

SOUTH AFRICA / JUDGMENT

Paarl Web Gauteng (Pty) Ltd v Reegans Freight CC (37661/2009) [2015] ZAGPPHC 1145 (7 December 2015) [2015] ZAGPPHC 1145

COURT

North Gauteng High Court, Pretoria

BEFORE

Makgoka

CASE / FILE NUMBER

37661/2009

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IN THE

HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 37661/2009

Not

Reportable Not of interest to other Judges

DATE:

7/12/2015

In

the matter between:

PAARL

WEB GAUTENG (PTY)

LTD Plaintiff

and

REEGANS

FREIGHT

CC First

Defendant

REEGAN

NAIDOO Second

Defendant

Heard: 26

June 2015

Delivered: 7

December 2015

Coram:

MAKGOKA J

Summary: Contract - formation - unilateral mistake - what constitutes - Authority of members of close corporation to bind the close corporation - s 54 of the Close Corporations Act 84 of 1984- Credit facilities - customer exceeding credit limit - effect thereof - whether supplier of goods ordered after credit limit exceeded, is barred from claiming full amount.
ORDER
Action

for contractual claim arising from a credit agreement:

1.
The first and second defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay to the plaintiff the sum of R433 427.62;
2.
Interest on the above sum shall run at the rate of 18% per annum from 1 March 2009 to date of final payment;
3.
The first and second defendants are ordered to pay the costs of the action on an attorney and client scale.

JUDGMENT

MAKGOKA,J

- [1] The plaintiff instituted an action for payment of R895 617.72. The action was pursuant to a credit facility which was approved by the plaintiff in favour of the first defendant. On 15 October 2014 summary judgment was granted by this court against the first and second defendants in the amount of R350 000 jointly and severally. Both defendants were granted leave to defend the balance of the claim against them. Both defendants resist the balance of the plaintiff's claim.
- [2] The plaintiff conducts business, among others, as a printer of newspapers and magazines. The second defendant, Mr Reegan Naidoo was also one of members of the first defendant (Reegans Freight) during the relevant period, being February - July 2008. The other members were his father (Mr. VB Naidoo) and his sister, Ms Karmen Naidoo. During February 2008 the second defendant established another close corporation named Stylrr Media CC (Stylrr), of which he was the sole member.
- [3] He used Stylrr as a vehicle through which he published a magazine called Stylrr Funk. Four orders for the printing of the magazine were placed by the second defendant with the plaintiff. Order 1 (May 2008) for 30 000 copies, order 2 (June 2008) for 20 000 copies, order 3 (July 2008) for 17500 copies and order 4 (September 2008) for 15 000. The orders were all placed in on the email address of Stylrr.

- [4] In its particulars of claim, the plaintiff alleges that on 5 February 2008 Reegans Freight, represented by Mr. VB Naidoo applied for credit facilities with the plaintiff, which credit facilities were granted on certain standard terms and conditions, in terms of which the plaintiff would from time to time supply printing work on behalf of Reegans Freight. The credit application was attached to the particulars of claim as annexure 'B'. It further alleges that pursuant to such agreement, four orders for publication of a magazine were placed on behalf of Reegans Freight by the second defendant.
- [5] In its plea, Reegans Freight denies that it entered into an agreement with plaintiff for credit facilities. It pleads that it was approached by the second defendant to sign surety for the debt of Stylrr. According to the plea, Reegans Freight agreed to sign surety for a maximum of R350 000 for Stylrr. It is stated that Mr VB Naidoo, who signed the document on behalf of Reegans Freight, never intended to sign an application for credit facilities, but a suretyship for the debt of Stylrr, limited to R350
000. This, according to the plea, explains why judgment was granted in that amount, as explained in para 1 above.
- [6] Accordingly, Reegans Freight's liability for the balance of the plaintiff's claim is what is to be determined, and the trial

proceeded on that basis. I had ruled at the commencement of the trial that the defendants bore a duty to begin. The defendants called Mr. VB Naidoo and the second defendant. Messrs Paul de Bruyn, Malcolm Steward and Jandre de Milander testified for the plaintiff. To avoid any confusion between Mr. VB Naidoo and the second defendant, on the one hand, and the second defendant and Reegans Freight, on the other, I will in this judgment refer to Mr Reegan Naidoo simply as 'the second defendant'. Below is a summary of the evidence.

