IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 14/07804

In the matter between:

PIEMARIE CHRISTINE TRADING CC APPLICANT

And

UNICORE HOLDINGS (PTY) LTD RESPONDENT

With

The Government of the DRC seeking to intervene.

JUDGMENT

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[1] The applicant applies for an order compelling the respondent to deliver certain goods purchased by the former in terms of an agreement of sale between the parties. The Respondent, whilst admitting the agreement of sale between the parties, contends in essence that the purchase price has not been paid in full, and alleges that an amount of US $25 000.00 remains outstanding. There is, in addition, an application to intervene, interlocutory to the main application, brought by the Government of the Democratic Republic of the Congo which, in turn, is opposed by the applicant.

[2] The order sought in the main application by the applicant plainly constitutes final relief; factual disputes between the parties must therefor be adjudicated in terms of the *Plascon-Evans* rule.[1] I heard argument simultaneously on the interlocutory as well as the main application and I will refer to these applications as such in this judgment.

[3] It is common cause between the parties that on 28 February 2013, the Respondent submitted a written quotation together with a *pro forma* invoice, addressed to the Department of Health: DRC, for the sale of the items tabulated in the invoice to the Applicant.[2] The price per item listed in the quotation is stated in US dollars, but on page 3 of the quotation the total price is stated in South African Rand in the sum of R3,517,682.00, next to the inscription: *"Conversion to Rands ZAR 1 : USD 8.9579*". The quotation contained the following material terms and conditions:

"Terms & Condition [sic]

1. *All prices are FOB South Africa, Payable in ZAR to Unicore*

2. *Terms of Payment: 100% payment in advance*

3. *Delivery time: 6 to 12 weeks after receipt of payment."*

[4] In paragraph 11 of the founding affidavit the applicant alleges that during March 2013, it accepted the respondent's aforesaid quotation and that an agreement of

[1] *Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C, and the authorities cited at 634G and 634I.

[2] It is not clear from the papers in either the main application or in the interlocutory application why the invoice was addressed to the DRC.

sale in respect of the items listed in the quotation on the terms and conditions stated therein thus came into being.

[5] The respondent admits that an agreement between the parties came into being, which it describes in paragraph 18 of the answering affidavit as being *"partly written and partly oral"* and refers in this regard to the same quotation which was attached to the founding affidavit as the written part of the agreement. In the result, the fact that the quotation was addressed to the Dept. of Health, DRC rather than the applicant is removed from contention, because the respondent must by reason of the said concession be taken to have admitted the applicant's *locus standi* to sue on the agreement.

[6] Yet, despite admitting that it prepared the quotation for consideration by the applicant and that it submitted the quotation to the applicant for its attention, the respondent would nevertheless appear to deny that the agreement was entered into upon the terms contained therein. Had the applicant relied merely upon an oral agreement, it would have been incumbent upon it to establish the terms of such agreement, despite the respondent's allegation that the agreement contains different terms than those alleged by the applicant and despite such onus involving the duty to prove a negative on the part of the party bearing the onus.[3] But the situation is different in the case of a written agreement, or where there is reliance upon a partly written and partly oral agreement, and one of the contracting parties alleges a term contrary to the terms contained in the written part of the agreement. In such a case,

[3] See *Kriegler v Minitzer and another* 1949 (4) SA 821 (A) at 825

that party bears an onus to establish the terms upon which it seeks to rely.[4] In the present matter, the respondent alleges, *inter alia*, that it was specifically agreed that the price was payable in US Dollars, thus contradicting the term stated in the quotation to the effect that the purchase price was payable *"FOB Jhb South Africa, Payable in ZAR to Unicore"*.

[7] There is no attempt by the respondent to explain the discrepancy between the terms as stated in the quotation and the terms as alleged in the answering affidavit; i.e., whether the terms as contained in the quotation were subsequently amended by agreement, or whether the written portion of the agreement, being the quotation, does not contain an accurate reflection of the parties' agreement and accordingly falls to be rectified. Nor does the respondent explain why it accepted the payment in South African Rand if, as it now alleges, payment was to have been made in US Dollars. There is, in any event, a patent discrepancy between the terms as alleged in paragraphs 18.3.2 and 18.3.3, respectively, of the answering affidavit. If no goods were to have been purchased from the respondent's overseas suppliers until full payment had been received, as alleged in para 18.3.2, and this term was implemented, there cannot conceivably be any "*exchange rate charges/demurrage charges"*, which provision was allegedly included as part of the agreement, as contended in para. 18.3.3. From the very allegation that such charges were incurred, it follows that the goods must have been ordered from the respondent's suppliers before payment by the applicant was received by the respondent. There is no explanation by the respondent why this was permitted to occur, if it were true that the agreement in fact forbade this.

