IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2507/2011

In the matter between:

NORLAW INVESTMENTS (PTY) LTD **Plaintiff**

And

ERIC SLABBERT AGENCIES (PTY) LTD **Defendant**

Neutral citation: ***Norlaw Investments (Pty) Ltd v Eric Slabbert Agencies (Pty) Ltd (2507/2011) [2013] SZHC 69 (3rd May, 2013)***

Coram: **M. Dlamini J.**

Heard: **7th August 2012**

Delivered: **3rd May, 2013**

– provisional sentence summons – defendant alleging goods to be liable to tax – court's duty to consider the totality of evidence produced and come to a just decision

Summary: The parties herein entered into a written agreement of sale where a consignment of pieces of garments were sold and delivered to the defendant by applicant. The defendant paid a portion of the purchase price by cash on the date of the agreement. It issued two post dated cheques for the balance.

[1] However, on the due dates, plaintiff failed to receive its money as the first cheque was referred to drawer while the second was stopped for payment at the instance of defendant. Defendant alleges that payment was stopped because plaintiff failed to pay taxes on the goods.

Evidence

[2] *Viva voce* evidence was led in this case. **Mr. Norlaw Nerbret** appeared on behalf of the plaintiff. He informed the court that he was the managing director of plaintiff. He represented plaintiff in a sale agreement with defendant. Plaintiff sold about 16,000 pieces of garments at a price of E9.50. An agreement was signed. However, after a week defendant informed plaintiff that some of the pieces were not in a good condition and that he had to pay taxes and duties on the consignment. They then agreed to reduce the price from E151,258.15 to E80,112.00. Further it was agreed that defendant would return 4,000 pieces and he would be left with 12,000 pieces. This reduced the purchase price further to E66,112.00. The 4,000 pieces were returned and plaintiff paid a sum of E17,000.00. The defendant issued two cheques staggering payment. The first cheque was for E31,112 while the second cheque was for E35,000. Defendant later requested plaintiff not to bank the cheques. He paid the first cheque by cash in installments. Similarly, in respect of the second cheque, he requested

plaintiff not to bank it on the due date. However, he later called plaintiff and informed him to proceed to defendant's premises to collect the consignment on the basis that revenue authorities would be doing checks and therefore did not want them to find the goods. He promised that the consignment would be returned to him once revenue authorities have left. **Mr. Norlaw** informed the court further that as he was in Piet Retief and he arrived at noon whereupon defendant insisted to have the goods removed. He resisted on the basis that he too had no place to keep the goods. Defendant nevertheless hired a truck and ordered that the goods be taken to plaintiff's premises.

[3] Days passed by without defendant collecting the goods. When the date for the second cheque fell due, he banked it. It was however, stopped by the bank. Nothing much turned out on cross-examination except that it was put to this witness that he undertook to supply defendant with proof of payment of the taxes. In response, plaintiff maintained that the issue of taxes was sorted out during the agreement and therefore the price was reduced.

[4] The second witness for the plaintiff was its employee, **Ms Juliet Courtean** who informed the court that she was plaintiff's sales lady. Her evidence was that defendant, **Mr. Slabbert** informed her that he was returning the goods and would collect them after three days when customs officials would be through with inspecting his place of business. However, this was never to be so.

[5] Plaintiff closed its case.

[6] Mr. **Eric Slabbert** gave evidence on behalf of defendant. He informed court that he was the managing director of defendant and that his company had done business with plaintiff several times.

[7] His evidence was that **Mr. Norlaw** approached him with garments for sale. He inspected the sample and was happy with the quality. They agreed at a price of E9.50 per piece. He enquired on any reject and **Mr. Slabbert** informed him that there were no reject. They then signed the contract. On receipt of the goods, two problems arose. Firstly, that duties were not paid in respect of the goods. When plaintiff was approached, he undertook to supply documents as proof of payment of duties. However, he never did. Secondly, there were rejects which the plaintiff asked that they be returned. Plaintiff further requested for 4000 pieces which were to be sold in South Africa. By agreement, these pieces were to be delivered by defendant in Johannesburg. They were duly delivered. As a result a second agreement was signed where the price was reduced from E9.50 to E4.50. The total amount owing became E66,112.00.

