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G.P.-S.43575—1969-70—2,000

J 219

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Provincial Division)
(APPELLATE Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

STANDARD TRADING CO (1960) LTD. *Appellant,*

versus

LACEY KNITTING MILLS LIMITED *Respondent*

Appellant's Attorney
Prokureur vir Appellant I. al, S & S.

Respondent's Attorney
Prokureur vir Respondent H[illegible]

Appellant's Advocate
Advokaat vir Appellant [illegible]

Respondent's Advocate
Advokaat vir Respondent M. Seligson

Set down for hearing on
Op die rol geplaas vir verhoor op 17-9-1971

2.3.4 7.9

Coram: Hiemstra, Boshoff, Wessels, Trollip et Miller, JJ.A.

(C.P.D.)

Bills Taxed—Kosterekenings Getakseer		
Date Datum	Amount Bedrag	Initials Paraaf

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

STANDARD TRADING COMPANY (1960)
(PROPRIETARY) LIMITED ..... Appellant

and

LACEY KNITTING MILLS LIMITED ..... Respondent

CORAM: RUMPFF, BOTHA, WESSELS, TROLLIP et MULLER, JJ.A.

HEARD: 17.9.1971. DELIVERED: 15.11.1971.

J U D G M E N T

RUMPFF, J.A. :

In this matter the appellant sued the respondent for damages in the Cape Provincial Division. After the case for the appellant had been heard an application was made for absolution from the instance which was granted with costs. The appellant now appeals against that order.

In its Particulars of Claim, as amplified by further particulars, the appellant alleged that on the 8th of August, 1969, the respondent, acting through one Davies, orally sold to the appellant, represented by its managing

director/.....

director, Dave Levin, at Tiervlei, Cape Province, 10,000 yards of material at R1,30 per yard and 6000 yards of material at R1,40 per yard. It was a term of the agreement that payment was to be effected by the appellant to the defendant "nett nett 30 days cash" and such payment was to be confirmed and paid through Prudential Shippers S.A. Limited. On the 10th September, 1969, Prudential Shippers S.A. Limited duly confirmed the sale but on or about the 30th September, 1969, the respondent wrongfully repudiated the agreement which repudiation the appellant accepted. The appellant claimed damages in the amount of R11800,00, being a loss of profit in respect of the material bought. In its further particulars the appellant stated that the phrase that payment was to be effected "nett nett 30 days cash" meant that payment was to be effected 30 days after delivery.

In its Plea the respondent admitted that an oral agreement had been entered into between the parties on the 8th of August, 1969, at Tiervlei, on certain terms and conditions and subject to confirmation by appellant's shippers, Prudential Shippers S.A. Limited, but denied the construction placed by

appellant/....

appellant on the phrase "nett nett 30 days cash". Respondent alleged that at no time did the said shippers confirm the agreement entered into by the parties. Respondent further alleged that on about the 15th September, 1969, at Tiervlei, or Johannesburg, the parties, represented by Levin and Davies respectively, entered into an oral agreement on certain terms and conditions and also subject to confirmation by the said shippers, but this agreement was also not confirmed.

In respondent's further particulars for trial the respondent admitted that there had been an agreement on the 8th August, 1969, concerning the two lots of material at the prices referrred to by the appellant but alleged that it was a term of the agreement that payment was to be effected "nett nett 30 days cash" which meant that the face value of the invoice was to be paid within 30 days of the date reflected on the invoice and that delivery was to be effected in and during August, 1969. The respondent also alleged that the agreement, referred to in its plea as having been entered into on or about the 15th September, 1969, was in substitution of

the first agreement. In terms of this agreement the respondent undertook to sell the fabric at the prices referred to, and that payment was to be effected "nett nett 30 days cash" meaning within 30 days of the date reflected on the invoice. Delivery of one parcel of fabric was to be effected immediately and delivery of the other parcel was to be effected approximately two weeks thereafter. The respondent again alleged that this agreement was subject to confirmation by the said shippers.

On the pleadings, including the further particulars supplied, the onus on the appellant was to prove the agreement it alleged to have been entered into on the 8th of August, 1969, in so far as the respondent had denied the appellant's allegations, and that the shippers had confirmed the agreement and had undertaken to pay in terms of the agreement.

