

SOUTH AFRICA / JUDGMENT

Henen's Meat Market (Pty) Ltd v Solly's Catering Equipment CC (CA 269/2009) [2010] ZAECGHC 43 (3 June 2010)

[2010] ZAECGHC 43

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Bloem, Kroon

CASE / FILE NUMBER

CA 269/2009

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE - GRAHAMSTOWN

CASE NO. CA 269/2009

DATE HEARD : 28 May 2010 DATE DELIVERED : 3 June 2010 In the matter between: HENEN'S MEAT MARKET (PTY) LTD Appellant and SOLLY'S CATERING EQUIPMENT CC Respondent

JUDGMENT

BLOEM A J

The Appellant, as Plaintiff in the Magistrate's Court, issued summons against the Respondent for payment of the sum of R20 000,00. After the Magistrate had heard evidence adduced by both parties he granted absolution from the instance with costs. The appeal is against that judgment.

2. The cause of action arose from an agreement of sale. It is common cause that during March 2005 and at Port Elizabeth the parties entered into an oral agreement in terms whereof Appellant sold to the Respondent who purchased from the Applicant second-hand fridges. It is furthermore common cause that the Respondent collected five fridges from the Appellant. The number of the fridges sold was in dispute. 3. The Appellant refurbished one of its shops in Port Elizabeth by removing old fridges and installing new ones. Mark Lipschin, the Appellant's managing director who handles the financial and certain operational side of the Appellant, testified that nine fridges were removed. All the fridges were fully functional when they were removed. According to him, seven of the nine fridges formed the subject matter of the sale. He testified that the Appellant did not sell the remaining two fridges because the Appellant intended using them in one of its other shops. Shortly after the fridges had been removed, the Appellant contacted Solon Petrou, the Respondent's

managing director, and arranged a meeting with him. The intention was to sell the fridges to the Respondent. (Mr Petrou testified that “everybody calls [him] Solly”. I shall hereinafter also refer to Mr Petrou as Solly with no disrespect to him.) After Solly had been contacted he attended the Appellant’s premises where discussions took place regarding the fridges. He inspected the fridges, expressed satisfaction with them and did not raise any problem relating to their condition. The Appellant sold the seven fridges to the Respondent for R30 000,00 on a voetstoots basis. Ownership in the fridges passed from the Appellant to the Respondent on that day, Mr Lipschin testified. Solly made out a cash cheque for R30 000,00 and handed it to Mr Lipschin. He could not wait to collect the fridges. The cheque was banked but on or about 11 March 2005 it was returned by the Standard Bank of South Africa Limited, the Appellant’s banker, marked “referred to drawer”. The Appellant then noted that the cheque was post-dated 10 May 2005. 4. Mr Epstein, the Appellant’s administration manager, does its cash-up, banking and general accounting. He testified that on 18 April 2005 he telephoned Solly about the dishonoured cheque. After he had spoken to him Mr Epstein made a note on the letter dated 11 March 2005 from the Appellant’s banker to the effect that the cheque of R30 000,00 would be replaced by the end of April 2005. He testified that Solly had, during his telephone conversation with him, undertaken to pay the sum of R30 000,00 to the Appellant by the end of April 2005. 5. On 25 April 2005 Solly attended the Appellant’s premises and dealt with Mr Epstein. Solly gave him cash in the sum of R10 000,00. Mr Epstein wrote the following on one of the Appellant’s complimentary slips dated 25 April 2005: “Received ten thousand rand from Solly’s Catering being part payment i.r.o. post dated cheque for R30 000,00 – balance still due R20 000,00 .” He signed that slip. A copy of that slip was given to Solly. Mr Epstein could not recall whether he made arrangements with Solly about payment of the remaining R20 000,00. He denied that, in addition to the cash of R10 000,00, Solly also handed to him a cheque dated 30 April 2005 in the sum of R10 000,00. He said that if such a cheque had been handed to him he would have made a note to that effect on the complimentary slip. 6. The Respondent called Solly who testified that he thought that he had purchased ten fridges. They were all in good condition when the agreement was concluded. Regarding the payment of the purchase price of R30 000,00, it was agreed that he would collect the fridges on three occasions paying R10 000,00 to the Appellant on each occasion. In addition, he would hand to the Appellant a post-dated cheque for R30 000,00, to be returned to the Respondent after the last R10 000,00 had been paid to the Appellant. After a few days and when the Respondent’s employees were at the Appellant’s premises to collect the remaining fridges, Solly received a call from the driver of the vehicle who informed him that certain parts of the fridges were missing. Solly instructed him not to load the fridges and to return them. Solly went to inspect the remaining fridges for himself. 7. Solly also testified about the cash cheque dated 30 April 2005 in the sum of R10 000,00 drawn on Nedbank, the Respondent’s banker. He testified that he handed that cheque to Mr Epstein on 25 April 2005. Solly accordingly testified that the Respondent had paid the sum of R20 000,00 to the Appellant, R10 000,00 in cash and a cheque in the sum of R10 000,00. According to him the Respondent did not owe the Appellant any money. To the contrary, he testified that it was the Appellant which owed the Respondent the sum of R8

