IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no. 5260/2009

In the matter between:

MABY CLOTHING (PTY) LTD Plaintiff

and

DEPARTMENT OF HEALTH,
FREE STATE PROVINCIAL GOVERNMENT Defendant

Heard on: 26 JUNE 2015

Judgment by: MOTLOUNG, AJ

Delivered on: 8 APRIL 2016

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[1] In this action, the plaintiff Maby Clothing (Pty) Ltd, (Maby) instituted proceedings against the Department of Health Free State, (Defendant) seeking damages in the sum of R412 479-04, pursuant to, what it alleges to be, a repudiation by the defendant of an agreement between the parties and which repudiation the plaintiff accepted.

The Agreement:

[2] On or about 15th May 2006, the plaintiff and defendant entered into a partly oral partly written agreement based on the tender by the defendant. The relevant provisions of the agreement for purpose of the plaintiff's claim against the defendant were:

2.1 The defendant appointed the plaintiff as a supplier of uniforms for female and male personnel of the Department of Health in the Free State Province and specifically hospitals.

2.2 The defendant and all institutions were authorized to obtain quotations from the plaintiff for the procurement of uniforms.

2.3 The plaintiff was to fully measure and fit personnel at the various health care institutions for quotations to be given and uniforms to be made up.

2.4 Payment would be made directly to the plaintiff in respect of garments ordered and delivered to the defendant's institutions.

<u>Pleadings</u>:

[3] It is particulars of claim the plaintiff averred in paragraphs 9 – 13 that:

> 9. *On or about 23 November 20016, in Bloemfontein defendant orally informed the plaintiff that it was no longer interested in purchasing the goods as per the orders and canceled the orders, alternatively on 12 March 2007 and at Bloemfontein the defendant in writing informed the plaintiff that it was no longer interested in purchasing the goods as per the orders and cancelled the orders.*
>
> 10. *The defendants conduct constituted a repudiation of the agreement between the parties.*

> 11. *Plaintiff elected to accept the repudiation and terminated the agreement between the parties and orally advised the defendant accordingly on 12 March 2007.*
> 12. *As a result of the aforesaid repudiation plaintiff suffered damages in the sum of R412 479-04 being plaintiffs net profit at a rate of 132 percent of the value of the orders.*

[4] The defendant pleaded as follows:

> 3. *The defendant admits the conclusion of a written agreement with the plaintiff on 30 June 2003, has no knowledge of the correctness of the remainder of the allegations contained in this paragraph, does not admit same and puts the plaintiff to the proof thereof.*
> 8. *The defendant denies the averments set forth in this paragraph, and pleads that the plaintiff was only required to measure and fit personnel at the various health care institutions after a written request was dispatched to the plaintiff.*

The defendant at the commencement of the trial amended its plea, to read:

> *"The defendant denies that there was any repudiation of the agreement with the plaintiff and pleads that there was a new contract awarded to another company on 2 October 2006. The plaintiff was awarded part of the new contract to supply only the male uniforms."*

The defendant pleads that defendant's officials were not authorized to place orders on behalf of the defendant and the contract for the female uniforms was awarded to another company. The amendment was agreed to and the plaintiff filed his replication.

[5] The parties agreed at the commencement of trial that only claim two of the particulars of claim need to be adjudicated. Claim one has been settled by agreement with payment of R12 000-00.

[6] When the trial commenced, the parties by agreement made an application for separation of merits and quantum in terms of rule 33(4) of the Uniform Rules of Court, which order I granted. The matter thus proceeded on the merits only. Exhibits 'A', B and 'C' form part of the record herein.

[7] The plaintiff led the evidence of the following witness:

Gianluca Brunetti

He testified that he is a joint Managing Director of Maby Clothing (Pty) Ltd, for 30 years. The main business of the plaintiff is to manufacture corporate uniforms for institutions. They do protective clothing as well as uniforms for nurses etc. They deal with large orders, although sometimes they do small orders. He said he is in Sales and Finance. He interacts with clients. He is mostly personally involved in these matters.