In his evidence Levin stated that on the 8th August, 1969, at the premises of the respondent, he bought two mixed job lots of fabric. The one lot was about 6000 yards, which he bought at R1,40 per yard, and the other was about

10000 yards, which he bought at R1,30 per yard. Davies was the person who represented the appellant. In his evidence-in-chief Levin also said the following:

> "What was agreed in regard to terms of payment and delivery? --- The terms of payment as agreed, as I understood it, to be 30 days nett nett after delivery of the goods to me.
>
> COURT: Did you say 30 days nett nett or just 30 days nett? --- Nett nett; it makes very little difference. It is just about the same.
>
> MR KING: (Cont.): First of all, let us understand this. Nett nett means what in the trade? --- Nett nett means without any discount reductions or any other reductions whatsoever.
>
> So the agreement in that regard then was nett nett 30 days after delivery? --- Correct. F.O.R. (free on rail), Parow.
>
> And in regard to dates of delivery, what did you discuss with Mr Davies? --- We discussed and agreed that I shall let him have the date of delivery three weeks after receipt of confirmation by them from my shippers, Prudential Shippers (S.A.) Ltd., in Johannesburg.
>
> COURT: Can I just have that again. "I agreed that I shall let him have.....'?
>
> MR KING: A delivery date three weeks....? --- After shippers confirmation to the defendant.
>
> So, did you agree with Davies as well that these goods, this order, would be confirmed by your shippers? --- That is correct."

Levin also stated that he instructed Davies to send four sets of indents to his address P.O. Box 3912, Johannesburg. Three of these would be given to his shippers in Johannesburg for confirmation to the respondent and one would be kept for his records. It appeared, thereafter, that the indents had been sent to a wrong address i.e. P.O. Box 3012, Johannesburg and Davies undertook, telephonically, to send fresh indents to the correct address which Levin received on the 29th of August, 1969. On that date Levin informed one Kessel, the chairman of Prudential Shippers (S.A.) Limited that he had received the indents and would forward them to Kessel. The indents together with a letter from Levin was received by Kessel on the 8th of September.

When Levin received the indents he considered that the contents thereof did not accord in some respects with the agreement he had made with Davies and he caused the indents to be altered. The delivery instructions on the indents had read as follows:

Delivery instructions - Customer to advise.

Delivery Dates - August 1969 ex factory.

Levin altered the indents to read:

Delivery Instructions - Customer to advise date of despatch from factory.

Delivery dates - Please do not deliver before we advise you the date.

This latter sentence was also typed in, in red, lower down on each indent. Kessel confirmed the indent as altered in accordance with the written instructions contained in Levin's letter of 3 September, 1969, and returned one copy to respondent together with the letter which he had received from Levin. These documents were received by respondent on the 15th September. The letter from Levin to Kessel read as follows:

"Dear Sirs,

Enclosed please find orders in triplicate -

(a) Approximately 6,000 yards Crimplene @ R1.40 per yard.

(b) Approximately 10,000 yards Crimplene @ R1.30 per yard.

You will note from the Indents that since we require you to confirm same to Messrs. Lacey Knitting Mills Ltd., these goods must be made ready for railing but must only be railed when we advise them of the railing date, since right now we have no space available for these goods as they are very bulky.

We have made a note of this on the Indents and you will notice that they must not rail the goods

unless/.....

unless we advise them to do so. When confirming these Indents to them also do so in writing. You will also note the terms are 30 days nett, in other words you pay for these goods only 30 days from date of receipt, which date we will advise you on receipt of the goods. Kindly confirm that this has been attended to."

Levin also stated that Davies telephoned him at his house on the 15th September and told him that he had received the indent from the shippers and that he wanted delivery instructions. Levin's evidence-in-chief about this incident reads as follows:

"Will you tell his Lordship about that telephone call? --- Yes. He telephoned me and he asked for shipping instructions. He said he'd got this indent and he thanked me very much for sending it on.

He got the indent? --- He got the indent.

Do you mean from....? --- From Prudential Shippers. As I say, he thanked me for it, and he did not even then apologise to say that he is very sorry about this terrible mistake his office had made with the box number. We then discussed the matter of delivery of these goods, and I said I've got three weeks in which to give you railing instructions for these goods, but in the meanwhile you can send one of the two lots, either the 10,000 yards or the 6,000 yards. But it is impossible for me to accept the whole lot in one as my space is limited, in my warehouse and store rooms.

Did Mr Davies also have problems in regard to delivery? --- Yes."

After/.....

