REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE:42298/2016

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

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AFRIRENT (PTY) LTD Plaintiff

(Registration no:2003/023458/07)

And

NUCO AUCTIONEERS (PTY) LTD Defendant

(Registration no: 2003/000308/07)

JUDGEMENT

KOLLAPEN J

[1] In this action the Plaintiff seeks an order directing the Defendant to deliver a UD Water tanker JMC 046 GP alternatively to repay the sum of R 202 236.00 being the agreed consideration for the water tanker. In addition the Plaintiff seeks the payment of damages in the sum of R 299800.00 it says it has suffered occasioned by the failure of the defendant to deliver the water tanker. The Defendant has instituted a counter claim in the sum of R 135 000.00 being in respect of commission it alleges it was entitled to as a result of the bid made on behalf of the Plainitff at the auction of the 23 July 2015.

[2] The Plaintiff called as witnesses, Mrs Coetzee, a partner in the law firm Geyser and Coetzee and Mr Nemakabhani a project manager in the employ of the Plaintiff. Mr De Jager a director of the Defendant testified on behalf of the Defendant .

The factual background

[3] The dispute between the parties has its origin in an auction which was held and conducted by the Defendant on the 23 July 2015. One Divan Pretorius (Pretorius) submitted various bids at the auction on behalf of the Plaintiff in respect of some of the items on auction. A dispute arose between the parties as to the liability of the Plaintiff for commission as well as payment in respect of a water tanker which was the subject of the bids.

[4] Both parties secured the services of attorneys and in an attempt to settle the dispute various offers and counter offers were made. It would be appropriate to refer to a letter from the Defendant's attorneys to the Plaintiff's attorneys of the 16 September 2015 in the following terms :-

> *"We have received instructions in response to the aforementioned settlement offer and are hereby instructed to offer the following options to your client in order to settle the matter:*
>
> *Option 1: Afrirent to settle lot 79 – Nissan UD Water Tanker JMC 046 GP in full including Commission and Doc fee in the amount of R202 236.00 (two hundred and two thousand and two hundred and thirty-six Rand).*

Option 2: Afrirent to settle all commissions lost on cancellation of invoice to the amount of R153 900.00 (one hundred and fifty three thousand nine hundred Rand) as set out below:....."

[5] The Plaintiff's attorneys on the 18 September 2015 advised the Defendant's attorneys that instructions had been received from the Plaintiff to accept Option 1 in full and final settlement. The Plaintiff's attorneys sought banking details in order to make payment. These were provided and on the 21 September 2015 Plaintiff's attorneys provided the Defendants attorneys with proof of payment in the sum of R 202 236.00. Notwithstanding what appeared to be the full resolution of the matter , the Defendants attorneys thereafter took the stance that the offer had been misinterpreted and that in addition to the payment of R 202 236.00 which had been made the Defendant required a further payment of R 153 900.00 (which represents the amount of Option 2) .

[6] While this dispute was ventilated in correspondence for some time , it was not pursued in the trial before this Court and the Defendant accepted that the matter was settled when the Plaintiff opted for Option 1 and paid the sum of R 202 236.00 .

[7] That being the case there appears to have been an attempt by the Plaintiff to secure delivery of the water tanker on the 29 September 2015 and the evidence of Mr De Jager was that Pretorius refused to accept the water tanker that was the subject of the agreement secured by the parties legal representatives but insisted on taking delivery of a Mercedes water tanker. Pretorius was not called to testify. Whatever may have occurred on the 29 September 2015, the stance of the Defendant after this date continued to be that it required payment of the monies set out in Option 2 (something the Plaintiff vehemently opposed). During this time the Plaintiff's attorneys placed on record that its contractual obligations that it entered into in anticipation of obtaining delivery of the tanker was under threat and the Defendant was given notice that the Plaintiff intended to hold it liable for any loss incurred.

[8] The dispute dragged on with the Defendant's attorneys insisting that the Plaintiff was liable for the amounts set out in Option 2. In addition there was no tender on the part of the Defendant in respect of the delivery of the water tanker. Summons was then issued in May 2016.

[9] The Defendant has raised 3 defences to the Plaintiff's claim and they are :-

A The purported settlement is in conflict with the non-variation except in writing provisions of the original terms and conditions of the auction

[10] The Defendant contends that the purported settlement entered into between the parties constituted a variation of the original terms and conditions of the auction of the 23 July 2015 and to the extent that it was not reduced to writing and signed by the parties, as required by the terms of the original agreement of the 23 July 2015, it has no force or effect.

