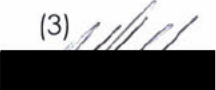


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: 55460/2020

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER
(3)	JUDGES: YES / NO
	REVISED.
 [REDACTED]	<u>13 September 2024</u>
SIGNATURE	DATE

In the matter between:

DREAM WORLD INVESTMENTS 401 (PTY) LTD

Plaintiff

and

SMD TECHNOLOGIES (PTY) LTD

Defendant

JUDGMENT

**THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE
CIRCULATED TO THE PARTIES BY E-MAIL. THE DATE AND TIME OF HAND
DOWN IS DEEMED TO BE 13 SEPTEMBER 2024**

LINGENFELDER AJ

1. The plaintiff applies in terms of Rule 6 (11) read with Rule 28 for leave to amend its particulars of claim in terms of a notice of intention to amend dated 19 April 2023. The defendant opposes the proposed amendment on the grounds that the particulars of claim, if amended in terms of the notice of amendment, would be rendered excipiable. It accordingly falls to be decided, by considering whether the particulars of claim, if amended as requested by the plaintiff, and accepting the allegations made in the amended particulars of claim to be established, would disclose a cause of action, or would be excipiable on the grounds contended for by the defendant. The allegations raised in the defendant's plea are irrelevant to the determination of this issue. Both parties have referred to the relevant authorities in their written heads of argument. I proceed to consider the application on the basis of the allegations in the particulars of claim were the amendment to be granted, and which I will refer to as "the amended particulars of claim".
2. The plaintiff entered into 2 agreements with the defendant for the purchase of thermometers. The plaintiff seeks to cancel the agreements and claim re-payment of the purchase price paid in terms of both agreements.
3. The plaintiff in the amended particulars of claim relies on two agreements, being an oral agreement concluded in April 2020 ("the April agreement") and a later written agreement concluded in May 2020 ("the May agreement"). The plaintiff seeks to rely on and to plead the existence of the implied and/or tacit terms in respect of both agreements. The written May agreement incorporates certain

standard terms and conditions which are annexed to the particulars of claim as annexure "POC1", but which in terms of the amended particulars of claim do not apply to the oral April agreement.

4. The defendant delivered a notice of objection to the proposed amendment and a notice of objection to the application for leave to amend. The grounds of objection can be summarised as follows:

- 4.1. the proposed amendment seeks to introduce and rely on an implied and/or tacit term to the agreements concluded between the parties;
- 4.2. The alleged implied/tacit term sought to be introduced is, so the defendant contends, in the form of a warranty that the thermometers would carry a CE marking and be properly certified in conformity with European Commission Directive 93/42/EEC;
- 4.3. The defendant contends that the proposed amendment seeks to introduce an allegation that **the defendant** (but presumably, and if regard is had to the defendant's heads of argument, the reference was intended to be to **the plaintiff**) tacitly specified or instructed that the goods would be CE marked and certified;

- 4.4. That the plaintiff seeks to link the defendant's alleged breach of the implied/tacit term as the causal basis for its claim for damages;
- 4.5. In terms of clause 15 of the written May agreement (attached to the particulars of claim as annexure "POC1") the plaintiff is precluded from pursuing a claim against the defendant for goods supplied contrary to a specification.

Accordingly, so the defendant contends, if the proposed amendment is allowed the amended particulars of claim would be excipiable in that the plaintiff's claim for breach of contract would be contradictory to and precluded by clause 15 of annexure POC 1.

5. The attempt by the plaintiff to avoid clause 15 by inserting a new paragraph 10(bis) in which it contends that its damages claim does not arise from any discrepancy or defect in the plaintiff's specifications or instructions is objectionable in that, so the defendant contends, the very notion of the implied or tacit term is to incorporate a specification to the goods imposed upon the defendant by the plaintiff, and the very basis of the claim, is that the plaintiff has no claim for any loss or damage for as a result of any discrepancy or defect in those specifications or instructions.
6. As a further and separate ground of objection, the defendant relies upon clause 16 of "POC1", and contends that this clause expressly excludes any warranty as

to the suitability of the goods for the purpose for which the defendant intends to utilise them. This objection is premised upon paragraph 8.5 of the proposed amended particulars of claim as being a contention that the thermometers are unfit for purpose and not susceptible for on-sale to customers.

7. The defendant further, in paragraph 10 of the objection, contends that clause 18 of "POC 1" excludes the defendant's liability for any defect in the goods delivered to the plaintiff. This objection was not dealt with in the defendant's written heads of argument or in oral argument, and in my view does not warrant further consideration as the amended particulars of claim do not contain factual allegations which would render clause 18 applicable.

8. THE RELIANCE ON CLAUSE 15

- 8.1. Clause 15 of annexure "POC1" (the written agreement) provides as follows: *"If any goods or any part of them to be supplied in accordance with the **specifications or other instructions furnished by the Customer**, the Customer shall not have any claim against the Company for any loss or damage sustained by the Customer as a result of any discrepancy in the specifications or instructions."* (The emphasis is my own).

