

SOUTH AFRICA / JUDGMENT

Sindat Spol S.R.O v Euro Diamond Products CC (05957/2014) [2015]

ZAGPJHC 284 (10 December 2015)

[2015] ZAGPJHC 284

COURT

South Gauteng High Court, Johannesburg

BEFORE

F Kathree-Setiloane

CASE / FILE NUMBER

05957/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

no: 05957/2014

In the matter between:

SINDAT
spol. s
r.o
Plaintiff
And
EURO
DIAMOND PRODUCTS
CC
Defendant

JUDGMENT

KATHREE-SETILOANE J:

- [1] This is a provisional sentence action as envisaged in Rule 8 of the Uniform Rules of Court. Provisional sentence will only be refused when the probabilities of success in the principal case are in the Defendant's favour.[1] The Plaintiff's claim is founded upon four bills of exchange drawn by the Plaintiff for acceptance by the Defendant, and accepted by the Defendant. The Plaintiff claims payment of the sums of: (a) €22 743,92; (b) €19 630,80; (c) €25

794,99; and (d) €17 285,60, together with mora interest at the maximum prescribed rate and costs of suit.

The distribution agreement

[2] A distribution agreement was concluded between the Plaintiff, as supplier; and the Defendant, as distributor in Prague on the 3rd day of May

2007. It provides, inter alia, that:

(i) the Plaintiff would supply Technistone products (“the stone products”) to the Defendant for distribution in the territory

of the Republic of South Africa and sub-African countries (article 3);

(ii) the purchase prices for the products would be paid by the Defendant in accordance with the Plaintiff’s then current price list (article 8.1) at FCA Hradec Kralove (Incoterms 2000), unless agreed otherwise (in which regard it is pointed out that:

(a) Hradec Kralove is a city in the region of Bohemia in the Czech Republic;

(b) “FCA” is an abbreviation for the shipping term “Free Carrier”, which has the effect that the seller is only obliged to deliver the goods, cleared for export, to the carrier nominated by the buyer at the named place, in casu Hradec Kralove, (articles 8.2 and 11.1);

(c) on a *soi-disant* “Documents Against Payment” basis, payable 90 days from the date of invoicing (which provision had the effect that the Defendant would only receive the documents

necessary for the loading or offloading of the stone products by its carrier once the Plaintiff was satisfied that the proper arrangements

for payment by the Defendant had been made; and be required to effect payment long after it received delivery of the stone products), (“the

documents against payment procedure”) (article 9.1);

(iii) the Plaintiff afforded the Defendant a credit limit of €650 000,00 (article 9.2);

(iv) the quality of the stone products delivered by the Plaintiff to the Defendant would accord with the General Commercial Condition 2007 for such product (“the quality standard”);

(v) the risk of damage to the stone products would pass to the Defendant upon delivery of the stone products by the Plaintiff FCA Hradec Kralove (article 12.1);

(vi) the Defendant was obliged to lodge any claim arising from the defects in the stone products against the Plaintiff before the Defendant

commenced the processing of such products (“the pre-processing notification”) (clause 4.1);

(vii) the following instances would not be regarded as defects:

- (a) treatment and realisation in conflict with the regulations for implementation, installation and maintenance of the stone products;
- (b) variations of colour tone, structure and artwork (in respect whereof it was recorded that the product consists of more than 92% of the natural material, in respect whereof the small colour difference is a normal and natural property);
- (c) apparent defects, which are not claimed by the Defendant before the embedding, mounting or further processing of the product, (“the acceptable defects”) (article 13.5);

(viii) the Defendant would only be entitled to lodge a claim against the Plaintiff on the basis of:

- (a) short-delivery of the stone products, within 3 days after receipt of such products;
- (b) apparent quality defects, on agreement with the Plaintiff;
- (c) latent quality defects, within 30 days from the discovery thereof, but in any event before further processing or realisation and in the framework of the warranty period forming the subject matter of article 13.2 (which limited the Plaintiff’s liability for defects to a period of 2 years from the date of despatch of the stone products), (“the claim lodgement periods”) (article 13.6);