[11] The antecedent question that arises out of this defence is whether the agreement evidenced by the correspondence between the parties constituted a variation of the original agreement or a new agreement in the form of a compromise. In Christie's Law of Contract (7th edition) the learned author characterises a compromise as a settlement by agreement of disputed obligations and also cautions that however the contract may be described by the parties , the court will look at the substance rather than the form in order to decide whether a particular obligation or dispute has been compromised.

[12] What emerges clearly from the evidence is that given the dispute that had arisen following the auction of the 23 July 2015, the parties though their legal representatives sought to settle the matter. The detail of the various letters exchanged and that led to the matter being resolved on the basis of Option 1 made no reference to it being a variation of the original agreement nor is that a reasonable inference to be drawn from the conduct and the actions of the parties largely expressed in the correspondence exchanged and to which reference has been made.

[13] On the contrary what occurred was a compromise where the parties keen to avoid litigation entered into a new agreement which was embodied in the correspondence to which reference has been made and which existed independently and separately from the original agreement . Indeed there was nothing in the original agreement that the new agreement between the parties sought to amend or vary as is evident from the language of the correspondence. That being the case the non- variation except in writing provisions of the original agreement were not activated.

[14] The Defendant sought to rely on the contents of the Plaintiff's claim to its counterclaim where it is pleaded that the ' *Defendant agreed to a variation of the terms of the agreement between the parties* ..' as providing evidence that what had occurred in the negotiations was in fact a variation of the original agreement. The language used in the plea to the counterclaim cannot be dispositive of the issue even if the parties call it a variation. It is a conclusion of law that is simply not supported by the facts and the facts which appear clearly and unambiguously from the correspondence exchanged is hardly suggestive of the conclusion that what the parties concluded was a variation of the original agreement. What the facts compellingly show is that there was a compromise that constituted a new agreement.

[15] This defence is not sustainable.

B The second defence raised is that the Plaintiff repudiated the agreement

[16] The Defendant contends that the Plaintiff, by its refusal to take delivery of the water tanker on the 29 September 2015 repudiated the agreement entered into between the parties. On this issue and even if one accepts that Pretorius refused to take delivery of the water tanker, it could hardly be said that the requirements for repudiation have been met.

[17] In *Datacolor v Intamarket 2001(2) SA 284 (SCA)* at para 16 the Supreme Court of Appeal described the approach to repudiation in the following terms :-

> *"Repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming...*
>
> *The conduct from which the inference of impending non- or malperformance is to be drawn must be clear cut and unequivocal, ie not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is a "serious matter"... requiring anxious consideration and – because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments – not lightly to be presumed."*

[18] The Court went to emphasise that the test was an objective and not a subjective one.

[19] On the evidence there was nothing to suggest that the Defendant accepted the Plaintiff's conduct in not taking delivery as a repudiatory act. On the contrary the evidence of Mr De Jager was that the water tanker remained available for delivery for some 8 months after the 29 September 2015. In addition and on the part of the Plaintiff it continued to assert that it had complied with all of its obligations in terms of the agreement reached between the parties respective attorneys and was thus entitled to delivery.

[20] It is thus far fetched and not open to the Defendant to suggest it regarded the Plaintiff's conduct in refusing delivery on the 29 September 2015 as repudiatory. If that was indeed the case it was open to then cancel the agreement – something it did not do. In addition and given that the conduct from which malperformance must be drawn must be clear and unequivocal it cannot be said that objectively speaking the Plaintiff's conduct on the 29 September 2015 and thereafter with its constant demand for delivery was clear and unequivocal of a party that did not wish to be bound by the agreement.

[21] For these reasons this ground of defence must also fail.

C The damages dispute

[22] The stance of the Plaintiff is that it placed the Defendant on terms that it would incur losses from the 30 September 2015 if the Defendant continued in its failure to effect delivery of the water tanker in question. This was recorded in correspondence between the parties and is not in dispute. In this regard the evidence of the Plaintiff through its project manager Mr Nemakabhani was that the Plaintiff had secured a written service level agreement with the Lekwa Municipality to supply amongst other things an integrated fleet management system and this included the procurement of vehicles such as water tankers. His further testimony was that the Plaintiff was compelled in order to ensure it delivered on its obligations in terms of the service level agreement to hire a water tanker from third parties which it did at additional cost. He said that there would not have been a need to hire a water tanker had the Defendant delivered the water tanker which was the subject of the agreement and for which the purchase consideration was paid.

