IN THE NORTH GAUTENG HIGH COURT,

(HELD IN POLOKWANE CIRCUIT COURT)

CASE NO: 236/2011

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED

2013/03/28 ....

DATE SIGNATURE

28/3/2013

In the matter between:

AMAREL AFRICA DISTRIBUTORS (PTY) LTD Plaintiff

And

ALVIN PADAYACHE Defendant

JUDGMENT

LEGODI J

INTRODUCTION

[1] A written agreement that was entered into on the 30 June 2008 between the plaintiff and defendant in terms of which the defendant undertook to pay to the plaintiff an amount of R1 650 000, became the subject of a dispute before me.

[2] The plaintiff is claiming from the defendant payment in the sum of R1 016 385 being the outstanding amount. The defendant is resisting the claim by the plaintiff on the ground that the plaintiff had failed to comply with its obligation in terms of the written agreement and secondly, on the basis that his indebtedness in the amount of R1 650 000 was a product of misrepresentation.

BACKGROUND

[3] The brother of the defendant, one Mr Esvay Vanan Padayache is the owner of AMAREL LABORATORIES (PTY) LTD. The latter is a manufacturer of certain products (referred to hereinafter as Amarel range of products).

[4] The Amarel range of products, are mainly used as hair products. Long before the 30 June 2008, the defendant was the sole distributor of the Amarel range of products. The defendant's rights of distribution aforesaid, was later transferred by the defendant to the plaintiff, apparently the defendant having agreed to a certain commission payable to him.

[5] The plaintiff's rights to distribute Amarei range of products were later terminated by concluding the written agreement which has become the subject of a dispute in this case. The relevant terms of the agreement to the dispute herein can be summed up as follows:

5.1 That the defendant is indebted to the plaintiff in the sum of R1 650 000 which debt was taken over by the defendant from Amarel Laboratories (PTY) Ltd.

5.2 That the amount of R1 650 000 was payable to the plaintiff in a monthly payments of R100 000.

5.3 That the plaintiff was to provide the defendant with all the marketing contacts and leads of customers within Limpopo Province and outside Limpopo Province for the Amarel range of products,

5.4 That the plaintiff was prohibited from directly marketing the Amarel range of products after the signing of the agreement,

5.5 That the plaintiff will not purchase the Amarel range of products from any source except from the defendant,

5.6 That as at the date of the signing of the agreement, the plaintiff was holding Amarel range of products, and that such stock shall be counted and sold to the defendant at a cost price and that payment thereof will be decided upon between the defendant and the plaintiff.

[6] On the 10 May 2011, the plaintiff instituted the present proceedings claiming that the defendant was in default in making payments as obliged in terms of the written agreement. The last monthly payment in the sum of R100 000 was made on the 29 September 2008.

[7] The defendant in his plea as amended raised a defence as follows:

7.1 That the plaintiff made a misrepresentation which led him into concluding the agreement,

7.2 That the misrepresentation was to the effect that Amarel Laboraties (PTY)Ltd was indebted to the plaintiff in the amount of R1 650 000 for stock of the Amarel range of products when in fact the amount was also for cement and petroleum jelly for a product called "Baby Time".

7.3 That the representation by the plaintiff was false and induced the defendant to enter into the agreement with the plaintiff and had the defendant knew of the true state of affairs, he would not have concluded the agreement aforesaid.

7.4 That the plaintiff failed to provide the defendant with all its marketing contacts and leads within and outside Limpopo Province for the Amarei range of products.

7.5 That the plaintiff directly marketed and sold the stock of the Amarei range of products to FAB CASH & CARRY in Johannesburg, which the plaintiff was supposed to sell to the defendant at a cost price.

7.6 That the plaintiff informed the defendant that the stock in trade was damaged when in actual fact the stock was sold to FAB CASH & CARRY in Johannesburg.

ISSUES RAISED BY THE PLEA AND EVIDENCE

[8] The following issues could be regarded as important issues that deserve to be determined in this case:

8.1 Whether the plaintiff made misrepresentation that unduly influenced the defendant to conclude the agreement?

8.2 Whether the plaintiff provided the defendant with marketing contacts and leads within and outside Limpopo Province for the Amarel range of products?

