



**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 No

DATE: 25 February 2020.....

SIGNATURE: .....

**Case No. 65466/2015**

In the matter between:

**FINE ASSET INVESTMENT 393 CC T/A**

**PLAINTIFF**

**KALAHARI HYDRAULICS**

And

**RUDOLF JANSEN T/A MOFENCHA CONSULTING**

**DEFENDANT**

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## JUDGMENT

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### MILLAR, A J

1. This is a dispute relating to the terms of an oral agreement for goods sold and delivered by the plaintiff to the defendant. The parties were agreed on all the terms of the agreement, save that in respect of when payment was to be made.
2. The order of the goods, delivery and that the defendant has not made payment were common cause. The plaintiff's case was that it had been agreed that payment was to be made within 60 days of invoice. The defendant's pleaded case was that it had been agreed that payment would only be made to the plaintiff once the defendant's customer had paid him.
3. Only 2 witnesses testified in the case, Mr. Anthony West testified for the plaintiff and the defendant himself testified.
4. Mr. West testified that he had known the defendant for some years. His business, the plaintiff, and the defendant had started to work together in 2012. The defendant had sourced goods from him and had then on sold those goods to defendant's client. The parties had communicated with each other by telephone, what's app – a social media messaging platform and by email. Orders were placed and then paid for within 60 days of delivery of either the goods or the invoice, whichever occurred later. The plaintiff was aware that the defendant's client, a large steel manufacturer in the Witbank area, had

experienced difficulty with payment on one previous occasion and had on request extended the payment to 90 days.

5. The goods to which this dispute relate are 70 “delimon blocks”, an item used in the lubrication of heavy machinery. The goods were ordered during October 2014 and because they were imported only arrived and were delivered to the defendant on 22 December 2014. There were two orders, one for 20 blocks and one for 50 blocks, 70 in total.
6. Mr. West testified that he had personally delivered all 70 blocks to the defendant on 22 December 2014 and that subsequently when no payment was received within the 60 days or thereafter, he had taken steps on behalf of the plaintiff to recover payment.
7. The defendant testified that the “delimon blocks” had been ordered in two batches – a first batch of 20 which was to be delivered by 22 December 2014 and a second batch of 50 which was to be delivered by 15 January 2015. The orders were for his client, a large steel manufacturer. The orders were placed in writing by the client and specified the bill of quantities, price and delivery date.
8. He testified that immediately after the placing of the orders he had been informed in a telephone call by an employee of his client in the procurement department that the orders were not to be delivered in 2 batches as ordered but rather in 3 batches and that payment would follow within 90 days of delivery of each of the batches. He said he had communicated this to Mr. West telephonically and had informed him that delivery was to take place in December 2014, January 2015 and February 2015.

9. The defendant testified that on 22 December 2014 the plaintiff had in contravention of the agreement between the parties delivered all 70 blocks to him instead of the agreed 20. He testified that the father of Mr. West had been the one to deliver the blocks to him and that he had immediately telephoned Mr. West and informed him that he was only supposed to deliver 20. Mr. West had then asked him to deliver all 70 to his customer and he had then called his customer and been informed that the balance could be delivered but that this was at the risk of the plaintiff.
10. He had then called Mr. West back and informed him of this and that he would only be paid when the defendant was paid – Mr. West then said to him that he was not concerned as the “delimon blocks” could be sold to another customer, also a steel manufacturer in the Witbank area, but in any event he was prepared to take the risk and told the defendant to deliver all the blocks to his customer. T
11. he defendant testified that both his wife and mother were present when Mr. West’s father had made the delivery and also when he had telephoned his client and Mr. West. He testified that all the discussions relating to the variation of the order from 2 batches to 3 and the agreement with Mr. West were verbal and these were never confirmed in any way by either his client, himself or Mr. West.
12. The blocks were all delivered. On 11 January 2015 the defendant was called to his client for a meeting and informed that no further payments would be made due to its financial position. It was subsequently placed in business rescue in April 2015.

