IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)

CASE NO: 1422/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

09/01/2024
DATE

[redacted]
SIGNATURE

In the matter between:
ANGLO OPERATIONS (PTY) LTD **PLAINTIFF**

And

MANO COAL (PTY) LTD **DEFENDANT**

JUDGMENT

LANGA J:

Introduction

[1] In this action the Plaintiff, Anglo Operations (Pty) Ltd, instituted an action seeking judgment against the Defendant, Mano Coal (Pty) Ltd, for contractual damages to the amount of R6 288 265.61, (Six million two hundred and eighty thousand two hundred and sixty-five rand and sixty-one cents), in respect of coal supplied by the Plaintiff to the Defendant in terms of an agreement between the parties. There is no dispute regarding the parties and jurisdiction.

[2] It is common cause as alleged in the summons that the Plaintiff and the Defendant concluded a written coal sale agreement ("CSA") on 31 August 2018, alternatively on 24 August 2018. In terms of this agreement, the Plaintiff and the Defendant agreed that the Defendant would purchase coal from the Plaintiff who would then supply the Defendant with the said coal. It was further agreed that the Defendant would prepay all pro-forma invoices within one day of receipt thereof. In terms of Clause 8, the Plaintiff shall supply a maximum tonnage of 70 000, (seventy thousand), tonnes of coal during the term of the agreement. The contract price for the coal is determined in Clause 13 of the agreement which provided that the coal supplied from the company's Site's Umlazi Section in terms of this CSA shall be R265 (Two hundred and sixty-five rand) FCA excluding VAT effective from 01 January 2018 to 30 September 2018.

[3] It is further common cause from the pleadings that the Defendant admitted that the Plaintiff delivered the coal in terms of this agreement and thereafter issued various invoices in respect of the coal so delivered. The relevant invoices in dispute are IO127619 dated 13 August 2018, and credit note IO127619, invoice IO1286665 dated 28 September 2018 and invoice IO128704 dated 1 October 2018. The nub of the claims based on these invoices is that the Defendant was charged on the lower 2017 price of R159 for the coal delivered in 2018 instead of the R265 per tonnage based on the 2018 agreement. The Plaintiff's claim in respect of each invoice is therefore for the price difference between the 2017 price and the 2018 price.

[4] In the plea the Defendant denied that the Plaintiff is entitled to any payment as all payments were made before coal could be collected. In the plea the Defendant, however, does not address the issue of the price difference, which is the main reason for the outstanding amount. The Defendant simply stated that it is impossible that there could be any outstanding amounts as the coal was paid for before collection according to the

agreement. Surprisingly, although the defendant raised a dispute over these invoices, however, in an email dated 27 March 2019 one Mr Koyama, then a director of the Defendant, acknowledged the Defendant's indebtedness to the Plaintiff in respect of these invoices and also made an offer to pay the outstanding balance of R6 288 265.61 in three equal monthly instalments of R2 096 333.33. Further, in its plea, the Defendant also acknowledged the offer to pay the outstanding amount as outlined in the email but denied liability and alleged that no coal was delivered and that this admission of liability by Mr Koyama '*was motivated by a reasonable expectation of other business benefits for the Defendant, which benefits never materialized.'*

The issues

[5] The issues in this matter are quite simple. It is common cause that the coal tonnage referred to in the disputed invoices have been supplied by the Plaintiff to the Defendant. It is further common cause that the Defendant did perform as stated in the plea by paying for the coal. It is further not in dispute that the Plaintiff issued the Defendant with invoices referred to in paragraph 3 above based on the agreement referred to in paragraph 2 above. In my view the only issue in dispute is whether or not the Defendant was under-charged for the coal resulting in the deficit of R6 288 265.61 as alleged by the Plaintiff.

Evidence

[6] At the trial, the Plaintiff called one witness, namely, Mr Murray Justin Shaw while the Defendant called Mr Vincent Mokholo, a director as well as Mr Fundi Koyama, a former director of the Defendant.

