

SOUTH AFRICA / JUDGMENT

Broadway Sweet v Bon Bon Sweets CC and Another (2008/11025) [2014] ZAGPJHC 262 (15 July 2014) [2014] ZAGPJHC 262

COURT

South Gauteng High Court, Johannesburg

BEFORE

Tshabalala

CASE / FILE NUMBER

2008/11025

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2008/11025

DATE: 15 JULY 2014

In the matter between:

BROADWAY SWEET.....Plaintiff

And

BON BON SWEETS CC.....First Defendant

GOUWS BAREND JOHANNES CHRISTOFFEL.....Second Defendant

J U D G M E N T

TSHABALALA, J:

[1] The plaintiff instituted the present proceedings against the defendants for the following relief:

1.1 An order confirming the cancellation of the agreement between the parties.

1.2 Payment of R972 975,41.

1.3 Interest on this amount at the rate of 15,5% per annum computed from the 18th May 2007.

1.4 Costs.

[2] The defendants counterclaimed for payment of R965 025,59, interest a tempore morae and costs against the plaintiff.

[3] The following are common cause facts:

3.1 The plaintiff and first defendant entered into a written contract of purchase and sale on the 2nd December 2006 in terms whereof the first defendant sold to the plaintiff certain machinery, formulae, goods and stock which formed part of a candy manufacturing plant for an agreed amount of R1 700 000,00. There were other goods which formed part of the packed items which did not belong to the candy manufacturing plant.

3.2 The purchase price was payable monthly at the rate of R200 000,00 save for the first and last instalments which were R172 975,41 and R165 024,59 respectively.

3.3 The second defendant (Gouws) bound himself as surety and co-principal debtor in solidum with the first defendant for the due performance by the latter of its obligations to the plaintiff in terms of the agreement.

3.4 The plaintiff only paid an amount of R972 975,41 of the purchase price to the first defendant from December 2006 until April 2007 in terms of the contract.

3.5 The first defendant undertook to install and commission the candy manufacturing plant and to ensure that such plant was fully functional, operational and in production within a specified time frame.

3.6 Due to the delay in completing the construction work where the installation and commissioning was to take place, the process of installing and commissioning the plant could not be commenced with within the time frames agreed upon.

3.7 Some of the items/goods delivered by the first defendant to the plaintiff were either not working or broken.

3.8 Prior to sale agreement being concluded the plaintiff represented by Nazeer Achmat Osman, his son Mohamed Fiaz Osman and Freddie van der Merwe had gone to the defendants' plant and "inspected" the machines or items that were subsequently delivered at the plaintiff's plant.

3.9 Some of the items delivered to the plaintiff were kept outside i.e. not under roof or shelter whilst at the defendants' plant.

3.10 After the installation and commissioning of the plant was completed the plant did not perform to its full or expected potential.

3.11 As a result of the last mentioned, the second defendant engaged the services of Johannes van der Merwe to establish the fault and to remedy it.

3.12 There is a dispute regarding whether Johannes did establish and fix the defects in the machinery or not. According to the defendants the problem was fixed whereas according to the plaintiff it was not.

[4] The plaintiff's claim against the defendants was for a refund of the purchase price it had paid to the first defendant for the goods sold by the latter to the former, on the grounds that:

4.1 the first defendant had made material misrepresentations to the plaintiff about the production capacity of such goods;

4.2 the defendants had failed to deliver all the goods sold to the plaintiff;

4.3 the goods delivered to the plaintiff by the defendants were defective or broken;

4.4 the value of the stock delivered to plaintiff was less than the one invoiced for.

[5] According to the plaintiff, it was induced by the misrepresentation of the defendants into acting to its detriment when entering into the agreement of purchase and sale with the defendants.

[6] The plaintiff has tendered the return of the goods delivered to it by the defendants.

[7] The defendants' counterclaim is for the payment of the balance of the purchase price and to hold the plaintiff bound to the agreement it seeks to resile from on the grounds that it had performed in accordance with the terms of the agreement.