13. During his evidence, the defendant admitted liability for the payment of 20 blocks, the cost of which was R166 896,00 and said he had already paid for them. He did this on the basis that the order for delivery on 22 December 2014 had been for 20 blocks. He disavowed liability for the remaining 50 on the basis that the plaintiff had assumed the risk in respect of these as they were only due for delivery on 15 January 2015.
14. This admission was contradictory of a letter written by the defendant's attorney shortly before the issue of summons in which liability for the entire order of 70 blocks had been accepted and also the plea subsequently filed, in which liability for the 70 blocks had been denied. The defendant was unable to proffer any explanation for the difference between the contents of the letter and the plea and in regard to the failure to disclose his admission of liability for the 20 blocks or his alleged payment. He was asked why he had not admitted this sooner and furnished proof of payment and said that he had not raised it with his attorneys as it was not relevant to what they had been discussing.
15. The versions presented by the parties are mutually destructive of one another.
16. In *Stellenbosch Farmers' Winery Group Ltd v Martell and Others*<sup>1</sup> it was held in regard to mutually destructive versions:

*"To come to a conclusion on disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities."*

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<sup>1</sup> 2003 (1) SA 11 (SCA) at 14I-J

17. Insofar as the version of Mr. West is concerned, it is consistent with the prior terms upon which the parties contracted with each other. The version of the defendant is that this particular transaction deviated from what had usually been agreed. The defendant despite testifying that there were third parties who could corroborate his version, both in respect of who delivered the blocks but also as to the telephone conversations with both his client and Mr. West that day, did not call any witnesses.
18. It was placed on record from the bar, at the commencement of the trial, that the representative of the defendant's client was in hospital in the intensive care unit and could not testify, however the defendant testified that both his wife and mother were available<sup>2</sup>. There was no explanation given for the failure to call either of them as witnesses.
19. It is highly improbable that the defendant's customer, a large corporation would place orders in writing and then immediately thereafter vary those orders verbally, ostensibly for its benefit, without confirming this in writing. It is furthermore highly improbable that Mr. West, upon being informed that delivery of 50 blocks was going to be at his sole risk, when he need not have taken any risk at all, would have assumed such risk solely and that the defendant who on his own version would bear no risk would not have recorded this in writing<sup>3</sup>.
20. Mr. West gave his evidence in a clear, cogent and forthright manner. He answered all questions put to him and when necessary made concessions. The same cannot be said of

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<sup>2</sup> Elgin Fireclays Limited v Webb 1947 (S) SA 744 (A) at 744A – "It is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him."

<sup>3</sup> Stellenbosch Farmers Winery supra at 13C – "*in business the failure to confirm an event promptly and on paper can be fatal.*"

the defendant. His admission in evidence for a part of the amount claimed only, when this was at odds with both the letter from his attorneys and the plea and then the failure to give any explanation for this casts a long shadow over his reliability. It suffices to state that he was an unsatisfactory witness and any evidence given by him can only be accepted when corroborated by that given by Mr. West.

21. The defendant's version that Mr. West's father delivered the blocks and that the telephone call was made to him in the presence of others is not corroborated but in any event, in light of the admission in evidence that he was liable for a portion of the amount claimed, which he had paid, together with the contradictory letter from his attorney in which he admitted liability for the full amount and the plea in which he denied liability for the full amount, his versions are mutually contradictory and so improbable that I find them all to be untrue.
22. I find on the probabilities that Mr. West indeed delivered the blocks to the defendant on 22 December 2014 personally and that there was no discussion about a variation of the agreed term that payment would be made within 60 days.
23. In the circumstances it is ordered:
  - 23.1 The defendant is to pay to the plaintiff the sum of R503 196,00;

23.2 The defendant is ordered to pay to the plaintiff interest on the amount of R503 196,00 from 8 September 2015 to date of payment at the rate of 9,75% per annum;

23.3 The defendant is ordered to pay the plaintiff's costs of suit.

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**A MILLAR**  
**ACTING JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

HEARD ON: 20 – 21 FEBRUARY 2020

JUDGMENT DELIVERED ON: 25 FEBRUARY 2020

COUNSEL FOR THE PLAINTIFF: ATT. N ESTERHUYSE

INSTRUCTED BY: DU PLESSIS VAN DER WESTHUIZEN INC.

REFERENCE: C COETZEE

COUNSEL FOR THE DEFENDANT: ADV L PRETORIUS

INSTRUCTED BY: HARVEY NORTJE WAGNER & MOTIMELE INC.

REFERENCE: T KARTOUDS