- [7] Mr. VB Naidoo confirmed having signed annexure 'B' to the particulars of claim, which is titled 'Application for Credit Facilities.' The document was completed by his daughter, Karmen, and brought to him by the second defendant in February 2008. At that time, the second defendant was registering a close corporation for the purpose of publishing a magazine. The second defendant wanted him to sign as surety because he did not have credit facilities. He agreed to be bound for an amount of R350 000. Since then, he never received any invoices or statements from the plaintiff. He had no business dealings with the plaintiff whatsoever, and he was never requested to make any payment to the plaintiff until he received the summons. To buttress this point, he confirmed that he wrote a letter to the plaintiff on 13 July 2009 in which he made the above point, and also confirming Reegans Freight's liability to be plaintiff in the amount of R350 000 (incorrectly stated to be R300 000 in the letter).
- [8] According to him, the second defendant and his sister, despite being members of Reegans Freight, did not have any authority to bind the close corporation as he had 'the sole authority' in that regard. On a broad basis, Mr. VB Naidoo's version was this: when he signed annexure 'B', he intended to sign a suretyship for his son's close corporation, Stylrr. He had

nothing to do with business except the 'suretyship'. He was never made aware that orders for printing had been placed with the plaintiff on behalf of Reegans Freight, which had no business dealings with the plaintiff except for him signing annexure 'B'. During cross-examination he conceded that on the face of it, annexure 'B' was not a suretyship but an application for credit facilities. He testified that it was 'an oversight' on his part by not ensuring that what he signed was a suretyship.

- [9] Regarding the credit agreement signed by his father (annexure B) the second defendant testified that he did not understand the difference between a surety and an application for credit facility. The second defendant testified that according to him, the application for credit facilities was by Stylrr for its magazine. There were no business dealings between his father, Mr. VB Naidoo or Reegans Freight, and the plaintiff. The plaintiff never rendered services to Reegans Freight, and at all times the plaintiff rendered services to Stylrr. He never represented to the plaintiff that he was representing Reegar's Freight. On 16 February 2009 he was made to sign an application for credit facilities to the plaintiff for an amount of R895 617.72 on behalf of Stylrr. The application also incorporated a suretyship, which he also signed in his personal capacity.
- [10] The second defendant further testified that when order 2 was made, the credit limit of R350 000 had been reached. Therefore, according to him only order 1 and part of order 2 were made on behalf of Reegans Freight, while part of order 2 and orders 3 and 4 were made on behalf of Stylrr. It was up to the plaintiff to decide where to place the orders made above the credit limit. According to him, at no point was he questioned by the plaintiff's credit managers as to how he was going to pay for the printed magazines. As a result, orders 3 and 4 were placed without any credit facilities as Reegans Freight had exhausted its credit limit.
- [11] He conceded, though, that there was no printing agreement between the plaintiff and Stylrr. He further conceded that he was aware that only an entity with granted credit facilities by the plaintiff could place orders on credit from the plaintiff, and that neither Stylrr nor he personally, had such facilities with the plaintiff. It was also common cause that he did not inform the plaintiff's credit managers at any stage that part of order 2, orders 3 and 4 were being placed on behalf of Stylrr, instead of Reegans Freight, and that all the invoices were made in the name of Reegans Freight.
- [12] Mr. Malcolm Steward was the plaintiff's sales agent during the relevant period. His duties included soliciting customers. He and the second defendant had met earlier during his employment with his previous company. When he moved to the plaintiff he solicited the second defendant's business. He was approached by the second defendant who informed him that he was intending to launch a magazine. The second defendant enquired from him regarding printing on credit. He informed the second defendant that he would need to set up a credit facility, after which he sent a credit application form to the second defendant for that purpose. The latter completed and returned it. It had been completed in the name of Reegans Freight. Accordingly, the entity granted credit facilities was Reegans Freight, and therefore, the orders placed by the second defendant were allocated to the account of

Reegans Freight because the account had been in the name of Reegans Freight.

