

SOUTH AFRICA / JUDGMENT

Cembrick Manufacturers CC v Dube (2030/2012) [2015] ZAFSHC 92 (21 May 2015) [2015] ZAFSHC 92

COURT

Free State High Court, Bloemfontein

BEFORE

A Kruger

CASE / FILE NUMBER

2030/2012

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No. : 2032/2012

In the matter between:-

CEMBRICK MANUFACTURERS CCPlaintiff

and

SA DUBEDefendant

HEARD ON: 5 & 6 MAY 2015

JUDGMENT

BY: KRUGER, J

DELIVERED ON: 21 MAY 2015

- [1] The question in this trial is whether the monies claimed by the plaintiff constitute a debt by Creative Thinking 534 t/a TK Developers (Creative Thinking). The defendant is sued in his capacity as surety and co-principal debtor for the debts due by Creative Thinking to the plaintiff on the basis of a written deed of suretyship.
- [2] The plaintiff's case is that it sold and delivered goods to Creative Thinking on the basis of an approved credit application.

Defendant's case is that Creative Thinking's credit application was never approved and that the goods claimed for were

sold to the sub-contractor of Creative Thinking, namely JAZ Construction Trust, (JAZ) represented by Ms Ethel van Zyl. The

defence is that there was no valid principal debt, i.e. a contract between plaintiff and Creative Thinking. It is of the essence of suretyship that there be a principal contract (Trust Bank of Africa Ltd v Frysch 1977 (3) SA 562 (A) at 584F-G). The question which must be investigated and answered is whether there was a contract between plaintiff and Creative Thinking.

[3] The defendant is the sole member of Creative Thinking, which got a contract to build 200 RDP houses in Petrusburg. Because

defendant had several other commitments, he decided to appoint JAZ represented by Ms Ethal van Zyl as his subcontractor for the

project. All actions on behalf of JAZ were, for purposes of this case, performed by Ms Ethal van Zyl. Ms van Zyl informed

the defendant that the credit of JAZ with the plaintiff was exhausted. It appeared that JAZ had several contracts with the

plaintiff. The account number allocated to Creative Thinking was JAZ 015. Ms van Zyl arranged a meeting between herself, Mr Spinola, the plaintiff's managing member and the defendant. The defendant could not recall exact dates, but it appears that the events took place in March 2009.

[4] A credit application form for Creative Thinking, incorporating a Deed of Suretyship for the defendant was given to the defendant.

Spinola testified that he gave the credit application form to Ms van Zyl. He did not talk to the defendant at the stage. Ms van Zyl gave the credit application form back to Spinola during the first week of March 2009. Some information on the form was outstanding.

[5] Spinola testified that it is plaintiff's practice to obtain a credit guarantee insurance for all their clients before the plaintiff is willing to provide credit. Spinola was informed by the credit guarantee concern that they were not willing to provide the plaintiff with any cover on the defendant. Spinola informed the defendant of this fact, and they had a meeting.

[6] On the evidence of Spinola and the probabilities their meeting took place on 11 March 2009. At that meeting Spinola asked the defendant for other security. In his evidence in chief Spinola said that the defendant suggested that Creative Thinking make a cession for direct payment by the Free State Department of Local Government and Housing. When it was put to him in

cross-examination that it was his suggestion that a cession for direct payment from the Department of Housing be obtained, Spinola

said he was not sure. He said there was a follow-up meeting on 16 March 2009. Spinola said he completed the cession for direct payment in the presence of the defendant, and gave it to defendant to give to the Department for signature. It was clear that the Department would take time to sign the document, and according to Spinola the defendant needed delivery of the bricks urgently. According to Spinola the defendant told him that he does not usually open accounts when he uses a sub-contractor, as here. Spinola said because this housing contract was important to defendant, he was willing to open an account with plaintiff. The defendant disputed that he was keen to open an account, and said he was informed that his credit application was turned down, and defendant accepted that there would be no sales to Creative Thinking.

