

SOUTH AFRICA / JUDGMENT

Origo International (Pty) Ltd v Smeg South Africa (Pty) Ltd (33541/2017) [2018] ZAGPJHC 412; 2019 (1) SA 267 (GJ) (25 June 2018)

[2018] ZAGPJHC 412

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD van Oosten

CASE / FILE NUMBER

33541/2017

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG

REPORTABLE:

YES

OF

INTEREST TO OTHER JUDGES: YES

REVISED

25

JUNE 2018

FHD

VAN OOSTEN

CASE

NO: 33541/2017

In

the matter between

ORIGO

INTERNATIONAL (PTY)

LTD APPLICANT

and

SMEG

SOUTH AFRICA (PTY)

LTD RESPONDENT

Contract

- demand for payment of amount of money owing failing which
cancellation - amount of demand disputed by applicant - applicant

after performing a reconciliation of the amount owing acknowledged liability for the lesser amount shown to be owing - tender to pay such lesser amount 'which payment shall be effected upon confirmation by your client of this amount constituting full and final settlement of this dispute' - respondent refused to accept the tender and cancelled agreement.

Application
for declarator that respondent's cancellation invalid - sole question for determination the validity and effect of the applicant's tender - held: a tender merely to pay does not constitute a proper tender - tender must be unconditional and made 'met openbeurs en klinkende munt' - tender for payment of lesser amount - legal effect thereof - protects tenderer from cancellation of contract should it be found that lesser amount tendered was in fact owing.

Dispute
as to amount of claim - referral for trial or the hearing of oral evidence - pending action instituted by respondent for payment of claim amount - dispute to be resolved in that action.

JUDGMENT

VAN OOSTEN J:

Introduction

- [1] What is the validity and legal effect, in a contractual setting, of a tender to pay in lieu of actual payment? Among a myriad of disputes arising in an application extending into many hundreds of pages, this is the question that lies at the heart of this matter and the answer thereto is decisive of the issues between the parties.

Background

facts

- [2] I shall only refer to the facts that I consider necessary for a proper understanding of the judgment. On 8 July 2014 the parties

concluded a written agreement in terms of which the respondent appointed the applicant as its exclusive retailer of all its unboxed,

discontinued, damaged and B-grade appliances that have been returned to it from its existing retailers (the agreement).

[3] By letter dated 14 August 2017, the respondent's attorneys demanded payment from the applicant, within 7 days, of the sum of R419 310.65 (the claim amount), in respect of goods sold by the applicant on consignment, during December 2016, which in terms of the agreement, had become due and owing by 16 January 2017. The claim amount arose from four invoices, rendered by the respondent in December 2016, in respect of which two subsequent credits were passed. The demand further states that failing payment the agreement would be cancelled.

[4] In the applicant's attorneys' first response to the demand, dated 16 August 2017, any indebtedness is denied and

reference is made to an 'on-going dispute in respect of certain variances as from January 2017' and the applicant unsuccessfully having called upon the respondent to resolve the matter by way of a joint reconciliation. The respondent was furthermore, once again, called upon to set out the basis for its claim, to which was added: 'Please be advised, to the extent that it is properly determined that any amounts are due to your client, same will be paid by our client' (the 16 August 2017 letter). On 17 August 2017 the respondent's attorneys replied in providing some calculation of the claim amount and reiterated that

failing payment thereof by 21 August 2017, the agreement would be cancelled.

[5] On 18 August 2017 the applicant prepared a detailed reconciliation of the account which showed that a lesser amount of R78 053.29 was due to the respondent (the admitted amount). The reconciliation was forwarded to the respondent's attorneys and in the same letter, dated 21 August 2017, the applicant's attorneys disputed the correctness of the amounts reflected in the respondent's

invoices but based on the applicant's reconciliation, acknowledged that the admitted amount was payable to the respondent.