After explaining what the problems of Davies were, Levin continued as follows:

"MR KING: (Cont.): Did he agree to telephone you back? --- He did. And he phoned me at home, early one morning. It must have been in the vicinity of about 8 o'clock.

And what happened in that telephone conversation? --- About a quarter to eight I think it was. He said well, he had managed to get containers for the one lot, the 10,000 yards. He said to me: What about the balance now? I've got all the containers now. I said, well, I will tell you what, rail it within three weeks of your receipt of confirmation, or, if it suits you better, three weeks from now.

Was it decided which order he would then send off, either the 10,000 or the 6,000, or could he make the choice? --- He could make the choice.

Mr. Davies could make the choice? --- He could make the choice."

After this telephone conversation Levin sent a letter dated 19 September, 1969, to Kessel by hand which reads as follows:

"Further to our telephonic conversation re Lacey Knitting Mills, Cape Town, we have agreed with them that they should rail any one of the qualities only in the meanwhile of the material. We will advise them later to rail the balance.

Please, therefore, confirm to them that it is quite in order, if you have not done so as yet, but do not under any circumstances pay before these goods have been checked by us here, since the stipulation on the Invoice is that payment

must/....

must be made 30 days after receipt of the goods. As soon as the goods arrive here, same will be checked by us and we will advise you whether you can pay within 30 days after receipt of the goods. The same applies to the second lot, for which we are to give them railing instructions. Why we could not take the goods in one lot is because these goods are very bulky and we cannot handle the whole lot of goods at one time.

Thanking you for your kind co-operation."

Kessel thereupon sent a copy of Levin's letter to respondent together with a letter reading as follows:

"We refer to your Orders 4489 (Client's O/No. 69/110) and 4488 (Client's O/No. 69/99).

Further to our telex message of Friday afternoon, we attach a copy of a letter we have just received from our Client, and please will you act accordingly.

Please acknowledge that our Client's instructions will be strictly adhered to."

This letter was received by the respondent on the 25th September, 1969. Thereafter Levin was informed by Kessel that he had received a telex communication from the respondent stating "Please regard abovementioned orders as cancelled as terms of payment are contrary to what customer agreed upon while in Cape Town". After further attempts by

Levin to negotiate with the respondent a final telex message was received by Kessel from the respondent reading as follows: "Order at all times subject to Shippers confirmation in terms of original agreement. No such confirmation of agreed terms received. Regret not prepared to execute. This is final not subject to further negotiation".

In his cross-examination Levin stated that as far as he could recollect the original agreement was that payment would have to be made 30 days from date of delivery and he understood that to be 30 days from delivery of the goods in his warehouse. He also stated that the term agreed upon "F.O.R. Parow" meant that he would have to pay the railage and that the respondent would deliver the goods to the railways at Parow and the railways would bring the goods on his behalf to Johannesburg. After stating that Davies on the 8th of August, had told him that he would like the goods [redacted] railed in August, Levin later categorically put his version as follows:

> "Never, never, never did we agree in Cape Town that delivery must be made in August. It was never agreed. It was never discussed. The only thing discussed was three weeks after the date of confirmation with the shippers I must give instructions."

Being/.....

Being questioned on the alterations which he had caused to be made on the original indents Levin inter alia gave the following evidence:

"I understood you to say this morning that the arrangement in regard to delivery was that three weeks from the date of confirmation delivery would be effected, so much so, that you said that it would not be necessary for you to give any delivery instructions. Do you remember saying that this morning? —— Yes.

How did this accord with that agreement 'Customer to advise date of despatch from factory'? —— I might want it earlier.

You might want it earlier and you might want it later? —— No. I made an arrangement, an agreement, that I would take it later.

Now, if your evidence is correct, Mr Levin, that you wanted to alter these documents to reflect the true agreement, why did you not cross out 'Customer to advise' and say 'Three weeks from date of shipper's confirmation'? —— I say again, I was dealing with a big firm, a respected firm, a firm which is held in good repute, I do not think that they would change their word in any way.

No, but you saw fit to make certain changes, and I want to know why you did not reflect the correct agreement in regard to delivery? —— I did not think it was necessary.

And in fact, you agree with me that what you reflected here was not the agreement; it was certainly not the agreement that you would be able to advise at your discretion the date of

delivery/....

delivery? --- Not at my discretion. I said within three weeks after confirmation.

