

**BETWEEN**

**AEM Ltd**

**APPLICANT**

**AND**

**ZVK**

**RESPONDENT**

Date of Order:

1 June 2012

Referee:

Referee Reuecamp

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that the Respondent, ZVK, pay the amount of \$7,039.83 to the Applicant, AEM Ltd, on or before 15 June 2012. The counterclaim of the Respondent, AVK, is dismissed.**

## **Facts**

[1] The Applicant claims that the Respondent in its own name entered into an agreement for the purchase of goods under Job No. 332043, and invoiced to it under the same invoice number at an amount of \$7,039.83 on 31 March 2011, which remains outstanding. The Respondent does not deny this but presented a counterclaim of \$6,000.00 in relation to the price of earlier and different goods (a triple-track wardrobe doors system) supplied to it, Invoice #330956, and paid by it on or about January/February 2012 (with a value of around \$3,000.00), which, as the Respondent alleges, was discovered to be deficient once installed. It now claims a refund of that price and additional labour costs relating to replacing that earlier supplied system as a credit to the later invoice. The Applicant denies that the system at the time of delivery by him was deficient and claims that he did not install the system and therefore is not responsible for installation deficiencies.

## **Issue**

[2] The issue is whether the Applicant is entitled to payment in full for the system supplied by it or that a credit should be allowed for the counterclaim of the Respondent.

## **Law**

[3] The relevant law is the law of contract and the Consumer Guarantees Act 1993 (“CGA”). This is because the Respondent purchased the goods as a consumer in terms of the CGA from the Applicant as a dealer in trade.

[4] In terms of s 6 of the CGA, the Applicant (supplier) guarantees that goods supplied are of acceptable quality.

[5] Section 7 of the CGA states that acceptable quality means that the goods are fit for all purposes for which goods of the type in question are commonly supplied; acceptable in appearance and finish; free from minor defects, and safe and durable, as a reasonable consumer, fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, having regard to amongst other things the nature of the goods and the price.

[6] Where the failure is of a substantial character, the consumer has the right to reject the item in terms of s 18(3) of the CGA. If the failure is not of a substantial character or has not been promptly drawn to the attention of the supplier for remedial action, the consumer may be entitled to damages to compensate it for the loss it suffered.

[7] The burden of proving its case lies with the party making the relevant allegation. The standard of proof is the balance of probabilities: i.e. it must establish that it is more likely than not what happened, and therefore must be better than possible alternative versions of events.

#### *The Applicant's claim*

[8] I find that on the evidence provided, the Applicant has established that it is entitled to payment for the goods supplied under Invoice #3320403. The Respondent has not provided any evidence to the effect that the Applicant did not supply those goods to the Respondent's company or that the goods were deficient. The Applicant's claim for \$7,039.83 is therefore allowed, subject to my further findings below in respect of the Respondent's counterclaim.

#### *The Respondent's counterclaim*

[9] The Respondent provided oral evidence of his complaint that the top hung triple track doors supplied by the Applicant invoiced under the earlier Invoice #0033956 were difficult to operate once installed as they rubbed against each other. He further claims that the opening left once the doors slid over each other, as that system is designed to do, was not sufficient for his purposes. He claims he advised the Applicant of this but the matter was not remedied so he ordered a replacement system from another manufacturer.

[10] The evidence provided included drawings of the various locations where the system was installed, enabling me to assess the track system personally, as selected by the Respondent. It also included the dimensions of the various doors ordered, and measured to fit at the site by the Applicant together with the Respondent's builder who supervised the site, and confirmed by the Respondent once the selected system and its measurements were advised and quoted to him. The products were then subsequently cut to size and delivered to the site by the Applicant, and painted and installed under instructions of the Respondent's builder by a third party contractor.

[11] I have considered the evidence of the Respondent's supplier of the replacement system. The witness was unable to testify to the actual position and operation of the Applicant's system since he had not seen it. His evidence was of a general nature relating to similar products and systems as supplied by him and the Applicant. He emphasised that proper functioning of a top hung triple track system is critically dependent on proper installation.

[12] I find that the evidence provided to me by the Respondent has not established that the measurements were incorrect or not complied with or that the openings on installation were otherwise not in accordance with the Respondent's instructions or contrary to good business practice and standards.

[13] With regard to the Respondent's other complaint, the Respondent provided additional evidence by its builder, who confirmed that the measurements had been taken in his presence, and that the doors were installed not by the Applicant but by the builder's subcontractor and, after installation, indeed rubbed against each other and that the Respondent was not happy.

[14] The Applicant claims that the system is a standard top hung triple track system as selected by the Respondent and that the accompanying tracks are standard and if properly installed should cause no problem. He states that the alleged problem was pointed out to him once they were installed when later he delivered some door handles and that he advised the builder that the top hung tracks were not correctly installed and what needed to be done. He

claims that he was not responsible for any installation deficiencies. He further claims that he was at no stage advised by the Respondent that remedial action was required by him, or that there was a problem with the products the subject of the fully paid earlier invoice until he sent the invoice relating to further supplies and, once not paid, enforcement action was taken. He was surprised to find out that the system had been replaced.

[15] I find that the disputed goods were supplied as ordered and that they were accepted, painted and installed by another party or parties. All of this and the further payment for those goods by the Respondent indicates to me that they were accepted on delivery. On the basis of the evidence presented, I prefer the evidence of the Applicant that he complied with his side of the supply contract and was not responsible for installing the system, and at no stage was required to remedy any problem for which he could reasonably be held responsible.

[16] I accept his evidence that once he was confronted with the complaint it was on the basis of the Respondent's demand to take the uninstalled doors back, which he declined. I find that the Applicant was not under any duty to accept the return of the system, which, as I have found, had been accepted by the Respondent, unless the Applicant's system was deficient, as distinct from its installation.

[17] I find that the Respondent has failed to establish that. Therefore, the Applicant is entitled to payment as invoiced in Invoice #00332043. I order accordingly. It follows that the counterclaim of the Respondent is dismissed.