8.3 Whether the plaintiff concluded an agreement with the defendant in terms whereof, the plaintiff was permitted to market or sell some of Amarel range of products to other people or entities? And if not, whether the plaintiff was entitled to sell the Amarel range of products at any price not stipulated by the defendant?

8.4 Whether the plaintiff provided the defendant with a counted stock list and whether the plaintiff sold such a stock to the defendant at cost?

DISCUSSION OF THE ISSUES AND FINDINGS

[9] Before I start discussing the issues identified in paragraph 8 above, let me just deal with another issue which was raised as a special plea at the commencement of the trial on the 4 October 2012. The decision on the special plea was stayed until at the end of the case on merits.

[10] I now proceed to deal with the special plea. The special plea was raised in the defendant's amended plea. The special plea is that at the time of the institution of the action on the 10 May 2011, the plaintiff was deregistered as a company. In brief, the background to the special plea is a follows:

10.1 On the 13 November 2009, a notice of deregistration of the plaintiff was given by the Commission for Companies and Intellectual Property. On the 16 July 2010 the plaintiff was deregistered.

10.2 On the 10 May 2011, the plaintiff instituted the present action. As at that time, the plaintiff was deregistered.

10.3 The defendant discovered on the 13 September 2011 that the plaintiff was deregistered as a company.

10.4 Just as a matter of details, on the 13 September 2011 and after the plaintiff had submitted an application for restoration, by a way of a letter from Companies and Intellectual Property Commission, the plaintiff was informed as follows:

"Your application for restoration was successfully processed and the status has been changed to IN DEREGISTRATION PROCESS.

The enterprise status will change to IN BUSINESS once all annual returns must be filed electronically on http:/ww.lipc.co.za"

10.5 On the 14 September 2011, the plaintiff was further informed by the Commission aforesaid as follows:

"Your filing for Annual Return(s) was successfully processed. For any enquiries please quote, the tracking number for reference".

10.6 Based on all of the above, I can find no basis to suggest that the procedural aspect relating to reinstatement has not been complied with. On the 4 October 2012, being date of hearing of this matter, the defendant filed notice to amend the special plea.

[11] The defendant pleaded that the plaintiff lacks *locus standi* to institute the action due to the fact that at the time it instituted the action, it was deregistered.

[12] The plaintiff's counsel did not object to the amendment, neither did he raise any prejudice in proceeding with argument on the special plea.

[14] The gist of the contention by the defendant's counsel was that the plaintiff ceased to exist as a legal entity when it was deregistered on the 16 July 2010. It meant that the plaintiff amongst others could not institute legal action, so the contention continued. Deregistration put an end to the existence of the plaintiff. Its corporate personality came to an end in the same way that a natural person ceases to exist when he or she dies, so it was argued. For this submission, counsel for the defendant relied on ***Miller and Others v Naflos Investment Holding Co. Ltd and Others 2010 (6) SA 390 SCA.***

[15] It appears from the two letters the contents of which were quoted in paragraphs 10.5 and 10.6 that the plaintiff was deregistered in terms of the 1973 Companies Act on the basis that it failed to file annual returns. It was reinstated or restored in terms of the 2008 Companies Act which came into operation on the 1 May 2011.

[16] The reinstatement of registration of a deregistered company in terms of the 2008 Act, follows upon an application thereof in terms of section 82(4) read with regulation 40(6) and (7) and only after the filing of outstanding annual returns and payment of outstanding prescribed fees in respect of the deregistered Company.(See **Fintech (PTY) Ltd v Awake Solutions (PTY) and Others 203 SA 570 (GSJ)**. For the sake of completeness and clarity the section and the regulations aforesaid read as follows:

Section *"82. **Dissolution of Companies and removal** from register –*

(1 ...)

(2) ...

(a) ....

(b) ...

(3)

(a) ...

(i) ...

(ii) ...

(aa) ...

(bb) ...

(b) ....

(i) ...

(ii) ...

(aa) ...

(bb) ...

(4) If the Commission deregisters a company as contemplated in subsection (3), any interested person may apply in the prescribed manner and form to the Commission to reinstated the registration of the Company,

Regulation 40. Winding-up, dissolution and deregistration of Companies and external Companies

(1) ...

(2) ...

(3) ...

(a) ...

(b) ...

(i) ...

(ii) ...

(iii) ...

(4) ...

(a) ...

(b) ...

(5) ...

