



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Case No. 34609/2020

Date: 24/05/2022 **Signature:**

In the matter between:

CONSOLIDATED STEEL INDUSTRIES (PTY) LTD t/a

Applicant

STALCOR

Registration Number 2006/031549/07

and

CHRISTO ODENDAAL INVESTMENTS CC t/a

C.O. TRADING

Registration Number 2006/172259/23

First Respondent

ODENDAAL, CHRISTO

Second Respondent

JUDGMENT

MAHOMED AJ

INTRODUCTION

1. The applicant/plaintiff in this matter applied for summary judgment against the respondents/defendants jointly and severally, for the balance of the purchase price of goods sold and delivered in the amount of R366 761.65. I shall refer to the parties as in the action.
2. The contract price was R415 009. 78, which was reduced after the defendant made two payments into the plaintiff's bank account.
3. The plaintiff claims the balance is due and payable as at 31 August 2019. The defendant admitted indebtedness but denied it was due and payable on the date as pleaded. The evidence is that the defendant did not raise any of the usual defences of defective goods, short delivery, late delivery, or the wrong price.
4. Advocate Roux appeared for the plaintiff and referred the court to a written credit agreement, ("the agreement") which included a suretyship clause, that the plaintiff relied on. He submitted that the defendant does not have a bona fide defence and filed an opposition simply to delay payment.
5. Mr O' Dowd appeared for the defendants and submitted that the defendants have a bona fide defence which if successful at trial would

constitute a defence. He raised two defences, they are that this court does not have jurisdiction to determine the matter, and that the second defendant laboured under an iustus error when he signed the agreement, he did not know that he had signed a personal surety for the goods which the first defendant had purchased. He argued he signed on behalf of the “customer”, the first defendant.

6. Mr O’ Dowd submitted that the court has first to determine the issue of jurisdiction before the determination of the other issue that the defendants raised.

THE PLAINTIFF’S SUBMISSIONS

7. Mr Roux referred the court to the defendant’s plea which sets out:

“7.1 the defendants admit that as at 31 August 2019 the First Defendant was indebted to the plaintiff in the sum of R415 090,78” and

8.1 The defendants admit making payment to the plaintiff of R38 329, 13 and R10 000 on 15 October 2018 and 18 March 2020 respectively which reduced the indebtedness to R366 761,65.”

8. Counsel submitted that the defendant admitted indebtedness and furthermore, referred the court to the defendants’ affidavit resisting summary judgment in which the defendants now deny that any

amount is due, however in the plea they admit liability. Counsel submitted that it was a statement under oath and a total contradiction, it is clear the defendants have no bona fide defence to the plaintiff's claim. The defences raised are improbable and bad in law.

9. Mr Roux argued that raising a point on jurisdiction is not a bona fide defence. He proffered that the plaintiff provided credit facilities to the defendant for purchase of the goods. Upon receipt of a completed credit application form, which incorporated a suretyship, the plaintiff assessed the application and approved it in Johannesburg. The written agreement which included a non-variation clause was concluded in Johannesburg, which is the plaintiff's place of business.
4. Mr Roux referred the court to statements reflecting the credits, which the plaintiff, rendered regarding the two payments the defendant made. Counsel argued that the payments in themselves constituted indebtedness and payment into the bank account in Johannesburg is sufficient to confirm the court's jurisdiction in Johannesburg.
10. Furthermore, it was a term of the agreement that the defendant would collect goods from the plaintiff upon the goods becoming available. There is no evidence that the plaintiff delivered goods to Cape Town nor any address for delivery in Cape Town.

11. Notice of acceptance of the offer would have been received in Isando and the plaintiff performed in response to the accepted offer. The first defendant placed orders pursuant to the agreement and the credit facility. Mr Roux submitted that it would make no sense if the “inverse of this argument” applied, as there is nothing that the defendants offered the plaintiff.

12. Counsel argued further that the defendants raise a defence of no jurisdiction, however they failed to file an exception or raise a special plea. He argued they must be “deemed to have submitted to the court’s jurisdiction” given that they took further steps when they filed a plea, and they served an answer to the summary judgment application. He relied on **PURSER v SALES**¹ and **BONGULI v STANDARD BANK OF SOUTH AFRICA**² and argued that by their prayer for leave to defend, the defendants submit to the court’s jurisdiction.

13. Mr Roux submitted further that the first defendant made payment into plaintiff’s bank account in Johannesburg, whereupon the plaintiff issued statements reflecting credits, delivery was also deemed to take place when stock became available for collection from the plaintiff’s premises in Johannesburg. Counsel submitted that one element of

¹ 2001 (3) SA 445 SCA at 451J,

² 2010 (5) SA 202 SCA [18-23]

the cause of action, the payment into the account in Johannesburg is sufficient to establish jurisdiction and to argue further on this point is merely to delay the inevitable and increase legal costs.

