Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 2328/2017

In the matter between:

CASTCRETE (PTY) LTD Plaintiff

and

ASSASI BHAMS INVESTMENTS (PTY) LTD Defendant

DATE OF HEARING : 30 SEPTEMBER 2022
DATE OF JUDGMENT : 20 OCTOBER 2022

FOR THE PLAINTIFF : ADV. LOUW
FOR THE DEFENDANT : MR. WESSELS

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 on 20 OCTOBER 2022.

ORDER

Resultantly, the following order is made:

(i) The plaintiff's claim is dismissed.

(ii) The plaintiff is ordered to pay the costs of suit of the defendant on a party-and-party basis, on the High Court scale and to be taxed.

JUDGMENT

HENDRICKS JP

[1] The plaintiff and the defendant entered into an agreement that the plaintiff would sell and deliver *inter alia* roof tiles to the defendant when so ordered against due payment. This agreement was partly oral and partly written. The plaintiff allege that it has complied with its terms of the agreement and that the goods (i.e. roof tiles) were sold and delivered to the defendant, in accordance with the agreement, as per the invoices made out to the defendant. The plaintiff claim that an amount of R124 868.47 is owed, due and payable by the defendant and therefore summons was issues for payment of the aforementioned

amount plus interest. This amount claimed is disputed by the defendant. In its plea, the defendant take issue with the fact that the said amount is not due nor payable as certain amounts need to be deducted and taken into account, which was not done and to which the defendant was entitled to in terms of the agreement. This include discounts, short deliveries, damaged goods (i.e. roof tiles), overcharges for transport and refunds for the return of the pallets on which for example the roof tiles were packed to be transported.

[2] On behalf of the plaintiff, its Managing Director at the relevant time, Ms. Horton, testified. Her evidence can be succinctly summarized as follows. As Managing Director, she was in charge of the plaintiff company for the running of its day-to-day operations. There were other staff also in the employ of the plaintiff such as representatives (reps) but she had the final say when it comes to discounts. The plaintiff company had business dealings with the defendant which span over more than a two year period. Roof tiles packed on pallets were ordered by the defendant. The plaintiff company would seal for delivery the said roof tiles to be transported to the defendant's premises. The plaintiff had a bookkeeping system in place at that time which was not very reliable. For every purchase and delivery the plaintiff would invoice the defendant. Multiple copies of such invoices were discovered. She reconciled the invoices and compiled a reconciliation statement. This was done when a more reliable bookkeeping system was implemented by the plaintiff. It was then discovered, based on the calculations and

reconciliation statement, that the defendant owes the plaintiff the aforementioned amount of R124 868.47 as at 13 February 2018.

[3] She no longer work for the plaintiff and she is aware of the fact that the plaintiff ceded its rights to Credit Guarantee, who as an insurance company, compensated the plaintiff for the loss suffered to the value of 70%. She was only called to testify as a witness on behalf of Credit Guarantee. She testified that it was the norm and also practice which found general application within that industry, that an allowance be made for breakages at 2.5% of the total of the items delivered per invoice. Only if the breakages exceed 2.5% of the total items delivered, will a refund be paid or a deduction be made. This is also stipulated on the invoices. Insofar as the pallets are concerned, if the pallets are returned in good condition within thirty (30) days, will a refund be made to the defendant. With regard to transport, if the transport of the plaintiff was used, a tariff of R1.52 per item was charged. If the plaintiff source transport from independent third parties, the transport tariff will be R1.00 per item when link-truck deliveries were made. She was the only witness that testified for and on behalf of the plaintiff. The defendant closed its case without calling any witness.

[4] Ms. Horton's evidence was tested during cross-examination. Emphasis were laid during cross-examination on what the exact terms of the agreement between the parties were; the ineffective bookkeeping system that was initially used by the plaintiff; the discount for prompt

payment or settlement of the account; the refund for prompt return of the pallets; the allowances made for breakages; as well as the cession of its rights by the plaintiff to Credit Guarantee, which was not pleaded.

[5] The onus is on the plaintiff to prove its case on a balance of probabilities. The defendant did not raise a special plea. There was therefore no onus placed on the defendant to prove its case. The onus remained on the plaintiff, who alleged that it was owed an amount of R124 868.47, to prove it's claim on a balance of probabilities. This much is trite.