(6) The Commission may reinstate a deregistered company or external company only after it has filed the outstanding annual returns and paid the outstanding prescribed fee in respect thereof.

(7) An application to re-instate a deregistered company or external company must be made in form COR 40.5 and must comply with such conditions as the Commission may determine.

[16] Unlike the 1973 Act which specifically provided retrospectivity arising from restoration, the 2011 Act does not. In the Old Act, section 73(6) specifically made a provision for an application for restoration to court or for the court to order restoration of deregistered company. Both in the matter of ***Peninsula Eye Clinic (PTY) Ltd v Newlands Surgical Clinic (PTY) Ltd and Others 2012 (4) SA 484 (WCC)*** *and* ***Fintech (PTY) Ltd*** referred to in paragraph 15 above, the issue relating to automatic retrospective effect without more, was left open. However, in the latter matter for example, Van Oostein J dealt with the matter based on its facts when he considered the status of **Awake** in the period from deregistration to the reinstatement or cancellation of

deregistration in terms of 2008 Act. He found and declared that all acts done by or against **Awake Solutions (PTY) Ltd** from the date of its reinstatement were validity done and that these acts are of full force and effect.

[17] A discretionary power in terms of the 1973 Act was given to the court to determine whether a deregistered company ought to be restored. Section 73(6) thereof provided as follows:

(6)(a) The court may, on application by any interested person or the Registrar, if it is satisfied that a company was at the time of its deregistration carrying on business or was in operation, or otherwise that it is just that the registration of the company be restored, make an order that the said registration be restored accordingly, and thereupon the company shall be deemed to have concluded in existence as if it had not been deregistered,

(b) Any such order may contain such directions and make such provision as to the court seems just for placing the company and all other persons in the position as nearly as may be, as if the company had not been deregistered".

[18] The new Act makes no similar provision or provisions to guard against any injustices. Secondly, the power to reinstate or to restore deregistered entities is that of the Commission as it would be seen from the provisions quoted in paragraph 15 above.

[19] However, I do not think such an authority to deal with deregistration and or reinstatement by the Commission excluded the court from deciding on the fairness of such an action by the Commission, more so that it is apparent that

the Commission in terms of section 82(4) and regulations 40 (6) and (7) has to be satisfied on a narrow consideration. Prejudice will be major consideration for the court to take care of.

[20] As I said earlier in this judgment, counsel for the defendant did not seem to want to argue prejudice. His argument was simply that the plaintiff could not be allowed to proceed with the matter because when the action was instituted it was not in existence. In effect, the contention was that the proceedings were null and void *abnitio* as they were instituted by an entity that did not have legal authority to do so.

[21] It was not his contention that retrospective effect brought about by reinstatement or restoration would have prejudicial effect on his defence or in the conduct of his case. Perhaps rightly so he did not make this an issue. Remember, the case for the plaintiff on the pleadings is set out in paragraphs 5.1 to 5.6 of this judgment. The defence thereto is set out in paragraphs 7.1 to 7.7 above.

[22] In the course of argument, counsel for the defendant sought to suggest that the re-registration of the plaintiff was done only to cure the defect of instituting an action when deregistered. In the course of this, he further stated as follows:

"The plaintiff is not trading anymore. The trade of, he is not in business anymore"

[23] The statement does not constitute evidence. Neither did the defendant seek to introduce evidence dealing with the non-operational status of the plaintiff. This is despite the fact that when the court decided to proceed with the matter on merits, it also indicated that parties could come back to the special plea

later if they wanted to. This did not happen. Neither did any of the parties lead evidence to this effect at any stage of the trial. During evidence on merits, there was no suggestion whatsoever that the defendant would be prejudiced in the conduct of his defence due to the plaintiff's reinstatement or restoration.

[24] Based on all of the above, I have no difficulty in coming to the conclusion that the defendant would not be prejudiced by proceeding to determine the issues raised in paragraphs 8.1 to 8.4 of this judgment. I do so on the basis that the plaintiff having been reinstated, the acts done by the plaintiff or against the plaintiff from the dates of its reinstatement should be regarded as having been validly done and that more such acts should be regarded as being of full force and effect. I therefore now proceed to deal with the issues on merits.

WHETHER THE DEFENDANT AGREED OR ALLOWED THE PLAINTIFF TO SELL SOME STOCK FORMING THE SUBJECT OF THE WRITTEN AGREEMENT?

