

SOUTH AFRICA / JUDGMENT

Bard Medical (Pty) Limited v Litha Medical (Pty) Limited T/A ICU Medical SA (12/36593) [2013] ZAGPJHC 321 (4 December 2013)

[2013] ZAGPJHC 321**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Satchwell

CASE / FILE NUMBER

12/36593

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Source record**IN****THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG****(REPUBLIC****OF SOUTH AFRICA)****Case****number: 12/36593****DATE:**

04 DECEMBER 2013

In

the matter between:

BARD

MEDICAL PTY

LIMITED.....Plaintiff

And

LITHA

MEDICAL PTY LIMITED t/a ICU MEDICAL

SA.....Defendant

JUDGMENT**SATCHWELL J:****INTRODUCTION**

Plaintiff, a supplier of certain medical products, and defendant, a distributor of medical products, concluded an agreement for the distribution of three devices supplied by plaintiff. Plaintiff now claims damages from defendant alleging breach of contract in two respects:

Defendant sold products of another supplier in competition with the three devices supplied by plaintiff and also failed to place orders to the stipulated minimum. It is common cause that defendant did distribute competing products and ceased placing orders with plaintiff during the lifetime of the disputed contract. Defendant has pleaded that it was not bound to any prohibition on the distribution of competing products and that plaintiff had failed to deliver orders promptly and expeditiously which meant that defendant was not obliged to place orders with plaintiff.

At commencement of trial this court ordered a separation of issues - the issue of liability only would be dealt with

and the issue of quantum of damages (if any) was to be covered on a later occasion.

At issue is the distribution agreement concluded between the parties on 6th February 2012 which document formalized a fairly longstanding arrangement between them. The court must determine the import, if any, of the manuscript amendment made to the 'cover page' document by defendant; whether the written document constituted only the 'cover page' or the 'cover page' plus the "terms and conditions" document; the import of the 'minimum purchases' provision in the 'cover page'; whether the agreement was only

written or partly written and partly tacit or implied.

I heard evidence from Mr Charl De Klerk, managing director of plaintiff in South Africa ("De Klerk"),

Mr Brendan Marshall, business unit manager at plaintiff, ("Marshall"), Mr Carlo Natali, ("Natali"), market manager for defendant, and Felicia Lipner, ("Lipner")

administrative manager at defendant. Their evidence covers both the circumstances of the signing of the agreement and their understanding thereof as well as the commercial arrangements between the parties over a period of time prior and subsequent to the signing of this document.

CONTEXT TO THE AGREEMENT[1]

South African hospitals purchase goods and services from suppliers through tenders or procurement supply agreements. The court heard, for instance, that both plaintiff and defendant, are suppliers to the Life Health Group. During 2003 defendant met Venetec representatives in the United States and secured the rights to distribute and market the Statlok range of "peripheral IV securement devices" which included "clave needle-free connectors" furnished by ICU Medical USA to Venetec. Over a period of some three years, defendant built a significant presence in South Africa with the Statlok IV devices. However, during 2006 Venetec sold its business to Bard International.

Defendant continued to be supplied with Statlok devices and to distribute them to hospitals in South Africa.

However, the relationship was not the same. It was not in dispute that communications and response times to orders was less than satisfactory for defendant. Orders had now to be placed with an order clerk in Germany, finished products were shipped from Mexico to the Netherlands and only then to South Africa, delivery times or orders increased from weeks to months and the complaints went unresolved. The memorandum written by Natali to a product manager in Germany speaks for itself [2].

During 2010, defendant looked for and located a supplier of an alternative product, similar to the Statlok devices, in the United States and then concluded a non-exclusive agreement for the distribution of these Griplok devices in South Africa. Defendant then, subsequent to concluding its agreement to distribute the Griplok products in January 2011[3], carried out “test marketing” in South Africa and was marketing and supplying the Griplok products to non-contract accounts, such as Netcare and MediClinic, as a “defensive strategy” against plaintiff. When Statlok devices were not timeously supplied by plaintiff, defendant even substituted the Griplok products to hospitals who had contracted for the Statlok product from defendant.