[8] Very late in the proceedings, both parties sought to amend their pleadings. Both sides objected to each others notice to amend. These amendments, were sought after the respective parties/applicants had closed their cases. I indicated in respect of the applications to amend that I would address them when I hand down this judgment.

8.1 The plaintiff's amendment sought to introduce an allegation that the misrepresentation was made in writing and orally at defendants' place and at the plaintiff's.

8.2 The defendants' amendment sought to introduce an allegation that the defendants tendered to perform fully or to remain on plaintiff's plant for an extended period.

[9] The offer/tender to remain on the plaintiff's plant for an extended period was not put to the plaintiff's witnesses nor was the tender to deliver any outstanding goods. No explanation was given for the delay in making such an application and in not putting the version relating thereto to the plaintiff's witnesses.

[10] Whilst preparing this judgment and on examining the evidence and in particular the respective reports of the parties' experts, I realised that the issue of restitution had not been addressed. I then requested the parties to submit further heads of argument to address this issue. It was, in my view, necessary to address the ability or otherwise of the plaintiff to effect restitution in view of its undertaking and the common cause facts set out in the reports of the parties' experts.

[11] These reports clearly stated that:

11.1 Some of the machines could not be found/inspected.

11.2 Certain parts of the machines were missing and others worn out.

11.3 Certain machines which it is common cause, were delivered to the plaintiff in working condition were no longer in such condition.

11.4 Some machines were in a state of disrepair and others would be too costly to recondition.

11.5 Certain parts of the machines were in a poor state whilst some machines were incapable of working at all.

11.6 The list is not exhaustive.

[12] Notwithstanding these findings by the parties' experts, the plaintiff in its further heads of argument maintained that restitution could still be effected.

[13] The defendants on the other hand, argued that the plaintiff was no longer capable of restituting the items delivered by the defendants to the plaintiff in the condition it had received them in from the defendants. In the further heads of argument, the defendants indicated its intention to amend its plea to reflect that restitution is not possible.

[14] It is trite law that, where there is a reciprocal duty of performance by two feuding parties, and where one of them is incapable of performing through no fault of his/her adversary, he/she cannot expect the party capable of performing in the absence of his counter-performance to perform.

[15] In casu the plaintiff owed the defendants a duty to pay the purchase price and the defendants owed the plaintiff a duty to ensure that the plant was fully and optimally functional. Should the contract be voided/set aside for any reason and restitution be ordered, then the plaintiff would owe the defendants the duty to return to the plaintiff what it had received, in exchange for the purchase price paid by the plaintiff to the defendants.

[16] In its objection to the amendment of the defendants' plea, on the issue of restitution, the plaintiff contended that the defendant had admitted its tender of restitution in its plea and could therefore not so late in the trial deny it.

[17] A plea is capable of amendment at any stage before judgment. If an amendment is sought to align the pleadings with the evidence that has been tendered, in my view, there can be no ground for objection if an explanation is advanced for bringing an application to amend late, and provided no party is prejudiced thereby.

[18] Having regard to the defendants' denial of misrepresentation, I am satisfied that no prejudice can result if the plaintiff's amendment is allowed. It is, in my view, irrelevant where and how the misrepresentation took place.