- [13] He emphasized that no person or entity who has not been granted credit facilities could order goods on credit from the plaintiff. The second defendant was aware of this as he mentioned it to him during the discussions with him. According to him, all the four orders were placed on behalf of Reegans Freight. The second defendant never had any credit facilities of his own with the plaintiff. During cross-examination he conceded that the plaintiff never received any written order in the name of Reegans' Freight. He also never had any verbal discussion with the second defendant in the name of Reegans Freight. He conceded that all emails and correspondence was in the name of Stylrr Media. He was also aware that the second defendant's business was that of publishing the magazine through the vehicle of Stylrr Media CC.
- [14] Mr Jandre de Milander was the general manager of the plaintiff. In his position. He testified that had regular meetings with debtors under financial stress, trying to see how they could be assisted, since non-publication of an edition could spell disaster for a publication. He was aware of the account operated in the name of Reegans Freight. His attention to the account was drawn when it became outstanding, and the credit limit on it was exceeded. The issue was discussed with the second defendant at management level meetings, who represented Reegans Freight at those meetings. At the time he was dealing with one person, being the second defendant, and according to the credit application form, the debtor was Reegans Freight. During one of those meetings in July 2008, the second defendant pleaded with them to release the printed magazine, as it would have signalled the end of the magazine if the publication did not hit the streets. He indicated to the second defendant that the plaintiff would not release the printed magazine until a deposit of R100 000 was paid. The second defendant paid a deposit of R98 000, which was R2 000 short of the amount set by the plaintiff. However, in the spirit of the relationship he had with the second defendant, he authorized the release of the printed magazines.
- [15] Although he was aware of Stylrr Media as the second defendant's business, and that it owned the magazine, he had no reason to believe that he was dealing with any other business other than Reegans Freight. He would remember if the second defendant had told him that he was not representing Reegans Freight any longer, because that would have meant that the debt was not covered and the plaintiff would have to open new account for the new debtor. The second defendant never informed him that once the credit limit of R350 000 in Reegans Freight's name was reached, all further accounts would be for Stylrr. Had that been conveyed to him, he would remember that because it would have had debtor implication. According to him, the plaintiff would not have proceeded with the printing of the magazine because it would have entailed printing without cash or an account and that would have meant no payment. He would have been the only person to give authorization for any entity to order without having an account, and he would have insisted that there be cash payment upfront. In this instance, he did not give such authorization.

- [16] Mr de Bruyn's evidence concerned the updated balance of certificate, which was handed in during his evidence. I shall refer to it later in the judgment.
- [17] That, briefly, is the evidence. From the pleadings, common cause issues, the evidence and the minute of the pre-trial conference, the following four crisp issues have crystallized for determination. First, whether there was an agreement between the plaintiff and Reegans Freight as a result of Mr VB Naidoo's signature of the credit application form. Second, whether the second defendant had the authority to bind Reegans Freight. Third, whether the orders placed by the second defendant were on behalf of Reegans Freight. Fourth, whether the limit on the credit facilities is a bar to the plaintiff from recovering the whole amount. I proceed to consider, in turn, those aspects.

Agreement between the plaintiff and Reegans Freight

- [18] It is common cause that annexure 'B' was signed by Mr VB Naidoo on behalf of Reegans Freight in February 2008. It is further common cause that the true nature of annexure 'B' was that of an application for credit facilities. However, Mr VB Naidoo says that he intended to sign a surety agreement on behalf of the second defendant, and not an application for credit facilities. In effect, Mr VB Naidoo, by asserting this on behalf of Reegans Freight, he raised the defence of iustus error, which allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into

which he has entered. See *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board*[1] where the following apt remarks were made by Schreiner JA at 479A:

'Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists. At least the mistake (error) would have to be reasonable (Justus) and it would have to be pleaded. In the present case the plea makes no mention of mistake and there is no basis in the evidence for a contention that the mistake was reasonable.'

- [19] Therefore, in order to escape the consequences of an agreement on the ground of justifiable mistake, the error must be one which a reasonable man would make[2]. Where the error arises due to the negligence of the signatory, it does not constitute justus[3]. In the present case, Mr VB Naidoo, who has extensive experience in dealing with contracts, did not realize the true nature of the

document solely because he failed to read the document. Accordingly, the mistake was attributable solely to his own negligence in not reading the document, and the plaintiff had nothing to do with it. There is not even any suggestion to that effect. I therefore have no difficulty in concluding that annexure constituted an agreement between the plaintiff and Reegans Freight.