De Klerk’s predecessor at the plaintiff had made attempts during 2008 to conclude a written agreement with the defendant which came to naught. Nevertheless plaintiff continued to supply defendant with the Statlok devices for distribution without any formal agreement.

De Klerk took over at plaintiff in 2010 and had his first meeting with Natali and Lipner of defendant on 13th January 2011. He was made aware of defendant’s frustration with plaintiff and responded that plaintiff had

an internal customer services team with whom a meeting would be and was arranged for 22nd February.

Natali was adamant that he was open with de Klerk at their very first meeting that defendant had concluded the contract with Zefon as “backup”, had completed “test marketing” and was about to start selling Griplok products in noncontract accounts. He said that this advice met with “no response” from de Klerk but “a blank stare”. The evidence of both De Klerk and Marshall is that they were not informed by Natali of the Zefon contract nor of the pending distribution of the Griplok devices.

At a subsequent meeting of 28th July 2011, continuing difficulties in supply were raised by Natali and discussed between himself and De Klerk and Marshall. Natali testified that defendant’s strategy in distributing Griplok devices had been successful in that the Griplok devices were “gaining traction” in the market and that he so informed de Klerk at this meeting.

Natali’s evidence was that it would be absurd for de Klerk to say that he had no knowledge about the distribution of the Zefon products during 2011, i.e. the Griplok devices, because the market in South Africa is so small. Both de Klerk and Marshall deny that Natali informed them that defendant was distributing the Griplok devices pursuant to the agreement with Zefon.

The last meeting of 2011 was on 29th November. De Klerk and Marshall testified that they both attended this meeting at defendant's premises

when de Klerk handed a proposed agreement to Natali which included both the 'cover page' and the

'terms and conditions'; Natali says only Marshall was there on behalf of plaintiff and that no document was received by him. Natali recalls that, some days after the meeting of 29th November, he received an unsigned single page document (the 'cover page') in a white envelope. No 'terms and conditions' were attached thereto.

Natali inserted certain information into the 'cover page' and made a manuscript amendment to the document under the 'business terms' column. He signed the document and dated it 5th January 2012. He then returned the document to plaintiff. Thereafter it was received and signed by De Klerk who dated it 6th February 2012. Marshall acknowledged receipt thereof on 8th February and returned a signed copy to Natali[4].

BREACH – DISTRIUBTION OF COMPETITIVE PRODUCTS

Pleadings

14. Plaintiff avers that the defendant was obliged during the term of the agreement "to refrain from the manufacture, import, promote the sale of, sell, deal in or distribute any products in the Territory which are competitive with Products, save for any products competitive with the Products sold, dealt with or distributed by the defendant as at the effective date of the Distribution Agreement and as specifically provided for as Excluded Competing Products" "without the prior consent in writing of the plaintiff".[5] In short, plaintiff relies upon the provisions of clause 7(a) set out in the 'Terms and Conditions'

document to preclude distribution of the Griplik product whilst the defendant is being supplied with the Statlok devices.

Defendant has pleaded the parties entered into "a partly written and partly oral, alternatively tacit agreement"[6] and that POC1, i.e. the Cover Page constitutes the written portion thereof Defendant's

plea specifies that "no restrictions were applicable in respect of the defendant's entitlement to distribute products that competed with those to which the distributorship related"[7] and that "Natali , in signing ... did not intend to conclude a contract on behalf of the defendant with the plaintiff on the basis of the terms and conditions set forth in such unsigned pages" [8].

Further, defendant has pleaded that "the unsigned pages allegedly forming part of annexure POC1 were not sent to or received by Natali" [9] . I do not need to make a finding on the disputed receipt of the 'Terms and Conditions'

by reason of my finding on the construction of the written cover page itself. Similarly,

defendant's plea that the "unsigned pages... contain clauses which were contrary to Natali's and de Klerk's previous discussions in relation to the proposed distributorship[10]" do not require a finding by myself by reason of my understanding of the clear language of the cover sheet.

However, I have made some comments on the probabilities in respect of the discussions between the parties.

