IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

14/8/2014
DATE

SIGNATURE

14/8/2014

Case Number: 8041/13

In the matter between:

ANDY GOETSCH MOTORS CC t/a MODERN

SERVICE STATION LTD Plaintiff

and

ENGEN PETROLEUM LTD Defendant

JUDGMENT

POTTERILL J

[1] The plaintiff issued summons against the defendant for the replacement of a loss of product being 22 600 litres of fuel, alternatively to compensate the plaintiff for the loss in the amount of R221 171.78. Counsel for the plaintiff submitted that although the alternative relief is not the relief as set out in the contract the granting of the alternative relief is more practical. Counsel for the defendant agreed that if the court was to grant the claim the alternative claim should be granted.

[2] The following facts are common cause as of date of the hearing:

2.1 The plaintiff and defendant on the 25th of March 2005 concluded a written SERVICE STATION GENERAL TERMS AGREEMENT.

2.2 The plaintiff instituted action in terms of clause 9.8 of the contract which reads as follows:

> *"The Company shall be liable to replace product lost as a result of any defect in the Equipment: Provided that such liability shall not arise unless –*
>
> *(a) the loss of product and the defect in the Equipment are reported promptly; and*

(b) the extent and nature of the loss are substantiated in documentation reasonably prescribed by the Company.

The Company's liability (to the extent existing in accordance with the foregoing provisions of this sub-clause 9.8) shall be limited to replacing such lost product. In no case shall the Company be liable for any loss sustained more than 14 (fourteen) days prior to the date on which such loss of the product and defect in the Equipment shall have been first reported to the Company. Save as hereinbefore provided, the Company shall be exempt from and shall not be liable under any circumstances for any damages (whether indirect or consequential damages or special damages of any nature or loss of profit or product contamination, or otherwise howsoever whether or not similar to the foregoing examples) which the Dealer may sustain as a result of or in any way connected with the Equipment or any breach by the Company of any obligation in relation to the loan of the Equipment, even should such damages have been sustained in consequence of any negligence or other fault of, or in law attributable to, the Company".

2.3 That the loss occurred during the period September 2011 to March 2012.

2.4 It was during the hearing conceded by Mr. Kloppers for Engen that the plaintiff did comply with clause 7.2.(g)(iv) in that the plaintiff did maintain

proper stock and other accounting records and allowed the company access thereto at all reasonable times.

2.5 Mr. Kloppers further conceded that he never gave instructions that the defence was that the plaintiff neglected to report the loss promptly and did not know where his counsel got the stance from. This non-reliance of the defence raised in the plea and during the trial accordingly requires no further address.

[3] In dispute was whether the plaintiff adhered to the Statistical Inventory Management System (hereinafter referred to as "SIAM") for the detection and control of fuel losses. The defendant submitted that there was a failure to reconcile the electronic and mechanical readings which would have identified the problem and would have resulted in the immediate rectification of the fuel loss.

[4] Mr. Kloppers for the defendant also conceded that the loss amount and the nature and the loss was known to Engen in September 2012. The documents setting out the nature and the loss amount consisted of *inter alia* p155 of bundle 1, the report by Petro Logic that the nature of the loss was that bakelite was stuck in the release valve of nozzle 13 pump 10. There was thus a defect in the equipment as required in terms of clause 9.8 of the contract. On 5 July 2012 Margaretha Lategan the

Area Network Manager of Engen required a loss estimate urgently. This was because SIAM flagged this site as having an unacceptable variance (p163 bundle A). The loss estimate prepared by the **defendant** was accepted by the plaintiff as reflected on p160 bundle A; thus the loss amount was known to the defendant.

[5] The plaintiff's witness testified that he utilised the SIAM system which captured the electronic reads and he manually recorded the mechanical reads which Mrs. Van Niekerk then captured on the computer. The SIAM system also picked up the negative trend from the figures captured on the computer and on the 16th of September 2011 flagged it and on the 18th of October 2011 noted it as being failed. "Flagging" comprises of essentially keeping an eye open, but "failing" indicated that there is a problem. This correlated exactly with the pump analysis, tank analysis and the variance thereon as testified to by Mrs. Van Niekerk. There was no contradiction of the evidence of Mrs. Van Niekerk and Mr. Goetsch that nowhere in the SIAM system, nor in the agreement, or orally, were they informed to capture the electronical and mechanical readings and compare the same. Not even Engen having trouble to detect this rare problem encountered on the pump informed them that it is normal trade usage to record the mechanical and electronical readings and to compare them to ascertain and solve any problem of losses. The only inference from this irony that Engen themselves did not utilise this averred common trade usage is that there is no such requirement or general trade usage. Mr. Kloppers

could not give an answer to why Engen did not use this widely utilised trade quick fix. This defence that the mechanical and electronical readings should be compared is rejected as not being prescribed in terms of clause 9.8(b) or in terms of clause 7.2(g)(iv) of the agreement.

