 to Mr Ross Henderson was accepted he still owed plaintiff in the region of R250 000 (two hundred and fifty thousand Rand). However, he then testified that the first defendant would be entitled to a discount. The entitlement to a discount was never pleaded. It was also never put to any of the plaintiff's witnesses when they were cross-examined. Further, the fact that Mr Krishnasammy was unable to give a specific amount that the first defendant owed the plaintiff on its version casts further doubt on Mr Krishnasammy's evidence.
35. Mr Krishnasammy gave this court the impression that he was opportunistic in the evidence that he gave. As illustrated above in relation to the evidence on a discount. When he was challenged with what would flow from that evidence, such as provide a definite amount the first defendant owed the plaintiff his response lacked any credibility at all.
36. Further doubt is cast upon the defendants' version in relation to Mr Ross Henderson by virtue of the fact that defendants failed to adduce the evidence of Mr Henderson. The court was merely informed before the defendants closed their case that Mr Henderson was not available. It is not an exaggeration to say that Mr Henderson's evidence would have been key to the defendants establishing their case. Yet they took no tangible steps to secure his evidence. There was no subpoena for him to appear in court to testify in this matter. There was no subpoena duces tecum for Mr Henderson to produce the relevant banking records where the defendants' payments were allegedly made.

37. Furthermore, the alleged payments by the first defendant to Mr Henderson are nothing more than pieces of paper wherein alleged payments are allegedly evidenced. There was easily available evidence which could have added substance to the contentions that the first defendant paid Mr Ross Henderson as alleged and for the alleged purpose. The first defendants own bank statements for the relevant period were not discovered or produced. These statements could have proved that the relevant amounts were indeed paid by the first defendant on the alleged dates. If Mr Henderson's banking records were subpoenaed duces tecum and they were consistent with the banking records of the first defendant, whilst not conclusive, this would have gone a long way towards swinging the pendulum in the defendants' favour. The fact that the defendants did not take these steps must certainly weigh against them.
38. On the question of Mr Ross Henderson's alleged agency for the plaintiff it is trite that the defendants have the onus of proof by application of the old adage "He who asserts must prove". Naturally this will be proof on a balance of probability.
39. Having regard to all of the difficulties referred to above, the defendants have not discharged the burden of proof that Mr Ross Henderson acted as the plaintiff's agent as they have alleged.
40. Turning to the last question as to whether the defendants have established payment in the amount of R208 000 to Mr Henderson. When a defendant pleads a payment, the onus is on such defendant to both allege and prove such payment.[3]
41. Again, the documents discovered by the defendants by themselves do not establish the actual payment. If they had been corroborated by the first defendants own banking records for the relevant period as well as banking records of Mr Ross Henderson for the corresponding period subpoenaed duces tecum, that might have been another matter. The fact that the defendants took no steps to secure such records indeed counts against them. The defendants, on a balance of probabilities have not discharged the onus of proving such payments.
42. The fact that the first defendant is indebted to the plaintiff is not in dispute after all the evidence is considered. The amount of such indebtedness was disputed initially but the defendants have not established on a balance of probabilities that such payments were made to the plaintiff's agent. Further, the defendants have not established on a balance of probabilities that such payments were made at all. For the reasons set out above, the defendants' evidence on these aspects has been rejected.
43. The plaintiff has sought a prayer declaring that the verbal agreement has been validly cancelled. This relief was not seriously pursued by the plaintiff. It has never been the defendants' case that the agreement concerned is still valid and enforceable. In the circumstances of this case, I cannot see the need for granting such relief. Accordingly, no such order will be made.

44. The last aspect to consider is the issue of costs. Neither the plaintiff nor the defendants advanced reasons why the ordinary rule that costs should follow the event should not be applied. In the circumstances I believe that costs should follow the event.

In the circumstances, the following order is made:

- 1) The first defendant is to pay the plaintiff the amount of R458 457.49 (four hundred and fifty-eight thousand four hundred and fifty-seven Rand and forty-nine cents).
- 2) First defendant will pay interest on the above amount at the current mora rate from date of service of summons until date of payment.
- 3) First defendant will pay the costs of the action.

Lawrence Lever

Judge

Northern Cape Provincial Division, Kimberley

APPEARANCES:

PLAINTIFF:

Adv A Stanton oio Engelsman Magabane Inc.

DEFENDANTS: Adv B Babuseng oio Magoma Attorneys

Date of Hearing: 03 June 2021

Date of Judgment: 27 May 2022

- [1] Section 29(1)(g) as read with section 29(1A) of the Magistrates Courts Act 32 of 1944 (the Magistrates Courts Act).
- [3] STANDARD BANK v ONEANATE INVESTMENTS (IN LIQUIDATION) [1997] ZASCA 94; 1998 (1) SA 811 (SCA) at 823D-E.

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