Murray Shaw

[7] In summary form Mr Shaw essentially testified about a meeting he attended on 26 March 2019 with the Defendant's directors Mr Mokholo and Mr Koyama where the issue

of the outstanding amount was discussed. He stated that the initial amount owed was about R7 300 000.00 which came down to around R6 289 000.00 after a credit note of about R800 000.00 was made in favour of the Defendant. He stated futher that there was no dispute raised at the meeting regarding the amount owed and the only issue discussed was how the money Defendant should pay the outstanding amount. He further confirmed the email by Mr Koyana in which he offered to pay the outstanding amount in instalments. However, most importantly, Mr Shaw also testified about an email dated 6 March 2019 received prior to this meeting in which Mr Mokholo *inter alia* confirmed the following: "*Anglo Finance had to re-adjust our coal pricing, back dating it to January 2018, credits had to be passed on January, February and March 2018 periods as they were not informed about the price migration from R159 p/t to R220p/t and R265p/t."*

[8] Mr Shaw, however, also stated that the finace department of the Plaintiff had incorrectly charged the Defendant in to the 2017 prices and that the prices for January, February, March and September 2018 reflected the 2017 price of R159.72 per tonnage instead of R265 per tonnage as per agreement. He stated further that according to the August 2018 agreement signed by all the parties, the price was correctetly adjusted with effect from 1 January 2018 for coal supplied during the term of the agreement which is from 1 January 2018 to 30 September 2018. Mr Shaw further confirmed that after the meeting of 27 March 2018 an email dated 27 March 2018 was received from Mr Koyama, a director of the Defendant, also confirming the final amount of R6 288 265.61 as owing to the Plaintiff offering to pay the amount in in three instalments of R2 096 333.33. Mr Shaw was positive that there was never any dispute that the coal was supplied for the periods in question. He stated further that there was further no dispute regarding the Plaintiff's obligation to pay and that the only issue was how and when the payment was to be effected. In that discussion the Plaintiff required full payment of the outstanding amount by 31 March 2019 whereas the Defendant was proposing payment by the end of April 2019.

He further referred to the further email from Mr Koyama in which the latter asked for indulgence to be given at least three months commencing April 2019 ending May 2019 to pay off the debt.

[9] The version put to Mr Shaw under cross examination was essentially that there was never any discussion around the issue of price difference and that this issue is not even mentioned or alleged in the Plaintiff's particulars of claim. It was further put to him that the main issue for discussion at the meeting was the 14 tons of coal that could not be accounted for. However, the most important and surprising statement put to him was that the only reason for the Defendant to propose payment of the alleged amount was to maintain good relations with the Plaintiff. It was, however, never put to Mr Shaw that the Defendant did not admit liability to pay the Plaintiff the amount in question. Although it was put to Mr Shaw that the Plaintiff never issued an invoice of less than R265.00 per ton, the Defendant nevertheless did not challenge the calculation of the outstanding amount. After his evidence the Plaintiff closed its case.

Mr Vincent Mokholo

[10] Mr Moholo testified in his capacity as the director of the Defendant. He testified that he concluded the agreement (CSA) referred above in terms of which the Defendant agreed to pay the price stated therein for the coal supplied in the period 1 January 2018 to 30 September 2018. He further confirmed the price change in terms of Clause 13 of the agreement to the amount of R265.00 per ton and averred that this is the amount which was reflected on the invoices received. The thrust of his version was that the disputed invoices dated 12 September 2018, 28 October 2018 and 31 October 2018 were new invoices and that no coal had been supplied to the Defendant by the Plaintiff for these periods. Mr Mokholo's version regarding the meeting held on 26 March 2018 with Mr Shaw is that only the missing coal was discussed and nothing else. He however

confirmed that after this meeting, the Defendant considered how it was going to pay the Plaintiff. Despite this he still insisted that concerning the offer to pay the debt was only aimed at settling the matter between the parties amicably in respect of the coal that could not accounted for.

