



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **16343/2021**

In the matter between:

QUALITY MEDICAL SUPPLIES (PTY) LTD

Plaintiff

and

MEDICAL DIAGNOSTECH (PTY) LTD

Defendant

REASONS IN TERMS OF RULE 49(1) (c)

RK PARKER AJ

Introduction

[1] In this matter, the parties, concluded an agreement in terms of which the defendant will manufacture, sell and deliver surgical scrub to the plaintiff. Due to the defective and poor quality of the surgical scrub, the plaintiff claimed a refund in the amount of R1 081 068.08, together with transportation costs in the amount of R 123 912.50 of which the latter claim was withdrawn.

[2] Defendant delivered a counterclaim in the amount of R500 000.00 for the purchase of raw materials which it incurred to manufacture the plaintiff's products; however, this claim was also withdrawn.

Issues for determination

[3] The issues for determination, were:

- 3.1 The terms of the agreement between the parties.
- 3.2 Who provided the formula for the manufacturing of the products?
- 3.3 Whether there was an agreement to modify the formula for the manufacturing of the product.
- 3.4 If there was such an agreement, who was responsible for the costs of the modification
- 3.5 Any direct or indirect consequential loss or damage caused by the defective product and the defendant's liability if there was.
- 3.6 The terms of the credit notes issued by the defendant to the plaintiff.
- 3.7 The plaintiff's refusal to accept the replacement of the returned products by the defendant.
- 3.8 The quantum of the plaintiff's claims.

Common cause facts

[4] The locus standi and jurisdiction were not in issue. It was common cause that in July 2020 the plaintiff represented by Shanton Naicker (hereinafter referred to as "Naicker"), and the defendant represented by Ashley Uys concluded an agreement. On 16 July 2020 plaintiff paid an initial deposit of R50 000.00. The plaintiff approved samples delivered by defendant to it. On 29 July 2020 the plaintiff placed an order for 35000 units of skin disinfectant and 45000 units of surgical scrub to a total value of R2 656 500.00. On 31 July 2020 plaintiff paid the defendant an amount of R1 328 250.00 representing a 50% deposit of the amount of the purchase order. Subsequently plaintiff made two further payments to the defendant in the amount of R 472 606.00 on 8 September 2020 and R805 644.00 on 20 October 2020. Defendant agreed to replace free of charge any products found to be defective by its

laboratory. Between August 2020 and March 2021, the plaintiff returned 22099 units of the surgical scrub to the defendant.

[5] At the conclusion of plaintiff's case, defendant brought an application for absolution from the instance. Both parties duly delivered their heads of argument, and the absolution of the instance was granted on 28th February 2025, in favour of the defendant with the plaintiff to bear the defendant's costs of suit on a party and party scale including the costs of counsel where so employed.

[6] On 7 March 2025 plaintiff sought reasons for the order handed down on 28 February 2025 in terms of Rule 49(1)(c). What follows are therefore the reasons for the order.

[7] For the sake of convenience the parties shall be cited as named in the main action.

[8] Plaintiff based its claim on a single oral agreement concluded between the parties' respective representatives during July 2020, inter alia, for the following:

- 8.1 defendant will manufacture, sell and deliver goods to wit, 70% alcohol skin disinfectants and Chlorhexidine gluconate 4% solution (surgical scrub)
- 8.2 the surgical scrub would conform to similar products used in the market, both in appearance and quality, namely a thick liquid pink in colour that foams once used

[9] Defendant delivered samples of the surgical scrub to plaintiff who was satisfied and accordingly approved the samples, resulting in the 29 July 2020 order.

[10] Plaintiff pleaded that after it transported and delivered the surgical scrub to its client's in, inter alia Mpumalanga, plaintiff received complaints that the product was defective, more particularly the scrub was of poor quality, was watery, began to change colour and with the last batch, had a foul odour.

[11] About 22 099 units of products were returned to defendant, for which the plaintiff was furnished with credit notes on 23 March 202 in the amount of R96 000 and on 31 March 2021, in the amount of R614 987.80, respectively. These being the credit notes issued by defendant to plaintiff. It is not to be confused with credit notes issued by plaintiff to its clients.

[12] Plaintiff did not wish to conduct any further business with defendant and demanded the refund in the amount of R 1 081 086.08.

[13] Defendant argues that plaintiff did not allege any breach of contract in its particulars of claim, instead, relied upon a single oral agreement and argued that its claim was in respect of a breach of agreement between the parties.

Sample A

[14] Plaintiff called one witness, namely Mr. Naicker, who testified that the first sample referred to as sample A, which was sent during July 2020, was approved by the plaintiff, thus and after delivery of the agreed product, defendant had complied with its obligations in terms of the July 2020 agreement to plaintiff. Naicker's testimony was that the plaintiff was not satisfied with it, resulting in the plaintiff returning it.

