



CASE NO: I 3499/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SCANIA FINANCE SOUTHERN AFRICA (PTY) LTD

PLAINTIFF

and

AGGRESSIVE TRANSPORT CC

1ST DEFENDANT

JAN HENDRIK HOFMEYER VAN BLERK

2ND DEFENDANT

Neutral citation: Scania Finance Southern Africa (Pty) Ltd v Aggressive Transport CC (I 3499/2011) [2014] NAHCMD 57 (19 February 2014)

CORAM: Smuts, J

Heard on: 10 February 2014

Delivered on: 19 February 2014

Flynote: Action for payment of sums due under a financial lease agreement following cancellation. Defence raised an oral agreement with a third party. Court found the third party was not a party to the financial lease agreements and the alleged oral agreement could not be raised against the

plaintiff. The court further found that the oral agreement contended for was also excluded by the no oral variation clauses in the financial leases. Judgment granted in favour of the plaintiff.

ORDER

- a) Judgment in favour of the plaintiff in the sum of N\$590 651, 07;
- b) Interest on this amount a tempore mora at 15.5% per annum to date of payment;
- c) Costs of suit as between attorney and client. Those costs include the costs of one instructed and one instructing counsel.

JUDGMENT

Smuts, J

1.1.

[2] In this action, the plaintiff claimed a sum of N\$590 651, 07 against the defendants in respect of two financial lease agreements between the plaintiff and the first defendant. In terms of those financial lease agreements, plaintiff

leased two Scania trucks to the first defendant. The two lease agreements form part of the pleadings and were subsequently consolidated for certain purposes.

[3] In terms of the financial lease agreements the plaintiff remained the owner of the trucks and the first defendant had the use and possession of them.

[4] The plaintiff alleged that the first defendant breached the agreement by failing to pay the amounts payable in terms of those agreements. The plaintiff alleged that it elected to cancel the agreement, entitling it to the return of the trucks. The plaintiff alleged that the trucks were returned to it and the amount claimed by the plaintiff was determined with reference to the arrear rentals and the first defendant's obligations under the agreements in respect of the unexpired terms less the proceeds from the sales of the two trucks. The method of coming to these amounts is in accordance with the financial lease agreements.

[5] The second defendant is the principal of the first defendant. He is sought to be held liable on the basis of signing a surety in favour of the plaintiff in respect of the first defendant's obligations to the plaintiff.

[6] The history of this litigation is, to an extent, set out in the judgment recently delivered¹ in respect of an opposed application to amend. As is set out in that judgment, the defendants entered an appearance to defend and the plaintiff then applied for summary judgment. The defence raised in the opposition to the summary judgment application is maintained in the defendants'

¹22 January 2014

plea and in the trial.

[7] In their plea, the defendants contend that the plaintiff breached the agreement by failing to properly repair one of the trucks in an efficient and workmanlike manner and stated as a consequence that the first defendant was unable to use that truck for the purpose for which it was acquired through the financial lease agreement.

[8] The first defendant accordingly contended that it was entitled to cancel the agreement and did so on 22 July 2011 alternatively upon delivery of the plea. The defendant further states that, when cancelling the agreement, the first defendant entered into an oral agreement in terms of which the first defendant would deliver the trucks to Scania Truck Namibia (Pty) Limited (Scania Truck Namibia) which would upon delivery effect repairs and then sell each of the trucks for a price of no less than N\$1, 15 million excluding VAT. The defendants further pleaded that in terms of this oral agreement, the parties had agreed that if a prospective purchaser wished to purchase one of the trucks for less than N\$1, 15 million, then the sale would first have to be approved by the first defendant. The defendants alleged that the plaintiff breached the terms of this agreement by selling the trucks below the agreed selling price.

[9] The defendants also raised a special plea of non-joinder. In it, they contend that Scania Truck Namibia should have been joined. In support of this special plea, the defendant referred to the financial lease agreement where there was reference to Scania Truck Namibia and for its signature to those

agreements and contended that it had a direct interest in the matter and should have been joined.

[10] When the matter was argued at the conclusion of the trial, Mr Wylie, who appeared for the defendants, stated that the defendants no longer relied on the special plea of non-joinder. Even though they no longer did so, it is apparent from the defendants' approach to the matter that they would appear to have misconceived the nature of the agreement and the role of Scania Truck Namibia. This would become apparent from what is stated below.

[11] At the trial, the plaintiff called a single witness, one of its employees, Mr Colin Gertze. He testified as to the two agreements entered into between the plaintiff and the first defendant. He explained that these were financial lease agreements. He referred to the first page of the agreement entitled 'transaction schedule.' On that page, the parties are required to state the nature of the lease in question. There are various options provided for which would result in different clauses of the standard terms applying to the selected agreement. The two different basic options are primarily operational leases or financial leases. But each of these may have different variations or additional components including insurance or repair and maintenance or even both maintenance and insurance.

