THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 515/08
No precedential significance

CLADALL ROOFING (PTY) LTD

Appellant

and

Respondent

SS PROFILING (PTY) LTD

Neutral citation: *Cladall Roofing (Pty) Ltd v SS Profiling (Pty) Ltd* (515/08) [2009] ZASCA 92 (14 September 2009)

CORAM: NAVSA, MTHIYANE, HEHER, VAN HEERDEN JJA and WALLIS AJA

HEARD: 21 August 2009
DELIVERED: 14 September 2009

SUMMARY: *Contract – standard conditions of agreement – whether seller entitled to rely on certain clauses as defence to claim for damages by purchaser – goods delivered bearing no resemblance to goods ordered – no performance at all in terms of contract – held that clauses do not apply*

ORDER

On appeal from: The Port Elizabeth High Court (Erasmus J) sitting as a court of first instance.

1. The appeal is upheld with costs.
2. The order of the court below is set aside and substituted as follows:

'1. The court rules that the defendant is not entitled to rely on the special conditions as valid defences against the plaintiff's claim for the payment of damages.
2. The court rules that the plaintiff is entitled to withhold payment for the goods delivered on the pleadings as they stand.
3. The remaining issues in dispute on the pleadings are to be determined at a further hearing.
4. Costs are to be costs in the cause.'

JUDGMENT

NAVSA and VAN HEERDEN JJA (MTHIYANE, HEHER JJA and WALLIS AJA concurring):

Introduction

[1] This is an appeal, with the leave of this court, against a judgment of the Port Elizabeth High Court (Erasmus J).

[2] The appellant company, Cladall Roofing (Pty) Ltd (Cladall), a roofing contractor in the Eastern Cape, ordered 13 000 square metres of galvanised IBR roof sheeting from the respondent company, SS Profiling (Pty) Ltd (SS). The order gave a precise description of the required thickness, tensile strength and production quality of the goods.[1] SS has its head office in Brits. It buys raw material from a steel producer and then cuts and profiles the steel to

[1]The exact description of the goods in the order form is set out in paragraph 12 below.

customer requirements. For present purposes, and on the basis set out in paragraphs 19 and 20 below, it is accepted that SS delivered IBR sheeting to Cladall that was not in accordance with the specifications as described in the order. On that basis, Cladall, after the sheeting had been installed at a particular site, instituted action against SS, claiming damages comprising the reasonable cost of reinstating the roof according to the specifications. Cladall also refused to pay the outstanding balance of the purchase price.

[3] In defending the action and instituting a counterclaim for the balance of the purchase price, SS relied on its 'Standard Conditions of Agreement', which formed part of the credit application completed by Cladall and were also attached to each of its delivery notes. The clauses relied upon by SS were, inter alia, the following:

'6.4 The Customer hereby confirms that the goods or services on any Tax invoice issued duly represent the goods or services ordered by the Customer at the prices agreed to by the Customer and, where delivery/performance has already taken place, that the goods or services were inspected and that the Customer is satisfied that these conform in all respects to the quality and quantity ordered and are free from any defects.

. . .

7.3 No claim under this Agreement shall arise unless the Customer has, within 3 days of the alleged breach or defect occurring, given SS Profiling 30 days written notice by prepaid registered post to rectify any defect or breach of Agreement.

. . .

11.1 The Customer has no right to withhold payment for any reason whatsoever and agrees that no extension of payment of any nature shall be extended to the Customer and any such extension will not be applicable or enforceable unless agreed to by SS Profiling, reduced to writing and signed by the Customer and a duly authorised representative of SS Profiling.

. . .

18 The Customer agrees that no indulgence whatsoever by SS Profiling will affect the terms of this Agreement or any of the rights of SS Profiling and such indulgence shall not constitute a waiver by SS Profiling in respect of any of its rights herein. Under no circumstances will SS Profiling be estopped from exercising any of its rights in terms of this Agreement.'

[4] The court below held that Cladall was unable to 'get around' clause 6.4. With reference to clause 7.3, the court stated that, since it was common cause that Cladall did not give SS 30 days written notice by prepaid registered post (or otherwise) to rectify the defect or breach, Cladall was without any remedy. In dealing with the question of estoppel, raised by Cladall in its replication, Erasmus J held, with reference to clause 18 and after considering the evidence adduced, that Cladall's reliance on estoppel was unfounded.