[4] See *Kriegler v Minitzer and another, supra, at 825; Mans v Union Meat Co.* 1919 AD 268 at 271.

[8] This is an unacceptable way of traversing material allegations constituting, on the one hand, the very kernel of the applicant's case as well as, on the other, the respondent's defense. The quotation, containing as it does, the material terms proposed to form part of the contract, was manifestly couched in terms constituting an offer made *animo contrahendi* which, upon communication to the respondent of its acceptance by the applicant, resulted in the conclusion of an agreement along the terms stated in the quotation. This is precisely the effect also of the applicant's averments in connection with the quotation in paragraph 11 of the founding affidavit. The respondent's denial of the applicant's version as to the terms of the agreement is fundamentally inconsistent with the admission, in paragraph 18.5 of the answering affidavit, that the respondent had prepared the quotation and pro forma invoice referred to by the applicant for the latter's consideration and that an agreement came into being between the parties. If the quotation was accepted in the terms stated therein, it necessarily follows that the resultant agreement could not have contained terms at variance with the terms communicated to the applicant and accepted by it without any qualification.

[9] If the respondent wished to rely on a written agreement, or one partly in writing, but which does not contain the terms as alleged by it, it was incumbent upon it to set forth in its answering affidavit all the material facts necessary to establish such an agreement, regard being had to the principle that an affidavit in motion proceedings constitutes both the pleadings as well as the evidence,[5] as well as a pleader's obligation, in denying an allegation of fact, to do so in clear and unequivocal

[5] See *Hart v Pinetown Drive In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469C-E

terms.[6] This was plainly not done *in casu*, because the content of paragraph 18 of the answering affidavit is wholly ambiguous as to the factual basis of the respondent's alleged agreement upon which it seeks to rely.

[10] According to the respondent, the applicant's alleged late payment during March 2013, and the alleged breach to the effect that the payment was made in Rand rather than US dollar, resulted in an extra R350 000.00 becoming payable, which the applicant agreed to pay into the respondent's attorney's trust account on 9 September 2013.[7] This letter reads as follows:

> *"The telephone conversation between our Mr Hunter and your Mr H James on 6 September 2013 refers.*
>
> *We confirm that it is agreed that your Client wil pay the sum of R350 000.00 to us to be held in trust and not paid to our Client pending delivery of the goods purchased.*
>
> *Kindly forward proof of payment."*

[11] In para. 13 of the founding affidavit, the deponent states that after the lapse of more than 12 weeks after payment of the full purchase price for the items and after several demands for delivery of the purchased items, the respondent's attorney addressed a letter dated 8 November 2013 on behalf of the respondent to the applicant's attorney of record, a copy of which was annexed to the founding affidavit, marked annexure **"FA5**". The content of this letter is of considerable significance in the light of the respondent's subsequent claim that, as at this date, the full purchase price had not been paid, in the sense that the extra sum of R350 000.00 had allegedly only been paid on 9 November 2013. This, according to the respondent, resulted "*...in a further exchange rate costs/demurrage charges costs, which the client computed to be in the sum of $25 000".*

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[6] See Rule 18(5).

[7] See paras.18.6.1.1-18.6.3.3 of the answering affidavit (p. 32).

[12] Remarkably, there is not the slightest mention of an overdue amount, be it in the sum of R350 000, or in any other amount in the aforesaid letter, nor is there any mention whatsoever of a demand by the respondent for payment by the applicant of yet a further sum of $25 000 in consequence of such alleged late payment. On the contrary, it is stated merely that delivery of the equipment ordered by the applicant was expected "*…at or about month end…"* and that *"…our further update is to follow as the matter progresses."* This letter comes at a time when the alleged exchange control/demurrage costs, if these had in fact been incurred at all, must have have been uppermost in the minds of those in control of the respondent.

[13] The applicant's attorney responded to the aforesaid letter by way of a letter dated 12 November 2013, addressed to the respondent's attorney, in which it is recorded that, consequent upon the undertaking in the respondent's attorney's previous letter that delivery of the goods would occur by month end, the applicant has arranged for an accommodation by its own client until then. The entire tenor of this letter is wholly inconsonant with the applicant's having been in default of payment until 3 days before this letter.