Sample B

[15] Plaintiff requested defendant to modify the product, which according to defendants, is a further agreement which the defendant argued is agreement number two, which, the plaintiff has not pleaded in its particulars of claim. This caused defendant to have developed three more samples containing foaming agent concentrations of 5%, 8% and 10% respectively. This batch was sent to plaintiff during September 2020, which was referred to as sample B. Yet again, these samples did not measure up to plaintiff's satisfaction.

Sample C

[16] This caused defendant to have developed a 9% foaming agent referred to as sample C, which was accepted by plaintiff. The stock in the possession of the plaintiff during October 2020, was returned to the defendant in order to modify it in accordance with sample C.

New terms and conditions

[17] However, of importance, on 30 October 2020 defendant provided plaintiff with new terms and conditions for the plaintiff's acceptance, which terms were duly accepted by the plaintiff. On 6 November 2020 a sample was provided by defendant to plaintiff modified from the stock that had been returned to it intended to conform with sample C, this, Naicker specifically conveyed to plaintiff's clients and was exactly the same composition as sample C which plaintiff had previously approved. Despite acceptance of the sample this too was then rejected by plaintiff on the basis that the latest complaint it had received from its clients were that the product "does not make a proper lather and that it was not very soapy."

Sample D

[18] This resulted in yet a further sample D being modified, which sample was once again accepted by the plaintiff; however, it was also followed with a rejection on 12 April 2021, alleging that the product had gone off, prompting the plaintiff in demanding the return of the amount claimed in the amount of R1 081 068.08.

Two distinct agreements

[19] Defendant argued that it appeared that there were two distinct agreements the plaintiff had, namely, one with the defendant, and then one with its client. The latter, as conceded by Naicker, was that the plaintiff's clients was not part of the agreement in respect of the supply of the scrub. Defendant duly fulfilled its obligation when the plaintiff, on its own version, was satisfied and approved the sample. At this juncture once the sample has been approved, defendant argued, that it has fulfilled its obligation towards plaintiff who was the only party it contracted with. The dissatisfaction of the scrub appears to be lying elsewhere as it was the plaintiff's

clients who were not satisfied with the end product, which cannot be said, as correctly argued by the defendant to constitute a breach of contract between the plaintiff and defendant. After all, when the samples were provided to plaintiff, it was satisfied with the product sample.

Evaluation

[20] The evidence presented to the court was vastly different to what the plaintiff averred in its amended particulars of claim. Plaintiff relied on a single agreement.

[21] Defendant had complied with its obligations in terms of the first agreement and anything that happened thereafter therefore had to be in terms of the new or further agreements entered into between plaintiff and defendant which has not been pleaded in the particulars of claim. There are no allegations of any further or additional agreements entered into between the parties as well as defendant's compliance with them.

[22] In the final analysis of Naicker's evidence, plaintiff's client was not satisfied with sample A, (after plaintiff accepted the sample provided). This led to defendant making modifications to the product on plaintiff's specific instant and request resulting in a sample C, which too was initially accepted by plaintiff. This constituted a further agreement, namely the second agreement, and or, a variation of the first agreement as defendant had already complied with its obligations in terms of the first agreement. When the stock was returned to defendant to be modified to conform with sample C, this gave rise to the third agreement. However, this time defendant agreed to attend to the modification of the product with terms and conditions which were accepted by plaintiff. Once again, plaintiff repudiated the second agreement.

[23] Once again, plaintiff repudiated the second agreement giving rise to a fourth agreement and the production of a sample D, which plaintiff again approved. This can be seen from the WhatsApp conversation between the parties which is evident that the parties agreed that the modification would be reduced to 3% and not 4% to achieve the desired result, based on plaintiff basing its case on the first agreement. After reaching the fourth agreement, and the acceptance of sample D, plaintiff

repudiated this last agreement, by conveying its wishes “not to do business with defendant anymore” and claiming the refund of monies paid by defendant based on the credit notes issued by the defendant.

[24] I agree with the defendant, that in terms of the chronology as confirmed by Naicker, it became clear that the case pleaded by the plaintiff and which the defendant has defended to meet, is completely different to what the evidence proves.

[25] The evidence given to court based on the host of modifications and subsequent agreements were not pleaded by plaintiff. It therefore follows that upon a reasonable consideration of the evidence, it cannot be found that the plaintiff has proven the case it pleaded. As stated earlier, although the defendant witnesses have not testified, on the version which was before the court, it follows that defendant had performed its obligation in terms of any new and further specific instance and the requests made by plaintiff which culminated in the reaching of the further agreements.

[26] It was in fact plaintiff who repudiated every one of the agreements by first accepting the samples in terms thereof and then rejecting it. The defendant argued that the rejection cannot be held to constitute a breach by defendant of such agreements which it says in any event was not pleaded by plaintiff in its particulars of claim and rather constitute a repudiation of such further agreements by plaintiff.

[27] In contrast it was the argument proffered by plaintiff that the three agreements concluded after July 2020 as having not been pleaded by plaintiff is not correct on the basis that there has been only one single agreement between the parties. I could not agree, although the plaintiff argued that any subsequent actions by the defendant to rectify or modify the surgical scrub have been in a desperate and futile attempt to fully comply with its obligations in terms of that one agreement. After all, and right to the end, plaintiff approved all of the samples.