- 8.2. Mr Van Riet SC, who appeared for the plaintiff, submitted that the words *"furnished by the customer"* in the highlighted phrase, qualify both *"specifications"* and the words *"other instructions"*, whereas Mr Hoffman

who appeared for the defendant, made submissions on the basis that the words qualified only *“other instructions”*. Having regard to the absence of a comma after the word *“specifications”*, and the use of the word *“other”*, which implies that specifications are themselves instructions, but that there may be *“other instructions”*, in my view the words *“furnished by the customer”* also qualify the word *“specifications”*.

- 8.3. The question which then arises is whether the amended particulars of claim on a proper interpretation thereof, in particular the allegation relating to the existence of the implied/tacit term, include an allegation that the plaintiff tacitly furnished a specification in relation to the thermometers to the defendant. Mr Hoffman submitted that the defendant contends that the plaintiff’s specification for the goods lies in the fact that the goods must be certified and have a valid ICR certificate as being a specification imposed upon the defendant by the plaintiff, and does not rely on any other instructions furnished by the plaintiff to the defendant. In my view, having regard to the well-established principle that in considering an exception the allegations under consideration must be given every reasonable interpretation which they made arguably bear, the allegation of an express/implied term does not necessarily amount to an allegation that the plaintiff furnished a specification to the defendant in regard to the EC marking and certification of the thermometers, which is what it would be required to render clause 15 applicable.

8.4. The defendant in its heads of argument quoted from and sought to rely upon provisions of the European Commission Directive 93/42/EEC in support of its objection to the proposed amendment, and on an annexure to the Directive. Although the Directive is referred to in the plaintiff's amended particulars of claim, its terms and content were not placed before me by way of admissible evidence, and as the directive constitutes part of foreign law, this court cannot take judicial notice thereof, and the party seeking to rely thereon must prove its content. The defendant, should it have wished to rely upon specific provisions of the Directive, should have done so by way of an answering affidavit in support of its opposition application for leave to amend, but chose not to do so. Mr Hoffman also made no submissions based on the Directive during oral argument. I therefore disregarded what was submitted in paragraphs 25 and 26 of the defendant's heads of argument.

8.5. With regard to the proper interpretation of clause 15 of the written agreement, evidence of the parties of the context and circumstances in which the CE marking and certification was raised and became relevant, and what was envisaged by the phrase "*specifications furnished by the company*" would be admissible as establishing the context and purpose of the relevant contractual provisions. See *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC). Having regard to the authorities relied upon and referred to by Mr Van Riet SC to the effect that a court should generally refrain from deciding on exception issues of interpretation where evidence may be admissible on the issue

on the issue, but should defer the decision to a trial court, the objection raised by the defendant based upon the provisions of clause 15 is not sustainable. Furthermore, clause 15 clearly would not apply to the oral April agreement and would not constitute a basis for the objection to the amendment in respect of that April agreement as conceded by Mr Hoffman during argument.

8.6. As is apparent from paragraph 10 (bis) of the amended particulars of claim, the plaintiff disputes that its claim arises from any defect in a specification furnished by the plaintiff to the defendant, and Mr Van Riet SC submitted that the plaintiff's complaint in regard to the thermometers is not that they were defective and therefore not fit for the purpose of being used as thermometers, but that the absence of CE marking and certification renders them unfit for the purpose for which they were purchased, being for re-sale to end-users, and that the absence of the certification resulted in the plaintiff being unable to resell the thermometers. In my view, the amended particulars of claim are open for this interpretation, which if correct would render clause 15 inapplicable. This in my view is an issue which should properly be determined at the trial on the basis of all relevant evidence.

8.7. There is a dispute between the parties on the heads of argument as to whether the plaintiff bears the onus (as contended by the defendant) of alleging and proving that clauses 15 and 16 do not apply or whether the defendant, should it seek to rely upon the exclusion of liability under

clauses 15 and 16, is required to allege and prove the facts upon which it relies for the exclusion of liability. This is not an issue which I am called upon to determine in this application, as the defendant has not in its grounds of objection to the proposed amendment contended that the failure of the plaintiff to allege that clauses 15 and 16 do not apply, would render the amended particulars of claim excipiable.

- 8.8. Accordingly, in my view, the defendant's objection to the amendment based upon clause 15 of annexure POC 1, and the contention that clause 15 renders the particulars of claim, on any reasonable interpretation thereof, excipiable, is unsustainable and unfounded.

9. THE RELIANCE ON CLAUSE 16

- 9.1. Clause 16 of POC 1 provides as follows: "*The Company does not warrant that the goods **are not suitable** for the purpose for which they are required whether those purposes are known to the company or not.*" (My own emphasis)
- 9.2. I was informed during the argument that the plaintiff and defendant agree that the "*not*" in the phrase "*are not suitable*" is clearly an oversight and that the plaintiff accepts this and does not insist on rectification of the agreement in this regard.