[8] Subsequently, he was approached by the Textile Association to be a consultant on payment of dues. This meant that revenue officials would come to his premises to inspect it, he requested plaintiff to collect the goods before they came. Plaintiff arranged the truck which came with its employee. He however, paid the truck that removed the goods as per the dictates of his industry. It was his evidence that he could not be seen to be dealing in goods which have not been paid for in terms of taxes. Firstly he informed the court that the tax was far in excess of the sum of E35,000.00. As he had already issued the cheque of E35,000.00, he decided to stop it as the goods were a '*hot potatoe'* as it were.

[9] He was cross-examined on how he was able to remove the 4000 pieces from Swaziland to South Africa if the goods were owing duties? He informed the court that he negotiated with customs to clear the goods as plaintiff had informed him that there was evidence of payment.

[10] On the basis that the defendant insisted that he could not accept goods which were owing government tax and further that response by plaintiff that the goods were produced locally thereby creating doubt whether the goods were liable to tax, and further that tax far exceeded the sum of E35,000.00 as per defendant's evidence, the court ordered the revenue authorities to inspect the goods and report on whether they were liable for tax and if yes, how much?

[11] The first witness from revenue authorities failed dismally to comply with the court order. His supervisor was ordered to comply. **Mr. Lama Langwenya** appeared in court with a report where he gave evidence that he inspected the goods and were liable to tax. On the question of as to how much was the tax due, he failed to give an answer.

Adjudication

[12] From the evidence of plaintiff and defendant, the following are matters of common cause *viz.:*

- that the parties entered into a written sale agreement involving pieces of garments;
- that there was cash payment;
- that the goods were returned on the understanding that customs official should not find them in the premises of defendant;

- 4000 pieces were returned but delivered in Johannesburg by defendant at the request and behest of plaintiff;
- That a new agreement was drawn reducing the purchase price to E66,112.00;
- A sum of E17,000 was paid in cash;
- That two cheques were issued, post-dated representing the balance thereof;
- That the 1st cheque was paid by cash installments;
- That the only outstanding amount was E35,000.00 i.e. claim B.

Issues

[13] The question for determination is whether the goods were accepted with a condition that plaintiff produce proof of payment of government taxes.

[14] Plaintiff gave evidence that the issue of taxes were discussed before the second contract was concluded. It was agreed between the parties that the defendant will pay taxes and this influenced the reduction in the purchase price. The second agreement which is not in dispute is a result of consideration of taxes which were to be paid by defendant.

[15] Defendant on the other hand strenuously disputes this evidence. It was his evidence that plaintiff undertook to supply him with documents as proof of payment of taxes.

[16] From the above contention, could it be said that the contract between the plaintiff and defendant was one subject to condition *viz.* that defendant would discharge his obligation under the contract upon plaintiff producing proof of payment of taxes.

[17] In a unanimous judgment**, De Villiers A.J**. sitting with **Watermeyer J**. in **R. v Katz 1959 (3) S.A. 408** at **417** explaining types of conditions in a contract wrote:

> "*The word 'condition' in relation to a contract is sometimes used in a wide sense as meaning a provision of the contract, i.e. an accepted stipulation, as for example in the phrase 'conditions of sale'. In this sense the word includes ordinary arrangements as to time and manner of delivery and of payment of the purchase price, etc-in other words the so-called accidentalia of the contract. In the sense of a true suspensive or resolutive condition, however, the word has a much more limited meaning, viz. of a qualification which renders the operation and consequences of the whole contract dependent upon an uncertain future event…. Where the qualification defers the operation of the contract, the condition is suspensive, and where it provides for dissolution of the contract after interim operation, the condition is resolutive. The exact dividing line between the two classes is sometimes difficult to draw, because failure of a suspensive condition may have a resolutive effect, and a resolutive condition in a sense suspends dissolution of the contract. But for present purposes that aspect of the matter need not be pursued. What is of importance is the distinction between true conditions of either kind and ordinary stipulations falling outside their category. In the case of true conditions the parties by specific agreement introduce contingency as to the existence or otherwise of the contract, whereas provisions which are not true conditions bind the parties as to their fulfilment and on breach give rise to ordinary contractual remedies of a compensatory nature, i.e. (depending on the circumstances) specific performance, damages, cancellation or certain combinations of these…*"

[18] It is clear that the present case is one concerning not condition of a contract strict *sensu*. The condition as alleged by defendant is classified as per **De Villierws A. J.** as he then was *supra* as "*accidentalia of a contract*" for the reason that the condition was definite or certain. I say this because from the circumstances of the case at hand, the contract was concluded in that each party did fulfill its obligation although the respondent did so partly.