[8] He testified that during 2004 – 2006 the plaintiff entered into a contract with the defendant. However they had been doing

business together since 1993. The agreement was that they would receive a quotation and deliver the uniforms to the defendant. From the year 2000, the contract was done by tender. He said clients would give them a mandate to visit the site, and take sizes and fittings from personnel. Plaintiff would then give a quotation on a basket per case. Once defendant gives them the order number, plaintiff would start with the manufacturing process. This was done in 14 week cycles.

[9] He testified that the plaintiff covered the entire Free State, as the process was centralized. This was changed in 2000, when it was de-centralized. The price was fixed according to the lapsed contract price of 2003/2004, and was a formal acceptance of the tender for male uniforms.

[10] In February 2006, the tender was extended. The plaintiff was asked to visit institutions to obtain sizes and orders were placed. The defendant would purchase by quote, provided they had a budget for the uniforms and prices were within the last tender award. On the 26 April 2006, plaintiff wrote to the defendant to confirm that there won't be price escalation. They had received an instruction from the defendant's committee in June 2006. The extension of the tender did not have a time limit.

[11] He testified that plaintiff never solicited business from the clients, but instead they were approached by clients. The plaintiff only took orders after permission was granted. He said orders in claim two were based on the extension of the tender of the 23 February 2006, and these orders were terminated by defendant.

[12] On the 15 May 2006, an oral agreement was reached to supply uniforms. There were no documents supplied. This was an open-ended agreement until such time a new contract was entered into on the 5th October 2006. The defendant placed orders between these periods. He learned later that part of the tender was awarded to another company.

[13] He testified however, that their tender was not cancelled. Defendant made orders after October 2006. He acted on the orders. However, the plaintiff could not deliver the garments. After a while a dispute about these orders arose. As a result of the above, they incurred losses. The plaintiff sent a list of unpaid orders to the defendant. The defendant replied to that letter on the 12th March 2007, wherein they cancelled all the orders. He said orders were placed with the Head of Procurement at each institution.

[14] He said if he was aware that the authority had changed, he would not have taken the orders.

[15] In cross-examination he said he had a meeting with the defendant after the expiry of the contract on the 15th May 2006. He received written instructions to go to each institution to offer his services. He said the prices were maintained as per the previous contract.

[16] He said his claim was based on material used and production. The lost orders were made on information obtained from the defendant and the official orders detailed quantities and the

person authorized. He denied that the orders were made after cancellation of the tender. In re-examination he said he was unaware that the tender had been given to another company.

THE DEFENCE CASE:

[17] The defendant's witness, **LUCELLE CHRISTINA PRETORIUS,** testified that she is the Corporate Officer, falling under Supply Chain Management of the Defendant. She has been with Supply Chain from 1998, but has worked for the Defendant for approximately 30 years.

[18] She outlined her long career as traversing finance, Human Resources, supply chain, procurement, but now worked on all that should be procured by the defendant. If items are to be procured for the defendant this may be by contract or a quote. If a quote is used then evaluation of those submitted will be made, then only an order is placed.

[19] She further testified that not every official of the defendant can place an order. There has to be identified suppliers and then 3 quotations will have to be submitted. After evaluation of these quotes, an order will be placed. She said an order number is critical to each process.

[20] Between February 2004 and May 2006, there was a contract between plaintiff and defendant for the supply of uniforms. Previously the plaintiff exclusively provided all male and female

uniforms to the defendant. In the event the contract lapsed, an extension would be made and the plaintiff would continue to supply. She said a department directive dated **9 June 2006**, is an example of such extension.

[21] After the new contract came into place, the system was computerized to show an order number in real time when the order is placed. She said for a person to obtain an order number, there should at least be:

(i) A request made as per the contract;

(ii) That 3 quotations were submitted and one was preferred.

She said order numbers so issued cannot be manipulated. They also show the status of the order.