The Cover Page

The 'Cover Page' [11] is headed "BARD International Distribution Agreement for Exclusive Distributors" and comprises a section for "Distributor Information" to be inserted, a section for

"Business Terms" to be inserted, a section on "Terms and Conditions" and a portion for

signatures and dates.

In the "Business Terms" section there are three columns: the first apparently refers to paragraphs or clauses of another document (because the numbers do not follow chronologically), the second identifies what information

pertaining to "Business Terms" is dealt with or to be inserted and the third section provides space for information to be inserted.

Clause 6 deals with "Products" which are identified as "IV0567, IV0575, IV0583". It is common cause that these are the Statlok devices supplied by plaintiff to defendant. The typed details were inserted by plaintiff and Natali initialed that information.

Clause 10 deals with the "Term" which is identified as "1/12/2011" to "30/11/2014"

typed in by plaintiff and initialed by Natali.

Amendment of Cover Page - "Not Applicable"

Clause 7(a) of the Cover Page deals with "Competing Products". The word "NIL" had been typed in by plaintiff but this was deleted by Natali who inserted, in manuscript, the words "Not Applicable" and initialed this amendment.

Natali's evidence is that he concluded an agreement with plaintiff because he needed to ensure a supply of items from plaintiff and this contract "facilitated me to purchase product for the Life Health contract which still had one year to run". However, when he signed the written portion of the contract, he "struck out" the "most important clause". The typed insertion of the word "nil" meant, to Natali, that defendant was "not allowed competing products on the basis as already discussed" and so he "struck out" "what I thought was not applicable". Natali heard "not a word" from de Klerk or Marshall querying the signed document.

De Klerk said that there were discussions with Natali about the document at the end of November 2011 before it was signed but these did not include deletion of any provision of the contract. When he received the signed 'cover page' with "NIL" deleted and "not applicable" inserted he took the view that they meant the "same thing" or "one and the same thing" in the sense that

competing products were “none”. If there were to be competing products then the details of these were to be inserted. Since there was no reference to any competing products De Klerk signed the document.

The insertion of the words “Not Applicable” appears to me to be determinative of the issue whether or not defendant was precluded from the distribution of competing

products. After all, the first point of departure are the words used in the written document[12]

The document as originally prepared by plaintiff and presented to Natali clearly stated that there were

“NIL” “competing products” which means (as then apparently understood by De Klerk) that no competing products were allowed. However, the offer as contained in that document was not accepted by Natali. He deleted the prohibition on competing products.

That which was inserted by Natali was not the same as contained in the original offer. His change states that clause 7(a) concerning “competing products” is “Not Applicable”. Whatever the import of the provisions of clause 7(a) as set out in the disputed ‘terms and conditions’, those provisions are “not applicable”. They have been proclaimed by Natali to have no relevance to the written agreement about to be signed by himself.[13] The manuscript insertion specifically states that clause 7(a) and the issue of “competing products” is not pertinent to this particular contract.

The language is neither complex nor contorted. “Not applicable” is sufficiently clear to be understood by anyone reading the insertion with care[14]. The result of reading this fairly simple phrase is to understand both that clause 7(a) has no reference to this cover sheet and hence this contract and that

this cover sheet has no contact with any provisions dealing with competitive products. In short, description of , prohibition of or even provision for “competing products” has no bearing upon and no connection with this agreement. The cover sheet is silent in regards thereto.

Natali obviously selected the language and specially inserted them over and above that which had been typed. Such amendment must supplant the typed version[15].

Essentially, Natali made a counteroffer to plaintiff. De Klerk did not question or query or dispute the noticeable manuscript amendment to plaintiff’s original offer. He accepted the document as it now stood by signing and dating it. Marshall returned it to Natali.

