



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: 5010/2018

In the matter between:

**GELVENOR CONSOLIDATED FABRICS
(PTY) LTD**

Plaintiff/Respondent

and

WINELANDS TEXTILES (PTY) LTD

Defendant/Excipient

Date of hearing: 31 October 2018

Date of judgment: 6 November 2108

JUDGMENT

SAVAGE J:

[1] The defendant, Winelands Textiles (Pty) Ltd, has raised an exception to the particulars of claim of the plaintiff, Gelvenor Consolidated Fabrics (Pty) Ltd, on the grounds that such particulars fail to disclose a cause of action.

[2] On 11 January 2017 the plaintiff and defendant entered into a written master sale agreement incorporating a number of conditions of sale ('the master sale agreement'). The material terms of the master sale agreement are pleaded *inter alia* as follows:

- 2.1 the plaintiff was entitled to place orders with the defendant in writing or verbally, provided that any order placed verbally shall be confirmed in writing by the plaintiff not later than seven days after the verbal order has been placed;
- 2.2 the defendant shall at any time, in its sole discretion and on written notice to the plaintiff be entitled to restrict, limit or cancel any credit arrangements or facilities granted to the plaintiff in relation to the purchase of goods, including to reduce the plaintiff's credit limit;
- 2.3 on receipt of an order, the defendant shall confirm the purchase price of the goods relating to such order, in writing;
- 2.4 the defendant reserves the right on written notice to the plaintiff to suspend or reduce manufacture of the plaintiff's orders if the plaintiff has reached its credit limit, the plaintiff's financial position has deteriorated, or the defendant no longer considers the plaintiff creditworthy;
- 2.5 each order placed by the plaintiff, irrespective of whether in the case of a verbal order the order has been confirmed in writing or not, shall constitute an irrevocable offer by the plaintiff to conclude a contract with the defendant on the terms contained in the order;
- 2.6 every order for goods placed with the defendant by the plaintiff, whether verbally or in writing, shall be subject to the terms and conditions set out in the agreement, which shall be deemed to be specifically incorporated into the order; and
- 2.7 the defendant shall be entitled, in its sole discretion, to accept, in whole, or in part, or to decline, any order placed by the plaintiff.

[3] It is averred further in the particulars of claim that:

- '...5. On 6 February 2017 the defendant gave the plaintiff written notice that its credit limit was approved in the amount of R7 200 000,00...;

6. On 27 October 2017 a telephonic order ('the verbal order') was placed by the plaintiff to the defendant, for the supply of 23 000 metres of white satin weave fire retardant material ('the goods');
7. The verbal order was not reduced to writing by the plaintiff.
8. For the reasons pleaded in sub-paragraph 4.6 above¹ the verbal order was subject to the terms and conditions set out in [the master sale agreement] which are deemed to be specifically incorporated into the verbal order.
9. In respect of the verbal order the defendant was therefore obliged, for the reasons set out in sub-paragraph 4.3 above² to confirm the purchase price of the goods relating to such order, in writing.
10. The defendant failed to perform its aforementioned obligation to the plaintiff.
11. The defendant did not decline the verbal order.
12. The defendant did not limit or cancel the plaintiff's credit limit.
13. The defendant did not suspend the plaintiff's verbal order.
14. The defendant was therefore obliged to confirm the purchase price of the goods relating to such order, in writing and proceed to manufacture and deliver the goods to the plaintiff in the absence of it disputing the price.
15. Instead the defendant proceeded to sell the goods that the plaintiff had placed an order for in terms of the verbal order to a third party.
16. The defendant's conduct demonstrated a deliberate and unequivocal intention not to be bound by the terms of [the master sale agreement] and constituted a repudiation thereof.
17. The plaintiff elected to accept the defendant's repudiation, terminated [the master sale agreement] and informed the defendant of its election and termination thereof.
18. Arising from the defendant's repudiation, the plaintiff was unable to meet its obligations to its customers and suffered damages in the amount of R6 646 627,50.
19. The defendant is obliged in law to compensate the plaintiff for its damages.'