SURETYSHIP

14. Mr Roux submitted that the second defendant knew of the personal surety, and he must be bound by it. Mr Roux referred to the plea wherein the defendant admitted the suretyship and submitted that the defendant is estopped from denying knowledge of the suretyship clause. Counsel argued that the reader's attention is drawn to the suretyship at least three times on three different pages and the second defendant initialled each page. Moreover, the second defendant has admitted indebtedness in his plea.

15. It was further submitted that the parties concluded a written agreement and he referred to the integration rule, "*if parties decide to embody their final agreement in written form, the execution of the document deprives all previous statements of their legal effect, a collateral agreement that contradicts it will also be irrelevant as the party's previous statement on the subject can have no legal consequences.*" See **DT Zeffert** and **Paizes**³. The parol evidence rule excludes anything outside of the written agreement. Mr Roux denied that the

³ The South African Law of Evidence, 2nd ed, p 346

plaintiff entered into any oral agreements. The plaintiff persists with its argument that the written credit agreement and suretyship are binding, the second defendant knew of the suretyship, and he must be bound by it.

16. Mr Roux also alerted the court to the different dates on which the second defendant signed his affidavit, and the date it was commissioned. He persisted in his submissions that the defence is not bona fide and filed simply to delay payment.

THE DEFENDANTS' SUBMISSIONS

17. The defendants submitted that this court does not have jurisdiction to adjudicate the matter because neither respondent resides in or is in the area of this court's jurisdiction. Furthermore, the plaintiff's cause did not arise in Johannesburg
18. Mr O Dowd referred to s 21(1) of the Superior Courts Act 10 of 2013,

“A division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance...”

19. The defendants submitted that the contract was not concluded in the area of this court, and they relied on **VENETA MINERARIA SPA v CAROLINA COLLIERIES (PTY) LTD** ⁴

“ in Einwald v The German West African Company 5 SC 86 De Villiers CJ said at 91 that the grounds upon which jurisdiction can be exercised in respect of any contract over a Respondent without his consent, express or implied , are threefold: “viz by virtue of the Respondent’s domicile being here, by virtue of the contract either having been entered into here or having to be performed here, and by virtue of the subject-matter in an action in rem being situated in this Colony.”

20. Mr O Dowd argued that the applicant’s claim is based on two contracts, and both were concluded in Cape Town. He argued the signing and submission of the credit agreement by the second defendant was an offer, which the plaintiff could either accept or reject, and upon receipt of notice of acceptance, communicated to the defendants in Cape Town, the credit agreement was concluded there.

- 20.1. It was argued further that the second defendant concluded an oral agreement with a Mr Lapore the plaintiff’s representative in Cape Town, when the material terms of the sale agreement were confirmed as to the items for sale, the price, delivery, and terms of payment. ⁵

⁴ [1987] 2 ALL SA 447 (A) at p9

⁵ Case lines 011-17

21. Counsel relying on the **Veneta Mineraria Spa**, supra, argued that for jurisdictional purposes, the place of performance of the obligation that was breached is relevant. The defendants place of business and residence is in Cape Town, which is the court having jurisdiction in this matter. It was submitted further that the agreement was silent on where payment was to have been made, the defendants could have chosen to pay in cash at the plaintiff's branch in Cape Town.
 - 21.1. Mr O'Dowd denied acquiescence and submitted that the defendants raised the issue of jurisdiction in its plea and argued that their failure to raise an exception or a special plea of jurisdiction was no more than a matter of substance over form, and the defendants ought not to be prejudiced, as a result.
 - 21.2. He argued it did not matter, where the plaintiff's principal place of business is or where the credit facility is managed, he persisted with the argument that the plaintiff's cause of action did not arise in Johannesburg, as the agreements were concluded in Cape Town and breached in Cape Town.
22. The defendants admit liability for the balance claimed but deny any amount was due and payable as at 31 August 2019 as pleaded.

IUSTUS ERROR

23. Mr O'Dowd submitted, the second defendant is not bound by the suretyship because he did not know that he signed as surety for the first defendant, he submitted the second defendant was labouring under an iustus error.
24. The second defendant who signed on behalf of the first, as the customer, did not read the document, he had only a cursory look at the document, he signed it and handed it over to his assistant to complete the details. He did not expect it to include a surety clause.
25. He proffered he was told to expect a credit application form from Johannesburg, but he was never told it included a suretyship agreement.
 - 25.1. Although he noted the document was from the plaintiff, he was mistaken as to its content. The second defendant is sued in his personal capacity in terms of the suretyship agreement.
 - 25.2. Mr O' Dowd submitted that if the second defendant (i) was mistaken as to the content of the document, if (ii) his mistake was due to a misrepresentation, (whether innocent or otherwise), and (iii) his mistake was reasonable, he should not

be held liable. He referred the court to **BRINK v HUMPHRIES & JEWELL (Pty) Ltd**⁶, where the facts were similar to the facts in casu, where the court referred to **GEORGE v FAIRMEAD (PTY) LTD**, which established the principle that an innocent misrepresentation by the other party to the contract is sufficient, to excuse, in casu the second defendant from being bound, provided he can show that he would not have entered into the suretyship agreement if he had known it was included in the credit agreement.