[22] The order numbers for plaintiff were made after the contract had expired. The items were not delivered, hence the cancellation of these orders. She said the plaintiff relied on "Official Order Form", which is an internal document to supply. She said all the documents purporting to be orders have not been signed by the Head of Procurement and have no amounts. She said a Government Order is not done on a requisition document as these are purely internal documents that are not supposed to be in the hands of clients. She said only authorised persons were entitled to place an order.

[23] **JACQUALINE SUSSANA JACOBS** testified that she has been working for defendant for 32 years. She is in supply chain dealing with tenders and concluded the contracts with the plaintiff. She said the letter was to give hospitals permission to source quotations from plaintiff as the contract with the defendant had expired. The new contract was only approved in October 2006.

[24] She said from October 2006, after approval of the contract, quotations fell away and only contracts were used. She said if an order is placed after the contract has been concluded, then it becomes irregular. She said the plaintiff signed acceptance of the new contract on the **9th October 2006.**

She admitted that a circular of **15 May 2006** governed the relationship with the plaintiff after the contract expired.

ANALYSIS OF EVIDENCE:

[25] The plaintiff led the evidence of one witness, Mr Brunetti, its Joint Director, while two witnesses testified on behalf of the defendant. The main issue in dispute was that the defendant repudiated a contract between the parties. This is in line with earlier agreement before the trial began that only claim two should be determined.

[26] According to the evidence of the plaintiff, the parties had a contract that was renewed orally from the **15 May 2006**. The

prices would remain the same as in the original contract, for the supply of garments to various hospitals in the Free State.

[27] Due to the volumes that had to be supplied, an order would be made and delivery would be made at a later stage. The prices were fixed as per the previous contract. It was evidence of Mr Brunetti that all the orders placed by the defendant had to be supplied to the defendant.

[28] As a result of the oral agreement between the parties, measures were taken and thus this confirmed the orders. However, on the **17 March 2007**, all the orders made by the plaintiff were cancelled. This was the repudiation of the contract by the defendant.

[29] Counsel for the plaintiff submitted that the evidence of Mr Brunetti was honest and reliable. The plaintiff was never informed that the agreement has been cancelled. He submitted that if the version of the defendant is found to be correct, then the orders ought not to have been placed. He submitted that the oral agreement was not placed in dispute. There is no evidence that on the **15 May 2006**, the agreement was not valid.

[30] It was further submitted in closing that the defendant is estopped from relying on the lack of authority by its employees. He submitted that for a considerable time the employees of the defendant had the authority to make orders and until such time

that the mandate was withdrawn it is valid. The defendant should be held to the terms of the agreement that was in place.

[31] Counsel for defendant on the other hand submitted that it has always been disputed that not every official can act on behalf of the department. He submitted that all quotations must be handled in terms of the Supply Chain Management Delegated Powers.

[32] The defendant argued that the new contract came into operation on **23 October 2006**. All the orders in dispute were placed after the **23 October 2006**. The plaintiff wrote a letter on the **26 April 2006**, inquiring about the commencement date of the new contracts. This clearly demonstrates that the plaintiff was aware of the contracts when he placed the orders.

[33] It was further the submission of the defendant that the oral agreement is not valid as the order numbers were not outstanding at the time they were placed. He submits that there was no repudiation of the contract. He argued that the people who placed orders with the plaintiff did not have the authority at the time and therefore no mandate.

[34] Counsel for the defendant further argued that once the contract was in place, there was no need for the orders. He said estoppel cannot render legal that which is unlawful. Both witnesses for the defendant said it would be illegal to pay on the orders as the contracts were operating.

[35] The question will be whether there was any repudiation of the contract by either party.