[25] The defendant in his plea raised as a defence breach of the agreement by the plaintiff. The breach is characterized in the plea as follows:

"5.2 The Defendant specifically pleads that the plaintiff breached the conditions as set out in paragraphs 4, 5, 6 and 7 of Annexure A of the plaintiff's particulars of claim in that:

5.2.1 ...

5.2.2 The plaintiff directly marketed and sold the stock of the Amarel range of products to FAB CASH & CARRY in Johannesburg which the plaintiff was supposed to sell to the Defendant at cost".

[26] It was not in dispute that the plaintiff had sold the stock in question as averred and testified by the defendant. Clause 5, 6 and 7 of the written agreement read as follows:

"5. *AAD agrees that it will not purchase the Amarel range of products after this agreement is signed.*

6. *AAD agrees that it will not purchase the Amarel range of products from any source except from AP.*

7. *AAD may purchase the Amarel range of products from AP provided that AAD agrees to sell the products at the stipulated price set by AP*

12 *ADD is holding stock of Amarel products at the date of this agreement. Such stock will be counted and sold to AP at cost. Payment terms for the stock will be decided upon between AAD and AP at the time"*

[27] AAD refers to the plaintiff and AP refers to the defendant. As I said earlier, it was not in dispute that the plaintiff marketed and sold the Amarel range of products to FAB CASH & CARRY. The plaintiff however, wished to rely on an oral agreement to thwart the defendant's defence. The defendant is said to have refused to take some of the stock forming part of the written agreement. He allegedly indicated that such a stock in particular, the 5 litre hair product was not selling fast. Therefore, the defendant allegedly agreed that the plaintiff can take and sell the stock aforesaid.

[28] The plaintiff's cause of action as an entitlement to payment of R1 016 385.00 arising from indebtedness in the amount of R1 650 000 is based on clause 3.c of the written agreement. The entire cause of action is founded on the written agreement. Therefore, the plaintiff

cannot seek to thwart the defendant's defence by relying on such an oral agreement which is not even pleaded. Just on this point alone, the plaintiff ought to fail in its claim against the defendant.

[29] Even if I was to be wrong as stated above, I do not think that the plaintiff has succeeded in establishing the alleged oral agreement. In terms of the written agreement, the plaintiff is prohibited from marketing Amarel range of products. There is no provision in the written agreement where the defendant allowed the plaintiff to sell any of the Amarel range of products.

[30] Now the plaintiff in evidence sought to suggest that the defendant refused to take the sought stock on hand. This is said to have happened in July 2008 after the conclusion of the written agreement. The defendant is said to have visited the plaintiff's warehouse to view the stock on hand. The defendant's brother, who is the owner of Amarel Laboraties (PTY) Ltd and a signatory to the agreement, was allegedly phoned. He was phoned by the plaintiff. The defendant's brother on behalf of Amarel Laboraties also declined to take the stock which the defendant did not want. When all had failed, the defendant then agreed that the plaintiff could sell the stock for his own account so was the evidence on behalf of the plaintiff.

[31] Two witnesses testified on the allegations set out in paragraph 30 above. The allegations were however denied by the defendant and in certain respects by two if his brothers who testified on his behalf. The two bothers included the owner of Amarel Laboraties (PTY) Ltd. The latter firstly denied that the 5 litre hair care products are slow selling. It is mostly used by salons and it sells fast to the hair salons owners. This was also said by the defendant. The defendant in his evidence indicated that he was mainly dealing with hair salons owners and he had established a large clientele in that regard.

[32] The defendant's brother also indicated that he could not recall ever having been phoned by Mr Munshi on behalf of the defendant wherein he was asked to take the stock which the defendant did not want. If he had been called and asked to take the stock he would certainly have agreed thereto, because they are fast selling. The targeted market for the 5 litre containers of the Amarel hair care products are the hair salons. Secondly, his products had to be disposed within a reasonable period. It could be dangerous to the hair care users if very old products are used and this could have a negative image on the goodwill of the business regarding its products.