000,00 because the Respondent only took five fridges from the Appellant. Those five fridges he valued at about R12 000,00. 8. Mbani Mpangeni has been employed by the Respondent for more than 12 years. His job is to collect and deliver fridges. He cannot remember the date when he and other of the Respondent's employees went to the Appellant's premises to collect five fridges and took them to the Respondent's premises. They returned to the Appellant's premises on that same day to collect the remaining fridges. Upon arrival they noticed that certain parts of the remaining fridges were missing. On Solly's instructions they did not collect the remaining fridges. He did not see a security guard at the Appellant's premises when they collected the fridges. 9. Mbonela Alfred Nosilela, another of the Respondent's employees, gave evidence to the same effect as Mr Mpangeni. 10. With respect to the Magistrate, I find his judgment very difficult to understand. I have no idea how he arrived at the conclusion that absolution from the instance should be granted. He seems to have found that, because the parties joined issue on the number of the fridges sold and how the payment of the R30 000,00 would be effected, "the evidence before Court does not pass the threshold and therefore a ruling for absolution from the instance with costs is appropriate." He was required to resolve those disputes and not only identify them. 11. To resolve the factual disputes I will employ the technique referred to in Stellenbosch Farmers' Winery Group Ltd and Another vs Martell & Cie and Others 2003 (1) SA 11 (SCA) at 14I – 15D. 12. The Magistrate stated that he was invited to reject Solly's evidence. He found that, although Solly was not a good witness, he could not reject his evidence "as there are a lot where parties are in agreement though for different reasons". 13. A Court of appeal will be slow to disturb a trial Court's finding on the credibility of witnesses. It will only do so where, on the facts, such a finding is clearly wrong. (Santam Bpk vs Biddulph 2004 (5) SA 586 (SCA) at 589F – G) In my view, this is a case which calls for the Magistrate's findings (which depend on Solly's credibility) to be changed. Unlike the Magistrate, I reject Solly's evidence insofar as it was inconsistent with the evidence adduced by the Appellant. He was less than open with the Magistrate. His conduct during the sale and before the Magistrate speaks of a devious person. Firstly, when he handed a cheque of R30 000,00 to the Appellant during March 2005 he did not draw attention to the fact that the cheque was dated 10 May 2005. It was only on 25 April 2005 after the cheque had been dishonoured that Solly paid the sum of R10 000,00 cash to the Appellant. Secondly, he claimed that on 25 April 2005 he handed a cheque dated 30 April 2005 to Mr Epstein. As pointed out above, Mr Epstein testified that he would have made a note thereof if Solly had given him a cheque. I reject Solly's evidence in this regard because, although it is dated 30 April 2005, the cheque was presented to Nedbank for payment only on 1 September 2005. I find it highly improbable that the Appellant (which in March 2005 banked a cheque dated 10 May 2005) would shortly thereafter (on 25 April 2005) be presented with a cash cheque and present it for payment only on 1 September

2005. Furthermore, that cheque bore an endorsement of Nedbank. It did not bear an endorsement from Standard Bank. Regard being had to Mr Epstein's unchallenged evidence that all cheques received by the Appellant are banked at Standard Bank, one would have expected the cheque dated 30 April 2005 to have been banked at Standard Bank.