The authority of the second defendant

[20] I mentioned earlier that Mr VB Naidoo testified that the second defendant had no authority to bind Reegans Freight., and that only he had the sole authority. During the relevant period, the members of Reegans Freight were Mr VB Naidoo, Karmen Naidoo and the second defendant. This was the position until July 2009, when both Karmen Naidoo and the second defendant ceased to be members of Reegans Freight. It is common cause that the plaintiff was never informed of the second defendant no longer being a member of Reegans Freight. There are two short answers to the proposition that the second defendant lacked authority to bind Reegans Freight. First, the second defendant's alleged lack of authority was not pleaded. In *Tuckers Corporation v Perpellief*,^[4] this court held, with reference to *Durbach v Fairway Hotel*^[5] that a denial of authority must be specifically and unambiguously pleaded. Second, in the credit application form, annexure 'B', Reegans Freight mentioned the second defendant as one of its members. Section 54 of the Close Corporations Act 84 of 1984 is relevant. It provides:

- (1) Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with the corporation, be an agent of the corporation.
- (2) Any act if a member shall bind a corporation, whether or not such act is performed for the carrying on of business of the corporation

unless the member so acting has in fact no power to act for the corporation in the particular matter and the person with whom the

member deals has, or ought reasonable to have, knowledge of the fact that the member has no such power.

[21] The upshot of this section is that once Reegans Freight represented to the plaintiff that the second defendant was its member, s 54 became operative against it with regards to the authority of the second defendant to bind it. This is by operation of law, and any internal arrangement amongst the members in that regard is not enforceable against third parties such as the plaintiff. I therefore

find that the second defendant had the authority to bind Reegans Freight.

Were the orders placed on behalf of Reegans Freight?

[22] In this regard, it was admitted during the pre-trial conference that the second defendant purported to order printed materials from the plaintiff, on behalf of Reegans Freight in respect of orders 1 and 2. During the trial it was argued that this admission was later retracted in a letter, and that the position was that all orders were placed on behalf of Stylrr. This is an impermissible approach. Once a fact had been admitted in a pre-trial minute, it cannot simply be withdrawn in a letter without further ado. This is so trite that it is unnecessary to cite any authorities. I therefore find that it is common cause that orders 1 and 2 were placed on behalf of Reegans Freight.

[23] That leaves the dispute only in respect of orders 3 and 4. It is common cause that all of the four orders were made in a similar

manner. All were placed by the second defendant from the email address of Stylrr Media. It is further common cause that when placing

orders 3 and 4, the second defendant did not inform the representatives of the plaintiff that those orders were different to

orders

1 and 2, in the sense that they were being made in the name of Stylrr Media, and not Reegans Freight. Mr Steward's evidence was very clear that this was never conveyed to him by the second defendant. He also testified about what would have occurred had that been conveyed to him.

[24] In answering this question, sight should not be lost of the background facts, which I recap. It is the second defendant who

approached the plaintiff for credit facilities. He was furnished with an application form, which was completed and signed on behalf of Reegans Freight. In that form, he was mentioned as a member of the close corporation. The second defendant presented the form to the plaintiff and Reegans Freight was approved for credit facilities. I agree with the argument on behalf of the plaintiff that under these circumstances, a reasonable party in the position of the plaintiff would understand the signature of annexure 'B' as meaning that Reegans Freight wished to purchase goods on credit from the plaintiff from time to time, and that the second defendant, as a member of the close corporation, was authorized to place orders of goods with the plaintiff on its behalf.

[25] Subsequent to Reegans Freight being approved for credit facilities, the second defendant in fact placed orders 1 and 2 on behalf of Reegans Freight on the basis of the latter's credit facilities. Those orders were followed by orders 3 and 4 in a similar manner in which orders 1 and 2 were placed. When this occurred, there could not be any other understanding by the plaintiff but that orders 3 and 4 were similarly placed on behalf of Reegans Freight. It should be borne in mind that Stylrr did not have credit facilities with the plaintiff during the relevant period. On his own version, the second defendant accepted that only an entity with credit facilities could order goods on credit from the plaintiff. Only Reegans Freight had such facilities.