(ix) the claims lodged by the Defendant with the Plaintiff in respect of defective products received by it, would include the following

particularity:

- (a) the number of the bill of delivery of the consignment of which the defective product formed a part;
- (b) the date of despatch of such consignment;
- (c) the exact name of the damaged assortment item;
- (d) a description of the defect;
- (e) the quantity of the damaged products;
- (f) the Defendant’s proposal pertaining to the manner in which it wished the claim to be resolved, (“the claim procedure”)

(article 13.7);

- (x) should a claim submitted by the Defendant relating to the quality of any product, be rejected by the Plaintiff, the analysis and opinion of the Testing Laboratory of Stone and Aggregate Limited, situated in Husova Street, Horice v Podkrkonosi (a small town in Hradec Kralove) would be obtained and be final and binding on the parties, (“the claim resolution method”) (article 13.9),

(xi) The Defendant introduced the conclusion of the distribution agreement in paragraph 5.1 of the answering affidavit, and annexed a copy of the distribution agreement to the answering affidavit as Annexure “EDP1”.

The bill procedure

[3] The procedure that applies to the bills of exchange in this matter is as follows:

- (a) The purchaser, such as the Defendant (typically an entity in a foreign country to that of the supplier) places an order for the supply of goods (“the goods”) with a supplier of such goods, such as the Plaintiff (“the order for goods”);
- (b) The supplier would typically after acceptance of the order for goods; and prior to the shipment of the goods from the country in which the supplier conducts business to the business address of the purchaser, normally, in a different country; and in the event of it having been agreed that the purchaser would pay the purchase price for the goods by bill of exchange, draw a bill of exchange (similar to the bills of exchange in this action) for transmission to the bankers of the purchaser (“the bankers”); and acceptance by such purchaser, in the amount payable by the purchaser to the supplier in respect of the purchase price of the goods (“the notional bill”), thereby effectively granting the purchaser credit for the limited period until the due date of the notional bill;
- (c) The supplier may send the notional bill to the bankers, with instructions to either withhold the document required for the uploading of the goods onto the vessel in the port from which the goods are dispatched (the Port of Bremerhaven in the current matter) (“the pre-loading retention”); or offloading of the goods from the vessel at the destination port (the Port of Durban in this matter) (as happened in this matter) (“the pre-offloading retention”), accompanying the transmission of the notional bill (“the loading documents”) pending the acceptance of the notional bill by the purchaser (“the supplier's instructions”), in order to give effect to the documents (being the loading documents) against payment (represented by the acceptance of the notional bill) procedure;
- (d) Following the receipt of the notional bill by the bankers, the bankers would:
 - (i) verify the particulars of the banking account of the customer maintained in the books of account of the bankers;
 - (ii) issue collection advices (of which the documents annexed to the answering affidavit as Annexures “EDP6” – “EDP9”

issued by Nedbank Limited (“Nedbank”) and styled “Advice of Documentary Collection for Payment” are examples) to the customer to facilitate the acceptance of the notional bill by the customer and payment of the notional bill, (“the collection advices”);

- (iii) The bankers would then advise the supplier that the notional bill had been accepted by the customer, once and in the event of the customer accepting the same (“the acceptance advice”) and retaining the notional bill in its custody pending payment thereof by the customer;
- (e) The notional bill embodies an undertaking by the customer to pay the amount of the notional bill (“the notional amount”) to the drawer of the notional bill, being the supplier on the due date specified for such payment in the notional bill, which would typically be a date after the expected receipt of the goods by the customer (“the notional due date”). The notional bill constitutes an acknowledgement of debt by the customer in the notional amount for payment of the notional amount on the notional due date. The notional bill also provides the supplier with an uncomplicated cause of action against the customer for the recovery of the notional amount; and a measure of security that the supplier will receive payment for the goods ordered pursuant to the order for goods;
- (f) At the time of the furnishing of the acceptance advice by the bankers to the supplier, the bankers would, in accordance with the supplier’s instructions, release the loading documents required for the loading of the goods (in the case of a pre-loading retention) or the off-loading of the goods (in the case of a pre-offloading retention) as occurred in each instance in this matter. On the due date, the bankers would furnish the notional bill to the customer, in the event of the customer paying the notional amount to the supplier (in order to remove the notional bill from the possession of third parties) or the supplier, should the customer fail to pay the notional amount to the supplier (to enable the supplier to take legal action against the customer on the basis of the notional bill).
- [4] No actual presentment of the notional bill is required, inasmuch as the notional bill would already be in the possession of the customer’s bankers and already constitutes an acknowledgement of indebtedness. There rests no obligation on the bankers to pay the notional bill.