[12]

[13] In these instances, the parties agreed upon the option of a financial lease only, as is indicated on the very first page. This meant that repair and maintenance and the provisions relating to that option in the standard form of

the agreements would not apply under the agreements. The repair and maintenance, if selected, was to be provided by Scania Truck Namibia. But as those provisions were not applicable, that entity fell out of the picture within the contractual scheme. Neither of the financial lease agreements was signed by Scania Truck Namibia even though there is reference to it in both agreements, but, as I have said, only in respect of repair and maintenance. It was not however a party to either agreements because the repairs and maintenance options had not been included. It was thus not a party to either agreement.

[14] Mr Gertze confirmed that he arranged for the signature of the second defendant to the two contracts on behalf of the first defendant.

[15] The first defendant however fell behind with its payment obligations under the agreements. The extent of the first defendant's indebtedness was not in issue. All that was ultimately in dispute in this trial was the defence set out above, claiming cancellation and raising the alleged oral agreement between the first defendant and Scania Truck Namibia.

[16] In his evidence, Mr Gertze confirmed the notice of termination of the agreements to the first defendant dated 19 July 2011. He said that this letter followed undertakings by the defendant to remedy the breaches. The notice of termination required the defendants to deliver up possession of the trucks by 20 July 2011 at the premises at Scania Truck Namibia.

[17] Mr Gertze further testified that a meeting was then held on 20 July 2011

with the second defendant and the trucks were delivered. The second defendant requested that he assist in the sale of the trucks but nothing was agreed. Mr Gertze said that no agreement was reached. He also denied that the first defendant cancelled the agreement or even attempted to do so. His testimony was essentially not shaken in cross-examination.

[18] After Mr Gertze's testimony, the plaintiff closed its case. The second defendant and one of the first defendant's truck drivers Mr W. Hendricks gave evidence for the defendants.

[19] The second defendant's evidence was in accordance with the defence set out above. Under cross-examination, he said he had not read through the agreements when he had signed them. It was only after receiving copies that he realised that repairs and maintenance were not included. He confirmed that it was his understanding that Scania Truck Namibia was a party to the financial leases. He also accepted in cross-examination that the agreements could only be amended in terms of these agreements. After he received copies of the agreements, he approached the plaintiff to amend their terms because the first defendant was not able to reclaim VAT under them by reason of the nature and structure of the agreements. The plaintiff had declined to amend the agreements.

[20] Mr Van Blerk confirmed that the second defendant had received the cancellation notices and that he had initiated discussions with Scania Truck Namibia where the trucks were delivered. He also confirmed that the first

defendant was in arrears with its payments under the agreements by reason of cash flow difficulties. He also did not dispute the extent of its liability.

[21] Despite the allegations in the plea, Mr Van Blerk was not able to state unequivocally that the first defendant had cancelled the agreements with the plaintiff. But he suggested that by returning the vehicles, this amounted to cancellation when pressed as to any notification of the cancellation. He accepted that the first defendant had not given any notice of cancellation.

[22] Mr Hendrick's evidence of difficulties with one of the trucks did take the defendants' case further.

[23]

[24] It thus became clear that the first defendant had not cancelled the agreements on 22 July 2011, as pleaded. They had in any event been cancelled by the plaintiff on 20 July 2011. It was also clear that the second defendant misunderstood the contractual scheme and had considered that Scania Truck Namibia was a party to the agreements. It was however not a party to the agreements. The alleged oral agreement could thus not constitute a defence to the plaintiff's claim in the way in which the plea is formulated.

[25]

[26] But there is also a further reason why the defence raised by the defendants cannot succeed. It would also entail an amendment to the agreements between the parties. Each of the agreements includes what is generally known as a 'no oral variation provision' in clause 84 to the following effect:

'This document contains the entire agreement between the parties and no agreement at variance with the terms and conditions of this agreement no waiver by the lessor of any rights and/or any amendment or novation shall be of any force or effect unless reduced to writing in one document and signed by the parties hereto.'

[27] The agreement contended for by the defendants would constitute an agreement at variance with terms of the agreements (which have clear provisions as to what occurs upon the return of the trucks in the event of breach and cancellation)² as well as amounting to a waiver of the plaintiff's rights. The oral agreement contended for by the defendants did not meet the requisites of clause 84. It was not in writing. Nor was it signed by the parties. Evidence concerning it should have been excluded by the parole evidence rule.³

[28] As I have already said, the defendants did not dispute quantum of the claim and the certificate of balance used in support of the claim. Nor was the suretyship and its effect placed in issue.

[29] Given the failure of the defendants' defence, it follows that the plaintiff is entitled to judgment as claimed. The agreements provide that the plaintiff is entitled to costs on the scale as between attorney and client. The particulars of claim were amended to include a prayer seeking costs on this basis. The following order is made:

- a) Judgment in favour of the plaintiff in the sum of N\$590 651, 07;

²In clause 64 of the agreements.

- b) Interest on this amount a tempore mora at 15.5% per annum to date of payment;
- c) Costs of suit as between attorney and client. Those costs include the costs of one instructed and one instructing counsel.

[30] _____

DF Smuts

Judge

APPEARANCES

PLAINTIFF:

P. Barnard

Instructed by Van Der Merwe-Greeff

Andima Inc, Windhoek

DEFENDANT:

M. Wylie

Theunissen, Louw & Partners, Windhoek