See: **Jordaan v Bloemfontein Traditional Local Authority** 2004 (3) SA 371 (SCA).

South Cape Corporation (Pty) Ltd vs Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A).

Sardi v Standard and General Insurance Co Ltd 1977 (3) SA 776 (A).

[6] Ms. Horton conceded during cross-examination that for approximately half of the period that the plaintiff and the defendant were doing business, the plaintiff used an unreliable bookkeeping system which was far less than perfect. The concession went even further and it was conceded that errors might have occurred during the use of the previous bookkeeping system to the disadvantage of the defendant. On a balance of probabilities this was what happened.

[7] Furthermore, Ms. Horton conceded that on the invoices it is indicated that if the invoice is settled within the period of thirty (30) days, the defendant would be entitled to a discount of 2.5% of the amount per invoice. This was an inscription contained on all the invoices even after the bookkeeping system has been upgraded. She conceded that it may well have been understood by the defendant that prompt payment would entitle it to the said discount. This concession she made after being confronted with the question of her inconsistent allowing of the discount at whim. Sometimes she decided to give the discount and at other times she decided not to give the discount.

[8] She conceded that **Mr. Bham**, on behalf of the defendant, may well have labored under the impression that the defendant is entitle to the discount seeing that it was printed as such on the invoices and was allowed at times. On a balance of probabilities, the discount should have been allowed and be deducted from the amount claimed, which was not done consistently. Doubt exist as to whether the amount allegedly claim is indeed correctly computed.

[9] With regard to the pallets, Ms. Horton testified that the defendant was not entitled to send the pallets back with the same truck that delivered the goods (i.e. roof tiles). She could however not satisfactorily explain why not only the contracted third party transport company's drivers, but also the plaintiff's own drivers signed for the return of the pallets and transported it back to the plaintiff's premises on the very same day that

the goods were delivered. So too, did she find it difficult to explain the inconsistency insofar as the refund for the return of the pallets are concerned. At times the defendant was refunded and at other times not.

[10] With regard to the breakage allowance, Ms. Horton testified that breakage of less than 2.5% of the total items invoiced is seen and normal and more that 2.5% is seen as excessive in the industry. The defendant claim the discounted price per item that was broken. Ms. Horton could not satisfactorily explain that this was indeed a term of the contract agreed to between the parties that breakage to the value of 2.5% of the total of items invoiced, was regarded as normal in the general industry. On a balance of probabilities, this was not what was agreed upon between the parties. Ms. Horton's understanding of the normal breakage percentage in the general industry was probably never communicated to **Mr. Bham** of the defendant. That explain why **Mr. Bham**, on behalf of the defendant, would claim a deduction or refund for the breakage.

[11] It was pointed out to Ms. Horton during cross-examination that there was an inconsistency with regard to the transport tariff that was charged by the plaintiff. The amount charged differed. At times the plaintiff would charge R1.52 per item even if an outside transport company with a link-truck was used instead of R1.00 per item. She conceded that it is indeed correct and that the escalated charge was erroneous.

[12] The defendant take issue with the fact that it was entitled to the following credits:

R27 628.27 in respect of discounts which the Defendant was purportedly entitled to;

R7 638.12 in respect of "short deliveries" purportedly made by the Plaintiff;

R12 073.31 in respect of goods which were purportedly damaged;

R3 450.10 in respect of goods that were purportedly broken;

R30 444.30 in respect of amounts which the Plaintiff purportedly overcharged;

R49 698.30 in respect of pallets which the Defendant had purportedly returned to the Plaintiff

[13] The total amounts to R130 932.40. Mr. Wessels contended in his heads of argument filed on behalf of the defendant, that no debt is owed, due or payable to the plaintiff by the defendant. Over and above the fact that the defendant take issue with the aforementioned credits that were not passed in its favour, which amount exceeds the plaintiff's claim, the plaintiff was paid 70% of it claim by the insurance company, Credit Guarantee. Credit Guarantee than took over the debt collection and instituted this action against the defendant. Even if Credit Guarantee were to be successful in claiming back the full amount of R124 868.47 from the defendant, the plaintiff would not receive any amount thereof apart from the 70% already paid to it by Credit Guarantee. The plaintiff has written off the 30% shortfall of the debt, allegedly owed by the

defendant. It need to be mentioned that Credit Guarantee is not a party to these proceedings and the *locus standi* of Credit Guarantee is not pleaded. No evidence was led on Credit Guaranteés *locus standi* to litigate and prosecute the claim in the name of the plaintiff. I, am in full agreement with this submission by Mr. Wessels.

