THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 311/09

In the matter between:

BUFFALO FREIGHT SYSTEMS (PTY) LTD **Appellant**

and

CRESTLEIGH TRADING (PTY) LTD **First Respondent**

MARIA ELIZABETH BATT **Second Respondent**

Neutral citation: ***Buffalo Freight Systems v Crestleigh Trading*** **(311/09) [2010] ZASCA 66 (24 May 2010)**

Coram: HEHER, SHONGWE, TSHIQI JJA and MAJIEDT and SALDULKER AJJA

Heard: **12 March 2010**

Delivered: **24 May 2010**

Summary: Contract – whether an oral agreement subsequently entered into by the parties introduces a variation or waiver of the original written agreement – Practice – motions – whether genuine dispute of facts exists – whether the appellant is entitled to invoke a right of lien.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Boruchowitz J sitting as court of first instance):

1. The appeal is upheld with costs.

2. The order of the court quo is set aside and substituted with the following:

‘1. The application is granted.

2. The lien enjoyed by the applicant over the containers described in Annexure X to the Notice of Motion as “File 805.JSG.3995,” “File 805.JSG.4284,” “File 804.JSG3865,” “File 804.JSG 3947”, “ File 804.JSI 4015” is confirmed.

3. The first and second respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay to the applicant, the sum of R600 591. 05 together with interest thereon at the rate of 15.5% per annum a tempore morae from 31 May 2008 to date of payment.

4. Failing such payment the applicant is authorized to sell the goods referred to in paragraph 2 above to the extent necessary to cover any shortfall in the unpaid amount in paragraph 3 above.

5. The first and second respondents are ordered to pay the costs of the application jointly and severally.

6. The counter-application is dismissed with costs.’

JUDGMENT

SHONGWE JA (HEHER, TSHIQI JJA and MAJIEDT and SULDULKER AJJA concurring):

[1] This appeal raises the questions of whether the appellant is entitled to invoke a right of lien over goods received by it on behalf of the first respondent in terms of a facility granted to the first respondent by the appellant and whether an oral arrangement subsequently entered into by the parties disentitled the appellant from relying on certain trading terms and conditions.

[2] The appellant claimed final relief in the South Gauteng High Court, Johannesburg, in the following terms:

2.1 Confirmation of a lien allegedly enjoyed by it in respect of certain shipping containers.

2.2 Payment of the sum of R543 469. 54 together with interest thereon from 31 May 2008 in respect of clearing and forwarding services rendered on behalf of the first respondent.

2.3 An order authorising the appellant to sell all the goods which form the subject matter of the lien.

[3] The first respondent filed a counter-application in which it sought delivery of three containers retained by the appellant by virtue of the alleged lien. Boruchowitz J dismissed the application and granted the counter-application. In both instances the costs followed the result. This appeal is with leave of the court a quo.

[4] At the hearing of this appeal, counsel for the appellant moved to increase its claim by an amount of R 57 121.51. This was in respect of a charge for services rendered which the appellant had, by oversight, omitted from its claim as formulated in the application papers. It was clear from the answering affidavit that the first respondent admitted that the debt had been incurred. Counsel for the first respondent, very properly, did not oppose the amendment, which is now formally granted.

[5] The appellant carries on business as a freight forwarding and clearing agent. The first respondent is a furniture importer and retailer. The second respondent is sued in her capacity as a surety in terms of a written deed of suretyship. The appellant relies on an agreement which initially incorporated its standard trading terms and conditions and granted a thirty day credit line to the first respondent. In particular the appellant relies on clause 6 of the conditions. Clause 6 reads:

'Unless specifically agreed otherwise by the Corporation, all disbursements made by the Corporation on behalf of the customer as well as all fees charged to the customer by the Corporation for agency, documentation, carriage, warehousing, freight, financing of disbursements or any other intervention by the Corporation, are payable on presentation of the account without deduction or set off. No amount may be deferred or withheld by reason of any claim or counter-claim. The Corporation shall have a special and general lien over all goods as security for all monies owing by the customer to the Corporation.'

[6] From the series of invoices forming part of the record it is clear that the appellant's standard trading conditions were applicable. They were invariably referred to at the back of each instruction sheet, both before and after the revocation of the credit line and even after the fallout between the parties in May 2008 to which I shall allude next.