[19] The correct question to pose therefore is whether the evidence as adduced by defendant that the plaintiff would produce proof of payment of taxes "*an accidentalia*" of the contract in issue.

[20] The evidence from both parties show that:

- the purchase price was to be paid in installments. It appears that the sum of E17,000 cash was paid on the date of concluding the contract.

- There were subsequently two outstanding payments to be paid in the future. These payments were in cheque form of E31,112 and E35,000 post-dated.

[21] It further came out during *viva voce* evidence of both parties that the second cheque was paid in cash and therefore there were no issues with regard to it. Now suppose the evidence that the goods were accepted on condition that plaintiff produces proof of payment of taxes, one wonders how defendant could proceed to pay the amount reflected in the first cheque without receiving the said documents. From the unchallenged evidence of plaintiff this sum of E31,112 was paid in cash installments. In other words more than one payments were transmitted to the plaintiff in the absence of such documents.

[22] Further, the evidence from both parties that subsequent to delivery of the 16000 pieces of clothes, 4000 pieces were removed and transported over the border by defendant. The documents had not been submitted. In fact, if these documents were a condition of the contract, one would expect that the critical time for their production was when defendant was transporting the said pieces across the country. Defendant informed the court that he negotiated their passage. This evidence cannot be accepted. There was no need for the defendant to negotiate on the face of the averment that plaintiff had undertaken under the contract to produce them. These garments were taken to South Africa for the benefit of plaintiff and not defendant. The only probable inference that can be drawn from the set of evidence is that plaintiff's evidence lends credence in that the issue of taxes was discussed and it was agreed that the purchase price be reduced in order to enable plaintiff to pay the taxes due prior to the contract being concluded. If defendant therefore did negotiate at the border for passage, it was not because plaintiff was to produce proof of payment but that he would pay the taxes himself.

[23] What confounds defendant's case further is that he could not tell how much tax was due except to state that the taxes far exceeded the purchase price. Revenue authorities also failed to assist the court. This compels one to wonder whether the reprehension by defendant that the goods were "*a hot potatoe*" as it were was of any substance. The first witness from revenue failed even to state whether the goods were liable despite an unambiguous order in those terms by this court. The second witness too failed to state the value of the taxes.

[24] Further defendant both under cross-examination of plaintiff and in his evidence in chief, gave evidence that the purchase price was reduced. Although there was disparity on the amount of reduction as plaintiff stated that it was reduced to E6.50 while defendant to E4.50, the figure was immaterial as both parties agreed on the sum owing being E35,000.00 and total sum reduced by E66,112.00.

[25] However, no explanation was given by defendant on the reason to have the purchase price of each piece reduced in the face of the evidence that rejects were put aside.

[26] Further credence to plaintiff's evidence is from defendant who stated that plaintiff hired the truck that came to collect the goods but in turn defendant paid for the truck. How could he allow further loss from a contract that could not benefit him? Further there was no allegation of a counter-claim by defendant for the monies that have been paid under the contract.

[27] The totality of the above therefore points to one direction *viz.*, plaintiff was not obliged to produce proof of payment or conversely the issue of payment of tax was considered under the contract and it influenced the reduction of the purchase price.

[28] For the foregoing, I enter the following orders:

1. Provisional sentence summons is granted;

2. Defendant is ordered to pay:

2.1 The sum of E35,000.00;

2.2 interest at the rate of 9% *tempore mere;*

2.3 costs of suit.

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M. DLAMINI
JUDGE

For Plaintiff : **Mr. M. Simelane**

For Defendant: **L. Manyatsi**