

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2024-071100

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES

DATE: 30 July 2024

[REDACTED]

In the matter between:

NOTRE COAL (PROPRIETARY) LIMITED

Applicant

and

SOUTHERN PALACE INVESTMENTS 425 (PROPRIETARY) LIMITED

Respondent

JUDGMENT

K STRYDOM, AJ

1. In this urgent application for specific performance, the Respondent raised points *in limine* pertaining to urgency as well as the failure of the Applicant to comply with the provisions of Rule 41A.
2. I was satisfied that the Applicant had made out a case for urgency. Insofar as the failure to comply with the provisions of Rule 41A is concerned, I agree with the Applicant that such a failure is not a bar to the hearing of this application.¹

¹ See: *Nomandela and Another v Nyandeni Local Municipality and Others* 2021 (5) SA 619 (ECM) as well as *Growth Point Properties vs Africa Master Blockchain Company (Pty) Ltd* (2020/43806) [2022] ZAGPJHC 836 (26 October 2022)

3. The Respondent manufactures jiggling plants for use in the mining industry. On the 22nd of January 2024, the Applicant accepted a quote for such a plant and entered into an agreement ("the main agreement") with the Respondent. The relevant terms were:

- a. *"The prices quoted are valid for 30 days from date issued and are fixed for the period subject to any changes made by the client....[The Respondent] reserves the right to alter the prices at its own discretion, if deemed necessary and agreed by [the Applicant]."*
- b. *"Duration of manufacturing: [The Respondent] will provide [the Applicant] with an estimated date of completion, which is normally 10-12 weeks but will be discusses and agree upon 22 January 2022 and will depend on factors such as its existing commitments at the time of receipt of the order and the availability of materials and the lead times of buy-out items. [The Respondent] will make every effort to complete the order within this time, even so, delays do sometimes occur that are beyond its control and it will not be held liable for any such delays."*
- c. *"Payment terms:*
 - i. *1st Payment: 50% deposit .*
 - ii. *2nd Payment:20%: 4 weeks.*
 - iii. *3rd Payment: 15% on shipping*
 - iv. *4th Payment: after startup*
of the total amount, plus the Value Added Tax (V A T) thereupon (at prevailing rate) and will not commence with manufacturing unless the deposit has been cleared and the order received."

4. The initial purchase price was an amount of R 11 412 025.00. The Respondent made sporadic payments between January 2024 and March 2024. It had only paid the 50% deposit on the 12th of March 2024. Thereafter it made a R500 000-00 payment on the 30th March 2024. As such, it was late in making the second payment per the main agreement. Following threats by the Respondent to cancel the agreement, the parties concluded a variation agreement on the 8th and 10th of May 2024. The relevant terms thereof were:

1.4 The parties hereby agree to the variation of the payment dates and amounts, taking into consideration the amounts mentioned above in paragraph...

1.4.1 Payment of R2 011 730.00 by the signing of this Addendum by both parties;

1.4.2 Payment of the amount of R2 589 755.00 on the 21st of May 2024;

1.4.3 An amount of R250 000.00 payable in the trust account of Zyl's Incorporated before the product is loaded and transferred to the sight (sic) of the Purchaser;

4. The Supplier hereby undertakes to deliver the product as stipulated in the quote as soon as possible. The Purchaser take note that due to the interruption of the project as previously agreed to, the Supplier has to deliver the product outside its original planning.

5. Both parties undertake not to interrupt or delay the project or payment as such delays may incur more wasted costs."

5. The Respondent made payment of R2 011 730.00 on signing the variation agreement. However, it failed to make the second payment by the 21st of May 2024, leading to the Applicant (again) placing it on terms should it fail to affect the payment within 10 days from the 3rd of June 2024. The letter of demand indicated the Respondent reserved its rights, including the right to complete the plant at our its own costs and to sell it to the first willing and able purchaser to mitigate its damage.

6. Payment was made on the 13th of June 2024, however, the Respondent's attorneys informed the Applicant that the payment is kept on trust subject to the following:

"In terms of the agreement signed by both parties on the 08th and 10th of May 2024, the abovementioned payment was supposed to be made on or before 21 May 2024. This delay in payment by your client left our client with no alternative than to accept another project that was fully paid for. The project of your client can only continue after our client's current project is finish, which will take approximately 12 weeks."

"4. We have consulted with our client regarding the way forward and our client instructed us that the two main suppliers of the jigging plants and the screen manufacturer informed him at the end of May 2024 that they can't supply our client with the same goods for the same price as quoted before. Our client is in the process to gather information and reveal to your client the difference in prices. This increased prices which is a loss for our client is directly as a result of your client's late payment."

7. As a result of the indication that there the Respondent would not deliver the Applicant's plant until the Respondent's current project had been completed, the present application was launched.

