

22/03/2018

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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

DATE:

22/3/2018

SIGNATURE:

[Handwritten signature]

Case No. A620/2015

In the matter between:

LIPIDSANA DLO PRODUCTS (PTY) LTD

APPELLANT

And

MONALI KAMFER

RESPONDENT

JUDGMENT

MILLAR AJ

1. This appeal is against the whole of the judgment and order of the learned Magistrate Ndwandwe of the Pretoria Regional Court, delivered on 30 January 2015 when the appellant was ordered to make payment to the respondent of R 150 000,00 together with interest and costs.

2. The facts are uncomplicated and largely common cause. On 18 May 2011, the appellant and respondent entered into a written agreement ("the agreement"). The agreement consisted of two parts. The documents are pre-printed forms bearing the name of the appellant. The first was styled "Application as Principal" and the second as "General Terms and Conditions of the Lipidsana Multi-Level Marketing System". The second is expressly referred to in the first. Both were signed on the same day and read together record the terms of the agreement between the parties.

3. The first document contained the following clause:¹

"APPLICATION LICENCE FEE TO ACT AS PRINCIPAL FOR THE MARKETING AND SALE OF ALL LIPIDSANA PRODUCTS IN THE TERRITORY OF THE REPUBLIC OF SOUTH AFRICA TO THE AMOUNT OF ZAR 150,000,00 (ONE HUNDRED AND FIFTY THOUSAND SOUTH AFRICAN RAND) FOR THE

¹ Christie's Law of Contract in South Africa 7th Edition, Lexis Nexis, 2016 at page 226 where it is stated: "Written contracts, however, come before the court in their plain unvarnished form, often with pleadings setting out conflicting allegations of the 'true meaning and intent' of the contract, and in order to ascertain the common intention of the parties the court must interpret or construe the words they have used."

X

SUBSCRIPTION PERIOD ENDING 26 MAY 2011 TO BE KEPT ON TRUST PENDING THE ARRIVAL OF STOCK AND THE INITIATION OF THE MARKETING PROCESS ON OR BEFORE 12 AUGUST 2011 BY DEFAULT OF WHICH ALL MONIES RECEIVED WILL BE PAID BACK WITHIN 48 HOURS FROM DATE THEREOF."

4. The 12th of August 2011 arrived and the "ARRIVAL OF STOCK" did not take place. The appellant wrote to the respondent advising her of this and sought an extension of the time for the arrival of the stock to 26 August 2011. The appellant imposed a time limit on the respondent to reply to this request viz. 15 August 2018 at 16h00 and stated *"If we haven't received your decision by then via email it will be conclusively presumed that you accept the extension for the initiation of the marketing process until 26 August 2011"*.
5. The respondent was overseas when this email was sent. She responded on her return on 19 August 2011 and indicated that she did not agree to an extension and required her refund. The appellant denied receipt of the respondent's email but nevertheless admitted that her view was communicated to the appellant by her husband.
6. The appellant contended that notwithstanding that it had not complied with the agreement by the 12th of August, that nonetheless it was not liable to refund the respondent.

7. This denial of liability was premised on a number of grounds:
 - 7.1 The first was that the arrival of the goods was delayed as a result of these being detained at customs;
 - 7.2 The second was that by writing the letter of 12 August and imposing the conditions that it had, that the respondent's failure to respond timeously had resulted in an agreed extension; and
 - 7.3 The third was that the appellant had through her conduct, ratified the extension of the agreement.
8. An alternative was also pleaded to the effect that by virtue of the respondent's conduct, a new "verbal agreement" on the same terms as the original agreement had come into existence.
9. It is not disputed that the goods had not arrived in the sense contemplated between the parties. For purposes of the agreement between the parties, the arrival of the goods could only have meant that such goods were in the possession and under the control of the appellant and available for immediate sale. Such goods were clearly not while they were detained by the authorities.

The appellants request for extension is indicative of the appellant's understanding of the agreement to be so.

10. The nature of the condition and the legal consequences flowing from this will be determinative of this appeal.
11. The condition provides for "PENDING THE ARRIVAL" or put differently, in anticipation of the arrival. This construction clearly favours the condition being interpreted as a resolutive condition. *"A resolutive condition is one which provides for the dissolution of the contract after an interim period of operation, dissolution being retrospective in its effect to the time of contracting."*²
12. The agreement became operable upon signature and it is common cause that both the appellant and the respondent performed "in anticipation" of the arrival of the stock. Were the condition not resolutive and for example suspensive, neither party would have been required to perform under the agreement until such time as the condition had been fulfilled.³
13. The condition being resolutive resulted in the agreement being void *ab initio*.⁴ It was common cause between the parties and the evidence established that the

² The Principles of the Law of Contract, Kerr, Butterworths, 6th Ed. 2002 at page 449.

³ Christies supra page 166 "*pending the fulfillment of a suspensive condition the contract is inchoate*" see *Joseph v Halkett* (1902) 19 SC 289 293.

⁴ *Westmore v Crestanello* 1995 (2) SA 733 (WLD) at 736A-B where the court stated "*I do not readily comprehend how a purchaser could unilaterally waive a clause of a lapsed or defunct agreement (which by definition no longer exists) and by so doing unilaterally miraculously breathe new life into the corpse; and even worse, possibly ambush the unsuspecting seller who, acting in the belief that the contract*

respondent at no stage accepted an invitation to enter into a new agreement, or to vary the terms of the agreement before the condition was fulfilled.

14. The final leg of the appellants defence was that the respondent had through her conduct after the fulfillment of the condition entered into a new tacit agreement to extend the agreement . The evidence does not support this and it is as a matter of law in any event not possible to revive a void agreement.⁵

15. Having found that the condition was resolute, a further aspect arises. In regard to performance by the parties before the condition was fulfilled, *"any payments made must be refunded with interest, and any property handed over must be returned together with fruits and the cession of any actions that have accrued in respect of the property, and any necessary disbursements on the property must be refunded."*⁶

16. Ordinarily the appellant would, like the respondent, be entitled to restitution of what was paid during the existence of the contract. In the present case of the appellant however, the evidence was that what is alleged to have been paid by it in terms of the agreement was paid after the condition had been fulfilled and the contract was no longer in existence.

means what it says, has resold the property in question" and *Amoretti v Tuckers Land and Development Corp* 1980 (2) 330 at 332H to 333A.

⁵ *Westmore supra* at 738G quoting with approval from Halsbury's Laws of England 4th Ed Vol 9 para 484 "Even where a condition precedent for formation of a contract is inserted solely for the benefit of one party so that he may waive it he may not do so after the expiry of the time limit for fulfillment of the condition"

⁶ *Christies supra* page 172

17. In the circumstances what was paid by the appellant cannot be said to have been paid in terms of the contract and no refund would as a matter of law follow. The same cannot be said of the respondent whose payment was made while the contract was still extant, and she is entitled to the repayment she claimed.

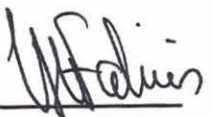
18. In the premises I propose the following order:

1. The appeal is dismissed with costs.



A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.



H FABRICIUS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 22 MARCH 2018

JUDGMENT DELIVERED ON: 22 MARCH 2018

COUNSEL FOR THE APPELLANT: ADV AJ SWANEPOEL

INSTRUCTED BY: VOGEL INCORPORATED

REFERENCE: MR J VOGEL

COUNSEL FOR THE RESPONDENT: ADV K FITZROY

INSTRUCTED BY: MUTHRAY AND ASSOCIATES

REFERENCE: MR N MUTHRAY