Arising from the reconciliation, the following tender was made:

'Our client hereby tenders payment of this amount (the admitted amount), which payment shall be effected upon confirmation by your client of this amount constituting full and final settlement of this dispute.'

(the 21 August 2017 letter).

[6] By letter dated 22 August 2017, the respondent's attorneys cancelled the agreement (the respondent's purported cancellation), which was subsequently confirmed on 8 October 2017 and, again, on 9 October 2017. On 23 August 2017, the respondent

instituted action against the applicant for payment of the claim amount (the action). The action is defended by the applicant and I was informed from the bar that pleadings have closed.

- [7] On 6 September 2017 the present application was launched.
- [8] On 9 November 2017, and in response to the respondent's application for summary judgment in the action, the applicant paid the amount of R76 834.01, which after further reconciliation, it found to be due.

The relief sought

- [9] The applicant seeks an order declaring the respondent's purported cancellation invalid and that the respondent be ordered to comply with the agreement, in particular to provide the applicant with stock as requested/ordered on 2 August 2017.
- [10] The respondent counter-applies for interdictory relief, pending finalisation of the action, in effect to restrain the applicant from disposing of or alienating any of the items listed in an annexure to the answering affidavit.

Discussion

The opposing contentions of the parties

- [11] The validity of the demand has not been challenged. The dispute between the parties concerns the correctness of the claim amount. The issue arising is whether the applicant's tenders constituted compliance with the demand. In this regard the applicant contends that a proper tender was made in regard to an admitted and subsequent duly proven amount of indebtedness, which disentitled the respondent to cancel the agreement. The respondent disputes that a proper tender was made and in any event, contends that a tender for payment does not constitute payment which is what the applicant was required to do in order to avoid cancellation of the agreement pursuant to the demand.

Was a proper tender made?

- [12] In order to qualify as a proper tender for payment, it must be unconditional and made 'met openbeurs en klinkende munt'

(B&R Investments (Pty) Ltd v Laubscher 1951

- (2) SA 567 (T) 570E; Odendaal v Du Plessis 1918 AD 470; Christie's Law of Contract in South Africa 7 ed (2015) at p 468).
- [13] Counsel for the applicant contended that two tenders were made: the first in the 16 August 2017 letter and the second, in the 21 August 2017 letter. As for the first, it is immediately apparent that the letter contains nothing but a promise, that payment will be made upon proper proof of the amount due. A mere tender to pay does not constitute a proper tender. Moreover, the liability to pay upon proper proof of payment, in any event, ex lege always exists and to elevate the promise to a tender, as counsel for the applicant has sought to persuade me to do, is seemingly artificial and falls to be rejected.

- [14] This brings me to the second tender which according to the wording used, was put forward as a tender, in the 21 August 2017 letter. The question is whether the tender in stipulating that payment will be effected upon confirmation by the respondent that the admitted amount is accepted in full and final settlement of the dispute, was conditional (Erasmus Superior Court Practice D1-443). Although the tender is made in tandem with confirmation required aimed at a full and final settlement, I do not think that in the context used, it was intended as an offer of compromise. A full reconciliation had been done by then and the amount found owing was tendered which upon acceptance thereof, in any event, would have resulted in a full and final settlement of the dispute. I accordingly find that the tender was unconditional (*Absa Bank Ltd v Van de Vyver* NO 2002 (4) SA 397 (SCA) para 10 and 16; *Reilly v Seligson and Clare Ltd* 1976 (2) SA 847 (W) 849H-851C; *Mantra Consulting (Pty) Ltd v Valor IT CC* (Case no 09/35874) [2010] ZAGPJHC 36, Christie's *ibid* at p 470).
- [15] The tender was made for payment of a lesser amount than the claim amount. In *Nkengana and Another v Schnetler and Another* [2011] 1 All SA 272 (SCA) para 12, it was held that a tender for payment of money must be for payment of the full amount owing. The question arising is what was the full amount owing? Counsel for the applicant, with reference to the applicant's full reconciliation in the papers showing the quantification of the admitted amount, submitted that in view of the respondent's failure to challenge it, this court should find that the amount was no longer in dispute and that it can be accepted as the true amount owing. I am unable to agree: this being motion proceedings I am not inclined to hold that, on the papers before me, the respondent has unequivocally admitted the correctness of the admitted amount. There are moreover, clear indications to the contrary, showing that the quantum of the amount owing at all times was, and, still is, in dispute.