It was argued on behalf of plaintiff that, if one were to allow competition by reading the amendment as I have suggested, that this would be irreconcilable with other provisions in the ‘terms and conditions’, for instance clause 5 requiring the “best efforts” of a distributor. It was also argued that the document purports to be a “Distribution Agreement for Exclusive Distributors” and that the quid pro quo of such exclusive supply by plaintiff would be the prohibition on distribution of competitive products by the

distributor. Both these arguments are contradicted by the possibilities provided for in the cover page itself, the terms and conditions on which plaintiff relies and the evidence of De Klerk. Clause 7 allows for distribution of competitive products with “the prior consent in writing of Bard”. Where such consent is granted then such products shall, according to clause 7, be “set forth in the Cover Sheet as Excluded Competing Products”. In short, the cover page and the terms and conditions themselves allow for competitive products

notwithstanding the exclusivity of the distributorship or the requirement that the distributor use its best efforts to distribute plaintiff’s products.

The cover page refers to the “attached Terms and Conditions”, requests that the other contracting party “Please read the Terms and Conditions”, requires that “Any modifications to the Terms and Conditions must be made on the Cover Sheet” and states that “Your signature on this Cover Page indicates Distributors agreement to the attached Terms and Conditions”. It is clear that this document, i.e. the cover page or cover sheet, was determined to ensure that the other contracting party, the distributor, would be bound by the ‘Terms and Conditions’. If Natali did not receive these Terms and Conditions, it is my view that he was cavalier in not contacting plaintiff to procure same. Whether or not De Klerk and Marshall had handed these Terms and Conditions to Natali then they were somewhat supine in not querying or challenging his amendment to the cover page which rendered clause 7(a) of the Terms and Conditions of no application to the written agreement. Whichever is the case, the amendment made it clear that there were no provisions pertaining to competing products which were “applicable” to this particular contract.

Conclusion

For the reasons given above I have no difficulty in finding that the specially composed and inserted manuscript amendment to the cover page takes precedence over the repeated references to the terms and conditions as set out in the cover

page[16].

Over and above the wording of the document as it was signed by both parties, I note a number of contextual matters

relevant to the issue of distribution of competitive products. Firstly, both plaintiff and defendant had concluded contracts with Life Health, which provide in clause 6 (with which De Klerk said he was familiar)

that, under certain circumstances, plaintiff and defendant are obliged to make “alternate” products

available to Life Health indicating that distribution/supply contracts with Life Health (at least) required access to alternates and that this was known to plaintiff. Secondly, notwithstanding the denials by De Klerk

and Marshall that Natali informed them of the Zefon/Griplok distribution, there is no reason why Natali would have been secretive or deceptive during 2011 when defendant had no written contract with plaintiff (and it was never suggested that there had been or was any prohibition on distribution of competitive products). Thirdly,

Natali's evidence that there had been test marketing of the Griplok devices, this had been successful and sales were now being made by defendant was not gainsaid while his evidence that this should all have been known to Marshall and De Klerk since the South African market is quite small certainly confirms lack of deception and the likelihood that Natali had been open with plaintiff about Griplok. Fourth,

Natali's rather scathing comment on the lack of response by De Klerk to the advice that defendant had

contracted with Zefon/Griplok is echoed in the De Klerk's lack of response to the noticeable manuscript amendment to the cover page.

Accordingly, I find that plaintiff has failed to discharge the onus that defendant was in breach of its agreement with plaintiff when it distributed products competing with those of plaintiff, , i.e. the Griplok devices.

BREACH – FAILURE TO PLACE ORDERS TO STIPULATED MINIMUM

35. Plaintiff avers that defendant was “obliged, during each contract year of the Term, to purchase and pay for products in a quantity not less than is specified in terms of the Distribution Agreement”[17] and that “during or about March 2012, the defendant ceased placing orders with the plaintiff for the supply of the Products.”[18].

The cover sheet, under the “Business Terms” column specifies with (reference to clause 6) dealing with “Minimum Purchases” the value of the purchases to be placed in each contract year: “1st contract year \$ 796,000, 2nd contract year \$ 876,000, 3rd contract year \$ 964,000”.