[33] Clearly, the plaintiff was required to prove the alleged meeting in which the defendant refused to take some of the stock and agreed to allow the plaintiff to sell the stock in question. On probabilities I am not satisfied that the plaintiff succeeded in establishing such an arrangement regard been had to the followings:

33.1 The stock on hand must have played a major role in the defendant agreeing to take over the liability of Amarel Laboraties (PTY) Ltd (hereinafter referred to as Amarel). The amount of R1 650 000 is regarded as an advance payment by the plaintiff to Amarel for the latter'products to be marketed and to be sold by the plaintiff. This appears clearly from the Preamble of the agreement in which it is stated as follows:

"Also in this agreement, AL owes AAD monies arising from advance payment made for stock ordered which was not delivered".

33.2 It is unlikely that the defendant would have refused to take the stock forming the subject of his liability to the plaintiff in the amount of R1 650 000. Although there was an attempt to argue that the amount of R1 650 000 was not confined only to stock seen in the light of the wording thereof, I cannot agree that the Amarel range of products were insignificant to the defendant' liability of R1 650 000. The defendant had to sell the stock in order to be able to pay the R1 650 000.

33.2.1 Firstly, there was no evidence to suggest that the liability did not relate to advance payment for Amarel products. During evidence the question revolved around whether some of the items on the statement forming the basis of liability were for something else and not for Amarel range of products. For example, there was a suggestion by the defendant that one other item related to cement which had nothing to do with Amarel range of product. The statement AL owes AAD a total of R1 600 000 from which the amount R250 000 (per para b) is to be deducted has to be seen in the context of the background relationship between the parties and also the Preamble to the written agreement.

33.2.2 Secondly, the plaintiff did not agree that any item on the statement was for cement. Its evidence and main contention was that everything that appears on the statement provided by Amarel and used to calculate liability to the plaintiff was in respect of advance payment for the Amarel range of products.

33.3 If indeed the defendant had agreed to the sale of the stock that he did not want, he would in my view, have invoked the provisions of clause 7 by fixing the price at which such goods had to be sold. Clause 7 was quoted earlier in paragraph 26 of this judgment. Secondly, the plaintiff did not plead authorisation to sell at a stipulated price, neither did the plaintiff testify to this effect. In terms of clause 5, the plaintiff is not allowed to directly market Amarel range of products after the signing of the agreement. It did, but no allegation and no evidence of a stipulated selling price by the defendant as required in terms of clause 7.

33.4 The other difficulty I find in the plaintiff's case is the sale of Amarel range of products forming part of the stock on hand at the conclusion of the agreement. The stock was sold to other entities without a benefit to the defendant. Before the conclusion of the agreement on the 30 June 2008, the defendant had given his distribution rights of Amarel range of products to the plaintiff. He was in turn getting a commission. Now according the alleged arrangement, the plaintiff would have been entitled to retain the stock in question and to sell it at profit margin of his own choice and at the same time still insist on the outstanding indebtedness in the sum of R1 016 385.00. This had the effect that the defendant lost out on the stock that he could sell at a profit which profit he could probably have used to reduce his indebtedness to the plaintiff.

[34] Based on ail of the above, the probabilities do not favour the plaintiff's contention that there was an agreement allowing the plaintiff to market and sell some of the stock on hand as at the time of the conclusion of the written agreement signed on the 30 June 2008. The plaintiff must therefore be found to have breached clauses 5 and 7 of the written agreement.

[35] There was a further contention to the issue under discussion. That is, the breach even if it was to be found to exist, such a breach or breaches did not make any difference, so it was contended. Any breach that might have occurred was branded as being immaterial or irrelevant in that the defendant elected not to take any action within a reasonable time based on the alleged breach.

35.1 A contract may be cancelled in the event of a breach, by agreement or by notice. A party wishing to rely on the cancellation of a contract because of its breach must allege and prove a breach of contract and that the breach is material. (See **Singh v McCarthy Retail t/a McIntoch Motors 2000 (4) SA 295 (SCA)**. An act of cancellation must be clear and unambiguous. (See **Nedcor Bank Ltd t/a Nedbank v Mooipan Voer & Graan Verspreiders cc 2002 (3) ALL SA 477 (T)**.

35.2 As a relief, the innocent party is entitled to cancel the contract and claim for a declaratory order that the contract was cancelled properly or he or she can claim for judicial cancellation. (See **Joubert v Bester 1977 (4) SA 560 (T)**.