[7] During the latter half of 2007 the first respondent experienced financial difficulties with the result that it breached its contractual obligations by failing to

pay the appellant within the agreed time frame and in some instances by not paying at all. The appellant was compelled to revoke the credit facilities and deal with the first respondent on a strictly cash basis. It is common cause that in January 2008 an amount of R756 604.40 was owing by the first respondent. In January 2008 various post-dated cheques were issued in an attempt to settle the debt. Two of them were met, but a cheque for R306 604.40 dated 31 March 2008 was dishonoured by an instruction to stop payment in April 2008 It was contended on behalf of the appellant that this revocation of the credit line did not evince an intention by the appellant to cancel the agreement. The invoices continued to incorporate reference to the standard trading conditions after the termination of the credit line. It is clear that they regulated the relationship between the parties as before.

[8] Subsequent to the dishonouring of the cheque the appellant received five containers on behalf of the first respondent. These arrived on 18 April 2008, 21 April 2008, 24 April 2008, 11 May 2008 and 27 May 2008. The appellant incurred further handling and storage charges. The first respondent's indebtedness to the appellant increased. A meeting was held on 5 May 2008 to discuss payment of the first respondent's indebtedness. The appellant alleges that the first respondent undertook to effect payment of the outstanding debt in full on a weekly basis commencing the following week. In addition, it is common cause that the second respondent signed a deed of suretyship for due payment of the first respondent's indebtedness. This is where a major dispute of fact arises. The first respondent contends that a suspense account was to be opened in respect of the arrears and the amount was to be paid off as and when the first respondent had money to pay. In support of the first respondent's contention three affidavits of witnesses (namely Mrs Batt, its manager, Mr Brown a director and Batt's son, and Ferreira, an employee) who were present at the meeting were produced. In my view, they differ in what the first respondent is alleged to have said in respect of a number of matters including when payment was to be expected. I shall deal with this aspect in detail later in the judgment.

[9] The first respondent failed, in the appellant's view of the agreement, to effect payment in the week following 5 May 2008. The appellant addressed a letter on 13 May 2008 to the first respondent demanding payment of the sum of R 674 131.82. In this letter the appellant referred to the standard conditions which entitled it to declare a lien and sell the goods to recover the amount of the indebtedness. This letter was followed on 27 and 28 May 2008 by a series of e-mails between the appellant and the first respondent. The gist of the e-mails is that the first respondent admitted that the sum of R307 000.00 was overdue and that it was prepared to pay interest on that amount. The appellant adopted the stance that it had afforded respondents extended time to sort out their finances but, since no further payment had been effected, it intended exercising its lien. The first respondent raised the issue of the credit and cash accounts. It contended, without referring to the alleged compromise agreement, that all monies paid in terms of the cash account had been paid and therefore the appellant could not exercise the lien which it enjoyed in respect of the goods. The appellant raised the issue of the stopped cheques and also to the threat to sell the goods and using the proceeds to settle the indebtedness.

[10] Only on 3 June 2008 did attorneys representing the first respondent raise, for the first time, the existence of the settlement agreement. But the letter does not include the alleged accord relating to the release of the containers paid for in cash which the respondent's witnesses state have been agreed on 5 May 2008. It refers neither to the alleged limitation on the terms of the suretyship (ie to existing indebtedness only) nor to the alleged undertaking by Mrs Batt to destroy it on satisfaction of that indebtedness. As these were all matters that Mrs Batt and later Brown said they regarded as material to the agreement, the omissions are strange. The appellant commenced proceedings on 4 June 2008.In the interim the first respondent had addressed a letter dated 3 June 2008 to the appellant demanding the release of the three containers already paid for. The counter-application followed when the demand was ignored.

[11] The appellant contends that the sum of R543 469.54 is due and payable by the first respondent and that at the time of the application it had received five containers on behalf of the first respondent, against which it was exercising a lien. It contended further that it had cleared three containers which were in storage and that the remaining two containers had been placed in bond, but had to be cleared by customs with resultant further disbursements. Costs were said to be increasing on a daily basis and amounted to R130 726.55 at the time of the application.

[12] The respondent on the other hand contended that in terms of the January 2008 agreement all further freight services by the appellant would be on a strictly cash basis and that on 5 May 2008 the parties entered into an oral agreement in terms whereof the first respondent could pay the outstanding R306 604.40 as and when money became available, on condition that the second respondent signed a personal deed of suretyship in favour of the appellant. It further contended that the sum of R306 604.40 was to be transferred to a suspense account and in addition it was contended, the appellant undertook to release the three containers in its possession which were paid for in cash.

[13] As I have already said, it is plain that the parties conducted their business on the basis of the standard trading conditions in respect of transactions material to the present matter. Counsel for the first respondent argued but faintly to the contrary. The revocation of the credit line, in my view, simply closed down the credit facility but did not affect the trading conditions.

