



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 596/2023P

In the matter between:

DAVID SCHALK JANSE VAN RENSBURG

PLAINTIFF

And

CORNELIUS IGNATIUS MICHAEL JOUBERT

FIRST DEFENDANT

MURRY ROBERT MOXHAM

SECOND DEFENDANT

JUDGMENT

P C BEZUIDENHOUT J:

[1] Plaintiff is seeking summary judgment against First and Second Defendant jointly and severally the one paying the other to be absolved for payment of the sum of R675 000.00 plus interest thereon and costs of suit. The application is opposed by First and Second Defendants.

[2] The claim arises from the sale of a pyrolysis charcoal plant which was sold by Plaintiff to Defendants for the sum of R760 000.00. The sale was in terms of a written

agreement of sale entered into between the parties and signed on 16 June 2020. Defendants paid a deposit of R60 000.00 and one payment of R25 000.00 thus leaving the balance of R675 000.00 which is being claimed.

[3] It is common cause that Plaintiff delivered the said plant to Defendants who installed the plant and sometime later expressed the view that it was not producing the quality of charcoal that was guaranteed to them. Defendants admit that the agreement of sale was signed and the terms and conditions contained therein. They however rely on what they refer to as a report by an expert relating to the production by the plant and certain letters between the parties proving the quality of the charcoal it would produce. The basis for their defence accordingly does not arise from the terms of the agreement but from these other factors to which I have referred. They further rely as a defence on the Consumer Protection Act. A counter claim was also filed seeking specific performance from Plaintiff.

[4] It is submitted on behalf of Plaintiff that the terms of the contract are not disputed and that no guarantee as to production was given. Two defences are raised. Firstly that it is not fit for the purpose for which it was purchased and secondly that of the Consumer Protection Act. It was submitted that after delivery of the plant it was common cause that it did produce bio-char and that there was no correspondence about problems with the said machine. It was submitted that Defendants did not prove that there was any defect in the machine. The agreement was never terminated and no defence good in law was raised by Defendants. It was not disputed that the plant could produce the only issue was the extent and quality thereof for which no guarantee was given as it was sold as is.

[5] It was further submitted that the Consumer Protection Act was not applicable and that nowhere in the answering affidavit does it set out which provisions of the Consumer Protection Act is being relied upon. It was further submitted that the counter claim was

without any substance as it merely referred to certain paragraphs of the plea which contained the allegations as to the plant not operating in terms of the guarantee when no such guarantee was given in terms of the agreement.

[6] It was submitted on behalf of Defendants that they had a *bona fide* defence and that it was a triable issue. It was submitted that reliance was placed on section 5(1)(a) of the Consumer Protection Act. It was further submitted that the laboratory report which appears at page 36 was relied upon and accordingly the plant was not producing what it was purchased for and that accordingly there was a valid defence and Plaintiff therefore breached the agreement. Defendants have raised valid defences and that accordingly the application for summary judgment should be dismissed with costs.

[7] In response it was submitted on behalf of Plaintiff that the report attached by Defendants was not an expert report and that there was no implied warranty in terms of the Consumer Protection Act. There was no cancellation of the agreement but only an order seeking specific performance.

[8] Paragraphs 5 of the agreement of sale specifically states that the plant is sold as a used plant with no guarantees after production has been proved. In paragraph 3.1 it sets out that the plant was sold as is and the plant was inspected by the purchasers and that it was a pyrolysis charcoal plant. The certificate/report which Defendants rely upon as the guarantee relating to the production of the said plant was done on 2 March 2018 and 5 March 2018 where it indicated a fixed carbon percentage of 97.2 %. This was approximately over two years before the agreement was entered into. It is contended on behalf of Defendants that this report is a guarantee given to them that it would produce 97 % pure bio-char where it was only producing 83 % pure bio-char.

[9] If this certificate was to be a guarantee of the bio-char the machine could produce one would have expected it to be incorporated in the agreement as on Defendants version they were given this before they signed the agreement. It appears to just be a report of what the machine was producing in 2018.

[10] It is also noteworthy from the emails of which copies are attached to the plea that on 19 March 2021 Second Defendant stated "Is there any way that you can come up to the plant and help us with the process as we obviously got something seriously wrong. The plant has been set up so you should be able to see what the problems are."

[11] In response thereto Plaintiff replied that he has an international expert which is available and stated "I think you are clearly doing something wrong." It is apparent from these letters that Defendants were seeking assistance as they were of the opinion that they may be doing something wrong and there is nothing in their letters that it is not producing according to the guarantee that was provided. It is only in the plea, after summons had been issued by Plaintiff against Defendants, that Defendants then raises the issue that the guarantee was provided. The letter of one Phipps they attach as support that it is not producing correctly also clearly states that "from photo's" he has perused. He did not inspect the said machine.

[12] In my view the Consumer Protection Act is not applicable as it was a term of the written agreement that no guarantee was being provided, that Defendants had inspected the plant and purchased it as is. The allegations in respect hereof are vague, bold and substantiated. The matter must be considered in terms of what is contained in the papers.

[13] In Defendants counter claim they plead that the terms and conditions of the agreement as pleaded by Plaintiff be incorporated into the counter claim by reference.

They allege that the breach is set out in paragraphs 5 to 7 of Defendants plea and be incorporated in the claim in reconvention. They then request that the breach be remedied and claim specific performance in terms of the alleged guarantee provided by Plaintiff.

[14] In paragraphs 5 to 7 of their plea it is set out that the agreement was concluded at a time when Plaintiff was informed what the plant was acquired for and that it was sold as being capable of producing a product known as bio-char with a purity of 97.2%. That it is not suitable for that purpose, could not produce it and only produced bio-char at a purity of 83% or less. As already referred to above the agreement specifically sets out that if there is any variation thereof it must be in writing and signed by both parties. It further sets out in paragraph 13.1 that neither party shall be bound by any representation, warranty, promises or the like not recorded in the agreement.

[15] It is noteworthy that if the requirement that it had to be of 97% purity was so important it did not form part of the agreement. The terms of the agreement are clearly set out, signed by the parties and the defences raised by Defendants do not disclose a *bona fide* defence which is sustainable or valid in law for the reasons which I have set out. Further the bold allegation that the Consumer Protection Act applies is also insufficient and is not a *bona fide* defence. It is vague and does not set out what it is specifically alleged.

[16] As the counter claim is based solely upon the reasons set out in the plea for the failure of Plaintiff to comply with the terms of the alleged guarantee which is not in the written agreement it also does not disclose any claim against Plaintiff.

[17] Accordingly Defendants have not shown that they have a *bona fide* defence which is sustainable in law or a *bona fide* counter claim and therefore the application must succeed.

ORDER

Summary judgment is granted in terms of paragraphs 1, 1.1, 1.2 and 1.3 of the notice of application for summary judgment.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED ON: 10 OCTOBER 2023

JUDGMENT HANDED DOWN ON: 13 OCTOBER 2023

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