The application of the documents against payment procedure

- [5] The documents against payment procedure was implemented with reference to the bills of exchange on the basis of a pre-offloading retention basis (“the implemented procedure”), as follows:

Bills of exchange A:

- (i) Date bill drawn 18 September 2008 (ii) Bill amount €22 743,92 (iii) Date of loading on vessel 2 October 2008 (iv) Name of vessel DAL Kalahari (v) Date of issue of bill of lading 6 October 2008 (vi) Date of collection advice 14 October 2008 (vii) Date bill accepted 28 October 2008 (viii) Due date of the bill 6 March 2009 (ix) Additional supporting documents Annexure “A1” – “A5”

Bills of exchange B:

- (x) Date bill drawn 19 September 2008 (xi) Bill amount €19 630,80 (xii) Date of loading on vessel 2 October 2008 (xiii) Name of vessel DAL Kalahari (xiv) Date of issue of bill of lading 6 October 2008 (xv) Date of collection advice 14 October 2008 (xvi) Date bill accepted 27 October 2008 (xvii) Due date of the bill 6 March 2009 (xviii) Additional supporting documents Annexure “B1” – “B5”

Bills of exchange C:

- (xix) Date bill drawn 16 December 2008 (xx) Bill amount €25 794,99 (xxi) Date of loading on vessel 28 December 2008 (xxii) Name of vessel Safmarine Nomazwe (xxiii) Date of issue of bill of lading 1 January 2009 (xxiv) Date bill accepted 28 January 2009 (xxv) Due date of the bill 27 May 2009 (xxvi) Additional supporting documents Annexure “C1” – “C5”

Bills of exchange D:

- (xxvii) Date bill drawn 22 December 2008 (xxviii) Bill amount €17 285,60 (xxix) Date of loading on vessel/ 8 January 2009 (xxx) Name of vessel DAL Kalahari (xxxi) Date of issue of bill of lading 14 January 2009 (xxxii) Date bill accepted 28 January 2009 (xxxiii) Date of collection advice 29 January 2009 (xxxiv) Due date of the bill 1 June 2009 (xxxv) Additional supporting documents Annexure “D1” – “D5”

DEFENCES RAISED

[6] The Defendant has raised the following defences:

- (a) The Plaintiff often sent products to the Defendant, which it had not ordered (“the no order defence”);
- (b) The stone products received by the Defendant were often defective and/or inferior (“the defective product defence”);
- (c) By virtue of various breaches of the distribution agreement and/or other agreement(s) by the Plaintiff, the Defendant has a massive counterclaim against the Plaintiff (“the massive counterclaim defence”);
- (d) Although the Defendant signed the bills of exchange, that did not constitute acceptance of the bills (“the signed but no acceptance defence”);
- (e) The bills of exchange had not been presented (“the no presentment defence”);
- (f) No cancelled endorsements appear from the bills of exchange (“the no cancelled endorsements defence”);
- (g) The documents against payment procedure did not apply (“the no documents against payment procedure defence”);
- (h) Payment pursuant to the collection advices received by the Defendant was never authorised (“the failure to pay defence”);

- (i) The aggregate sum of the Plaintiff's claim in this action is less than the amount previously demanded ("the lower claim defence");
- (j) It is the intention of the Defendant to demand security for costs in this action (presumably on the basis that the Plaintiff is a peregrinus of the Republic of South Africa) ("the entitlement to security for costs defence").

I will deal with each of the defences in turn below.