- [19] In its plea, the first defendant did not accept the tender for restitution by the plaintiff. When the court raised the issue of restitution with the parties, the defendant then indicated its intention to amend its plea to incorporate a plea that restitution was impossible or ineffective.
- [20] Save for the reports of the experts of the parties, their joint minutes, and the say so of the plaintiff there is no evidence before me indicative of whether restitution is possible or not. The further heads of argument do not take the matter any further than where it was when I requested them.
- [21] The plaintiff was not cross-examined on this aspect nor was its evidence or particulars of claim seriously challenged save to say that it was noted but not accepted. In view of the defendants' failure to put the plaintiff to the proof to can effect restitution, the plaintiff having noted its opposition of the application to amend, the defendants sought to obtain the court's leave to amend. Having regard to the plaintiff's undertaking to reinstate it was, in my view, not necessary to amend as the plaintiff can only be entitled to payment if it can reinstate.
- [22] I will now proceed to deal with the issue of the alleged misrepresentation by the defendant of the capacity of the machinery sold to the plaintiff and the defendants alleged proper performance.
- [23] According to Osman Snr the second defendant made certain representations on behalf of the first defendant relating to the value of the stock, the warranties relating to the conditions and capacities of the machinery sold to the plaintiff by the defendants, which representations induced the plaintiff to enter into the written agreement between itself and the first defendant.
- [24] The defendant contends that the plaintiff is precluded from relying upon such alleged representations by reason of the non-parole evidence clause and the voetstoots clause contained in clauses 18 and 6 of the written agreement.
- [25] Both parties, however, agree that there were discussions and correspondence between them before, during and after the written agreement was concluded. They are, however, not in agreement as regards the nature and purpose of those discussions and correspondence. In their opening addresses the parties agreed that if a written contract was concluded consequent upon a misrepresentation, the innocent party would be entitled to withdraw from such contract and that the parole evidence clause will not bar him from relying on such a misrepresentation.
- [26] In my view, this concession would lay to rest the argument by the defendant that the plaintiff is precluded from relying on a prior misrepresentation by the parole evidence and the voetstoots clauses, if indeed such misrepresentation induced the plaintiff to enter into the present contract to its detriment.

- [27] The defendants also deny making any misrepresentations to the plaintiff which induced the plaintiff to enter into the present agreement with the defendants.
- [28] It is common cause that the plaintiff was prior to the sale of the candy manufacturing plant, a customer of the defendant who owned such a plant. The plaintiff had no knowledge of running a candy manufacturing plant at the time.
- [29] In order for the plaintiff to make an informed decision on whether to buy the plant from the defendants, the plaintiff would, as a businessman, have been guided by certain information. According to the plaintiff such information was provided by the second defendant. It included inter alia:
- 29.1 What the capacities and conditions of the machinery were.
- 29.2 What they could produce optimally/or in full capacity.
- 29.3 What they produced whilst on his plant.
- 29.4 The first defendant only operated the plant for an hour per day.
- 29.5 It made R200 000,00 per month whilst operating it at that level and would have made a turnover of R1,8 m per month if it operated normally.
- 29.6 A letter dated the 18th October 2006 from the defendants to plaintiff which stated:
- “As per our conversation, please find attached the following list of machinery and their capacities.”*
- 29.6.1 The list indeed did set out the names and models of the machinery and their capacities – see pages 82 to 83 of the index to other documents.
- 29.6.2 A further list contained this information together with the prices of the machinery – see pages 100 to 101 of the index to other documents.
- [30] Even if one disregards the contents of 29.1 to 29.5 hereof, the contents of 29.6 amounts to a representation detailing the capacities and prices of the machinery then offered for sale by the first defendant to the plaintiff.
- [31] On the defendants’ evidence, it knew that the information contained in pages 82 to 83 and 100 to 101 referred to above was false or incorrect as it contained prices for some machines which the defendants considered to be scrap or of no value.
- [32] According to the defendants such information had been prepared for insurance purposes and not for the plaintiff. This fact is, in my view, irrelevant as information was furnished to the plaintiff without any qualification as to the possible inaccuracies contained therein. It was provided to the plaintiff to induce him to enter into the written contract with the defendants.