It does not say so here, does it? --- It does not say so."

On being questioned about the telephone conversation with Davies when the latter asked for delivery dates Levin inter alia gave the following answers:

"COURT: Did he say in the conversation in the morning when he telephoned you to your house that he wanted further confirmation from the shippers? --- No, he did not say that. He said: Will you please confirm it with the shippers.

Please confirm it with the shippers? --- Yes, confirm it with the shippers because I am going to write the shippers a letter now when I get back to the office.

What did he have to confirm with the shippers? --- I cannot tell you.

MR SELIGSON: (Cont.): Let us get that clear. He said to you: Please confirm it with the shippers? --- That is what he said to me: Please confirm it to the shippers.

Confirm it to the shippers. --- That is right.

And you undertook to do so? --- I undertook to do so.

And obviously the purpose of this was for him to get some further communication from the shippers? --- Yes."

In regard to his own interpretation of the term "nett nett cash 30 days" Levin gave the following answers to questions put to him:

"Do you agree with me that, on your evidence, payment was to be 30 days from the date of delivery, or shall we rather say the date of receipt, by you of the goods? Is that correct? —— When I interpreted 'delivery' I meant delivery to them, to me. Delivery means 'receipt'.

Delivery means receipt, Mr. Levin, because in fact you bought these goods f.o.r. Parow, not so? —— I then learned afterwards that delivery means delivering to agents, and the railways happened to be my agents, because it was Free on Rail, Parow.

That is correct. That is why I am asking you whether, when you say 30 days from date of delivery, you mean 30 days from the delivery of the goods to the railways, or 30 days from your receipt of the goods? —— Well, now I know it is 30 days from their delivery to my agents, which are the railways.

So, in other words, the arrangement was 30 days from delivery. Was that the actual agreement, or did they say 30 days cash, which you thought meant that? —— I thought that I interpreted this as 30 days delivery to me.

What was the actual term used to describe the terms of payment? —— Thirty days nett nett cash. Nett nett cash 30 days.

Those are the terms used, which you interpreted as meaning thirty days from delivery? —— Thirty days from date of delivery."

Kessel gave evidence for the plaintiff as also one Abramowitz, a director of Lillets (Pty.) Ltd.,

who/.....

after delivery. It is sufficient to quote one such passage:

"Anyway, so you agree that the order was to be subject to your shipper's confirmation? — That is correct.

That is one term. What were the other terms? We were talking about terms of payment and the first one you mentioned was shipper's confirmation. — That it should be 30 days from date of delivery nett.

Thirty days from date of delivery nett. — Nett.

Was that agreed upon in those terms, or was the agreement nett nett 30 days cash, which you took to mean 30 days nett from date of delivery? — That is right.

Now which? There are two possibilities. — I took it as nett cash 30 days from date of delivery.

I see. But you see, my question is: What was the actual phrase used in regard to the terms of payment? Was there specific mention of 30 days from date of delivery or was the agreement nett nett 30 days cash? — As far as I know, as far as I recollect, it was 30 days from date of delivery, nett, or nett 30 days from date of delivery.

In those very terms? — That is right.

I want to get this quite clear. This was not a case where the terms mentioned were nett nett 30 days cash, and you assumed that that meant 30 days from date of delivery. You say there was a specific agreement that payment would be made nett 30 days after the date of delivery? — That is correct. Those were the arrangements made in Cape Town."

Counsel for the appellant suggested that Levin made an error of law in thinking that delivery meant delivery in Johannesburg and that delivery was in truth delivery F.O.R. Parow. The shippers confirmed delivery F.O.R. at Parow and it was submitted that a reasonable man could hold that the terms of indent drawn by the respondent was not inconsistent with the appellant's case, that the further confirmation did not derogate from the original confirmation and that a binding agreement had come into being.

At the end of the appellant's case, the problem that faced the appellant was the confirmation by the shippers of two material terms of the agreement, namely, when delivery had to be effected and when payment had to be made. On the form of the pleadings and the conduct of the proceedings, failure to produce evidence that either of these terms had been confirmed by the shippers, would have entitled the respondent to an order for absolution from the instance.