¹ In sub-paragraph 4.6 it was pleaded that it is a term of the master sale agreement that every order for goods placed with the defendant by the plaintiff, whether such order is placed verbally or in writing, shall be subject to the terms and conditions set out in the master sale agreement, which shall be deemed to be specifically incorporated into the order.

² In sub-paragraph 4.3 it was pleaded that it is a term of the master sale that upon receipt of an order the defendant shall confirm the purchase price of the goods relating to such order, in writing.

Submissions of the parties

[4] The defendant, as excipient, takes issue with the particulars of claim on the basis that a binding agreement between the parties is presupposed, when properly construed no agreement existed since the plaintiff had not confirmed the verbal order in writing and the defendant was not obliged to confirm the purchase price of the goods. Since in terms of clause 1.10 of the master sale agreement an “*Order*” is defined as one placed “*by the [plaintiff] with the [defendant] for the supply of Goods from time to time, which, when accepted by the [defendant], shall constitute a Contract*”, and there had been no acceptance by the defendant, it was submitted for the defendant that from the case pleaded no contract relating to the supply of goods existed. The defendant, in terms of clause 3.7, was entitled to accept or decline any order placed by the plaintiff and, since the order was not accepted by the defendant, no contract of sale was concluded and there was no obligation on the defendant to manufacture or deliver the goods to the plaintiff. The defendant did not therefore repudiate any agreement and was entitled to sell the goods to a third party.

[5] It was submitted further that no damages are therefore recoverable from the defendant, more so when in terms of clause 14 of the master sale agreement the defendant is not liable for “*any loss of profits, indirect or consequential loss suffered by the [plaintiff] of whatsoever nature and howsoever arising*”. With no cause of action disclosed, the defendant seeks that the exception raised to the particulars of claim succeed with costs.

[6] In opposing the exception, counsel for the plaintiff argued that in terms of clause 3.6 of the master sale agreement every order constitutes an irrevocable offer

by the customer to conclude a contract with the supplier on the terms contained in the order, irrespective of whether it has been confirmed in writing or not. On a reasonable interpretation of the agreement there was therefore no need for the verbal order to be confirmed in writing by the plaintiff as customer and any interpretational issues which exist between the parties in this regard can be cleared up through evidence at trial.

[7] The defendant's failure to adhere to its obligation to confirm in writing the purchase price of the goods and proceed to manufacture and deliver the goods to the plaintiff, demonstrated a deliberate and unequivocal intention not to be bound by the terms of the master sale agreement. This constituted a repudiation of the master sale agreement, which repudiation the plaintiff elected to accept, to terminate the agreement and claim damages. For these reasons, it was submitted that the defendant has not discharged the onus to prove that no cause of action has been disclosed and the exception falls to be dismissed with costs.

Discussion

[8] An excipient is required to persuade the Court that on every interpretation which the particulars can reasonably bear no cause of action is disclosed,³ with the correctness of the facts averred in the particulars of claim to be assumed for purposes of determination of the exception.⁴

³ *Picbel Groep Voorsorgfonds (in liquidation) v Somerville and other related matters* [2013] ZASCA 24; 2013 (2) All SA 692 (SCA) at para 7 with reference to *Lewis v Oneanate (Pty) Ltd & another* [1992] ZASCA 174; 1992 (4) SA 811 (A) at 817F-G).

⁴ *Trustees for the Time Being of the Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* [2005] ZASCA 109; 2006 (3) SA 138 (SCA) at paras 3-10; *Francis v Sharp* 2004 (3) SA 230 (C) at 237D; *First National Bank of Southern Africa Ltd v Perry N.O.* 2001 (3) SA 960 (SCA) at 963C-D.

[9] Clause 1.10 of the master sale agreement provides that an order when placed and accepted by the defendant “*shall constitute a Contract*”. In terms of clause 3.1 the plaintiff is –

“entitled to place orders with the [defendant] in writing or verbally, provided that any Order placed verbally shall be confirmed in writing by the [plaintiff] to the [defendant] not later than 7 (seven) days after the verbal Order concerned has been placed”.

[10] The plaintiff pleads that it placed a verbal order with the defendant on 27 October 2017, but that this order was not reduced to writing.