[5] Thus, the court a quo concluded that SS was entitled to rely on the special conditions, and in particular, on clauses 6.4 and 7.3, as valid defences against Cladall's claim for damages. It went on to hold (relying on clause 11.1 of the special conditions) that Cladall was not entitled to withhold payment for the goods delivered. In the result Erasmus J dismissed Cladall's claim with costs and entered judgment in favour of SS on its counterclaim, ordering Cladall to pay the balance of the purchase price, namely, R254 396.96 with interest calculated from 17 February 2006.

[6] It is against these conclusions that the present appeal is directed. The main question to be determined is whether SS was, on the agreed facts of this case, entitled to rely on the clauses referred to by the court below. The short answer is no. The background and the reasoning are set out hereafter.

Background

[7] In the early part of 2006, Cladall successfully tendered to install roofing at a cooling facility in Addo in the Eastern Cape. The cooling facility is the property of the Addo Citrus Corporation and intended for storing oranges in preparation for export.

[8] The tender requirement was for the installation of IBR sheeting with a minimum thickness of 0.5 mm. In addition, the IBR sheeting was required to be of industrial strength, described in the industry as 'full hard'. This was necessary as the roof trusses were far apart and the roof was required to be 'trafficable'. In other words, the roof had to be able to withstand human traffic without bending or sagging.

[9] Consequently, on 31 January 2006, Mr Wessel Lategan, the managing director of Cladall, sent a telefacsimile (fax) to Mr Craig Bursey, an authorised representative of SS stationed in the Eastern Cape, requesting a quote for 13 000 m^2 of IBR sheeting. The request for the quote set out the following specifications:

'0.50 mm IBR FH Galvanised Z275 spelter as per ISCOR.'

'Z275' indicates the minimum galvanised content of the IBR sheeting. 'FH' is an abbreviation for 'Full Hard'. 'ISCOR' is the acronym for Iron and Steel Corporation, which used to be a renowned steel-producing parastatal.

[10] The fax was sent back by Mr Bursey with a price of R22 per square metre inserted in manuscript. Subsequently, Mr Bursey attended at Cladall's offices and, during a meeting with Mr Lategan, rewrote the specifications set out at the end of the preceding paragraph, namely, 0.50 mm and Z275, in manuscript on the same fax. However, instead of 'ISCOR', Mr Bursey wrote the words 'Mittal Material' on the fax. At a time unrelated to the present case, ISCOR had been taken over by Mittal Steel, a commercial company which is one of the major steel producers in the world. The purpose of indicating ISCOR or Mittal material was to denote a particular quality of material, related to the reputation of the producer. Mr Bursey signed the fax after having made these manuscript additions to it.

[11] It is uncontested that Mr Bursey's signed manuscript additions to Cladall's fax, as set out in the preceding paragraph, were made by him for Cladall's benefit, to confirm that he was aware of Cladall's specific requirements in relation to the tender and to ensure that Cladall would receive the correct material.

[12] Cladall then addressed a written order dated 2 February 2006 to SS. Under the heading 'Description', it was once again clearly specified that the order was for 13 000 m^2 of '0.5mm FH Z275 galvanised IBR roofsheeting ISCOR material'. Delivery was to take place between 14 and 16 February 2006. A further specific instruction on the order was that delivery of the

sheeting had to be made with trucks that had been fitted with a crane. This was necessary because the total sheeting ordered approximated 80 tons and, in the absence of a crane for offloading, manual labour would be required with attendant costs.

[13] The first consignment of sheeting arrived on 17 February 2006 at the installation site in Addo, in a truck with a malfunctioning crane. This problem caused Mr Bursey to contact Mr Lategan who then went out to the site. When he arrived on site, he saw the roof sheeting in the rear of the truck packed in lots. The dimensions of the sheeting appeared to him not to be uniform. This immediately aroused his suspicions and he sought confirmation from Mr Bursey that the sheeting was indeed what he had ordered, viz that it was in accordance with Cladall's express specifications. It was not possible to ascertain with the naked eye whether the material met the specifications, nor to conduct a physical examination of every sheet forming part of the consignment. Moreover, to determine the galvanisation content and tensile strength of the sheeting, laboratory tests would be required. On Mr Lategan's request, Mr Bursey telephoned the SS head office in Brits, to ascertain from a senior manager there whether they had despatched the correct, specified sheeting. During a lengthy conversation with the said manager, Mr Bursey was reassured that the correct material had indeed been despatched and he was told to convince Mr Lategan of this. Taking the manager at her word, he, in turn, reassured Mr Lategan that the material was 'the correct material ordered', that it was 'the right thickness and [that] it was full hard material, as he had asked for'.