[11] Under corss-examination he denied that the Defendant owed the Plaintiff the amount in question as the coal was paid for before it could be collected. In his answers he asserted that the pro-forma invoices for January, February and March 2018 were paid on the price of R210.00 per ton while the invoices for April, May, June and July 2018 the contractual price R265.00 per ton was paid. He simaltaneously stated that for the period January to September 2018 the price of R265.00 per ton was not paid as the Defendant was only liable to pay R220.00 per ton. Despite this averment and the opportunity to produce the invoices the next day as per agreement, Mr Mokholo failed to produce the invoices proving the price of R220.00 and the payment thereof. He failed to produce the alleged invoices despite having stated in court under cross examination that he has the pro-forma invoices and could get them from his computer. Mr Mokholo further conceded under cross examination that an admission to pay the Plaintiff was made by the Defendant and further that the correctness of the calculations made by the Plaintiff were correct. Although he suggested that there was missing coal of 14 tonnes, Mr Mokholo, however, confirmed that the Defendant was not invoiced for this missing coal and therefore did not pay for that coal.

Mr Fundi Koyama

[12] Mr Koyama's testimony on the other hand was very short and did not add any value to the evidence I might add. He confirmed that he was indeed at one stage a director of the Defendant. He however further stated that he could not comment on most issues as

he was more involved on the operational side than the financial side. He further stated that he did not bring any invoices as he had not been requested by Mr Mokholo to do so.

Evaluation and analysis

[13] The evidence relating to the agreement entered into by the parties on 31 August 2018 which was signed by the Defendant on 24 Augsut 2018 has been confirmed by both parties, particularly in so far as it relates to the price of R265.00 per ton with effect from 1 January 2018 to September 2018. Furthermore, in terms thereof, notwithstanding that it was signed on a later date, the agreement provides in Clause 1 that it is effective from 1 April 2018 to 30 September 2018. The invoices at the heart of this dispute as mentioned in paragraph [3] above could not be refuted by the Defendant safe to say that it was for coal not delivered. Despite this averment, the Defendant nevertheless conceded that the calculations made by the Plaintiff regading the amount owed in this matter are correct as was confirmed by Mr Mokholo in his evidence. It has also been conceded that the Defendant admitted liability in respect of the said amount of R6 288 265.00 as calculated by the Plaintiff. It is further common cause that the Defendant was prepared to pay this amount and in fact, proposed in writing to pay it off in 3 three instalments.

[14] The Defendant now seems to suggest that the amount claimed by the Plaintiff is for some unaccounted for coal while at the same time suggesting that it was for coal not received. This defence does not hold any water and should be dismissed without any further ado, particularly if one considers the fact that Mr Mokholo conceded in his testimony that the Defendant was not invoiced for the said coal and did not pay for it. It is therefore difficult to understand this defence because if it was not invoiced for said coal and did not pay for it, then it cannot be part of the equation in this matter. Secondly, the second apparent defence that the Defendant was charged for coal not received also

cannot be sustained. This is so in the light of the fact that the invoices are for the periods which the Defendant admitted it received the coal.

[15] Despite this defence it was never put to Mr Shaw that the coal was not received. Instead Mr Mokholo confirmed that the coal was received. The Defendant has in fact conceded in the plea that the Plaintiff performed in terms of the agreement and that it also performed by paying the invoices albeit for a different price. There can therefore be any question whether or not the coal was received during the months under consideration. While on this point it is necessary pause and point out that while the Defendant suggests that it paid on a different price based on pro-forma invoices received, the Defendant's witnesses both failed to produce these invoces at trial, even after Mr Mokholo undertook to make them available.

[16] Furthermore, the suggestion by the Defendant that it did not admit liability but only offered to pay almost R7 million rands in order to maintain relations with the Plaintiff is ludicrous to say the least. It is clear to all and sundry from the email dated 27 March 2019 by Mr Koyana that liability is admitted and an offer was made to pay the outstanding amount. In this email the Defendant is apologising for the situation at hand which it says was caused by third parties. This email is prededed by one from Mr Mokholo in which he also states that the Defendant '*is taking responsibility and wants to resolve the account*.' He further states the following: *'Further to the sobering realization that we are dealing with a possible case of fraud, Mano Coal is however proposing a payment arrangement for the outstanding balance.* The outstanding balance of the money owed to the Plaintiff by the Defendant is clearly admitted here. It is important to note that there is no mention here that the payment proposal is made gratiutiously by the Defendant in order to secure a long term business relationship with the Defendant. This defence in my view stands to be rejected.