I have no difficulty in finding that the Respondent did not hand a cash cheque of R10 000,00 to the Appellant on 25 April 2005. Solly's evidence in that regard is false. Thirdly, Solly's contention that the cash cheque of R30 000,00 was handed to the Appellant as some form of security, does not make sense. According to him, in terms of the agreement, the Respondent was required to make three payments to the Appellant of R10 000,00 each. The Appellant would return the cheque of R30 000,00 to the Respondent after the last payment of R10 000,00.

One only has to hear that scheme to reject it as nonsensical. The presentation of the cheque of R30 000,00 to the Appellant indicates to me that Solly was up to tricks from the start of the transaction. 14. I find the evidence of the remaining witnesses credible. The evidence adduced by the Appellant reads well and is easy to understand. I am aware that there is a dispute between the Appellant's and the Respondent's evidence regarding the presence or absence of a security guard at the Appellant's premises when the fridges were collected. That issue is relevant only insofar as it is contended that the remaining fridges had parts missing because they were not properly guarded. I find it difficult to believe that, when the Respondent's employees started with the collection of the fridges that morning, the first five fridges were fully functional but, when they returned to collect the other two fridges, it was noted that some parts were missing. To compound matters, Solly testified that the Respondent's employees returned to collect the remaining fridges a few days after the five fridges were collected. He obviously wanted to create the impression that the missing parts were stolen during the course of those few days. Both Mr Mpangeni and Mr Nosilela testified that they returned to collect the remaining fridges on the very same day when the five fridges were collected. 15. This issue is, in my view, not important because it was Solly's evidence that, when he sent the Respondent's employees to collect the fridges, they already belonged to the Respondent. His evidence in this regard reads: "I sent them [to] go and collect the stuff. Already the stuff ... was mine." Mr Lipschin's evidence in this regard was that when Solly gave him the cheque of R30 000,00 he said to him "Come and collect it; they are voetstoets; you know about refrigeration; you've seen the stuff, please come and collect it as soon as you can, please." When he was cross-examined he testified that Solly "looked at the fridges. He did the deal. He had to come and collect it. That's when the risk passed to him. End of the story." That evidence was not disputed. The Magistrate did not deal with Solly's and Mr Lipschin's evidence in this regard. He should have found that the delivery of all the fridges took place and the Respondent became the owner of those fridges when the parties concluded the agreement during March 2005. 16. Regarding the probabilities, I find that it is probable that only seven fridges formed the subject matter of the sale between the parties. That is so because the uncontradicted evidence is that the Appellant removed nine fridges from its store. It required two of those fridges at another store, leaving seven fridges for sale. The Appellant could not have sold ten fridges to the Respondent because it only removed nine fridges from its store. 17. If it is so that the value of the five fridges which were delivered was R12 000,00, one wonders why the Respondent did not counterclaim for the sum of R8 000,00 which, on its version, it had overpaid to the Appellant. 18. An assessment of the probabilities reveals that the Appellant's version is the more probable. That version is that during March 2005 the parties entered into an agreement in

terms whereof the Appellant sold seven second-hand fridges to the Respondent for the sum of R30 000,00, that the Respondent paid R10 000,00 to the Appellant, that five fridges were removed by the Respondent from the Appellant's premises and the Respondent has failed to collect the remaining two fridges. The Appellant accordingly discharged the onus of proving the agreement of sale, the delivery of the merx and the Respondent's failure to pay the remaining R20 000,00. The Respondent is therefore liable to pay the sum of R20 000,00 to the Appellant. In the circumstances the Magistrate's judgment cannot be upheld. 19. The following order is accordingly made.

The appeal succeeds with costs, such costs to exclude the costs of the Appellant's application for condonation of the late filing of a security bond.

19.2. The Magistrate's order is set aside and replaced with the following order :

"Judgment is granted for the Plaintiff against the Defendant for : payment of the sum of R20 000,00; interest on the sum of R20 000,00 at the legal rate from 26 September 2005, being the date of service of the summons on the Defendant, to the date of payment thereof;

3. payment of the Plaintiff's costs of suit."

BLOEM AJ I agree. _____ KROON J
Appearances: For the Appellant : Mr R de Vos (attorney) of
Friedman Scheckter, Port Elizabeth Netteltons, Grahamstown
For the Respondent : H B Ayerst
instructed by Pagdens Stultings, Port Elizabeth
Neville Borman & Botha, Grahamstown

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