[14] On the same day, after he returned to his office, Mr Lategan spoke telephonically to the same manager that Mr Bursey had spoken to earlier and was once again reassured that the sheeting that had been delivered was in accordance with specifications.

[15] Later that same day, Mr Lategan addressed an e-mail to the SS manager, sending her photographs of the sheeting that had been delivered and threatening to return it. However, after speaking to Mr Bursey once more,

and yet again obtaining an assurance that the sheeting that had been delivered was in accordance with Cladall's specifications, he relented and accepted the consignment.

[16] After SS had delivered all the sheeting, Cladall proceeded to install the roof, the extent of which was, as indicated above, 13 000 square metres. It was estimated that it would take approximately six weeks to complete the task. Within two weeks of the commencement of the installation, workmen reported that the roof was beginning to show indentations after it had been walked on. Mr Lategan and his roofing team deduced that this was because the tensile strength of the sheeting did not meet the agreed specifications.

[17] Mr Bursey was called out to examine the roof. After he had done so, he realised that there was a major problem and that the sheeting that had been delivered was not as had been specified by Mr Lategan. In particular, it was not of industrial strength. At that stage Cladall had paid the greater part of the purchase price. After discussing the matter with Cladall's attorney, Mr Lategan decided to withhold the balance of the purchase price. This was followed by an exchange of correspondence and telephonic communications with Mr Duvenage, the managing director of SS. Disputes arose concerning the thickness of the sheeting and whether the raw material had in fact been sourced from Mittal Steel.

[18] Mittal Steel representatives were called out to inspect samples cut from the sheeting. Mr Lategan also arranged for other tests to be conducted on samples of the sheeting. The latter tests revealed considerable variations in the sheeting, heightening Mr Lategan's suspicions. Mr Duvenage insisted on payment of the balance of the price and the matter remained unresolved.

[19] Cladall decided to institute action against SS as described above. At the commencement of the trial the parties agreed in writing, in terms of Uniform rule 33(4), to separate certain issues for determination, namely whether:

(a) SS was entitled to rely on the special conditions and in particular the sub-clauses relied upon in its plea as a valid defence against Cladall's claim for the payment of damages;
(b) Cladall, in the event of the court finding that the defendant was entitled to rely on the sub-clauses, had established estoppel as pleaded in its replication;
(c) Cladall was entitled to withhold payment for the goods delivered.

[20] For purposes of deciding the separated issues, it was assumed by the parties that SS supplied material that did not comply with the required specifications as pleaded by Cladall in its particulars of claim, more particularly, that the bulk of the material supplied had not been galvanised according to the Z275 specification; had not been manufactured and produced according to Mittal standards; was not 'full hard' and was also not the required thickness.

[21] It was agreed between the parties that, should the court find in favour of SS on issues (a) and/or (b), the plaintiff's claim stood to be dismissed and further, that should the court find that SS was excused from delivering materials not according to specifications by virtue of the special conditions, SS would be entitled to judgment in terms of its counterclaim. However, in the event of the court finding in favour of Cladall that SS was not entitled to rely on the relevant subclauses in the special conditions as a defence or was estopped from relying on such clauses, the remaining issues in dispute on the pleadings would be finally determined by the court below at a further hearing.

[22] The court below made an order in terms of the agreement between the parties and proceeded to hear evidence on the separated issues. The result was as recorded earlier in this judgment.