[6] It is further common cause that Mr. Kloppers made the witness of the plaintiff an offer to compensate the plaintiff for 70 % of his loss. Mr. Goetsch testified that it was put to him that he gets either 70 % or nothing. This was never denied in cross-examination of Mr. Goetsch. The facts themselves however substantiate his version. He declined the 70 % offer and the matter went on trial with no tender of 70 % putting up a defence that he is not entitled to claim any loss.

[7] The court need not interpret any clause in the contract. There is no dispute as to what the clauses entail. The only question is whether the plaintiff when claiming from the defendant did as required in terms of clause 9.8. This factual question as set out *supra* has an easy answer; yes the plaintiff did and the plaintiff must succeed with its claim with *mora* interest.

[8] The plaintiff argued that the costs should be on an attorney and client scale. It was argued that in September 2012 the nature and amount of the loss was before

Engen and they should have acknowledged the claim not only in the amount of 70%. On behalf of the defendant it was argued that the defence of comparing the electronical readings with the mechanical readings was a *bona fide* defence.

[9] In granting attorney and client costs the court exercises its discretion by marking disapproval of the conduct of the losing party and ensuring that the successful party recoups incurred costs not chargeable in terms of a party and party bill – ***Ward v Selzer*** **1973 (3) SA 701 (A).**

[10] The matter at hand certainly requires the discretion to be judicially exercised in favour of the plaintiff by granting attorney and client costs. The defences raised slipped away during pre-trials, before the hearing and even during the hearing. The one defence still standing is certainly not *bona fide*. Mr. Kloppers was an unreliable witness. He evaded questions and was simply untruthful. Despite Mr. Van der Spuy putting it to the witness for the plaintiff that the problem with the equipment, the pump, was rare Mr. Kloppers in his evidence denied that it was a rare problem. When confronted with where or when he entertained the same problem he could not recall one other incidence where this particular equipment malfunction occurred. He went on a tangent about where the pump could be opened or unlocked when answering a simple question as to whether the pump unit is a sealed unit. I do not

find it necessary to highlight any other contradictions or argumentative evidence. Mr. Kloppers could not answer the most important question as to why Engen itself did not compare the electronical readings with the mechanical readings. Although Engen may not have the duty to compare the electronical readings with the mechanical readings, if this is a well-known quick fix, widely practised, the question simply remains why did they not instruct the plaintiff to do so, or do so themselves. The second witness called was not reliable and did not make a good impression on the court at all. He could not bring any bearing on the matter at hand. That what he was adamant about was clearly contradicted by the SIAM document and he reluctantly had to concede same. In calling this witness the losing party persisted in the defence that it knew was spurious. The 70 % offer was not tendered in the plea and because the plaintiff did not accept it the defendant vexatiously persued this defence.

[11] I accordingly make the following order:

The draft order is marked "X" and made an order of court.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 8041/13

HEARD ON: 12-13 August 2014

FOR THE PLAINTIFF: ADV. P.M. VAN RYNEVELD

INSTRUCTED BY: Borman Snyman & Barnard Attorneys

FOR THE DEFENDANT: ADV. C. VAN DER SPUY

INSTRUCTED BY: Lanham-Love Attorneys

DATE OF JUDGMENT: 14 August 2014

'X' 14/8/2014

'X'

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

ON 14 AUGUST 2014 AT PRETORIA

BEFORE HIS LORDSHIP MR. JUSTICE ~~LEDWABA~~ Pogoenil

Case Number: 8041/2013

In the matter between:

ANDY GOETSCH MOTORS CC T/A
MODERN SERVICE STATION Plaintiff

and

ENGEN PETROLEUM LIMITED Defendant

'X'

DRAFT ORDER

THE FOLLOWING order is hereby granted:

1. The defendant is ordered to pay the plaintiff the amount of R221 171.78;

2. The defendant is ordered to pay the plaintiff interest on the amount of R221 171.78 calculated at the rate of 15.5% per annum calculated from 30 October 2012 to 31 July 2014 and at the rate of 9% per annum calculated from 1 August 2014 to date of payment;

X

3. The defendant is ordered to pay the plaintiff's costs which costs will include but not be limited to; ~~attorney + client costs~~ attorney + client scale.

3.1. Costs of senior-junior counsel;

3.2. The reasonable taxable reservation/preparation and qualifying fees (if any and on proof thereof) as well as the costs of obtaining the report of Mr F E van Tonder as well as the attendance of Mr F E van Tonder at Court on 12 August 2014;

BY THE COURT

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REGISTRAR

13 August 2014

14/8/2014