[11] Clause 3.3 provides that –

“upon receipt of an order, the [defendant] shall confirm the purchase price of the Goods relating to such Order to the [plaintiff], which confirmation shall be communicated by the [defendant] to the [plaintiff] in writing, including by way of the [defendant] inserting the details of the purchase price into the relevant Order form and transmitting same to the Customer by telefax or electronic mail”.

[12] Clause 3.6 states that every order placed by the plaintiff –

“irrespective of whether, in the case of a verbal Order, the Order has been confirmed in writing or not, shall constitute an irrevocable offer by the [plaintiff] to conclude a Contract with the [defendant] on the terms contained in the Order”.

[13] The defendant, in terms of clause 3.7, shall be entitled, “*in its sole discretion, to accept, in whole, or in part, or to decline, any Order placed by the [plaintiff]*”. The plaintiff pleads that the defendant did not confirm the purchase price of the goods relating to such order in writing, nor did it decline the order.

[14] Clause 3.9 provides that:

“Each Order accepted by the [defendant] shall constitute a separate and distinct contract concluded between the [defendant] and the [plaintiff], which

contract shall be subject to the terms and conditions contained in this Agreement."

[15] The plaintiff's cause of action is not one based on the conclusion of a separate and distinct contract between the parties, but on the alleged repudiation of the master sales agreement. The plaintiff avers that it made an irrevocable offer, in response to which the defendant did not decline or suspend the order, which was the subject of this offer, nor did the defendant limit or cancel the plaintiff's credit limit. It is the plaintiff's pleaded case that the defendant was obliged in the circumstances to confirm the purchase price of the goods relating to the plaintiff's order, in writing, and proceed to manufacture and deliver the goods to the plaintiff in the absence of it disputing the price; and that the failure to do so demonstrated a deliberate and unequivocal intention not to be bound by the terms of the master sale agreement, which constituted a repudiation of such agreement. Since the plaintiff elected to accept the defendant's repudiation and terminated the agreement, it claims damages suffered by it in the amount of R6 646 627,50 from the defendant.

[16] Courts are reluctant to decide an exception which concerns the interpretation of a contract since an exception is generally not the appropriate procedure to settle questions of interpretation when evidence may be admissible at the trial stage relating to surrounding circumstances, which may clear up the difficulties.⁵ This is precisely such a case.

[17] In *Trustees, Bus Industry Restructuring Fund v Break Through Investments CC & others*⁶ it was made clear that it is for the excipient to show that the plaintiff's claim is (not may be) bad in law. The defendant has not succeeded in showing this

⁵ *Murray and Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A); *Sun Packaging v Vreulink* 1996 (4) SA 176 (SCA).

⁶ 2008 (1) SA 67 (SCA) at para 11.

to be so, nor has it shown that on every interpretation which the particulars can reasonably bear no cause of action is disclosed.

[18] A trial court will be best placed to interpret the relevant provisions of the master sales agreement entered into between the parties. These provisions include, but are not limited to, the effect of the failure on the part of the plaintiff to confirm its verbal order in writing; and the failure on the part of the defendant to accept in writing, decline or suspend the plaintiff's order, or limit or cancel the plaintiff's credit limit. The trial court will furthermore, on an evaluation of any evidence before it, be able to determine whether the defendant was obliged to confirm the purchase price of the goods relating to the plaintiff's order, in writing, and proceed to manufacture and deliver the goods to the plaintiff in the absence of it disputing the price; whether a deliberate and unequivocal intention on the part of the defendant not to be bound by the terms of the master sale agreement has been shown to exist; and whether a repudiation of the master sales agreement by the defendant has been proved or not.

[19] Since I am satisfied that a cause of action has been disclosed by the plaintiff in its particulars of claim, the exception raised cannot succeed. There is no reason why costs should not follow the result.

Order

[20] In the result, the following order is made:

1. The defendant's exception raised to the plaintiff's particulars of claim is dismissed with costs.

K M SAVAGE

Judge of the High Court

Appearances:

For the plaintiff: S K Dayal SC

Instructed by Maharaj Attorneys

For the defendant: M J Fitzgerald SC

Instructed by Bowmans Inc.