

Sneller Verbatim/lks

IN THE HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 00/2030

2001-04-25


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DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES/NO

(2) OF INTEREST TO OTHER JUDGES YES/NO

(3) REVISED ✓

DATE 3/5/2001  SIGNATURE

In the matter between

**EAGLE FREIGHT (PTY) LTD**

Applicant

and

**FUCHSWARE APPLIANCES (SA) (PTY) LTD**

Respondent

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# J U D G M E N T

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WILLIS, J: The defendant has taken exception to the plaintiff's particulars of claim as amended. The plaintiff alleges that the exchange of letters between the parties, Annexures E1 and E2 to the original particulars of claim, contain an agreement upon which it relies. The defendant contends that these letters do not constitute a legally enforceable agreement.

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The plaintiff is a forwarding and freight agent. The defendant is a wholly owned subsidiary of Sasfin Bank Limited. It would appear common cause that a company, referred by counsel throughout the

argument as "Kelvinator", imported kitchen appliances from the Far East and made use of the plaintiff's services as a freight agent. The importation of the kitchen appliances was financed by Sasfin Bank Limited. In order to secure its position in financing the importation of these goods and to be assured of ownership of the items when they first arrived in South Africa, Sasfin Bank limited insisted that the defendant be the nominal importer. It appears common cause that Kelvinator went into liquidation and consequently the chickens were squawking, particularly in so far as this case is concerned, as to the liability of certain freight costs which had been incurred by the plaintiff. 5 10

I mention these facts by way of background. They do not in any way influence my interpretation of the two documents in question.

In Annexure E1 the defendant's attorneys, Elmarie Releham Attorneys, sent a letter to the plaintiff's attorneys, Rees and Associates, on 1 October 1999. The relevant portion of the letter reads as follows: 15

"At the outset we wish to refer you to the letters addressed to your client by our client dated 18 August 1999 in which it is stated that all costs associated with the import of the goods will be for the account of Kelvinator as well as your client's response thereto on 24 August 1999. Accordingly we believe that our client has no obligation to your client. 20

Without prejudice, and without any obligation so to do, our client is prepared to assist your client by claiming the VAT input 25

and if and when the Receiver of Revenue refunds our client, they will pay the amount of the refund over to your client. It must be stressed that the above is not an assumption of obligation on our client's part but purely a gesture of goodwill to assist your client.

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Should our client not be successful in recovering the VAT, then obviously no payment will be effected to your client. Please note that our client has never been and is not liable for any costs associated with the importation of the goods and in this regard we suggest that your client lodge a claim against the insolvent estate of Kelvinator.

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Kindly obtain your client's acceptance of the foregoing and once you have done so please let us have your client's VAT input in our client's favour as well as any necessary documentation which will substantiate a valid claim for a refund so that our client can endeavour to claim the VAT.

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We await to hear from you soonest.

Yours faithfully

Elmarie Releham".

The plaintiff's attorneys then replied on 12 October 1999. The relevant portion of this letter reads as follows:

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- "1. Your without prejudice telefax dated 1 October 1999 received by ourselves on 11 October 1999 refers.
2. Kindly note that without prejudice to its rights to pursue this matter further in the relevant forum should it become necessary, our client accepts your client's offer to assist

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our client by claiming the VAT input and thereafter, upon receipt of the funds from the Receiver of Revenue, to pay the amount over to our client.

3. We will ensure that the original invoice made out to your client is handed over to your offices. In the interim we wish to enquire what other source documentation you might require in this matter and look forward to hearing from you in this regard.

4. **We reiterate that the acceptance of this offer is entirely without prejudice to our client's right to pursue the rest of its claim or alternatively its entire claim if your client is unsuccessful with the Receiver of Revenue."** (my emphasis) -

The defendant took exception during certain preliminary addresses at the commencement of what was intended to be a trial to the plaintiff's averment (as I have already indicated) that this exchange of letters constituted a binding agreement. By agreement between the parties it was agreed that the matter would be argued by way of exception although there was no formal notice in regard thereto.

It is trite that acceptance of an offer must be clear and unequivocal or unambiguous, such that the acceptance must exactly correspond with the offer. (See e.g. Christian v Reis (1898) 13 EDC 8 at 15; Joubert v Enslin 1910 AD 6 at 29; Davis v Lewis & Chadwick & Co 1911 WLD 12 at 16; Treadwell v Roberts 1913 WLD 54 at 59-60; Whittle v Henley 1924 AD 138 at 148; JRM Furniture

Holdings v Cowlin 1983 (4) SA 541 (W) at 544A-C.)

"Yes but ..." does not signify agreement and any attempt to vary the terms of an offer by purporting to accept it will destroy the validity of the acceptance which will normally best be interpreted as a counter offer. (See e.g. Jones v Reynolds 1913 AD 366 at 370-1; Houston v Bletchley 1926 EDL 305 at 309-310; Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd 1962 (3) SA 143 (A) at 148G-150B. See also Christie, *The Law of Contract in South Africa*, 3rd ed. at p66.) 5

In my view, paragraph 4 of the letter from the plaintiff's attorneys addressed to the defendant's attorneys on 12 October 1999 is decisive. It seems to me that upon whatever construction one wishes to place on this clause, it contains a "yes but". In other words, the acceptance of the offer is clearly qualified and despite some eloquent linguistic panegyrics by Mr Cook, I am unable to conclude that any other interpretation is reasonably capable of being given to it. 10 15

In the circumstances, therefore, the following order is made:

1. The exception is upheld.
2. The plaintiff is granted leave to amend its particulars of claim. 20
3. The plaintiff is to amend its particulars of claim within 14 days of this order.
4. The plaintiff is to pay the costs of the exception.