The no order defence

- [7] The Defendant alleges that the Plaintiff often sent stone slabs to the Defendant, which it had not ordered. Significantly, the Defendant does not allege that the stone slabs, which form the subject of the bills of exchange in this matter, had not been ordered by the Defendant. In any event, and as contended by the Plaintiff, when due regard is had to the implemented procedure, it is abundantly clear that the Defendant ordered the material products, since the dates of acceptance of the bills of exchange all precede the respective dates of offloading of such products.
- [8] In addition, nowhere in the Defendant's opposing affidavit does it allege that it returned the stone slabs which it contends it had not ordered from the Plaintiff, thus leading to the inescapable conclusion that the Defendant has sold such products.

The defective product defence

- [9] The Defendant alleges in its answering affidavit that the Plaintiff frequently delivered defective stone slabs to the Defendant. The Defendant does not, however, contend that any of the stone slabs which form the subject matter of the bills of exchange had been defective in any manner whatsoever or that the alleged defective stone slabs did not comply with the quality standards as per the General Commercial Condition 2007 for such products, or suffer from any of the acceptable defects. Nor does the Defendant contend that it provided pre-processing notifications to the Plaintiff or that it followed the claim procedure within the claim lodgement periods or that the claim resolution method had been followed, resulting in a decision in the Defendant's favour.

The massive counterclaim defence

- [10] The Defendant alleges that during 2010, it opened two branches in Durban and Cape Town at the request of the Plaintiff, and that although the Plaintiff agreed to stock and support these branches, it failed to deliver on its undertaking resulting in losses for it in the amount of R5 million. It alleges, in this regard, that it is in the process of quantifying a claim for damages and intends instituting a counterclaim against the Plaintiff.
- [11] It is, once again, not alleged by the Defendant that it has any counterclaim against the Plaintiff arising from the delivery of the stone slabs that form the subject matter of the bills of exchange. On the face of it, all of the Defendant's counterclaims arose more than 3 years ago, and have become prescribed by virtue of the provisions of section 11 of the Prescription

Act, 1969. Furthermore when regard is had to those aspects of the Defendant's purported counterclaim, which arise from the alleged delivery of defective stone slabs, the counterclaims of the Defendant have been set out in such a vague, bald and unsubstantiated manner that it is impossible for this Court to conclude that the counterclaims are bona fide and that the Defendant is on a balance of convenience not liable to pay the sums claimed by the Plaintiff in this action.

The signed but no acceptance defence

- [12] The Defendant denies it accepted that the bills of exchange as drawee because on each bill of exchange the appropriate column marked "For acceptance" has been left blank and no signature of the alleged drawee appears in the appropriate space.
- [13] There is no merit in this defence, because when regard is had to the bill procedure as outlined earlier in the judgment, is clear that the Defendant accepted the bills of exchange, as the acceptor's signature appears on the bill. A bill of exchange can be accepted by the signature of the acceptor placed anywhere on such bill. It is not a requirement for the validity of the acceptance of the bill, that the bill specifically needs to be signed in the block provided for such signature.

The no presentment defence

- [14] The Defendant denies that the bills of exchange had been "presented for payment" because nowhere on the bills is there an indication that they were presented for payment. In this regard, it alleges that:
- (a) the stamps on the reverse side of the document marked "A2" is illegible, and nowhere on the document is there any indication that the bill was presented for payment on due date being 6 March 2009;
 - (b) On the document marked "B2" one of the stamps is completely illegible and the other seems to suggest that the document was "received" on 14 January 2009. Nowhere on the document is there any indication that the bill was presented for payment on due date, being 6 March 2009;
 - (c) On the document marked "C2" there appears to be only a part of a stamp together with another stamp, which seems to suggest that the document was received on 27 January 2009. Nowhere on the document is there any indication that the bill was presented for payment on due date being 27 May 2009 as alleged, or at all; and
 - (d) On the document marked "D2" the stamps on the reverse side of the document are completely illegible. Nowhere on the document is there any indication that the bill was presented for payment on due date, being 1 June 2009.