- [7] A second form of security was then agreed upon, because the defendant needed delivery of the bricks from plaintiff urgently, as testified by Spinola. According to the contract between Creative Thinking and JAZ, JAZ was to supply the bricks for the project. Spinola testified that the defendant told him that he would subtract the payments for bricks from what he paid JAZ. This second form of security proposed by Spinola was a cession of book debts by Creative Thinking to the plaintiff. That cession appears in plaintiff's trial bundle extract at page 43, signed by the defendant and dated 11 March 2009. Because he now had that cession of book debts, Spinola was willing to start delivery of the bricks immediately. The contract according to Spinola was that Ms van Zyl would place the orders on behalf of Creative Thinking. The defendant testified that he never gave Ms van Zyl or JAZ authority to place orders for bricks on behalf of Creative Thinking. Defendant's evidence is that JAZ ordered bricks.
- [8] As to the delivery of bricks, Spinola testified that once he had the cession of book debts he was willing to commence supply, and the first bricks were delivered on 16 March 2009. Ethal van Zyl gave plaintiff the erf numbers where delivery had to be made. The defendant told Spinola he would get the cession for direct payment signed. Spinola testified that the defendant also requested him to email the cession for direct payment document to the engineer, Mr Nortje. This evidence was not disputed in cross-examination, but when the defendant testified he denied that he requested that the document be emailed to the engineer. By the end of March 2009 Spinola still did not have the signed cession of direct payment back. He phoned the defendant. Spinola told the defendant that that cession was a very important document to him. Spinola said that during the first week in April he phoned the defendant again. He told defendant that if he did not get the signed cession back within two to three days he would stop the account. On about the 7-8 April 2009 Spinola stopped the account. Then Spinola got nervous calls from Ethal van Zyl, asking why he had stopped the account. On 24 April 2009 he continued with delivery. He got a payment of R90 000. On 20 May 2009 Spinola got a second payment of R90 000, and he again delivered. On 1 June 2009 the last delivery was made. Spinola testified that he stopped delivery on 1 June 2009 because he did not get the cession for direct payment.
- [9] As to the cession for direct payment, Spinola testified that during or about May 2009 he got a telephone call from the defendant's

office, telling him that he had not initialed all the pages of the cession for direct payment. Spinola asked that the defendant

come to see him, but that did not happen. He waited for two weeks, and when he did not get the cession for direct payment back, stopped delivery. In cross-examination it was put that according to the defendant, when he left Spinola's office with the cession for direct payment, it was complete, but the amount was in the order of R600 000 not R932 961.01 as appears on the document in plaintiff's trial bundle. The defendant's version put in cross-examination was that the defendant said the document was not the original, the defendant wanted the original. He then went back to Spinola, who printed an original document, and the defendant signed that in blank. At the Department the defendant saw the document, with the amount of R932 961.01 filled in, not the amount of about R600 000 that had been filled in on the document the defendant signed. In his evidence the defendant added that when he saw the R932 961.01, he told the Department not to proceed with the cession, after he had phoned Ms van Zyl and asked why there was now also a claim for material.

[10] According to the defendant, the first he heard that the account of Creative Thinking had been approved was in 2010, when Spinola and Ethal van Zyl came to see him. He was under the impression that Ethal van Zyl had made other arrangements for getting and paying for the bricks from plaintiff. He says he never got any accounts from plaintiff, but admitted that he did get other mail daily addressed to the same post box.

[11] I found neither Spinola nor the defendant to be completely satisfactory witnesses. In his evidence in chief Spinola said that the suggestion for the cession for direct payment came from defendant, yet in cross-examination he conceded that he could have made the suggestion. He claimed against the Department for payment of the debts of Creative Thinking and JAZ. The allegation in his letter of 11 February 2010 that the cession applied to debts of Creative Thinking and JAZ is incorrect. In the letter Spinola claims payment from the Department of money allegedly due by Creative Thinking to JAZ. There appeared to be a close relationship between plaintiff and JAZ, both seeking payment from the defendant. Plaintiff and JAZ launched a joint liquidation application against Creative Thinking, which application was not proceeded with.

[12] As to defendant, I find it difficult to understand why he was willing to state in his credit application to the plaintiff that he required a facility of R900 000, yet when he saw R932 961.01 on the cession of direct payment document at the Department, he told the Department not to proceed with the cession for direct payment. A further difficulty with defendant's version is that he maintained throughout that Spinola informed him that the credit application was turned down, and defendant accepted that. Yet he signed a cession of book debts of Creative Thinking and he went to give the cession for direct payment to the Department of Housing. Defendant at his weekly visits to the erven where JAZ was building as his sub-contractor saw bricks of the plaintiff. He never asked Ms van Zyl who paid for those bricks. The evidence of Spinola that the credit of Ms van Zyl (JAZ) was exhausted was not assailed. The fact that JAZ could not get credit is confirmed by the fact that defendant

applied for credit. He was told the credit would only be for diamond and stock bricks, and he was happy with that.

