

SOUTH AFRICA / JUDGMENT

Beckham Investments (Pty) Limited v Kylekim Creators CC (2839/2005) [2007] ZAKZHC 23 (16 October 2007) [2007] ZAKZHC 23

COURT

High Courts - Kwazulu Natal

BEFORE

Swain

CASE / FILE NUMBER

2839/2005

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IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

CASE NO. 2839/2005

In the matter between:

BECKHAM INVESTMENTS (PTY) LIMITED PLAINTIFF

and

KYLEKIM CREATIONS C.C. DEFENDANT

JUDGMENT delivered on 16 October 2007

SWAIN, J

The primary issue requiring resolution is whether the defendant delivered a quantity of shirts which it had manufactured from material supplied by the plaintiff, to Mr. Price, in accordance with the agreement concluded between the parties. The plaintiff says the defendant failed to deliver the shirts in accordance with the agreement, which required that:

the shirts be delivered into Mr. Price's distribution centre at NMR Avenue through a fence separating the interior of the distribution centre from the load platform and

written acknowledgment of delivery be obtained by the defendant from Mr. Price of delivery.

As a consequence of such failure, the plaintiff alleges it has suffered damages in the sum of R108,892.89, being the amount it would have received from Mr. Price, if the defendant had delivered the shirts.

The defendant however maintains that in terms of the agreement, the defendant was able to effect delivery by leaving the goods on the load platform with the approval of an authorised representative of Mr. Price, without obtaining a contemporaneous acknowledgement of delivery from Mr. Price. The defendant says that this is what it did and consequently denies that it failed to deliver in terms of the agreement, thereby rejecting the plaintiff's claim for damages.

It is trite that the plaintiff bears the onus of establishing on a balance of probabilities the terms of the agreement and the defendant the onus of establishing due performance, i.e. delivery. An examination of the pleadings reveals that this incidence of the onus of proof has not been disturbed by the manner of pleading. The defendant has simply denied both the meaning of the word "delivery" in the agreement contended for by the plaintiff, as well as the plaintiff's allegation of a failure to deliver by the defendant.

The main thrust of the plaintiff's case was to lead the evidence of representatives of Mr. Price, namely Messrs. Dixon and Kenny, with the object of establishing that the shirts in question were never received by Mr. Price into the interior of the relevant distribution centre. This was sought to be achieved by an examination of the documentation of Mr. Price in respect of the disputed delivery, as well as the systems and procedures in place at Mr. Price, for the receipt of stock as well as its storage and distribution. However, as was fairly and properly conceded by Mr. Voormolen, who appeared for the plaintiff, the issue of whether the goods were in fact received into the interior of the distribution centre, only arises for determination if the plaintiff succeeds in discharging the onus of establishing that this was the form of delivery required in terms of the agreement.

At the heart of this dispute lies the evidence of Mr. Chetty who was called on behalf of the defendant. Before examining his evidence and in order to place it in context, a number of facts which were common cause, or were not in dispute between the parties, have to be noted. These are the following:

The plaintiff and the defendant had done business over the years, the defendant manufacturing goods for the plaintiff who sold the goods to chain store businesses.

The order for shirts which the plaintiff had to fulfil for Mr. Price consisted of chocolate and camel coloured shirts. The plaintiff had split the order between the defendant and an entity known as Singh's Apparel, with the defendant being tasked with manufacturing the chocolate coloured shirts, and Singh's Apparel with the camel coloured ones. Singh's Apparel were unable to complete the manufacture of all of their shirts and it was therefore agreed that the defendant would also manufacture this portion of the camel coloured shirts, amounting to approximately two thousand five hundred shirts.

The plaintiff arranged for a specific delivery date with Mr. Price for the delivery of the camel coloured shirts by both the defendant and Singh's Apparel for 10 a.m. Friday 25 April 2003.

The defendant had met its commitment in terms of finishing the order on time for the 10 a.m. delivery, but Singh's Apparel were running late and were unable to meet this deadline.

Mr. Price would not accept a partial delivery of the shirts as a general rule as they wanted the defendant and Singh's Apparel to deliver at the same time.

Singh's Apparel delivered their share of the consignment later in the day.