In **Datacolor International (Pty) Ltd v/s Intamarket (Pty) Ltd 2001 SA 284 (SCA)**, the Court held that:

> *"Where one party to a contract, without lawful grounds, indicates to the other party in words or conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to 'repudiate' the contract.... Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated".*

[36] Looking at the passage above and the evidence presented before the Court, there is no basis to find that either party repudiated this contract. The only indication is that the parties had communicated the coming to an end of earlier arrangement and acceptance of the new contract. The letter of the 12 March 2007 was a mere communication of the new order prevailing as the plaintiff had already accepted the new contract.

The test for repudiation is not subjective but objective. **Ponisammy & Another v/s Versailles Estate (Pty) Ltd 1973(1) SA 372 (A) at 387 A – C.**

The plaintiff also failed to explain what it elected to do once it was aware of the repudiation. Once a party makes an election, that person is bound by that election. He is bound to enforce the remedies available to him or her pursuant to the election, and he or she is not at liberty to seek redress against a defaulting party by way of remedies inconsistent with election.

See: Custom Credit Corporation (Pty) Ltd v/s Shembe 1972(3) SA 462 A at 469(H).

There is also no indication that the election was communicated to the defendant. The claim for repudiation can therefore not stand.

[37] The plaintiff raised the issue of an oral agreement in its pleadings. This was denied by the defendant, but during his testimony, Mr Brunetti failed to provide evidence of the facts and circumstances from which the contracts could be inferred. In any event, the orders in dispute were made during the existence of the new contract, the terms of which were agreed to by both parties.

[38] It was the evidence of Ms Pretorius that the order date was done at real-time and could not be altered by any person. There is no basis to second guess the dates as they appear on documents.

[39] On the issue of estoppel, the plaintiff appears to have raised it as an afterthought. The plaintiff did not plead estoppel nor did he prove the essential elements of this defence.

See: Blackie Swart Argitekte v/s H van Heerden 1986(1) SA 249 (A) 260.

For any party to succeed on estoppel, the following elements are essential:

(a) Representation by words or conduct of a certain factual position;

(b) The party acted on the correctness of the facts as represented;

(c) The party acted, or failed to act, to her or his detriment;

(d) The representation was made negligently;

(e) The person who made the representation could bind the defendant by means of a representation.

In **NBS Bank Ltd v/s Cape Produce Co (Pty) Ltd 2002(1) SA 396 (A) at para [25]:**

> *"Where a principal is held liable because of the ostensible authority of an agent, agencies by estoppel arise. But the law stresses that appearance; the representation must have been created by the principal himself. The fact that another holds himself out as his agent cannot, of itself, impose liability on him".*

[40] It is trite law that estoppel may not be used to make legal what would otherwise be illegal and cannot replace statutory requirements for the validity of contracts.

See: Trust Bank van Afrika Bpk v/s Eksteen 1964(3) SA 402 (A).

In **Philmatt (Pty) Ltd v/s Mosselbank Developments CC 1996(2) SA 15 (SCA),** Grosskopf JA held that:

> *"generally where a statute requires that certain formalities have to be complied with in order to render a transaction valid, a failure to comply with such formalities cannot be remedied by estoppel".*

The plaintiff has not pleaded estoppel and less the facts to prove the essential element of this defence. I find that estoppel must fail as the plaintiff cannot rely on making legal that which is illegal. The internal documents of the defendant cannot be used as a source of authority by the plaintiff to prove that a junior official bound the defendant to an oral agreement.

[41] In my view the dispute centres around the orders made by the defendant's officials who it is claimed had no authority to bind the defendant. The defendant had denied the officials had authority. No evidence was led to show that the officials had the authority to make representation on behalf of the defendant.

[42] In the circumstances I find that the plaintiff has failed to prove its case on a balance of probabilities and consequently find in favour of the defendant with costs.

[43] I grant judgment in favour of the defendant as follows:

1. The action against the defendant is dismissed.
2. Costs of suit.

SE. MOTLOUNG, AJ

On behalf of plaintiff:	Adv. Venter Instructed by: Mark Harris Attorneys Morning side Sandton
On behalf of defendant:	Adv. R Rathidili Instructed by: State Attorney Bloemfontein