35.3 While the right to cancel must be exercised within a reasonable time, mere delay does not result in the loss of that right. (See **Mahaveer v Sharma NO 1985 (3) SA 729 (A)**. Whether an innocent party had made an election to cancel is a question of fact to be decided on the evidence (See **Peters NO v Schoeman 2001 (1) SA 872 SCA par 12**).

35.4 It is common cause that the defendant after he had made three payments, stopped paying. This was after the defendant had on more than one occasion demanded the stock list and customers' contacts and leads from the plaintiff. I deal with this aspect in more details from paragraph 36 hereunder. It suffices for now to mention that I am satisfied that on the facts of the case, the defendant made an election to no longer be bound by the agreement when he stopped paying in terms of the agreement for the reasons that are dealt with hereunder.

35.5 Insofar as the plaintiff might have wanted to avert the defendant's defence based on a breach by arguing that the election to cancel was not made within a reasonable time, in the circumstances of the case, I am not satisfied that the defendant had lost such a right based on unreasonable delay in cancelling or making an election to cancel. As I said, failure to pay in terms of the agreement in my view, signifies an intention to no longer be bound by the agreement.

35.6 Any breach of clauses 4, 5 and 12 of the agreement quoted earlier in this judgment in my view, cannot be construed as being immaterial and irrelevant. Any such breach will justify election to cancel, also seen in the light of the reasoning for taking over the liability of Amarel.. Therefore, the contention that any breach that is alleged and proved is immaterial and irrelevant ought to be rejected.

WHETHER OR NOT THE PLAINTIFF PROVIDED THE DEFENDANT WITH CUSTOMERS' LIST AND STOCK LIST

[36] In terms of clauses 4 and 12, the plaintiff was obliged to provide the defendant with marketing contacts and leads for the Amarel range of products and also to sell to the defendant counted stock of Amarel products at a cost price. The plaintiff's version was that the terms and conditions in both clauses 4 and 12 had been fulfilled or complied with. This was denied by the defendant and his witness.

[37] The onus is on the plaintiff to establish on the balance of probabilities that clauses 4 and 12 had been complied with. For this purpose, the plaintiff relied on the evidence of the two witnesses, namely; the owner of the plaintiff Mr Munshi and one Mr Mohammed. The latter was the manager of the plaintiff at warehouse.

[38] It was during or about July 2008 when the defendant allegedly arrived at the warehouse. The stock on hand was counted. The defendant was there. He then rejected the five litres of hair products, alleging that they were not fast selling. I dealt with this aspect earlier in this judgment. He then collected the stock that he chose to take. He only came on that particular day for the stock. On the very same day, he was provided with contacts and leads. The stock was taken once by the defendant and what remained was what the defendant did not want and was sold by the plaintiff.

[39] Contrary to the plaintiff's evidence, the defendant and his witnesses denied any suggestion that the stock list, the contacts and leads particulars were provided. Firstly, according to the defendant he collected the stock about three times from the plaintiff warehouse and not once as suggested. Secondly, the plaintiff charged three percent to the cost of the stock which was supposed to be sold to the defendant only at a cost as envisaged in clause 12 of the written agreement. One of the defendant's brothers worked for the defendant as from the third or fourth quarter of 2008. Initially he worked for Amarel Laboraties (PTY) Ltd.

[40] On several occasions he was instructed by the defendant to get stock list, customers' leads and contacts from Mr Mohammed who was working for the plaintiff. Mr Mahommed was the warehouse manager for the plaintiff. On all occasions Mr Mahommed is alleged to have made excuses and promises to provide the list, but it was never done

[41] There are therefore two contradictory versions mainly by two witnesses from both sides. Both the stock list and the customers' leads and contacts were generated or printed out from a computer. A copy thereof was allegedly given to the defendant on that occasion when he allegedly came to collect the stock. When he collected the stock, an invoice would have been issued to him and

he would have signed a copy to acknowledge the stock he had bought and collected.

[42] The plaintiff however failed to produce any invoice relating to either, the stock list, or a document containing customers' contacts and leads. The explanation given was that none of the documentation so printed out of the computer and allegedly given to the plaintiff could be found. Interestingly, no explanation of efforts taken to procure such documents was given. The plaintiff contended itself with mere assertion that such documents could not be found. I found this to have been very unsatisfactory.

[43] For the plaintiff to want to enforce payment in terms of the written agreement, it has to establish on the balance of probabilities that for its part. it had fulfilled its obligations in accordance with the terms and conditions of the written agreement and in particular clauses 4 and 12.