Conclusion

[16] In conclusion, I find that the Defendant has not raised any meritorious defence to the action. The Defendant tried several avenues to resist the claims but none of them can assist the Defendant. As stated above it has been proven that the Plaintiff delivered the correct amount of coal to the Defendnat in terms of the agreement. This is as also confirmed by the Defendnant. The evidence shows that the Defendant, contrary to the half hearted claims made, has received the correct tonnage of coal from the Plaintff. Furthermore, the Plaintiff has proved that it sold some of the said coal as specified in the relevant invoices referred to above to the Defendant at a lower price than the one agreed upon hence it became necessary for the agreement (CSA) to be entered into dealing specifically with the adjustment of the price.

[17] Consequently, in my view, there can be no question that the Plaintiff has performed in terms of te agreement. On the other hand even though the Defendant has paid for the coal and therefore performed, I am satisfied that the Plaintiff has proved that it did not pay the full and correct amount as reflected in the agreement in respect of certain months. Despite having stated under oath that it had in its possession the correct invoices showing that it has paid the correct amount for the coal, and despite having been invited to bring the invoices to court even though they had not been discovered, the Defendant still failed to produce the invoices proving that it paid the correct amount of R265 per ton as it claimed to have done so. It is trite that in a case where the Defedant as a debtor has pleaded that it has paid the debt in question, it then bears the onus to prove that it has indeed paid.

[18] Consequently, I am satisfied that the Plaintiff has proved on a balance of probabilities that the Defendant has paid for the coal received based on the incorrect 2017 price of R159.00 per ton instead of the 2018 price of R265.00 per ton. I am further

satisfied that the amount of R6 288 265.51, which constitutes the difference between what was paid and what should have been paid, has been correctly calculated as confirmed by the evidence and also conceded by Defendant. In this case the judgment stands to be granted in the Plaintiff's favour for the payment of the said soutstanding amount.

Costs

[19] Concerning the costs, it is trite that the general rule is that costs should follow the result. Consequently, there should be no debate in this matter as to who must bear the costs of this litigation. The costs should accordingly be awarded to the Plaintiff as the successful party.

Order

[20] In the result I make the following order:

1. The Defendant is ordered to pay to the Plaintiff an amount of R6 288 265.61 with interest at the rate of 10.25% calculated from 1 August 2019 (date of demand) until the date of final payment, both dates inclusive.
2. The Defendant is further ordered to pay the costs of the suit on party and party scale.

[21] Lastly, I must deal with a rather disappointing but unfortunately regular occurrence in our courts of late. The intentional, unfortunate, ill conceived and scornful outburst made by the Defendant's attorney Mr Lesomo in court, apparently in protest for having been called to order when he did not want to abide by the directiion of court from the bench, deserves some comment at this stage. The outburst was clearly a personal attack on the court aimed at provoking an engagement which I deliberately did not allow to ensue. I decided at that moment not to respond to the outburst in order to contain the situation. The bigger

picture was for the trial to be managed in such a manner that it would be finalized without the unneccessary drama. Further, during the hearing the attorney also addressed his opponent in a manner that was unbecoming of legal a practitioner in court as can also be seen from the record. Although Advocate Kloek later indicated that Mr Lesomo apologised to him, the conduct nonetheless remains wayward and improper.

[22] While I was initially hesitant to refer this to the LPC for investigation, but on second thought I thought it was necessary to do so for the following reasons. The main reason is that this type of behaviour, which has the potential to bring the courts and the administration of justice into disrepute, is becoming common place in our courts and need to be dealt with properly. The other is that this type of behaviour is a manifestation of not only the attorney's lack of respect for the court and colleagues, but it was also an exhibition of his intolerance and lack of understanding of his role and position as an officer of the court. It is a matter of concerns that the legal profession seems to have practitioners, who like Mr Lesomo, have no respect for the rules. Despite his purported experience Mr Lesomo's conduct did not fit the ethics and professionalism expected of an attorney of this court. I therefore direct the Registrar of this court to send this judgment togather with the record of the proceedings in this matter, in particular Mr Lesomo's opening address on the 16 August 2023, to the relevant office of the LPC for attention and investigation.

MBG LANGA
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff:	Advocate JW Kloek
For the Defendant:	Mr B Lesomo
Heard on:	12 October 2023
Delivered on;	09 January 2024

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 09 January 2024 at 14h20.