[26] The fact that the second defendant made use of the email address of Stylrr when placing those orders is of no moment. It does not mean the orders were placed on behalf of Stylrr, as the latter entity never applied to the applicant for credit facilities. Therefore, by placing orders 3 and 4 in a similar manner as orders 1 and 2, Reegans Freight cannot now tenably argue that the latter orders were any different from orders 1 and 2. It is prevented by the principle of estoppel from asserting the contrary. I therefore find that the orders 3 and 4, like orders 1 and 2, were placed on behalf of Reegans Freight, and it is liable for payment in respect of those goods.

Credit limit exceeded

[27] Finally, it was contended that because Reegans Freight's credit limit was R350 000, the plaintiff was not entitled to recover any more than the amount of the limit. There is no merit in this contention. A similar argument was rejected in *Stiff v Q Data*.^[6] At para 17 Mthiyane JA said:

'The suggestion that because credit was given in excess of R100 000, other than on a COD basis, the plaintiff was precluded from claiming the full amount, is misconceived ... The plaintiff is not compelled to grant an increase in credit by way of written consent only. If he chooses to allow the defendant to exceed the initial limit without paying cash on delivery, it is entitled to do so. The provision requires prior written consent is plainly a provision in favorem the plaintiff and the benefit of it may be waived.'

[28] To sum up. The second defendant placed orders 1, 2, 3 and 4 from the plaintiff pursuant to the credit facilities approved by the plaintiff for Reegans Freight. The second defendant, as a member of Reegans Freight, had the necessary authority to make those orders on its behalf. At no stage did the second defendant inform the plaintiff that orders 3 and 4 were not in the name of Reegans Freight, unlike orders 1 and 2, which were admittedly placed on behalf of Reegans Freight. The plaintiff reasonably understood the position to be that all orders were placed in the name of the only debtor approved for credit facilities, namely Reegans Freight. No other entity connected with the second defendant had credit facilities with the plaintiff. Reegans Freight is in the circumstances liable to the plaintiff for those orders.

[29] It remains to be determined, the amount of Reegans Freight's indebtedness to the plaintiff. During the trial an updated certificate of balance signed by the plaintiff's managing director, Mr Paul de Bruyn, was handed in. It shows the balance owed as R433 427.62. It is now axiomatic that a certificate of balance provides prima facie proof of the amount of the debt calculated according to the agreement and the transactions between the parties.^[7] To disturb the prima facie proof afforded by the certificate of balance, the defendants had to adduce evidence of such a nature 'as to throw into judicially cognizable doubt about the validity or legality of the claim.'^[8]

[30] The defendants have not, other than valiant argument, produced any evidence to disturb the prima facie evidence afforded by the certificate to prevent it becoming sufficient proof. I am thus satisfied about the amount of Reegans Freight's indebtedness to the plaintiff. The second defendant, on 16 February 2009 bound himself as surety and co-principal debtor in solidum to the plaintiff for the payment by Reegans Freight for, among others, all amounts owing to the plaintiff by Reegans Freight.

[31] There remains the question of costs. The plaintiff has been successful. Costs must therefore follow the event. The agreement

provides for costs to be ordered on an attorney and own client scale. The plaintiff has paid for attorney and client scale. There is no reason to decline the request.

[32] In the circumstances the following order is made:

2. Interest on the above sum shall run at the rate of 18% per annum from 1 March 2009;

TM Makgoka

Judge of the High Court

Date of hearing: 26 June 2015

Judgment

delivered: 7 December 2015

Appearances

For the Plaintiff:

Adv. L. M. Spiller

Instructed by:

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Andrea Rae Attorney, Pretoria

For the Defendants:

Mrs. R. Erasmus

Instructed by:

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[1] National and Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958

(2) SA 473 (A).

[2] Brink v Humphries and Jewel (Pty) Ltd 2005(2) SA 419 (SCA) para 8.

[3] Standard Credit Corp Ltd v Naicker 1987

(2) SA 49 (N)

[4] Tuckers Land & Development Corporation (Pty) Ltd v Perpellief 1978

(2) SA 11 (T) at 16.

[5] Durbach v Fairway Hotel Ltd 1949

(3) SA 1081 (SR) at 1082.

[6] Stiff v Q Data Distribution (Pty) Ltd 2003

(2) SA 336 (SCA).

[7] Senekal v Trustbank of Africa Ltd 1978

(3) SA 376 (A).

[8] Senekal, above, at 387A-B.

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