[44] The defendant and his witness impressed the court as good witnesses. Their evidence around non-receipt of the customers' leads and contacts and counted stock list was not in any way destroyed. They corroborated each other in material respect. For example, that on several occasions the plaintiff was requested to provide the defendant with stock list and customers' leads and contacts.

[45] One can assume that the customers' leads and contacts were very important to the defendant. For him to be able to sell the stock that was to be sold to him by the plaintiff at a cost, he would have required to have contacts and leads of new customers that the plaintiff established during the time it was still distributing Amarel range of products. The defendant would have needed the extent of the stock on hand which formed part of the written agreement concluded on the 30 June 2008. I therefore find the defendant's version to be

more probable than that of the plaintiff. I now come to deal with another issue raised earlier in this judgment

WHETHER THE PLAINTIFF MADE CERTAIN FALSE REPRESENTATIONS

TO THE DEFENDANT?

[46] In his plea, the defendant averred as follows:

"2.2 *The defendant specifically pleads that the plaintiff made a misrepresentation which lead me to enter into the agreement which is attached to the plaintiff's particulars of claim as Annexure "A".*

2.3 *This misrepresentation which the plaintiff made was that, Amarel Laboraties (PTY) Ltd was indebted to the plaintiff in the amount of R1 650 000 for stock of the Amarel range of products when in fact the monies was in respectfully for a product called "Baby Time".*

2.4 *The representation by the plaintiff was false and induced the defendant to enter into the agreement with the plaintiff. The defendant would not have entered into the agreement with the plaintiff if he knew that the representation was false".*

[47] A party relying on fraud or misrepresentation must not only plead it, but must also prove it clearly and distinctly (**See Countney – Clarke v Bassingthwaighte 1991 (1) SA 684 (NM) 689**). The onus is the ordinary civil onus, bearing in mind that fraud is not easily inferred.

[48] It is not sufficient to allege that the representation was 'false' because the word implied no more than that the representation was untrue. The mental element must be alleged (**see Breeds v Elsie Motors (Edms) Bpk 1963 (3) SA 525 (A)**). The representor or his agent must have had the intention that the representee will act on the representation.

[49] The representation must have included the representee to act or conclude the agreement. **(See Seven Eleven Corp of SA (PTY) Ltd v Cancun Trading no. 150 CC 2005 (5) SA 186 (SCA)**.

[50] If reliance is placed on fraudulent non-disclosure, facts giving rise to the duty to disclose must be set out. It is also necessary to show that the duty to disclose was deliberately breached in order to deceive. **(See (2) SA 915 (A) and Movie Laundry Co (PTY) Ltd v Van Wyk 2003 (2) ALL SA 291 (C).**

[51] If fraud or misrepresentation led to the conclusion of a contract, cancellation of the contract may be claimed. **(See North West Provincial Government v Tswaying Consulting CC 2007 (4) SA 452 (SCA**). The innocent party may elect to keep the contract alive and claim damages.

[52] If cancellation of the contract is claimed, restitution must be tendered. The defendant is claiming dismissal of the plaintiff's action and cancellation of the written agreement. The breach contention has been raised as a defence and regard being had to the facts of the case, the defendant has nothing to return or to tender as a restitution or compensation.

[53] Now, coming back to the issue under discussion, the document relied upon as the basis for misrepresentation, is a statement issued on the 31 June 2008 by Amarel Laboraties. The statement is directed to the plaintiff. It shows the amount in respect of which Amarel Laboraties was indebted to the plaintiff. As one can see, the statement was issued on the very same day the written contract was signed by or on behalf of the plaintiff, defendant and Amarel Laboraties.

[54] It is also important to mention that and as it would also appear from the written agreement, the three parties have had a meeting on the 18 June 2008, just before the conclusion of the written agreement. The statement consists

of seven pages. It shows the date, description or transaction, debits and credit amounts and then the balance outstanding as due to the plaintiff. The due amount is in respect of advance payments by the plaintiff to the defendant for stock that was supposed to be delivered to the plaintiff. As at the time of the conclusion of the agreement, not all the stock paid for in advance was delivered to the plaintiff. The total amount was summed up and recalculated by hand and it came to R1 646 403.31. The R1 650 000 indicated on the written agreement is said to be a round figure of the said sum of R1 646 403.31.

