

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

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DATE
SIGNATURE

Case no. **59158/2021**

In the matter between:

In the matter between:

DYNAPAC SA (PTY) LTD

Applicant

and

BLACK BOND SURFACING (PTY) LTD

Respondent

Coram: Dlamini J

Date of delivery: 9 August 2022

The judgment hereunder is deemed to have been delivered electronically by circulation to the parties' representatives via email and shall be uploaded onto the caselines system.

JUDGMENT

DLAMINI J

- [1] This is a *rei vindicatio* application for the return of certain equipment, which was sold and delivered subject to ownership only passing to the respondent when final payment was made.
- [2] The applicant is a company duly registered in terms of the Company Laws of the Republic, selling heavy-duty equipment.
- [3] The respondent is a company duly registered in terms of the Company Laws of the Republic, a contractor in the construction industry, more particularly in the building of roads.
- [4] The applicant testified that on 27 August 2020, the respondent purchased from applicant a second hand, used paver and two new equipment, a pneumatic roller and a drum roller.
- [5] On the same day, pursuant to the above the parties signed a Customer Order Confirmation. An invoice was then generated by the applicant amounting to R 4 899.000 (four million eight hundred and ninety nine rand).

- [6] The applicant avers that the respondent initially made payments in accordance with their agreement. However, the applicant says the respondent failed to honour the payments of installments due on 5 October 2020, 4 November and 4 December 2020.
- [7] The applicant submits that on 8 December 2020, the respondent sought indulgence from the applicant and made an undertaking to remedy the arrears. On this undertaking, the respondent only made three payments. Those arrears due by the respondent remain well in excess of a million rand.
- [8] The applicant says that on 5 November 2021, applicant issued a Notice in terms of Section 345 of the Companies Act¹ to the respondent.
- [9] The applicant submit that it went further and granted the respondent a further 5 (five) working days to remedy its breach without success.
- [10] Finally, the applicant submit that the respondent refused to remedy the breach and return applicant's equipment after the applicant has cancelled the agreement on 1 December 2020, alternatively on 4 August 2021, due to the effluxion of time when the agreement ran its natural conclusion.
- [11] The respondent does not, in so many ways, dispute the facts alleged by the applicant. However, the respondent denies that it is in breach of the agreement as the applicant failed to comply with the terms of the agreement. The respondent submit that there are material dispute of facts in this case, as a result says the respondent that this application should be referred to trial for *viva voce* evidence.
- [12] Furthermore, the respondent resist this application based on the principle of *exceptio non-adimpleti contractus*. That the plaintiff has not performed in

¹ Act 61 of 1973

terms of the contract therefor the respondent's obligation to perform has not arisen².

[13] The question to be answered in this case is whether there are material disputes of facts and the issue relating to the respondent defense of the *exceptio non-adempti contractus*.

[14] It is a trite principle of law that where there are material dispute of facts, which cannot be decided on the papers. The applicant cannot be entitled to a final order. In proceeding for final relief, the approach to determining disputes of facts is authoritatively set out by Corbett AJ in the Plascon Evans case³.

[15] This principle has been stated as follows;

“As the high court was called on to decide the matter without the benefit of oral evidence it has to accept the facts alleged by the appellants (as respondents below), unless they were so far-fetched are clearly untenable that the Court is justified in rejecting them merely on the papers”.

[16] The applicant submits that there are not materiel disputes of facts present in the matter. That the denial of the respondent of the Standard Terms and Conditions are far-fetched and should be rejected. The applicant avers that the respondent admitted placing the order for the equipment required by the respondent

[17] Furthermore, that the respondent admitted providing the applicant with Purchase Order, receiving a Customer Order Confirmation containing a clear provision that ownership of the equipment will remain vested in the applicant, which also does include the installment payment plan. That the Respondent admitted the inception of the agreement on 4 September 2020, that ran up to 4 August 2021. Further, that the respondent admitted the terms and

² Grand Mines (PTY) LTD v Giddey NO 1999 (1) SA 960 (SCA)

³ Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] (3) SA 623 (A)

conditions contained in the quotation on used equipment. As a result contends the applicant, that the respondent therefore admitted knowledge of the limited warranty on the second-hand equipment.

[18] The respondent denies it is in breach of the agreement as the applicant has failed to comply in terms of the agreement. That the machinery especially the paver did not work. The respondent contends that there are various telephonic conversation with the applicant relating to the issue of the paver not working. Further that the applicant did not bring to the court's attention the fact that the three machines cannot work independently of another, neither do the applicant deal with the technical issues raised by the respondent.

[19] Finally, the respondent submits that the matter should be referred to trial, as *viva voce* evidence needs to be heard.

[20] The respondent's assertion of the existence of material dispute of facts in this matter are spurious and very thin. The Court in the *Plascon Evans*⁴ sets out the guiding principle as follows;-

"In certain cases the denial by the respondent of the fact alleged by the applicant may not be such as to raise genuine or bona fide dispute of facts."

[21] In this case, the respondent has admitted that it enquired about the machinery, that it received a quotation and thereafter placed an order for the machinery. It is evident from the pleadings that the respondent admitted signing the Purchase Order and more critically in my view is the respondent's admission receiving the Customer Order Confirmation duly signed by the respondent clearly indicating that the ownership of the equipment will remain vested in the Applicant.

[22] The respondent does not anywhere dispute the fact and acknowledges that the paver only carries a limited warranty as a second hand equipment.

⁴ *ibid*

- [23] Further, the Respondent does not deny that it failed to honour the monthly repayments installments due to the applicant. Instead, the respondent, on or about 3 December 2020, requested an indulgence and undertook to settle the arrear amounts due to the applicant which undertaking the respondent failed to honour. There is no denial or dispute by the respondent that it received the Section 345 Notice from the applicant.
- [24] Also, the respondent does not dispute the applicant's cancellation of the contract on 9 December 2020, alternatively, that the agreement ran its ordinary course and it expired by effluxion of time in August 2021.
- [25] In the light on the above, the Respondent's claim of the existence of material dispute of facts has no merits, it is unsupported. In my view, the purported existence of material dispute of facts by the respondent is just a deliberate excuse to avoid its obligation to return the applicant machinery. The Respondent plea of the *exceptio non-adimpleti contractus* is nonexistent and is not supported by evidence and it is thus dismissed.

In all the above, circumstances, the following order is made.

1. The order marked "X" signed by me on 31 May 2022 is made an order of Court.

DLAMINI J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 30 May 2022

Handed down on: 09 August 2022

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