What Mr. Chetty did when faced with the failure of Singh's Apparel to arrive at the appointed time is the crucial issue. He states that he telephoned Mr. Russell Mather, the sales director of the plaintiff and told him that he was at Mr. Prices with the plaintiff's delivery, but that the other company had not yet arrived and he asked him what he should do. He says that the reply he received was the following:

"Rajen if you know the guys down there please make arrangements to leave your goods there, when Singh's come in with their delivery they will link up the delivery with the paperwork what Singh's is going to bring and do the delivery".

The response of Mr. Mather to this when giving evidence, was to say he could not recall Mr. Chetty phoning him and telling him this. He stated he was not suggesting it did not happen, but he did not remember as it was four years ago. He also could not remember telling Mr. Chetty what he was reported to have said, but added that it was highly unlikely he would have said that Chetty could leave the goods on the loading bay without a goods received note, or proof of delivery.

The fact remains however that Chetty was placed in a situation where he had to find a solution to the problem he faced. Mr. Voormolen, again fairly conceded that he could not contend that Mr. Chetty had dishonestly exploited the situation by leaving with the goods and thereafter falsely claimed that he had delivered them. Indeed there is no evidence to justify such a conclusion being drawn. Consequently the evidence of Mr. Chetty that he left the goods on the loading platform must be accepted. The issue however is whether he did so with the approval of the plaintiff without the need to obtain any written proof of delivery and left them on the loading platform with the consent of an authorised representative of Mr. Price.

Mr. Chetty stated that he then looked for Mr. Selvan Pillay, a supervisor of Mr. Price who, according to Mr. Chetty, was the second in charge and the individual they always spoke to regarding deliveries. Mr. Dixon confirmed that Selvan Pillay was the supervisor at Mr. Price at the time and had authority to control what happened at the receiving area of Mr. Price. Mr. Chetty stated that he explained his problem to Selvan Pillay, who agreed to help him and gave him a person to offload the delivery on the platform. When the offloading was complete Pillay sent another person to count the cartons. Pillay then said to him

"Ok Rajen these are 92, when Singhs come in I will link the order up and send it through".

Chetty also said that another employee of Mr. Price by the name of Ishar also knew about the delivery. Mr. Dixon confirmed that there was in fact an employee of Mr. Price at the time called Ishwal.

At about 3 p.m. that day he telephoned Pherrana at the plaintiff and asked whether Singhs had made the delivery. She replied that they had and that she was in possession of the proof of delivery. He stated he took an interest in telephoning her because without a “proof of delivery” he could not get paid the following week. Pherrana Abdul was called by the plaintiff and stated that she knew Mr. Chetty but said she was unable to recall whether he had telephoned her on a certain Friday in April 2003, but that it was possible he had. She said she would have been able to tell him whether the goods had been received by Mr. Price, based upon the invoice of the plaintiff which is delivered to Mr. Price and stamped by Mr. Price in confirmation of having received the goods. She identified Exhibit “A3” as the document in question.

As regards Exhibit “A3”, Mr. Chetty confirmed that this was the type of invoice they used to deliver goods to Mr. Price and that without this document together with the packing slip, which is generated in advance by the plaintiff, together with a warranty and indemnity form, a delivery could not be made to Mr. Price. He stated that he had not seen Exhibit “A3” until the litigation had commenced and on previous occasions he received proof of delivery from Mr. Price by way of such an invoice stamped by Mr. Price. On this particular occasion he had gone to Mr. Price without any of these documents, but did so on the basis that the paperwork would come in with Singhs, as he was told by Mather.

It is therefore improbable that Chetty would go to Mr. Price to deliver his share of the consignment unless he believed that the documentation from the plaintiff, being the invoice and the packing slip, were to be brought by Singhs, who were scheduled to deliver at the same time.

According to Mr. Dixon, a supplier would not be allowed to deliver without the invoice and pre-packing slip, being Exhibits “A2” and “A3”, but that Singhs delivery (which it is common cause was made) could not have been done using the invoice “A3”, for the entire order and “A10” the pre-packing slip for Singhs part of the order. Later in his evidence however, he explained that what could have happened was that Singhs was allowed to deliver using “A3” the invoice, and “A10” the pre-packing slip, which were not consistent with each other, as the pre-packing slip showed that Singhs was delivering less than was made out in the invoice. This could have been allowed on the basis that the stock was late, they would have had head office pushing them to take the stock in to get it to the shops, and they were in possession of the pre-packing slip “A10”, which would have allowed them to process the delivery. This scenario would obviously apply when Singhs delivered later in the day.

