

SOUTH AFRICA / JUDGMENT

Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd (721/94) [1998] ZANWHC 3 (19 November 1998) [1998] ZANWHC 3

COURT

North West High Court, Mafikeng

BEFORE

Khumalo

CASE / FILE NUMBER

721/94

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IN THE HIGH COURT OF SOUTH
AFRICA
(BOPHUTHATSWANA PROVINCIAL
DIVISION)
I 721/94

In the matter between:

UNION
SPINNING MILLS (PTY) LTD
APPLICANT
and
PALTEX
DYE HOUSE (PTY) LTD
RESPONDENT
KHUMALO J
MMABATHO
APPLICATION FOR LEAVE TO APPEAL
DATE

OF HEARING:

30 OCTOBER 1998

JUDGEMENT

HANDED DOWN: 19 NOVEMBER 1998

D.A. KUNY SC: FOR THE APPLICANT

R.G. BUCHANAN SC: FOR THE RESPONDENT

KHUMALO J: This is an application for leave to appeal. The Court had been requested in terms of Rule 33 for a separation of issues. The Court granted the application. The preliminary issue to be decided was: "Which terms and conditions governed the contractual relationship between the plaintiff and defendant?" According to their pleadings the defendant (now the applicant) denied any knowledge of certain terms and conditions of sale of yarn which the respondent (plaintiff) alleged were conveyed to the applicant (defendant) by order confirmation documentation which was posted to the applicant in respect of every order. After hearing oral evidence I gave an order in favour of the respondent in this application and costs.

Two points to be decided in this application are:

- (a) Is the order or ruling in favour of the respondent appealable?
- (b) Are there prospects that another court may arrive at a different conclusion on the merits?

APPEALABILITY OF ORDER:

For a judgment or order to be appealable the following attributes must be present:

- "(a) it must be final, in effect and not be susceptible of alteration by the court of first instance;*
- (b) it must be definite of the rights of the parties, that is, it must grant definitive and distinct relief; and
- (c) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."

See Harms: Civil Procedure in the Supreme Court, page 530.

The order which I made decides the dispute regarding the terms and conditions governing the sale of the yarn. The action of the respondent is for the price of the yarn. The plaintiff has still to adduce evidence to establish the quantity and price of the yarn supplied. If the respondent fails to do so then its action must fail. The applicant has raised the defence that the yarn supplied was defective contrary to the respondent's obligation to supply cotton yarn of good quality. This defence is re-enforced by the fact that the respondent is a manufacturer of cotton yarn and it is therefore liable under the *actio en empto* for consequential losses caused to the buyer by reason of the latent defect in the cotton yarn unless it has expressly or impliedly contracted out of it. See *Holmdene Brickworks v. Robert Construction* 1977(3) SA 670(A) at page 683 A-B. The terms and conditions which were found to apply to the parties affect both the applicant

and respondent's claims as to liability. Clause 19 of the terms and conditions of sale amounts to an attempt to contract out of such liability. The order of this Court does, in my view, dispose of a substantial portion of the claim and counterclaim.

It is final and definite of the rights of the parties under the contract.

I hold therefore that the order is appealable.

HAS THE APPLICATION PROSPECTS OF SUCCESS?

The Court heard the evidence of both sides before deciding the issue relating to the terms and conditions governing the contractual relations between the parties.

In paragraph 7(a) of applicant's main heads of argument it is submitted that the Court made no credibility findings on any of the witnesses called at the hearing. The submission is not correct. I would like to refer to passages in the record to show that credibility findings were made.

PLAINTIFF'S CASE:

At page 67 of the judgment the following appears:

"Mr. Ferguson was a good and honest witness."

At page 68:

"Mr. Snijman's evidence does not contain improbabilities or any contradictions. He corroborates Ferguson on what transpired in Port Elizabeth."

At page 70:

"On the whole Mr. Scheffer was an honest witness and he is amply corroborated by the evidence of Mrs. Cusse."

"Mr. Bester also testified and his evidence corroborates that of the other witnesses. He was in my view a reliable witness. I may mention in passing that all this evidence is also supported by that of other customers such as Mrs. Villet, Mr. Limbada and Mrs. Anna Maria Friesneg who all said they received order confirmations from the plaintiff."

DEFENDANT'S CASE:

At page 71 the following appears concerning Mrs. Verhoef:

"On the whole she was an honest but unreliable witness in that she could not remember events and was not sure of the correctness of what she told the Court."

From the bottom of page 72 up to page 74 the judgment deals with deficiencies in Mr. Beraru's evidence and concludes as follows:

“If the evidence of Mr. Beraru is scrutinised carefully the impression I get is that honest as he may be, he was not adequately informed about what was happening within the companies. It seems a case of the right hand not knowing what the left does.”

From all these extracts it is clear that I believed the witnesses of the respondent and not those of the applicant. Credibility did play a role in the matter. As correctly pointed out by Mr. Buchanan the determination of the credibility of witnesses was obviously inextricably bound up with the overwhelming probabilities which support the respondent’s version.

It is correct that the Port Elizabeth agreement took place after the alleged defective yarn was delivered. My finding that the conditions of sale were discussed at that meeting is not intended to convey that the applicant became bound by the terms and conditions from that moment. The terms and conditions became binding when applicant received the order confirmations but failed to reject the conditions timeously. At page 75 the judgment reads as follows:

“In casu the evidence of such office practice has been adduced. Other correspondence like invoices etc. was received. There is no reason why the order confirmations were not received. In my view the evidence is that the order confirmations were indeed received.”

It is clear that Snijman’s evidence is not the basis of the above view.

I am satisfied that because of the improbabilities inherent in the applicant’s version and the deficiencies therein, another Court would not arrive at a different

conclusion.

The result is that the application for leave to appeal is refused with costs.

J.A.M. KHUMALO

JUDGE OF THE HIGH COURT

VAN ONSELEN & VAN ROOYEN: Attorneys for the Applicant MINCHIN & KELLY: Attorneys for the Respondent

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Prepared on 14 October 2026 · Esheria