I.635/96

SDS REINFORCED CONCRETE ENGINEERING versus
TRUST/CO GROUP HOLDINGS (PTY) LTD

1996/09/30

Strydom, J.P.

PRACTICE

Summary Judgment - Interpretation of contract between parties - Court not willing to embark on interpretation unless under certain circumstances - Summary judgment refused.

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CASE NO. I 635/96

IN THE HIGH COURT OF NAMIBIA

In the matter between
APPLICANT

SDS REINFORCED CONCRETE ENGINEERING

(PTY) LTD
RESPONDENT

versus

TRUSTCO GROUP HOLDINGS (PTY) LTD

CORAM: STRYDOM, J.P.

Heard on: 1996.08.27

Delivered on: 1996.09.30

JUDGMENT

STRYDOM, J.P. : This is an application for summary-
judgment. Applicant issued summons against respondent for payment of the amount of N$23 23 0.4 0 as well as interest and costs on an attorney and client scale. Applicant's causa is for goods sold and delivered to the respondent on the latter's instance and request.

Respondent duly entered appearance to defend whereupon the applicant launched the present proceedings. In its opposing affidavit, the General Manager of the respondent, one" Van Rooyen, stated that the respondent conducts business as a property developer. He goes on to say that on 28th June, 1995 respondent obtained a written quotation for a quantity of hollow flooring blocks from the applicant. The price quoted was N$62 720. Respondent accepted the quotation subject to the following statement:

> "We will be ready for the slabs on 17.7.1995 and any delivery achieved after 28.7.1995 will seriously delay us."

This condition was inserted by the respondent on the quotation form under the following heading for which provision is made on the quotation form, as follows:

> "ORDER
>
> I/We hereby accept your quotation received herewith, subject to the above conditions, the stipulations overleaf and with the following amendments:"

Respondent further alleges that delivery of the goods was only effected towards the end of July, 1995. A large percentage of this first consignment of blocks was however of an inferior quality which crumbled already on the offloading thereof.

Applicant was informed of this situation but countered that the blocks may have broken due to being manhandled by the respondent. This caused the respondent to arrange for independent tests to be conducted to determine the strength of the blocks. Because of the problems experienced -with regard to the quality of the blocks, applicant and respondent arranged for similar blocks to be imported from South Africa. The first consignment was received, on. 11th August, 1995.

Respondent further continued to say that as a result of the delay of delivery he could not timeously complete the townhouses, in respect of which the blocks were needed. As he was financing the development by way of a building society loan, such delay caused the respondent to have to foot the bill for interest on its loan for a much longer period. The losses so suffered, as well as the costs involved in the testing of the blocks, are in excess of N$140 000.

Respondent further admits his indebtedness to the applicant in the amount of N$23 230.40 but says that in the circumstances it has a counterclaim against the applicant which is in excess of the applicant's claim against it.

Mr Swanepoel, on behalf of the applicant, attacked respondent's affidavit on various grounds. The first point made by counsel was that the respondent, where he referred to the defence, did so not on behalf of the respondent, which is of course a company, but stated that he denies that he did not have a bona fide defence, etc. However a reading of the affidavit shows that the deponent is the General Manager of the respondent and that he was duly authorised to act on its behalf. He referred to the respondent as doing business as a property developer and that it was the respondent who obtained the quotation. It seems to me therefore that this one paragraph where the allegation is made that it was the deponent, in his personal capacity who had a bona fide defence, is no more than tardy draughtsmanship. Bearing in mind that summary judgment is an extraordinary remedy which closes the doors of the Court

to the defendant (see Bill Troskie Motors v Motor Spares Centre (Edms) Bpk, 1980(2) SA 961 (O) at 962) and which, as it was stated in some cases, will only be granted once it is shown that the applicant's claim is unanswerable (see Arend & Another v Astra Furnishers (Pty) Ltd, 1974(1) SA 298 (C) at 3 05), the Court will not on such a technicality non suite a defendant. Especially not where there are clear indications that the deponent is acting on behalf of the defendant company.

Mr Swanepoel is however on firmer ground when he submitted that the condition inserted by the respondent concerning any delays cannot be regarded as a term or condition which would have entitled the respondent to cancel the agreement once a delay occurred. Mr Swanepoel firstly pointed out that in such an

event it would have been necessary to amend or even delete terms imposed by the applicant such as stipulation 9 and conditions 4(f) and (g) contained in the agreement.

At this stage of the proceedings a Court will be slow to embark upon an interpretation of the contract documents because it is not able to construe such terms against the background of the surrounding facts as they existed at the time the agreement was concluded, unless the contention put forward is based on a palpable misreading or logical fallacy and the document is clear on the point in issue. (See Millinan NO v Klein, 1986(1) SA 465 at 480 F - I.) It may very well be that the condition inserted by respondent, which, so it seems, was accepted by the applicant, amended the terms referred to by Mr Swanepoel. If that is so no rectification would be necessary. Stipulation 9 provides that applicant would have at least 20 working days for the fabrication of material once the terms of payment have been adhered to. These terms required a deposit of N$5 000 and the balance at least 3 days before delivery. It seems that in this instance the blocks were delivered before the balance was paid and, as pointed out by Mr Dicks, the applicant may well have waived this requirement.

Nothing seems to turn on clause 4(f) and there is no indication that it was ever invoked by the applicant. Clause 4 (g) must be read with clause 2 (c) wherein the applicant undertook to replace defective material if it is notified within 24 hours. On the affidavit of Van Rooyen it seems that that is what had happened. The applicant was notified, he rejected the claim, the blocks were tested and thereafter replaced with material

obtained from South Africa. Respondent did not say in the affidavit that notification took place within 24 hours after delivery but he goes on to say that he and applicant then together arranged to get the blocks from South Africa.

Mr Swanepoel also submitted that clause 4(g) of the conditions of contract furthermore excludes consequential damages resulting from the use of wrongly delivered or defective materials. The operative word here is the word "use". Respondent's claim arises from late delivery and not from the use of wrong or defective materials received by him. Clause 4(g) can therefore not assist the applicant.

In the circumstances I must agree with Mr Dicks that the defence of a counterclaim set out in the affidavit was set out with sufficient particularity to constitute a bona fide defence. It is, as was put forward by Mr Swanepoel, that more particulars could have been given. However at this stage it is not required of a litigant to set out a defence with the same particularity and precision which would be required at the pleading stage. It is also not the function of the Court to determine whether the respondent would be able to prove its defence. (See Estate Potgieter v Eliot, 1948(1) SA 1048 (C) ; Breitenbach v Fiat S A (Edms) Bpk, 1976(2) SA 226 (T) at 229 and Arend v Astra Furnishers (Pty) Ltd. 1974(1) SA 298 (C) at 303 and 304).

Furthermore, and if I am wrong in my conclusion above, I am satisfied that in all the circumstances this is a case where

the Court, in the exercise of its discretion, should refuse summary judgment.

STRYDOM, JUDGE PRESIDENT

In the result the application for summary judgment is refused with costs.

ON BEHALF OF THE APPLICANT: ADV J J SWANEPOEL

Instructed by: A Vaatz

ON BEHALF OF THE RESPONDENT: ADV G DICKS

Instructed by: Lorentz & Bone