Later in his evidence a further possible scenario that he painted was that there would have been communication between the supervisor at Mr. Price with the plaintiff, asking what the situation was and they would have said

“No, the other truck or the other CMT is on its way”

and based on that they would have brought stock in. This scenario would apply when the defendant arrived earlier in the day, but Singhs had not yet arrived. He also said that they allowed split deliveries of split colours because different CMT's could be involved. He agreed that where there was stock which was urgently needed and only part of it was delivered, they would let it go through in anticipation of the rest coming later, but normally this would not happen because the stock would not come from two different CMT's as in the present case. He also agreed that Singh's Apparel were allowed to deliver by presenting "A3" the tax invoice, together with "A10" the pre-packing slip, despite the fact that they were inconsistent and the pre-packing slip showed that Singhs was delivering less than was made out in the invoice. Mr. Mather of the plaintiff confirmed that the stamped tax invoice "A3" reflecting that the entire order had been delivered, would have been returned to the plaintiff by Singh's Apparel.

Of significance in this regard is that Mr. Dixon stated that apart from November and December, April was their busiest month and they would have received some twenty five thousand cartons on the day in question, with all four delivery gates open to receive deliveries. On this basis he stated that if the boxes had been left by Mr. Chetty where he says he had left them, it would have interfered with their operation.

It is therefore apparent that the evidence of Mr. Chetty as to the agreement he reached with Mr. Pillay of Mr. Price, as well as the involvement of Ishwar or Ishwal, stands unchallenged as neither of these individuals gave evidence. In addition, neither Mr. Mather nor M/s Abdul of the plaintiff are able to contradict his evidence, albeit that Mr. Mather says it is unlikely that he would have agreed to the goods being left without proof of delivery. Although Mr. Dixon disputes that the goods could have been left on the platform, he concedes that split deliveries are allowed in certain circumstances as outlined above.

The fact remains however that Mr. Chetty, knowing that he would not be paid without a proof of delivery from Mr. Price, arrived at Mr. Price without any documentation for the reasons set out above. He then left without the goods, and without any proof of delivery, which in the normal course of events would inevitably result in his not being paid. Why would he do such a thing unless he was confident that proof of delivery of his goods would be forthcoming from Mr. Price later in the day? Such confidence could only arise as a consequence of the acceptance of the goods by Mr. Price and an undertaking to furnish the requisite proof of delivery, when the balance of the order was delivered by Singh's Apparel. It would be totally illogical for Mr. Chetty to simply leave the goods on the loading platform, without the knowledge or consent of Mr. Price, for such conduct would inevitably lead to the defendant not being paid. Such conduct becomes even more improbable when the evidence that this was a particularly busy day is considered. Why would he leave the goods on the loading platform unattended without the assurance that Mr. Price was aware of them and had taken responsibility for them?

In my view, in the light of the a foregoing, the plaintiff has failed to discharge the onus of establishing that in terms of the agreement the defendant was obliged to deliver the goods into the interior of the distribution centre through the fence separating the interior from the load platform, and in addition that the defendant had to obtain a written acknowledgment of delivery from Mr. Price. For the same reasons, the defendant has in my view succeeded in discharging the onus of showing that delivery was effected in terms of the agreement.

As regards the issue of costs, these in my view should follow the above result. As regards the wasted costs of the previous adjournment, this was occasioned by the need on the part of the plaintiff to amend its particulars of claim. It is therefore reasonable that the plaintiff should pay such wasted costs.

In the end result, the order I make is the following:

Judgment is granted in favour of the defendant with costs, such costs to include the wasted costs occasioned by the adjournment on 27 March 2007.

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SWAIN, J.

Appearances ../

Appearances:

For the Plaintiff : Adv. Voormolen, A.V.

Instructed by : Henwood Britter & Caney

For the Respondent : Adv. Goddard, G.D.

Instructed by : Raasma Punchoo & Associates C/o P.H. Francis & Associates

Dates of Hearing : 26 & 27 March 2007

25 September 2007

Date of Judgment : 16 October 2007

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