[23] The Defendant sought to dispute that the service level agreement required the Plaintiff to supply the water tanker that it had hired but it was pointed out that service level agreement made provision for ad hoc rentals as was required by the Municipality and in addition that the agreement was based on the lease of 300 units throughout the currency of the agreement. The relevance of this was that even though the schedule to the service level agreement indicated the provision of 4 water tankers, this was to be read with the other provisions of the agreement including the duty to provide ad hoc rentals as well as the agreed figure of 300 units throughout the agreement.

[24] Under those circumstances I am satisfied that there was a duty on the part of the Plaintiff to provide a further water tanker and that its service level contract would have been compromised at the very least if it failed to do so.

[25] While there was no dispute that the Plaintiff incurred costs in hiring of vehicles from third parties, the Defendant sought to introduce evidence that what was in fact hired was not a water tanker but a panel van and a bakkie and in addition sought to dispute that the water tanker that was the subject of the agreement was fit for the purpose of delivering drinking water. There was however no admissible evidence tendered by the Defendant in support of these assertions. There was no basis for this evidence as Mr de Jager was neither an expert so qualified in seeking to conclude that the water tanker was not fit for use nor was his evidence regarding what he may have uncovered on the vehicle registration system admissible as at best it constituted hearsay evidence.

[26] Under these circumstances I am satisfied that the Plaintiff has made out a proper case for the award of damages incurred largely to mitigate its losses incurred by the failure of the Defendant to deliver or tender for delivery the water tanker which the parties had reached agreement on and for which the Plaintiff had paid the purchase consideration in full. This represents the cost of hiring a water tanker for the period 30 September 2015 until the 19 February 2016 (excluding the period 12 December 2015 to the 17 January 2016) .

[27] In argument the Plaintiff conceded that its entitlement or damages would only commence from the 30 September 2015 and that accordingly the amount claimed stood to be reduced by R 39 000.00 . In addition it was placed on record that the purchase consideration that was paid is being held in an interest bearing trust account by Attorney

Michael Romanos and that any order the Court was inclined to make with regard to payment should take this into consideration. A letter received from Attorney Romanos confirmed that he holds the sum of about R 239 000.00 in trust and intimated that he would pay such amount less any further charges to be incurred as directed by the Court and subject only to any rights in respect of any possible application for leave to appeal being exercised. Those conditions appear to be reasonable and will be incorporated into the order I intend to make.

[28] For the reasons given I am satisfied that the Plaintiff is entitled to the relief it seeks and that the Defendant's counterclaim also falls to be dismissed as the compromise to which reference has been made excluded any agreement on the payment of commission in respect of what is claimed .

I make the following order :-

Claim 1

a) The Defendant is ordered to pay to the Plaintiff the sum of R 202 236,00 together with interest at the rate of 10.25% per annum from the 30 September 2015 to date of payment.

b) In pursuance of the order made in 1 above , Attorney Michael Romanos is ordered to pay to the Plaintiff's attorneys the net amount of monies held in trust in the account name ' Afrirent/Nuco Auctioneers' , subject to the following in which event payment will not be made :-

(i) Should either party have timeously launched an application for leave to appeal and if refused having failed to file a petition for leave to appeal; or

(ii) Having received leave failing to duly, timeously and properly prosecute the appeal to finality; or

(iii) Prior to the date following the expiration of the time period permissible by the Rules of the High Court for a party to launch an application for leave to appeal, unless the legal representative of the party entitled (or who believes such entitlement) to appeal record/s in writing that such parties does not intend seeking the Court's leave to appeal.

(iv) The Defendant will remain liable to pay to the Plaintiff any shortfall occasioned as a result of its claim in paragraph a) and the amount it receives in terms of paragraph b). If the amount received in terms of paragraph b) is in excess of the amount due in paragraph a) such excess shall be utilised in respect of Claim 2.

Claim 2

a) The Defendant is ordered to pay to the Plaintiff the sum of R 299 000.00 together with interest at the rate of 10.25% per annum from date of judgment to date of payment.

Costs

b) The Defendant is ordered to pay the Plaintiff's costs in respect of the action.

c) The Defendant's counterclaim is dismissed with costs.

N KOLLAPEN
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 13 SEPTEMBER 2019

DATE OF JUDGMENT : 18 OCTOBER 2019

PLAINTIFF'S COUNSEL :Adv P LOURENS

DEFENDANT'S COUNSEL :Adv C HARMS