- [13] Defendant testified that JAZ and Ms van Zyl had no authority to order bricks on behalf of Creative Thinking. Yet the defendant knew that bricks were necessary for his housing project he had sub-contracted to JAZ. It was in defendant's interest that the houses be built. On the probabilities defendant knew that Creative Thinking was being debited for the bricks by plaintiff. I find that an account was opened for Creative Thinking, credit was granted to Creative Thinking, and defendant is liable as surety for the proven debts of Creative Thinking to plaintiff.
- [14] As to quantum, Ms Wright devoted a considerable portion of her address at the end of the case to the question whether the amount of plaintiff's claim was proved. She conceded that the certificate of balance constituted *prima facie* proof. Although Ms Comache, who signed the certificate, said she was satisfied with all the invoices, Spinola conceded that mistakes were made by his sales staff. Ms Wright says Spinola relied on plaintiff's accounting department, he did not deal with the account personally. The initial statements show two payments of R90 000, yet those payments are removed later. Those amounts were paid by Ms Ethal van Zyl, who was responsible for payment for the bricks in terms of her contact with Creative Thinking. Ms Wright points out that all the invoices presented in court are photocopies, some of them illegible. Ms van Zyl used the account to order bricks. The question arises why the account should not, on the delivery note and on the invoice, which two documents are created at the same time, refer to JAZ, stating the delivery address. Ms Wright describes the practice of making the delivery note out in the name of Creative Thinking as "fishy". She submits that enough doubt has been created about the certificate. As to the interest calculation, Ms Wright submits that the manner of calculation is unsatisfactory and incorrect. Amounts of interest are taken out and re-inserted.
- [15] For purpose of interpreting the contract, Ms Wright referred to *Bothma-Batho Transport (Edms) Bpk v S. Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) par [12], where Wallace JA points out that in interpreting a contract one looks at *inter alia* the circumstances in which the document came into being. In this case the evidence shows that Ms van Zyl needed another account. For that reason she submits that an account was created for Ms van Zyl or JAZ, not the defendant. This is an attractive argument, implying a rectification of the Credit application and Suretyship, listing the principal debtor as JAZ, not Creative Thinking. There was never such rectification application.
- [16] The point is that defendant needed bricks urgently for his housing project. He signed several documents to make the giving of credit for the purchase of the bricks from the plaintiff possible. The only way the bricks were going to be delivered was if defendant guaranteed the debt. The reason why plaintiff supplied the bricks was because it had the suretyship and cession of book debts from Creative Thinking; waiting for the cession of direct payment.

- [17] In considering the quantum the question arises: What is the significance of the fact that two payments of R90 000 were made for bricks by Ethel van Zyl? These two payments were initially credited to the account of Creative Thinking, but later reversed by Spinola. The evidence does not disclose to which account the amounts were then credited. The statements of JAZ to Creative Thinking dated 1 March 2011 lists that on 20 April 2009 and 20 May 2009 two amounts of R90 000 were for “CEM Brick Payments”. Thus JAZ paid plaintiff for bricks. The fact that these two payments were initially credited to Creative Thinking’s account and the fact that, after receiving these two payments, Spinola proceeded to make further deliveries, indicate that defendant should receive the benefit of those two payments. Plaintiff’s claim should be reduced by R180 000.
- [18] The capital claim by plaintiff is R336 459,10. That amount should be reduced by R180 000. The calculation of interest by plaintiff as set out in Exhibit “B” page 4a is in my view subject to doubt. The calculations have not been proved beyond reasonable doubt. In terms of clause 17.1(c) of the Credit Agreement, interest runs at 1.5% per month. That is what plaintiff is entitled to, as from 30 days after the last delivery 1 June 2009.

ORDER

1. Defendant is ordered to pay plaintiff R156 459,10 plus interest on R156 459,10 at the rate of 1.5% per month from 1 July 2009 to date of payment.
2. Plaintiff is ordered to pay the wasted costs of the hearing on 29 October 2013.
3. Save as is set out in paragraph 2 above defendant is ordered to pay the costs of suit.

A. KRUGER, J

On behalf of plaintiff: Adv P Zietsman S.C.

Instructed by:

E.G Cooper Majiedt Inc

BLOEMFONTEIN

On behalf of defendant: Adv GJM Wright

Spangenberg Zietsman & Bloem

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Prepared on 10 October 2026 · Esheria