[14] The respondent's attorney, in turn, responded to the applicant's attorney's aforesaid letter by way of a letter dated 29 November 2013[8], in which it was denied that the respondent had committed itself to the 30th November as a date of delivery, and undertook merely to ask the respondent for an update as to the expected date of arrival of the ordered goods and to keep the applicant apprised of developments, "*…in order for this matter to be finalised as soon as is possible."* If, as is now contended on

[8] Annexure FA7 to the founding affidavit (p. 20).

behalf of the respondent, the applicant was not only responsible for the delay but, indeed, was indebted to the respondent in an extra amount of US$25 000.00 in consequence thereof, the content and tone of the aforesaid letter would be inexplicable. The absence of any mention of a delay brought about by a late payment on the part of the applicant, and the absence of any demand for the payment of an additional sum allegedly due by reason of such delay are, again, wholly inconsistent with there being an amount still outstanding at this point.

[15] When part of the equipment finally arrived during January 2014, the respondent's attorney addressed a letter to the applicant's attorney of record, in which he stated: "*We are pleased to report that the equipment referred to in Annexure "A" is ready for your client to collect…"*. Yet again, no mention was made of any outstanding amount payable by the applicant, at a stage when, had additional costs in the amount of US$25 000.00 in relation to foreign currency fluctuations or demurrage been incurred by the respondent, such costs must necessarily have been accounted for by then. Not only did the respondent make no demand for payment of any additional sum allegedly outstanding, but it indeed gave delivery of this part of the consignment without any demur whatsoever. The respondent's conduct as aforesaid is fundamentally inconsistent with its present claim that there is an outstanding balance of the purchase price payable before it is obliged to make delivery of the remainder of the goods sold. In the event, the first time any mention was made of the alleged additional amount payable was in a letter dated 9 June 2014, addressed by the respondent's attorney to the applicant's attorney of record, annexed to the answering

affidavit as annexure D2, which came at a time after the application had already been instituted.

[15] The alleged dispute thus engendered, so it is argued on behalf of the respondent, precludes the grant of the relief sought. However, a real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. See *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para. 13. I am by no means so satisfied. As pointed out above, the respondent failed to set forth the material allegations necessary to explain how its version of the agreement came into being and how it came about that the agreement was entered into on terms contrary to the terms contained in the quotation it submitted to the applicant. Another material fact entirely absent from the respondent's account is when and precisely how the further amount of $25 000.00 allegedly became payable. This is, after all, a matter falling within the peculiar knowledge of the respondent, and about which it bears the *onus*. It is not sufficient for the respondent to merely make mention, belatedly and in passing, that an extra amount has become payable by the applicant; the necessary particularity, with reference to the source documentation explaining the basis upon which the additional amount has been computed and agreed upon by the parties ought to have been disclosed by the respondent, absent which it cannot be said that it addressed this issue seriously and unambiguously. In the absence of a plausible explanation from the respondent as to the reason why it failed to demand payment of the extra sum when it fell due, or why it took so long for the respondent to realise that an extra sum has

become due, this allegation is clearly untenable and falls to be rejected merely on the papers.

[16] The application by the Minister of Health of the Government of the Democratic Republic of the Congo, to whom I shall henceforth refer as the DRC, to intervene in the application is, in my view, devoid of substance, because the DRC has not shown a cognisable legal interest in the relief sought by the applicant, nor has it formulated any cognisable relief it will seek against the applicant should leave to intervene be granted. The respondent has contracted with the applicant as a principal, despite the respondent's knowledge at the time that the applicant was sourcing the goods purchased for the DRC. The DRC's allegation that the applicant is in default in respect of its agreement with the DRC does not afford the latter any basis to intervene in the present application. The DRC does not even allege that it has withdrawn the applicant's mandate to source and supply the goods purchased by the applicant from the respondent. Indeed, its conduct in seeking to persuade the respondent not to effect delivery of the goods to the applicant, is in my view *prima facie* unlawful.

[17] In these circumstances, the applicant's application must be granted, the respondent to pay the applicant's costs, whilst the application to intervene falls to be dismissed with the applicant in the interlocutory application to pay the costs of the applicant in the main application.

[18] I accordingly make the following orders:

A The respondent is ordered to deliver the goods itemised in annexure FA3 to the founding affidavit to the applicant within 15 days of this order, save for the

items enumerated in annexure FA 9 to the same affidavit, which have already been delivered.

B The respondent is to pay the applicant's costs of this application.

C The application for leave to intervene by the intervening party is dismissed.

D The intervening party, the Democratic Republic of the Congo shall pay the costs of the application to intervene.

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Vermeulen AJ

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