Does a tender to pay constitute performance?

- [16] The tender in the present matter must be considered against the background facts and in particular that the applicant was in terms of the agreement, liable to pay the December invoices by 16 January 2017. A tender to pay is a promise or an undertaking to pay and, accordingly, does not constitute actual payment. The applicant's tender, leaving aside the correctness of the amount tendered, accordingly, did not constitute payment.
- [17] The matter however, does not end there. The applicant's tender, although not constituting payment was not without legal effect. I merely need to refer by way of analogy, to the well-known offer to settle and tender procedure, provided for in Rule of Court 34, and the effect thereof in the exercise of the court's discretion in awarding costs (See the judgment of Van Zyl J, in *Fox v Cango Wildlife Centre (Pty) Ltd* (6010/01) [2014] ZAWCHC 32 (1 November 2004); *Gralio (Pty) Ltd v DE Claassen (Pty) Ltd* 1980 (1) SA 816 (AD) 825D-G)). On the facts of this case, the tender has this consequence: should it be found that the admitted amount (or the lesser amount subsequently paid) was in fact the true amount owing, the applicant will be protected from the consequences of non-compliance set forth in the demand for payment, which is cancellation of the agreement (See *National Bank of SA Ltd v Leon Levson Studios Ltd* 1913 AD 213, where the lessee's tender for payment of rental due, in the

circumstances of that case, was held sufficient to prevent cancellation of the lease; Boland Bank Bpk v Steele 1994 (1) SA 259 (T) 266G).

[18] I have already held that the dispute concerning the exact amount owing, has not been resolved and remains in dispute. The dispute can only be resolved upon proper ventilation thereof in the action that has already been instituted. It is accordingly my finding that the validity of the respondent's cancellation of the agreement is wholly dependent upon proof of the amount claimed and that failing such proof, the respondent's purported cancellation ought to be declared invalid in accordance with the relief sought by the applicant in this application. A referral for trial or for the hearing of oral evidence generally would have followed, but has become superfluous in view of the pending action and it will be for the parties with practically all information having been disclosed, to either come to a sensible agreement concerning the quantification of disputed amount or to effect such amendments to the pleadings as they may consider necessary, in order to give effect to this

judgment.

[19] Finally, I turn to consider the counter-application. It is common cause that the goods which are the subject matter of the

counter-application, are in the applicant's possession, having been delivered to the applicant in terms of the agreement, on consignment and that they belong to the respondent. The applicant has however undertaken to properly account to the respondent and to keep all funds properly determined to be owing to the respondent in regard to items sold, in a suspense account. The applicant has, as I have alluded to, meticulously accounted in respect of its indebtedness to the applicant, which has not been shown to be incorrect. Its bona fides is unquestionable. No final determination as to the continued existence of the agreement has been made. I accordingly consider it in the interest of justice not to grant the interdictory relief sought, but to afford credence to the undertaking made by the applicant.

[20] In the result the following order is made:

1. No order is made in regard to the applicant's application.
2. No order is made on the respondent's counter-application.
3. The costs of this application and counter-application shall be costs in the action.

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT ADV L HOLLANDER

APPLICANT'S ATTORNEYS SCHINDLERS ATTORNEYS

COUNSEL FOR RESPONDENT ADV NPG REDMAN SC

RESPONDENT'S ATTORNEYS C DE VILLIERS ATTORNEYS

DATE OF HEARING

20 JUNE 2018

DATE OF JUDGMENT

25 JUNE 2018

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