Evaluation

8. From the outset it should be noted that both parties argued the matter along the lines of the requirements for a final interdict. In cases of specific performance, this is not the correct approach. As stated by in Christie's 'The Law of Contract South Africa':²

"One way of breaching a contract is by doing something expressly or impliedly forbidden by the contract or inconsistent with the obligations imposed by the contract. A plaintiff who asks for an interdict to prohibit such a breach is in reality asking for specific performance in the negative form of non-performance of the forbidden or inconsistent act to ensure performance of the contract. His entitlement to an interdict, subject only to the court's discretion, is therefore as unquestionable as in the case of a plaintiff who seeks specific performance in the positive form. Especially, his entitlement is not subject to the requisites for an application for an interdict set out by Van der Linden"
[Underlining my own]

9. As such, I do not intend to pertinently address the factors in support of and against the granting of final interdict. The simple question is whether the Applicant is entitled to specific performance. It would only be entitled to demand specific performance if there was a contractual obligation on the Respondent to deliver the jiggling plant by a defined date or upon the occurrence of a certain event and the Respondent had failed to comply with its obligation.³
10. The Respondent essentially argues that payment of the 50% payment deposit 'triggered' the Applicant's obligation to start manufacturing of the plant (per paragraph 1c above). Based on the estimated date of completion (per paragraph 1b above) being between 10 to 12 weeks, it argues that (assuming 12 weeks from the 12th of March 2024) the plant should have been ready for delivery by the 12th of June 2024. As such, regardless of the late subsequent payments, the Respondent argues that it is now entitled to delivery of the plant.
11. The interpretation afforded to the main agreement, as read with the variation agreement by the Applicant is, in my view, incorrect in several respects.

² LexisNexis, 6th Edition at pages 555-556

³ See for instance: *Singh v McCarthy Retail Ltd t/a McIntosh Motors* [2000] 4 All SA 487 (A), also reported at 2000 (4) SA 795 (SCA).

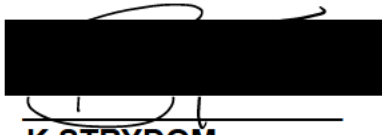
12. The Applicant's argument that the main agreement set out a definite period for manufacturing is incorrect. Plain reading of the main agreement clearly indicates that the manufacturing period was an estimated period.
13. The Applicant also submitted that the main agreement set out a definitive list of instances where the 12 weeks period may be exceeded. The wording used is:
"...factors such as its existing commitments at the time of receipt of the order and the availability of materials and the lead times of buy-out items."
14. Much was made in argument of the fact that the Respondent only informed the Applicant that it had taken on another project after it had made the penultimate payment on the 13th of June 2024. It was argued that the other project was not in "existence" at the time of conclusion of the main agreement or the variation agreement and therefore could not be relied on as a reason for the delay in completion of the plant. This is also incorrect. On plain reading, the instances following the words "*such as*" are examples and not a set defined list.
15. Even if the Applicant's reading of the main agreement was correct, the manufacturing period per the main agreement was clearly varied by clause 4 of the variation agreement:

"The [Respondent] hereby undertakes to deliver the product as stipulated in the quote as soon as possible. The [Applicant] takes note that due to the interruption of the project as previously agreed to, the [Respondent] has to deliver the product outside its original planning."
16. On the Applicant's version, the date for delivery per the main agreement would have been the 12th of June 2024 – i.e the "original planning" was for manufacturing to have been completed by the 12th of June 2024. In terms of the variation agreement, the Applicant took note that delivery would be *outside* of the original planning. This argument seemingly tied in with the (incorrect) interpretation that any delay may only occur due to the "set" list of circumstances. This position is unsustainable given the fact that any date for delivery that may have been defined per the main agreement, had clearly been varied by the variation agreement to "as soon as possible".
17. The Applicant has therefore failed to prove that it the Respondent has breached the agreement and resultantly, has failed to prove its entitlement to specific performance.

18. As a result, the following order is made:

Order

1. The application is enrolled and determined as a matter of urgency pursuant to the provisions of uniform rule of court 6(12) and any non-compliance with the ordinary rules and practices pertaining to forms, service and enrolment is hereby condoned.
2. The application is dismissed
3. The Applicant is ordered to pay the Respondent's costs on a High Court scale, with counsel's fees determined at Scale B.


K STRYDOM
ACTING JUDGE OF THE HIGH
COURT, GAUTENG DIVISION,
PRETORIA

Judgment reserved: 16 July 2024

Judgment handed down: 30 July 2024

Appearances:

For the Applicant:

Adv J van Rooyen, instructed by DE Bruwer attorneys

For the Respondent:

Adv RF de Villiers, instructed by Van Zyl's Incorporated