[15] I am of the view that this defence is without foundation for the following reasons. No presentment of the bills of exchange was required, because they had not been drawn on Nedbank. The obligation to effect payment pursuant to the bills, thus rested upon the Defendant. In any event, the bills of exchange had at all material times been in the possession of Nedbank.

The no cancelled endorsements defence

[16] The Defendant states that the bills of exchange contain no endorsements, which had been cancelled and consequently, the bills of exchange contain no endorsements. This, in my view, is not a defence.

The no documents against payment procedure defence

[17] The Defendant alleges that the distribution agreement erroneously provides for the documents against payment procedure. It has, however, failed to set out any facts which would entitle it to the rectification of the agreement. As contended by the Plaintiff, the reference to the documents against payment procedure in the distribution agreement was clearly intended, and is not a mistake. Significantly, in this respect, the implemented procedure dovetails completely with the documents against payment procedure, provided for in the distribution agreement.

The failure to pay defence

[18] The Defendant's failure to authorise Nedbank to pay the amounts of the bills of exchange, pursuant to the issuing of the collection advices by Nedbank to the Defendant is not a defence, but is, in fact, the reason why the Defendant breached its obligation to pay the bills of exchange. This defence is, therefore, unsustainable.

The lower claim defence

[19] The Defendant contends, in relation to this defence, that the aggregate sum of the bills of exchange is less than the full amount owed by the Defendant to the Plaintiff. In this regard, the Defendant points out that the Plaintiff's claim on the alleged bills of exchange adds up to a total of €85 455-31, however, in the letter of the Plaintiff's attorneys, dated 23 September 2013 (Annexure "EDP4" to the opposing affidavit), the full sum of the Defendant's liability is €373 857.32. This fact, to my mind, most certainly does not excuse the Defendant from paying the amounts claimed in this action.

The entitlement to security for costs defence

The Defendant alleges in its opposing affidavit that it intends to demand from the Plaintiff security for costs in terms of Rule 47(1) of the Uniform Rules. There is no merit in this defence as the plaintiff does not dispute its obligation to provide security for costs in this matter and has, in response to the Defendant's demand for the payment of security for costs, duly provided such security.

Conclusion

[20] For these reasons, I find that the Defendant has failed to establish on a preponderance of probability that the Plaintiff is unlikely to seek in the principal case. The Plaintiff is accordingly entitled to provisional sentence against the Defendant as prayed for on prayers 1-5 of the Plaintiff's provisional sentence summons.

[21] In the result, I make the following order:

1. Payment of:
 - 1.1. the sum of €22 743,92;
 - 1.2. interest on the above sum calculated:
 - 1.2.1. at the maximum rate, at present 15,5% per annum;
 - 1.2.2. from 6th day of March 2009 to date of final payment;
2. Payment of:
 - 2.1. the sum of €19 630,80;
 - 2.2. interest on the above sum calculated:
 - 2.2.1. at the maximum rate, at present 15.5% per annum;
 - 2.2.2. from 6th day of March 2009 to date of final payment;
3. Payment of:
 - 3.1. the sum of €25 794,99;
 - 3.2. interest on the above sum calculated:
 - 3.2.1. at the maximum rate, at present 15.5% per annum;
 - 3.2.2. from 27th day of May 2009 to date of final payment;
4. Payment of:
 - 4.1. the sum of €17 285,60;
 - 4.2. interest on the above sum calculated:
 - 4.2.1. at the maximum rate, at present 15.5% per annum;
 - 4.2.2. from 1st day of June 2009 to date of final payment;
5. The Defendant is ordered to pay the Plaintiff's costs.

F KATHREE-SETILOANE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Counsel for the Plaintiff: HB Marais SC

Instructed by: Shapiro-Aarons Inc.

Counsel for the Defendant: Mr Y Coertzen

Instructed by: Viljoen Attorneys

Date of Hearing: 19 October 2015

Date of Judgement: 10 December 2015

[1]

Vide Union Share Agency v Spain 1928 AD 74; Tweek Zongezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a The Land Bank and Another 2011 (3) SA 1 CC

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