- 9.3. Once again, clause 16 will not be applicable to the April agreement as conceded by Mr Hoffman. The defendant's argument is that clause 16 precludes the plaintiff's claim on the written agreement, as the plaintiff itself states that the goods were not fit for purpose, namely for the plaintiff's purpose, i.e. to sell the goods on. On the plaintiff's version, so it is argued, the goods suffered from the feature referred to in clause 16, as is borne out in paragraph 8.5 which states "*Thermometers without a valid ICR certificate are not fit for purpose and not susceptible for on-sale to customers.*" Paragraph 8.5 does not form part of the notice of intention to amend and is contained in the original particulars of claim. The defendant had the remedy to file an exception against the original particulars of claim, based on the incorporation of paragraph 8.5, but did not do so.
- 9.4. Mr Hofmann argued that there is no ambiguity in clause 16, and as such, the clause must be interpreted as it stands. Mr Van Riet SC argued that the defendant is making a quantum leap in accepting that due to the fact that the plaintiff acquired the thermometers for the purpose of on-selling and cannot do so without the proper certification, that this equals "*not fit for purpose*" in terms of clause 16. On the plaintiff's interpretation, the meaning of "*not fit for purpose*" in clause 16 refers to an inability to use the thermometers for the ordinary purpose of thermometers, namely to take one's temperature. I am of the view that this clause is capable of being interpreted in this way, and that in view of the *University of*

Johannesburg-matter (supra) evidence would be admissible and should be allowed as to the correct interpretation of the words.

9.5. I was also referred to the matter of *Odendaal v Ferraris* 2009 (4) SA 313 SCA, where the Supreme Court of Appeal held that the absence of statutory approvals for building alterations or other statutory requirements, does not render the property unfit for the purpose for which it was purchased, that is for habitation. The respondent did not allege in that matter that failure to have obtained permission for the outbuildings rendered the property unfit for habitation. The respondent in fact received exactly what he purchased. The absence of statutory requirements are defects to which the voetstoots clause in the agreement between the parties would apply.

9.6. I am of the view that the *Odendaal-matter* referred to above does not assist the defendant in this application. This matter is distinct from *Odendaal* and more comparable with the matter of *Ornelas v Andrews Café and Another*, where a property was sold as a going concern for the purpose of conducting a cafe and restaurant business. It transpired that the restaurant was operated without a license and that such a license could not be obtained. The sale was cancelled on the basis that the seller's failure to deliver a property from which the envisaged business could lawfully be conducted was a material breach of an implied term. The sellers relied on a voetstoots clause and specifically that there was no guarantee whatsoever as to the state or condition of the business. This clause was interpreted restrictively by the court and it was held that the clause did not exempt the seller from delivering a business that could

lawfully be conducted there being an implied warranty to this effect, and that it was not a case of a defect in the *res vendita*, but in truth a case of delivery to the buyers of something different from what was bought.

- 9.7. Accordingly, in my view the defendant's objection to the amendment based upon clause 16 of annexure POC 1, and the contention that clause 16 excludes liability and renders the particulars of claim, on any reasonable interpretation thereof, excipiable, is unsustainable and unfounded.

10. CONCLUSION

- 10.1. On the basis of my findings that the defendant's objections to the proposed amendments are unfounded and unsustainable, the plaintiff is entitled to the main relief which it seeks in regard to the amendment to the particulars of claim.
- 10.2. In regard to costs, courts have held that a party seeking an amendment is seeking an indulgence, and may well be ordered to pay the costs of a successful application if the opposition to the amendment was reasonable. In my view, although I have concluded that the objections based upon clauses 15 and 16 have no merit (and the objection based upon clause 18 was not persisted with before me) I cannot find that the objections based upon the provisions of clauses 15 and 16 (but which would in any event not be applicable on the plaintiff's pleaded version to the overall April agreement) were necessarily unreasonable. The defence

based upon clause 15 may well be upheld at the trial upon consideration of all the relevant evidence, but made by the same token be rejected, and the same applies to the interpretation of the words "*fit for purpose*" in clause 16.

10.3. In the exercise of the discretion, I am of the view that the costs of the objection should be reserved to be argued at the hearing of the matter before the trial court.

In the result make the following order:

- (1) the plaintiff is granted leave to amend its particulars of claim in terms of the notice of motion in the application for leave to amend dated 26 May 2023;
- (2) the plaintiff shall deliver its amended pages of the particulars of claim within 10 days of the date of this order;
- (3) the costs of this application and the costs of counsel and the scale thereof, are reserved.



M M LINGENFELDER AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of Hearing:

02 September 2024

Date of Judgment:

13 September 2024

Appearances:

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