- [33] The defendants called Freddie van der Merwe as its witness. He admitted that he was previously in the employ of the plaintiff. According to this witness he did not hear Gouws mention any turnover as he was not always present during the discussion between Gouws and Osman.
- [34] The fact that Freddie van der Merwe did not hear the second defendant mention the turnover that was made or could be made by the first defendant does not confirm the defendants' version that no such a representation was made. The alleged discussion between Osman Snr and Freddie van der Merwe on their way back from the defendants' plant, in fact confirms that a discussion between Osman and the second defendant concerning the turnover that the plant made and could make did take place. Freddie van der Merwe's testimony that Osman Snr told him that Gouws (second defendant) had told him that he (Gouws) was making R200 000,00 per month whilst operating the plant for an hour per day was indicative of this fact.
- [35] Based on what I have set out in the last five paragraphs I am satisfied that Gouws did make representations to the plaintiff that the defendants generated R200 000,00 per month by running the plant for an hour per day, with a view to sway it to enter into the contract of the sale of the plant. I am equally satisfied that such representations in fact had influenced the plaintiff to enter into such a contract.
- [36] The next issue I deal with is whether there was full compliance by the defendant with the terms of the contract i.e. whether the second defendant (Gouws) did install and commission the candy manufacturing plant for the plaintiff and if so, whether the plant was properly functional after commissioning with the assistance of Johannes van der Merwe.
- [37] According to the plaintiff Osman Snr and Jnr at the time when the second defendant left the plaintiff's plant, same had not been properly installed and commissioned. According to these two witnesses and Freddie van der Merwe certain machines were experiencing problems before Freddie van der Merwe left the plaintiff's employ during the first week of April 2007.
- [38] The defendants attributed the production problems experienced to certain extrinsic factors such as untrained labour, unfavourable weather conditions and the need for other machines or equipments. According to Gouws the one problem relating to a stick inserter machine was solved after the intervention of Johannes van der Merwe during approximately the 26th April 2007. This was done by effecting certain minor adjustments to the machine. The extrinsic factors relied upon by the defendant were however not pleaded.
- [39] According to Johannes van der Merwe the stick inserter was functioning 100% when he left. He had run the machine for 2 hours to ensure that it stopped at the correct position.
- [40] The problems he had diagnosed with the stick inserter were:

40.1 Incorrect sticks were used.

40.2 He could not check the speed the machine ran at as it was not running at full capacity.

40.3 The machine could not cope with the sticks that Gouws had been using in 2005 and had continued to use at the plaintiff's plant in 2007, despite having stopped using them in 2005 after being warned against using them.

40.4 The sticks were due to their size and shape not inserting properly on the candies.

40.5 Even after he had done the adjustments he did the machine still did not run 100%.

40.6 He had hand fed the sticks to the sweets.

40.7 He had reported the problem and suggested solution to Ingenior his principal after completing his inspection and adjustment.

[41] Neither Gouws nor Johannes van der Merwe testified that:

41.1 They had obtained the correct sticks.

41.2 The running of the stick inserter was tested with the correct sticks being used.

41.3 The stick inserter produced 180 sweets per minute according to its specifications after the adjustments were made by Johannes van der Merwe.

41.4 The report submitted to Ingenior was given to the plaintiff and the recommendations contained therein, if any, implemented.

[42] Without:

42.1 Having tested the speed of the stick inserter using proper sticks.

42.2 Determining whether the recommended sticks were inserting on the candies.

42.3 Determining whether the stick inserter delivered to its full capacity and

42.4 Ignoring Osman Jnr's evidence that the stick inserter was not operating properly when Johannes van der Merwe left the plaintiff's plant after a dispute had developed between him and Gouws relating to where the repairs/inspection of the machine was to take place.

I am satisfied that Johannes van der Merwe could not with any degree of certainty declare the stick inserter machine to have been functioning 100% when he left. To arrive at such a conclusion the production capacity of the stick inserter had to have been tested, a determination made that the sticks did not block the magazine, the candy manufacturing process ran from the beginning to the end without any interruption, the speed test conducted and the production plant ran at its full capacity. No such evidence was tendered.

[43] Both the experts in their respective reports, alluded to the fact that the lubrication system was in a poor condition which according to the plaintiff's expert (Manyane) will slow down the production, because the press machine does not self lubricate and need to be striped and cleaned on continuous basis.