[55] The defence of misrepresentation was first set out in paragraph 2 of the plea dated the 15 December 2011. Then on the 11 February 2013, and after the defendant had already testified, the plea was amended as quoted in paragraph 46 of this judgement to include the following averments to paragraph 2:

55.1 At the end of paragraph 2.3 of the plea by adding: *"…. and petroleum jelly for a product called "Baby time".*

55.2 By adding another paragraph as follows: *"2.4 the representation by the plaintiff was false and induced the Defendant to enter into the agreement with the plaintiff. The Defendant would not have entered into the agreement with the plaintiff if he knew that the representation was false".*

55.3 A party wishing to rely on fraud or misrepresentation in order to escape his obligations in terms of the agreement, must not only allege facts upon which fraud or misrepresentation is based, but must also adduce evidence to prove such facts or allegations. The timing of the representation inducing a party to conclude an agreement which he or she will not have concluded, had he or she have known of the true state of affairs, is very important.

[57] The defendant did not testify on the alleged representation, the nature of the representation and what was actually said to him by whom, when, where and what influence the representation had on him to conclude the agreement. As at the time of the conclusion of the defendant's evidence during 2012, he had not as yet made allegations as quoted in paragraph 55.1 and 55.2 above, neither did he apply to be recalled so that the new allegations could be substantiated. Just on this point alone, his defence of misrepresentation ought to fail.

[58] There is of course, another difficulty confronting the defendant. The question is who had made the representation, if any? His cause of complaint was based on some of the items in the statements issued by Amarel Laboraties and not by the plaintiff. The items relate to cement and the petroleum jelly for a product called "Body Time".

[59] As a brief background, the owner of Amarel Laboraties testified on behalf of the defendant. The plaintiff apparently advanced money to Amarel Laboraties to enable the plaintiff to buy cement that was targeted at a certain building project. When the project did not materialise, Amarel Laboraties remained indebted to the plaintiff in the sum of R250 000. According to the evidence, when the cement or building project did not succeed, the advance of the amount by the plaintiff to Amarel Laboraties was treated as an advance for Amarel range of products. It was therefore included in the statement as a liability towards the plaintiff. In the light of all these, it cannot be said false representation was made and that it was made by the plaintiff. On this basis, the defendant should be found not to have succeeded in making a case for misrepresentation against the plaintiff.

[60] As regards, the petroleum jelly for a product called "Baby Time," again this had a bearing on Amarel Laboraties. The item for this was

included in the statement prepared by the latter. It forms part of Amarel Laboraties' indebtedness to the plaintiff. It is included in the R1 650 000 liability by Amarel Laboraties. The Baby Time product came as a result of an arrangement between the plaintiff and Amarel Laboraties, through payments by the plaintiff in advance to the Amarel Laboraties,. The latter was to purchase petroleum jelly in drums from Durban. Out of the petroleum jelly, Amarel manufactured the Baby Time (baby care products) which was then delivered to the customers designated by the plaintiff. This clarity came during the evidence of the last witness for the defendant who happens to be the defendant's brother and the owner of Amarel. The representation if any, was not made by the plaintiff and no evidence was adduced to attribute the alleged false representation to the plaintiff.

[61] Having regard to what is stated in paragraphs 59 to 60 above, the wording of clause 3.c raised another issue with regard to the alleged misrepresentation. At the risk of repeating myself, it reads as follows: "*AL owes AAD a total of R1 650 000 from which the amount of R250 000 (per paragraph b) is to be deducted*".

[62] Whilst one can accept that R1 650 000 was in respect of the stock not delivered to the plaintiff, after the plaintiff had made an advance payment in connection thereof, The suggestion that the liability was intended to be limited to Amarel range of products only, ought to be seen in the context of what is stated in paragraphs 59 and 60 of this judgment. Therefore the contention around this ought to be rejected. However, the plaintiff's action is destined to fail seen in the light of my findings regarding the other issues on the breach.

[63] Consequently, an order is hereby made as follows:

63.1 The plaintiff's action is hereby dismissed with costs, 63.2 The written agreement concluded on the 30 June 2008 is hereby cancelled.

M F Legodi

M F LEGODI

JUDGE OF THE HIGH COURT

(NORTH GAUTENG HIGH COURT)

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