It seems clear from what has been quoted above, that whether or not it was a term of the original agreement,

that delivery would take place in August, delivery in August could no longer be effected because of the delay caused by respondent's own mistake in sending the indents to a wrong address in Johannesburg. When the altered indent was confirmed by Kessel and received by the respondent it contained a term in relation to delivery inserted by Levin which according to Levin's own evidence was different from what had been agreed upon, namely, that delivery would take place within three weeks after confirmation. The new provision on the indent, inserted by Levin and confirmed by the shippers, was that the customer was to advise the date of despatch, without any specific time being referred to. On Levin's own evidence this was not the original agreement, and, in the result, there was no confirmation of the original agreement as to the date of delivery.

When, according to the evidence of Levin, it was subsequently agreed that delivery of one lot was to be made immediately and the other within three weeks of confirmation or three weeks of the date of the new agreement, the confirmation by the shippers was also not in accordance with

this agreement. According to the confirmation by the shippers it again was left to the appellant without qualification when to give instructions to rail the second lot of goods. In regard to payment, Levin testified that, according to the original oral agreement, payment had to be made 30 days after delivery of the goods to him, F.O.R. Parow. At the time he understood that to mean 30 days after the goods had been delivered to him in Johannesburg, he having to pay the railage. That was, of course, wrong. Indeed, Levin admitted that, after the dispute had arisen, he discovered that it meant 30 days after delivery to the railways as his agent at Parow. Now it is clear from all the correspondence referred to above that, at Levin's instance, Kessel confirmed to respondent that payment would be made 30 days after the goods had been received by him in Johannesburg. (See especially Levin's letters to Kessel of 3rd and 19th September, 1969, the terms of which relating to payment were confirmed by Kessel to respondent.) That is, however, not what the parties had agreed upon. I agree, therefore, with the view of the trial Court that the point was well taken that

the/....

the appellant's shippers did not confirm the agreement as deposed to by Levin. In the result, it is not necessary to consider the other arguments advanced by the appellant in support of the order granting absolution from the instance with costs.

On the basis that the Court a quo correctly granted absolution from the instance, with costs, counsel for the appellant asked for an order setting aside the order of the Court a quo and for an order granting leave to the appellant to amend his pleadings so as to aver a failure by the respondent to put the appellant in mora. It was suggested that even if there had been no proper confirmation by the shippers at the date of the respondent's repudiation there was a real contractual relationship between the parties which upon the fulfilment of the suspensive condition relating to confirmation would become a perfected agreement of sale, and which respondent was not entitled to repudiate when it did so. The amendment applied for intended to introduce an alternative cause of action reading as follows: "On the 30th September 1969 the said

agreement/....

agreement had not yet been confirmed in due form by Prudential Shippers (South Africa) Limited and was still open for confirmation."

What counsel for the appellant sought was the introduction of a cause of action not pleaded before and not fully canvassed at the trial. Counsel for the appellant conceded that the Court a quo, after granting absolution from the instance with costs, would be functus officio and could itself not have granted the order now sought in this Court.

Although this Court may in certain exceptional circumstances allow an amendment of the pleadings (see, inter alia, United Building Society and Another v. Lennon, Ltd., 1934 A.D. 149 at 162), I am not satisfied that it is competent for this Court, at this stage, to set aside an order correctly granting absolution from the instance, with costs, and to allow an amendment of the pleadings so as to introduce a new cause of action. Such an order by this Court would, I think, negate the very essence of the concept of absolution from the instance in a civil case. For a discussion of this problem, when

application/.....

application was made for fresh evidence to be led after an order of absolution from the instance, see the judgment of Wessels C.J. in Colman v. Dunbar, 1933 A.D. 141 at p. 162 and p. 163. I do not think, therefore, that this Court ought in this case to grant the application for an amendment of the pleadings.

During the argument counsel for the parties were granted leave to file supplementary written arguments on one particular point raised in the heads of argument for respondent. That was done. Thereafter the appellant through its attorneys maintained that the supplementary argument for respondent was more than a mere reply to appellant's supplementary argument and was a belated attempt to re-debate the particular issue, and consequently requested that the matter be set down for the hearing of oral argument on the point. The supplementary argument for respondent does prima facie seem to be unnecessarily prolix for a reply on a restricted issue. However, in view of the conclusion I have arrived at on the matter as set out above, it was, and is, unnecessary

to pursue that issue and consider that request. The taxing master's attention is, however, drawn to the above observation.

The appeal is dismissed with costs.

RUMPFF, J.A.

BOTHA, J.A.
WESSELS, J.A.
TROLLIP, J.A.
MULLER, J.A.

Concur.