25.3. It was asserted that the second defendant expected a suretyship would be in a separate document or it would be highlighted to alert the reader to the clause and set it apart from the other clauses. He signed as customer for the first defendant, there is nothing in the signature section of the document that sets out that he was signing in his personal capacity. The second defendant did not know he had signed in a dual capacity. Mr O' Dowd argued that a reasonable man could have been misled, and the second defendant was misled.

25.4. Mr O' Dowd, proffered that the reference to a suretyship appeared on the first page but under the applicant's name,

⁶ [2005] 2 ALL SA 343 (SCA)

when one would have expected it to appear next to or below the words “credit application.” He further argued that the clause appears at the end of the general terms and conditions. The bold font is the same for all clauses. He submitted that the document was a trap.

26. Mr O’Dowd submitted that the defendants have a bona fide defence which if proved at trial will constitute a defence to the plaintiff’s claim. Furthermore, he submitted that if the court finds it has the jurisdiction to hear the matter, the defendants then pray for leave to defend the action.

JUDGMENT

27. I agree with Mr O’Dowd that the defendant’s raised the issue of jurisdiction in their plea, however they failed to raise an exception or a special plea, which could have curtailed proceedings if successful.
28. In **FRANK ALBERT WILLIAM PURSER v ALAN EDWARD SALES**⁷, the court referred to the learned authors Herbstein and Van Winsen⁸

“Where a person not otherwise subject to the jurisdiction of a court submits himself by positive act or negatively by not

⁷ 2001 (3) SA 445 (SCA) at [13]

⁸ The Civil Practise of the Superior Courts in South Africa 3rd ed at 30

objecting to the jurisdiction of that court, he may, in such cases as actions sounding in money, confer jurisdiction on that court.”

Further at [17] ..an objection to jurisdiction must be put forward before litis contestation at the origin and among the very preliminaries of the suit.”

29. It is noted that the defendants pleaded the issue of jurisdiction within the plea and continued to plead the merits of the plaintiff's claim when they pray for leave to defend.
30. I agree with Mr Roux that this prayer must be seen as the submission to the jurisdiction of the court.
31. It is common cause, that the conclusion of the purchase and sale agreement depended on the approval of credit. The credit was approved by the plaintiff in Johannesburg. The defendant's purchased on that credit facility. The defendants awaited receipt of the credit agreement, which they knew was to arrive from Johannesburg. The defendants could have purchased with cash, which Mr Roux proffered was the plaintiff's usual practise, however it did in some cases offer a credit facility to clients. The approval and implementation of the of the credit facility, was integral to the conclusion of the contract. Both done in Johannesburg.

32. I am of the view that Johannesburg has material jurisdiction over the matter.
33. The defendant's paid over two amounts into the plaintiff's bank account which is held in Johannesburg. They received and accepted statements rendered in Johannesburg.
34. The second defendant may have an argument for trial as to his not knowing that he has signed in a dual capacity and may not be bound to the suretyship agreement. In summary judgment applications a court has a discretion given the nature of the proceedings.
35. In **BREITENBACH v FIAT SA (EDMS) BPK**⁹ Coleman J, stated.

"It is, however, even more important to guard against injustice to the defendant, who is called upon at short notice and without the benefit of further particulars, discovery, or cross examination to satisfy the court in terms of the sub-rule (3) (b).

"... the discretion given to a court in terms of the Rule to give leave to a defendant to defend, although such defendant has not complied with Rule 32 (3) (b), should only be exercised when the court feels an injustice would be done if it does not exercise its discretion."

"... it seems to me that if, on the material before it, the court sees a reasonable possibility that an injustice may be done if summary judgment is granted, that is sufficient basis on which to exercise its discretion in favour of the defendant."

⁹ 1976N (2) SA 226 (T)

36. On the facts before me, I am of the view that the defendants may have a point to be argued at trial as to the knowledge of the existence of a suretyship clause.
37. Accordingly, I am inclined to grant the defendant leave to defend to prevent any injustice that may be suffered.

I make the following Order:

1. The jurisdiction of this court is confirmed.
 2. The defendant is granted leave to defend.
 3. The papers in the application shall serve as the pleadings in the action.
 4. The reserve costs of 2 August 2021 shall stand over to final determination of the matter.
 5. The costs of this application are to be in the cause.
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MAHOMED AJ

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the 24 MAY 2022.

Heard on: 17 February 2022

Delivered on: 24 May 2022

Appearances:

For Applicant

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