Conclusions

[23] In the course of his judgment, Erasmus J reasoned as follows:

'Counsel for the plaintiff contends that what was delivered by the defendant was not the merx contracted for by the parties, but something else; consequently the delivery was not in terms of the contract and the defendant therefore cannot rely on the special conditions to escape

liability for damages flowing from that delivery. The specifications were clearly of critical importance to the plaintiff. The fact that the bulk of the sheeting supplied by the defendant did not conform to those specifications did not however alter the essential nature of the material. What the plaintiff ordered and what the defendant delivered was IBR galvanised iron sheeting. It was accepted by the plaintiff as being such. It was installed and used for the purpose for what it was purchased, namely the erection of a roof – albeit one below specification. The agreement in any event caters for and thereby contemplates the possibility that the material delivered by the defendant might not comply with contractual specifications (see subclauses 6.4 and 7.3 . . .). Non-compliance with those specifications in a particular delivery is dealt with contractually and the delivery therefore falls within the ambit of the contract. The defendant's non-compliance with the contractual specifications may give rise to issues of damages, but does not place the material outside the contract. Counsel's contention therefore does not hold.'

[24] We do not agree with this reasoning. In our view, it is clear from the evidence that Cladall required, and ordered, a very specific product and SS agreed to provide *that* product – IBR roofsheeting with a thickness of 0.5 mm, full hard industrial strength, galvanised according to a specification of Z275 and manufactured according to Mittal standards. For the purposes of deciding the separated issues agreed upon by the parties, it is common cause that the bulk of the product delivered by SS, while it was indeed IBR roofsheeting, was *not* of the required thickness; was *not* full hard industrial strength; had *not* been galvanised according to a Z275 specification, and had *not* been manufactured and produced according to Mittal standards. Not one of the specific attributes of the roofsheeting agreed upon between the parties as forming the subject of the agreement had thus been met; in fact, the roofsheeting delivered by SS bore no relation to the goods ordered, but was an entirely different (and inferior) product. None of the minimum threshold requirements set by Cladall and agreed to by SS had been met by the latter. The contract could not be performed by delivering IBR sheeting, irrespective of its specification. It could only be performed by delivering IBR sheeting of the required specification.

[25] Properly interpreted, clauses 6.4 and 7.3 of the standard conditions of agreement (set out in paragraph 3 above) can only govern the situation where *defective* goods are delivered by SS to its customer in terms of the contract.

They do not apply to a situation where the goods delivered by SS are an entirely different product to the goods ordered by the customer and bear no resemblance to what had been agreed between the parties. This was conceded by counsel for SS during argument before us.

[26] For the purposes of the separated issues, SS accepted that it did not deliver the goods that it was obliged to deliver in terms of the contract. It therefore failed to establish that it had performed at all in terms of the contract and its reliance on, inter alia, clauses 6.4 and 7.3 of the standard conditions was misplaced. Moreover, although SS relied in its plea on clause 5.4 of the standard conditions, which gives it the right to deliver alternative goods to those ordered in certain circumstances, SS did not lead any evidence in this regard and, in our view, this clause does not take the matter any further and thus cannot be invoked by it.

[27] Bearing in mind that this case was decided on the agreed facts (set out in paragraph 20 above), neither clauses 6.4 and 7.3, nor any of the other clauses relied upon by SS in its plea, afford it a valid defence against Cladall's claim for the payment of damages. This being so, the question of estoppel does not arise. As regards the further question whether Cladall was entitled to withhold payment for the goods delivered, clause 11.1 (as set out in paragraph 3 above) clearly cannot apply to a situation in which there has been no performance at all (as opposed to defective performance) in terms of the agreement. It follows that this question must be answered in Cladall's favour.

[28] The following order is made:

1. The appeal is upheld with costs.
2. The order of the court below is set aside and substituted as follows:

'1. The court rules that the defendant is not entitled to rely on the special conditions as valid defences against the plaintiff's claim for the payment of damages.

2. The court rules that the plaintiff is entitled to withhold payment for the goods delivered on the pleadings as they stand.

3. The remaining issues in dispute on the pleadings are to be determined at a further hearing.

4. Costs are to be costs in the cause.’

_____
M S NAVSA
JUDGE OF APPEAL

_____
B J VAN HEERDEN
JUDGE OF APPEAL

Appearances:

For the Appellant:	A Beyleveld
Instructed by:	Friedman Scheckter Port Elizabeth Matsepes Inc Bloemfontein
For the Respondent:	G Jacobs
Instructed by:	Goldberg & Victor Port Elizabeth L J Van Coppenhagen Inc Bloemfontein