[14] Insofar as the reconciliation statement drawn by Ms. Horton is concerned, she conceded that it may not be perfect and that she did not utilized the services of external auditors, although the plaintiff had external auditors. She is not an accountant. It is obvious that there are flaws in the said reconciliation statement. This much was conceded by Ms. Horton. Mr. Wessels contended in his written submissions that the invoices discovered were not proved by the plaintiff. As such it amounts to hearsay, the evidential value to be attached thereto is minimal. The defendant did not admit the correctness of the invoices discovered by the plaintiff. Reliance was placed on the dictum in the case of **Rautini v Passenger Rail Agency of South Africa** (853/2020) [2021] ZASCA 158. I find the reference to this case quite apposite in the matter at hand.

[15] Much has been made by **Mr. Louw** on behalf of the plaintiff about the fact that the defendant, especially Mr. Bham, did not testify. He submitted that the version as put up by the plaintiff is prove on a balance of probabilities that the defendant is indebted to the plaintiff in the amount claimed. This is so, the submission continuous, because the defendant does not dispute that the goods (i.e. roof tiles) were indeed

sold and delivered to the defendant. It is however not that simple. The onus remained on the plaintiff to prove its case on a balance of probabilities. As already alluded to earlier on, the plaintiff failed to prove its case. The defendant need not present any evidence in the face of the plaintiff failing to prove its case. This Court cannot and will not find in favour of the plaintiff in the face of the concessions made by Ms. Horton and the other shortcomings in the plaintiff's case as alluded to earlier. This case is distinguishable from the cases of **Mazibuko v Santam Insurance Co Ltd and Another** 1982 (3) SA 125 (A) and **Venter and Others v Credit Guarantee Insurance Corporation of Africa Ltd and Another** 1996 (3) SA 966 (A), referred to by Mr. Louw. Reliance on the age old matter of **Pillay v Krishna** 1946 AD 946 is with due respect also misplaced. The defendant in the matter at hand does not put up a special defence or a special plea. Therefore, as correctly submitted by Mr. Wessels, does the onus not shift from the plaintiff to the defendant as the defendant does not have to prove any special plea or defence. The submission by Mr. Louw that the defendant raised a special defence and bore the onus to prove same, is incorrect.

[16] The defendant's failure to testify is not proof of the plaintiff's case. Evidence, at least to establish a *prima facie* case, is required from the plaintiff. The question that need to be answered is the sufficiency of the evidence thus given. The balancing of probabilities, drawing of inferences and conclusion came into play only after, and not before, the plaintiff has made out a *prima facie* case. Court decisions must be

based on proven facts. If the plaintiff fails to adduce evidence on which to prove its allegations, the case should be dismissed.

[17] Insofar as costs are concerned, it should follow the result and be awarded in favour of the successful litigant, the defendant. Mr. Wessels contended that this was an abuse of the court processes and that a punitive costs order on an attorney-and-client scale is warranted, seeing that the quantum claimed falls within the jurisdiction of the Magistrate Court (in particular the District Court and not even the Regional Court). I with respect disagree. In **Standard Bank of South Africa Ltd and Others vs Mpongo and Others** 2021 (6) SA 403 (SCA) it was decided that the High Court must entertain matters within its territorial jurisdiction that falls within the monetary jurisdiction of the Magistrate Courts, if brought before it, because it has concurrent jurisdiction with the Magistrate Court. This Court is due to the application of the *stare decissis* principle bound by the decision of a higher court (SCA). The plaintiff, although unsuccessful in its claim, was perfectly entitled to institute it in this Court. However, since the plaintiff is unsuccessful, it does not mean that this Court is bound to order that the costs be paid on a Magistrate Court scale. The plaintiff has made a choice and chose to litigate in this (High) Court. It therefore has to pay costs on the High Court scale. The converse would have been the situation if the plaintiff was successful in its claim.

Order

[18] Resultantly, the following order is made:

(i) The plaintiff's claim is dismissed.

(ii) The plaintiff is ordered to pay the costs of suit of the defendant, on a party-and-party basis, on the High Court scale and to be taxed.

R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG