HIGH COURT OF SOUTH AFRICA
LIMPOPO LOCAL DIVISION, THOHOYANDOU

CASE NO: MCA 06/2023

(1) REPORTABLE: [redacted]/YES

(2) OF INTEREST TO OTHER JUDGES: [redacted]/YES

(3) REVISED. ✓

[redacted]

In the matter between

ZOUTPANSBERG MOTOR WHOLESALERS CC

t/a HYUNDAI LOUIS TRICHARDT **APPELLANT**

And

INTENGO IMOTO (PTY) LTD

t/a NORTHCLIFF NISSAN **RESPONDENT**

JUDGMENT

<u>IM KHOSA AJ</u> (TC TSHIDADA J concurring)

Introduction

[1] This is an appeal against the whole judgment and order including an order of costs made by the Regional Magistrate Court of Louis Trichardt (the Regional Court) on the 31 October 2022. The Regional

Court upheld the Respondent's claim for payment of R 290 000.00, being the purchase price of two Nissan bakkies. The Appeal is opposed.

Factual background

[2] Both parties are in the business of selling motor vehicles. On the 30 October 2018, the Appellant purchased 2 Nissan bakkies from the Respondent for the sum of R145 000.00 each. The Respondent emailed the invoices for both vehicles to the Appellant. The invoices provided details of the nominated bank account for payment of the purchase price for the bakkies.

[3] On the same day, the Appellant effected payment for one bakkie, emailed proof of payment to the Respondent and took delivery of that bakkie. On the 31 October 2018, the Appellant made another payment and took delivery of the second bakkie.

[4] Approximately a week later, the Respondent informs the Appellant that payment of the purchase price for the bakkies has not reflected in its bank account.

[5] It became clear to the parties that the emails were intercepted and the bank account details on the invoices were altered by a cyber fraudster. The parties were victims of Business Email Compromise "BEC", a cyber-crime that has become popular in this technological age of electronic communication and payment.

[6] None of the parties was prepared to take the loss. The Respondent require payment of the purchase price of the bakkies and

the Appellant standpoint is that it has paid for the bakkies. That led to the institution of the civil proceedings in the Regional Court.

The pleadings

[7] The Respondent's case was founded on a breach of contract. It is the Respondent's case that the Appellant breached its contractual obligation by failing to make payment of the purchase price[1]. In so far as payment of the purchase price is concerned, the Respondent's case is that upon delivery of the bakkies or upon receipt of the invoices, the Appellant would affect payment of the purchase price.

[8] The Appellant pleaded that it made payment of the purchase price by EFT to the account number nominated as per the invoices[2]. The Respondent elected email and EFT as its chosen mode of communication and payment respectively and thus assumed the risk inherent in those stipulated methods[3]. The Appellant's further pleaded that it was a term of the agreement that upon payment being received, the Appellant would take delivery of the bakkies.

[9] The Regional Court heard evidence of 3 witnesses. In summary, the testimony revealed that the invoices received by the Appellant were not the invoices sent by the Respondent's representative. Upon comparison, the last 4 digits of the account numbers on the invoices sent by the Respondent's representative were different from the last 4 digits on the proofs of payment and invoices received by the Appellant.

The judgment

[10] In paragraph 20 of the judgment, the Regional Court found that *"the defendant was negligent in paying the purchase price due to the Plaintiff into a bank account without verifying that such account was in fact that of the Plaintiff. In the circumstances, the defendant should bear the consequences of its negligence and pay the amount claimed by the Plaintiff."*

[11] The Regional Court further found that the debtor cannot raise a defence that it discharged its obligations by making payment per information received without verifying the information[4].

[12] On the issue of onus, the Regional Court found that the Plaintiff had to prove that it provided the Defendant with the correct bank details thereafter the onus shifts to the Defendant to prove that the money was transferred to the account provided by the Plaintiff[5].

The grounds of appeal

[13] The Appellant contends that Regional Court erred in finding that the Appellant had an onus to verify the bank account before making payment and were negligent in not doing so, in not finding that the invoices in the email of the 30 October 2018 contained the nominated bank account and in not finding that the Respondent had a duty to verify the information on the proofs of payment and/or confirm that money reflects in their bank account before releasing the bakkies to the Appellant.

The law

[14] In terms of Rule 6(3) of the Magistrate's Court rules, the Respondent has to plead the cause of action, and in the manner as is provided for in Rule 6 (4) which reads as follows:

"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

[15] In the case of *McKenzie v Farmer's Co-operative Meat Industries Ltd*[6], the term "material fact" was defined in the following terms: *"... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."*

[16] The court in *Robinson v Randfontein Estates GM Co Ltd*[7] stated that;

'The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been."

Evaluation

[17] The Respondent's particulars of claim are clear and concise. Its claim is that of breach of the sale agreement by non-payment of the purchase price. The Respondent's case was met by a defence which is also clear and concise. The Appellant's defence is that it in fact made payment of the purchase price in a manner of payment preferred by the Respondent.

[18] At trial, the Respondent led evidence that the Appellant's official was negligent in not verifying the bank account details prior to making payment. The Regional Court found in favour of the Respondent on that basis. The pleadings simply called upon the Regional Court to determine whether there was a breach of contract by non-payment of the purchase price. If so, then grant judgment in favour of the Respondent.

[19] In *Kali v Incorporated General Insurances Limited*[8] it was said that: *"... a pleader cannot be allowed to direct the attention of the party to the issue and then at the trial attempt to canvass another"*. This is precisely what the Respondent has done.

[20] In *Minister of Safety & Security v Slabbers*[9], it was said that:

"The purpose of pleadings it to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for the plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issue falling outside the pleadings when deciding a case."

[21] The Respondent pleaded a cause of action of breach of contract and sought relief in the form of specific performance. At trial, the Respondent adduced evidence of an unpleaded claim of negligent failure to verify the bank account details prior to effecting payment.

[22] The Regional Court erred in finding that the Appellant was negligent, in that the finding of negligence was out of sync with the cause of action pleaded by the Respondent. This is a complete departure from the pleaded case, the granting of the Respondent's claim was incorrect and thus begs for interference by this court.

[23] The Respondent's claim was founded in contract, not in delict. As the *dominus litis*, the Respondent bore the onus to prove the terms of the contract, that it complied with the terms and that the Appellant breached those terms.

[24] The Appellant pleaded additional terms of the contract. By doing so, it placed the onus on the Respondent to prove that those additional terms are not terms of the contract. In my view, the Regional Court erred in finding that the onus shifted to the Appellant to prove that it paid into the correct bank account. There is no basis in law for that shift of onus to the Appellant.

[25] The Respondent failed to prove the terms of the contract and to disprove the additional terms of the contract pleaded by the Appellant. Without a clear identification of the terms of the contract, it would naturally be difficult to make a determination whether there is a breach.

[26] In order to succeed, the Respondent had to prove a breach of the terms of the contract relating to payment of the purchase price. Instead, the Respondent adduced evidence of negligent failure to verify bank account details. Effectively, the Respondent failed to prove the breach of a term of the contract claim it pleaded. On this basis alone, the Respondent's claim ought to have failed.

[27] In determining the liability of the Appellant to pay the Respondent the sum of R 290 000.00 based on negligence, the court a quo erred in that it lost sight of the pleaded case. Therefore, the judgment of the Regional Court falls to be set aside.

Costs

[28] It is a trite principle of our law that costs are within the discretion of the court and that discretion must be exercised judiciously. The general principle that costs follow suit finds application in this matter.

[29] I therefore make the following order:-

29.1 The appeal is upheld with costs.

29.2 The order of the Regional Court of Louis Trichardt is set aside and replaced with the following order:

29.2.1 The Plaintiff's claim is dismissed with costs.

PP [redacted]

IM KHOSA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree, and it is so ordered.

[redacted]

TC TSHIDADA J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES

FOR THE APPELLANT	:	**Adv J H Groenewald**
INSTRUCTED BY	:	**Van Heerden Rudolph Inc**
FOR THE RESPONDENT	:	**Adv J Carstens**
INSTRUCTED BY	:	**G D Ficq Attorneys**
DATE OF HEARING	:	**10 November 2023**
JUDGMENT	:	**30 January 2024**

JUDGEMENT DATE : Judgment handed down in court and electronically by circulation to the parties' legal representatives by email and publication through SAFLII.

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[1] Par 7 of the particulars of claim
[2] Par 9 Plea
[3] Par 10 Plea
[4] Par 22 Judgement
[5] Par 25 Judgement
[6] *McKenzie v Farmer's Co-operative Meat Industries Ltd* 1922 AD 16 at 22
[7] 1925 AD 173 at 198
[8] 1976 (2) SA 179(D) at 182A
[9] (668/2009) [2009] ZASCA 163 (30 November 2009)