[14] The purpose of the meeting on 5 May 2008 was to seek payment of the outstanding amount, or at least assurance that it would be paid on conditions acceptable to the appellant, and the time frame within which it could be paid. The dispute is on when and how the debt would be paid. The appellant contends that the agreement was that payment would be made on a weekly basis commencing the following week, whereas the first respondent's version was that

payment would be effected as and when money was available. The latter version is inherently improbable to a high degree. A few examples will suffice; it is unlikely that the first respondent would have moved from a position of relative certainty to one of extreme uncertainty. It was in possession of a dishonoured cheque and it had clear contractual rights. There was also no dispute as to the indebtedness. To strengthen the appellant's position it requested additional security by requiring a signed suretyship. Of what value would the suretyship have been if the first respondent would pay as and when money was available? And of what value would an undertaking not to rely on the suretyship have been to it as the second respondent averred? The subsequent conduct of the respondents is at odds with any bona fide belief in the minds of its representatives that agreement had been reached on the terms later alleged by them.

[15] As I mentioned earlier to illustrate the contradictions, the respondent's witnesses, Batt, Brown and Ferreira put forward versions different as between themselves and at odds with that of Mrs Wolff (a representative of the appellant). In essence their story was that Wolff wanted to be paid weekly, but Batt told her that she was not prepared to give undertakings which she might not be able to keep. A compromise was reached. In order to reflect the flavour of their case accurately I prefer to set out the contents of their respective statements (which they included in the answering papers).

[16] Mrs Batt stated as follows*:*

'I had a meeting with Margrit Wolff from Buffalo Freight on the 5th May, 2008 regarding the outstanding amount of R306 604.40. The meeting was to make some arrangements to pay this amount off. She did say that there will be interest charged on this amount to which I agreed. I took Jacques Brown and Rita Ferreira with me so that whatever was said between us I had witnesses. Margrit called Sally from their accounts department to sit in for this meeting. Margrit asked me if I can promise her that there will be a weekly payment for the outstanding amount. My answer to her was "Margrit I will never, ever make a promise that I cannot keep. I will make

payments to you as I get money." Then Margrit asked me to sign surety for this amount. She said she will not use it, and will destroy it when the money was paid to her. I signed it. Margrit then told Sally that she must bring this amount into the current month and on this amount I will have to pay interest. After we agreed to the above arrangements, I then asked Margrit about the container that was with them. I asked Margrit if she will release the container. She agreed to this. The invoice for this container was R108 705.30. I paid this amount on May 08, 2008. When I phoned they said Margrit will still not release the container. Then I got another invoice for R61 192.02 and a second invoice for R64 651.65 I added them up and got to a total of R125 843.67. I then wrote a cheque for the amount of R139 874.06 on the 16th May 2008. That was R14 030.39 more than the invoices that was given to me by Buffalo Freight. Then the next thing I know all these invoices were given to me with all these costs. I really thought we could work this out, but I am not sure. In the containers are orders where clients have paid a deposit and were going to pay in full when we delivered the goods to them. Now that we have not received the goods and can't supply the clients we have to pay them back. Given the above how does Margrit expect us to make more regular payments.'

[17] Brown described events as follows:

'Myself and Mrs Batt explained our situation to Mrs Wolff and we asked her for help. Mrs Wolff then said that she would help us and the following agreement was made. Mrs Wolff said that the money will be placed in a holding account and that we could pay the amount off. We then told her that we could not say how much we are capable of paying every month but that we will pay it off as soon as we possibly can. There was no specific amount or time limit given to us. Further more we made arrangements with the containers held by Buffalo Freights and we agreed to pay them in full then they would be released to Crestleigh Trading. Mrs Wolff gave a letter to Mrs Batt to sign for surety and said that she would not use the letter and that it would be destroyed once the account was settled. To my knowledge payment was made in full on container at Buffalo Freight and none of the containers released yet. Payment made exceeded the amount due on containers. And we took it that the balance was paid on holding account. So in short we are trying to comply with the agreement.'

[18] Ferreira stated that:

'Mrs Batt explained to Margrit that she has a problem to pay the outstanding amount and asked her if she could pay it off as the money comes in, she will try and pay it off as quick as what she can, Margrit asked her if she can promise her a payment every week, where Mrs Batt told her she

will never make a promise where she is not 100% that she can keep to that. At one stage Margrit asked Mrs Batt to sign a surety letter, Margrit still said she will not use it and will destroy it as soon as the amount was settled.

At that stage I told Margrit that I was caught with the same type of letter and the same promises. She then said she will not use it we got her word, and that we can be there when she destroy if Mrs Batt did sign the letter.

Margrit told Sally to take the amount of R306 604.40 out of the period it was in and bring it in as a current account.

Only after this was agreed on Mrs Batt asked Margrit if she will release the container that was with them, Margrit said if she get the payment for the container she will do so. Mrs Batt told me she has paid Margrit for that container but she still don't want to release the container. Mrs Batt also told me that she got two more invoices from two more containers, she has paid the two invoices and with a little extra so that the amount can come off, even if it is little by little.'

[19] The court a quo approached the matter on the basis that the facts pertaining to the agreement of 5 May 2008 were in dispute and that there had been no request by the appellant that the matter be referred for evidence or trial. It then applied the principle in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 E-F (where it was held that the court must deal with the matter on the basis of the respondent's version coupled with the admitted facts in applicant's papers) However, in *Truth Verification Testing Centre CC v AE Truth Detection CC* 1998 (2) SA 689 (W) at 698 H-J , Eloff AJ said:

'I am also mindful of the fact the so-called robust common-sense, approach' which adopted in cases such as Soffiantini v Mould 1956 (4) SA 150 (E) in relation to the resolution of disputed issues on paper usually relates to situations where a respondent contents himself with bald and hollow denials of factual matter confronting him. There is, however, no reason in logic why it should not be applied in assessing a detailed version which is wholly fanciful and untenable.'

I respectfully agree. The court should be prepared to undertake an objective analysis of such disputes when required to do so. In *J W Wightman (Pty) Ltd v*

Headfour (Pty) Ltd 2008 (3) SA 371(SCA), it was suggested how that might be done in appropriate circumstances. The present case calls for a similar analysis.

[20] A court must always be cautious about deciding probabilities in the face of conflicts of facts in affidavits. Affidavits are settled by legal advisers with varying degrees of experience, skill and diligence and a litigant should not pay the price for an adviser's shortcomings. Judgment on the credibility of the deponent, absent direct and obvious contradictions, should be left open. Nevertheless the courts have recognised reasons to take a stronger line to avoid injustice. In *Da Matta v Otto* 1972 (3) SA 858 (A) at 689 D-E, the following was said:

'In regard to the appellant 's sworn statements alleging the oral agreement, it does not follow that because these allegations were not contradicted – the witness who could have disputed them had died – they should be taken as proof of the facts involved. Wigmore on Evidence, 3rd ed., vol. VII, p.260, states that the mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner, because to require such belief would be to give a quantative and impersonal measure to testimony. The learned author in this connection at p. 262 cites the following passage from a decision quoted:

"it is not infrequently supposed that a sworn statement is necessary proof, and that, if uncontradicted, it established the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts-testimony which no sensible man can believe-goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit, cannot be disregarded."

Also in *Siffman v Kriel*, 1909 T.S. 538, INNES, C.J., at p 543 says:

"It does not follow, because evidence is uncontradicted, that therefore it is true … The story told by the person on whom the onus rests may be so improbable as not to discharge it."

[21] I am satisfied that the court a quo should have adopted this approach when considering the first respondent's defence and version of what happened at the meeting of 5 May 2008. If it had done so, it must have concluded that no genuine factual dispute existed and that the version propounded by the

respondents was fanciful and wholly untenable. In the premises I find that no compromise agreement had been reached on 5 May 2008 as contended for by the respondents. The appellant's contention to the contrary ought to have been upheld by the court below. It should have come to the conclusion that the standard trading terms and conditions alluded to in the preceding paragraphs had in fact remained extant.

[22] I am constrained to disagree with the finding of the court a quo that the quantification of the applicant's claim could not be ascertained from its affidavits. An examination of the statements and tax invoices shows clearly how the sum of R543 469.54 was arrived at. They cover all debits and credits. As referred to earlier the amount of R57 121.51 has been added to the claim by reason of the amendment. The first respondent is therefore entitled to judgment for R600 591.05.

[23] There was no dispute that if the appellant was entitled to enforce its claim against the first respondent at the time that it purported to exercise its lien over the three containers, it was also lawfully entitled to the security which the lien provided. It follows that the counter-application should have been dismissed.

[24] In the result:

1. The appeal is upheld with costs.

2. The order of the court quo is set aside and substituted with the following:

'1. The application is granted.

2. The lien enjoyed by the applicant over the containers described in Annexure X to the Notice of Motion as "File 805.JSG.3995," "File

805.JSG.4284," "File 804.JSG3865," "File 804.JSG 3947", " File 804.JSI 4015" is confirmed.

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4. Failing such payment the applicant is authorized to sell the goods referred to in paragraph 2 above to the extent necessary to cover any shortfall in the unpaid amount in paragraph 3 above.

5. The first and second respondents are ordered to pay the costs of the application.

6. The counter-application is dismissed with costs.'

_____
J SHONGWE
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	M Nowitz
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