[28] Insofar as the disclaimer which defendant relies upon, plaintiff avers that defendant did not tender it in its plea to replace the defective product based on the

above. It is clear that the defendants action, that it accepted the plaintiff's cancellation and elected not to rely on the indemnity contained in the invoice and that such tender was never put to Naicker during cross examination and accordingly plaintiff believes that absolution of the instant should not be granted as there is now an evidentiary burden on the defendant to present evidence that the bulk product was of exactly the same quality as the approved samples. The plaintiff argued that there was no evidence that the defendant offered to replace the product that and that plaintiff refused to accept this tender.

Credit notes

[29] Turning to the credit notes which plaintiff relies upon as its claim as the sum total from defendant, in the sum of R 1 081 068.08, being the credit notes issued by plaintiff to its clients.¹ On the contrary the credit notes issued by defendant to plaintiff totalled an amount of R 710 987. 80² . The evidence by Naicker on whether plaintiff should be entitled to be refunded by the defendant based on the credit notes which was issued by the defendant to plaintiff , he conceded that the credit notes contained a clause in terms whereof defendant's liability in the respect thereof to replace any products found to be defective to be free of charge and this would be the sole extent of defendants liability for defective products. Furthermore, it stated that defendant would not be held liable for any direct or indirect consequential loss or damage of products.

[30] It therefore follows that plaintiff's reliance on the credit notes to establish an amount which defendant is liable for payment is incorrect. Worse, the plaintiff has not pleaded in its amended particulars of claim that defendant has breached the agreement, yet it proceeds to claim the amount it credited to its clients as the amount the defendant must refund the plaintiff.

[31] Put differently, Naicker's evidence in this regard was that the plaintiff was entitled to a refund in terms of the credit notes which were issued, however plaintiff

¹ para 14 Particulars of Claim

² para 17 Particulars of Claim

has not claimed this amount in its particulars of claim, instead it claimed for the amount of the credit notes it supposedly issued to its clients.

The test for absolution from the instance

[32] Given the evaluation of the above, measured against the test for absolution from the instance the arguments presented by both counsels correctly reflected on the test to be applied, the rules and legal authority when a court considers an application for absolution from the instance. In terms of rule 39 (6) the test to be applied when deciding whether or not to grant absolution from the instance,³ echoed in *Gordon Lloyd Page & Associates v Rivera and Another*⁴

“...the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.

...This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff.”

[33] Absolution of the instance may be granted at the conclusion of a plaintiff's case, if the plaintiff has failed to adduce sufficient evidence upon which a reasonable court could grant judgment in favour of a plaintiff, or the plaintiff has failed to produce sufficient evidence to establish a prima facie case, in other words, a case in which all the elements of the claim have been proven.

[34] Absolution from the instance is in conflict with the legal principle of audi alteram partem, which stipulates that no person may be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them. Consequently, is granted sparingly, certainly not lightly, or on the basis of flimsy reasons. It should only be granted where the plaintiff's case is so weak that no

³ Erasmus, Superior Court practice RS24, 2024, D1 Rule 39-15 to Rule 39-16

⁴ *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) at 92F-H. See also *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (AD) at 409G-H

reasonable court can find for plaintiff and a court should not order absolution where it is in the interests of justice. Plaintiff's counsel relied on additional authority in this division by Gamble J, in Van Zyl N.O. obo A.M v MEC for Health, Western Cape Provincial Department of Health, lean on the side of allowing the case to proceed.

Conclusion

[35] The evaluation of the claims made by the plaintiff in its particulars of claim and the evidence presented will determine whether the plaintiff successfully countered the defendant's absolution from the instance.

[36] In the result plaintiff has failed to make out a case for claiming the quantum it has claimed and in any event Naicker admitted the terms of the credit note in terms of whereof defendant's liability and respect thereof , to replace any products found to be defective to be free of charge and this would be the sole extent of defendant's liability for defective products and the defendant would not be held liable for any direct or indirect, consequential loss or damage of product.

[37] As foreshadowed above, Naicker's evidence cannot be said to support the case pleaded by plaintiff. His evidence does not place any evidentiary burden upon defendant in the matter. Plaintiff therefore has failed to discharge the onus upon it for a finding in its favour and accordingly the absolution from the instance was granted.

Parker AJ
Acting Judge of the High Court

Appearances:

Plaintiffs' counsel: Adv. A. du Plooy
082 924 9076 / awiedp@gmail.com

Plaintiff's attorney: Ryan James & Associates
076 685 4445 / ryan@rjandassociates.co.za /
lean@meattorneys.co.za

Defendants' counsel: Adv. D. Rabie
072 282 9803 / [djrabie@capebar.co.za](mailto:djrabe@capebar.co.za)

Defendants' attorney: Marais Muller Hendricks Inc.
(021) 943 3000 / merlin@mmh.law