- [44] The problem of lubrication was also confirmed by Osman Jnr and Freddie van der Merwe in their testimony. According to Osman Jnr it was necessary to stop the machine to clean it as it would not operate continuously. According to Osman Jnr, the advice to operate the machine in that manner was given by Gouws. Indeed if there was no fault with the lubrication, Osman Jnr would not have known about the striping and cleaning of the machine.
- [45] Both experts also agreed that punches and dyes were lacking in the press machine and that the powder mixer referred to in item 43 of the index – to the other documents is made of material not suitable for food manufacturing according to Manyane. According to him normal mild steel instead of stainless steel was used to manufacture the powder mixer, whereas according to the defendants' expert (Van Graan) the mixers referred to in this item are not specifically designed for the tablet it was used for, but that there were sufficient other mixers suitable for food manufacturing. It was nowhere stated where these other mixers were to be found and if they were indeed used in the plant.
- [46] When Gouws left the plaintiff's plant, the missing dyes and punches had not been replaced nor had the self lubrication been restored.
- [47] Having regard to these factors I am satisfied that the installation and commissioning of the plant was not done properly, alternatively not done to ensure optimal or full capacity production.
- [48] This is borne out by:
- 48.1 The level of production achieved during the period March to April 2007 which according to Osman Jnr was 6 401 and 11 733 which translated in monetary value to R57 609 and R105 600 respectively.
- 48.2 The failure on the part of the defendants to dispute or challenge the evidence of the plaintiff on various factors such as:
- 48.2.1 Gouws taught Osman Jnr to stop the lubricating machine every two hours to clean it.
- 48.2.2 The machine had problems with glue and sticks not inserting which by the first weeks of April 2007 had still not been fixed (according to Freddie van der Merwe).
- 48.2.3 Gouws' advice to the plaintiff to purchase a new stick inserter machine and a fluid bed dryer.
- 48.2.4 Cooling tunnel not delivered.
- 48.2.5 Manual labour used to insert the sticks to the candy.
- 48.2.6 Several punches and dyes not delivered.
- 48.2.7 Tablet machine had to be striped every two hours to clean punches.

48.2.8 The stock delivered by defendants to plaintiff was far less than R500 000,00 which Freddie van der Merwe placed at R70 000,00.

[49] Finally, I fail to understand how the first defendant can insist on the “voetstoots” clause when it concedes that its plant was not running at the time when the Osmans and Freddie van der Merwe visited the defendants’ plant before the sale save for one blender. By its own admission the defendants concede that the plant could therefore not have been inspected as it was not running.

[50] For all these reasons I am satisfied that:

50.1 The defendant misrepresented the conditions and capacities of the plant.

50.2 It delivered stock/material worth R70 000,00 to the plaintiff.

50.3 The misrepresentation made by Gouws on behalf of the first defendant precludes the defendants from relying on the parole evidence and voetstoots clauses of the written contract.

50.4 By reason of the misrepresentation, the plaintiff was induced to conclude the contract to purchase the plant from the defendant.

50.5 The misrepresentation was made with the intention that the plaintiff should act upon it.

50.6 The defendants knew that it was false as evidenced by sending incorrect and false prices, conditions and capacities of the machinery to the plaintiff.

50.7 The plaintiff is entitled to resile from the contract in issue in this case.

50.8 By reason of resiling the plaintiff is obliged to return the machinery it received from the defendant in the condition it had received it in, and to pay the monetary value of the material/stock valued at R70 000,00.

50.9 Save for the restitution referred to above, the defendant is not entitled to the payment of the balance of the purchase price it is claiming from the plaintiff.

[52] I am as a result satisfied that the plaintiff has succeeded to prove its entitlement to a refund of the amount paid to the first defendant and the defendant has failed to prove its case on a balance of probabilities.

[53] Accordingly I make the following order:

1. The defendants jointly and severally are ordered to pay the plaintiff an amount of R972 975,41.
2. The said payment should be made against the delivery of the goods, material and machinery delivered to the plaintiff by the defendant.
3. The value of the stock and material delivered (R70 000,00) should be set off from the amount to be refunded to the plaintiff.

4. The first defendants' counterclaim is dismissed.
5. The defendants pay the costs jointly and severally.

N D TSHABALALA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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