Defendant has pleaded that the parties entered into “a partly written and partly oral, alternatively tacit agreement”[19] and that one of the terms of the agreement was that “all orders of products placed by the defendant on the plaintiff would be executed promptly and expeditiously by the plaintiff in a manner that would not disrupt the business of the defendant and more particularly its ability to satisfy the reasonable purchase orders of its customers from time to time”[20] but that plaintiff breached this term of the agreement and “failed promptly and expeditiously to deliver products ordered by the defendant” which breach “resulted in disruption to the business of the defendant and effected [sic] its ability to satisfy the reasonable purchase orders of its customers from time to time”.[21]

Supply System

38. The general background to the written agreement set out above indicates what defendant considered to be perennial problems with plaintiff and which were, according to defendant, not resolved. When Bard took over, “only two out of forty five employees” from Venetec stayed on with the result that there was little or no institutional history, there were “breakdowns in communication” with the only point of contact now an “order clerk in Germany”, product now followed the circuitous route from Mexico to the Netherlands and not direct to South Africa contrary to Natali’s view that “cargo must move on the shortest line/route”, directions were then given by the Bard MD in SA to Germany that product was to be supplied first to Bard and only then passed on to defendant [22] which was yet another complication leading to delays. Under Venetec lead times for supplies had been four to six weeks whilst under the Bard regime delivery times were “unpredictable” and were, according to both plaintiff and defendant considerably longer, Marshall having written in January 2012 [23] that the “turnaround currently from placing an order to delivery is between 5 – 6 months”

According to Natali, plaintiff had some idea that it would take over distribution of products in the market and therefore removed product for distribution from defendant, but this had not materialized and plaintiff had to return to defendant to assist with distribution of those very products.

Natali wrote to Markus Pitsch at Bard in German on 27 August 2010 setting out the many difficulties, that this meant that “your company has successfully placed inefficiencies in our way and increased the cost of doing business to a point where it’s

becoming unviable to pursue contractual work due to the uncertainty of what Bard plans to do next”[24]. Natali proposed a number of solutions to Pitsch including that defendant would order “container lots at a time” if Bard would send “fast selling, high volume line items directly from the USA/Mexico” because this would both eliminate certain “transport/freight handling costs” and “would simply reduce lead times by 3 months”

In short, defendant experienced plaintiff as a highly unsatisfactory partner in the process of bringing medical products to hospitals. Such “stock shortaging”, says Natali, had both “a reputational effect” and placed “stress on business”.

These historic difficulties had all been explored with De Klerk and his staff from 2011 onwards. It was not disputed by him that Natali was “unhappy” and that there had been “complaints regarding lead times and deliveries”. De Klerk’s response had been to “try to encourage them to order more stock and [we would] resolve queries and [we offered] extended payment terms to six months” because this would “allow them to carry more stock but not have to carry the cashflow burden” According to De Klerk these offers of extended payment terms were “not taken up”. Natali explained that this would not resolve the main issues and would add new costs such as increased warehousing costs.

Orders

and Deliveries

Plaintiff and defendant clearly had and still have a very different understanding of the requirements for deliveries.

De Klerk stated in his evidence in chief that he considered that deliver/supply times were acceptable

for this product and referred the court to a period of 90 days as “average lead time” . Although he did want to make the lead times “shorter” , he seemed comfortable with the notion that “we supplied 100% of orders”. Natali said defendant continued to “ experience usual delays” at the hands of plaintiff.

Just two examples from the documentation speak to the problems complained of:

On 1st February 2012 order VEN 126 was placed by defendant involving product to the value of \$ 84,800. The order clerk in Germany confirmed this order the same day advising that she did not “have ETA dates yet”. On 8th February the invoice clerk in Germany advised that “ETA date (subject to receipt of the valves) is 15th June 2012” which was explained in evidence as delivery in South Africa but not to defendant. Then on 29th February an “improved ETA date for order” of the 18th May 2012 was notified.[25]. In summary, the original lead time on the order was four and a half months or some 135 days.

On 8th February 2012 order VEN 127 was placed by defendant involving products to the value of \$ 63,600. The order clerk in Germany advised on 27th February that the ETA was 11th June 2012. This was a lead time of four months or some 120 days[26].

It was common cause in evidence that this was not acceptable to defendant. But the lack of certainty

was compounded.

Firstly, on 13th March new ETA dates were advised from Germany – delivery for order VEN 126 had improved to 18th May (three and a half months or about 105 days) and delivery for VEN 127 had improved to 11th June (four months or 120 days).

Secondly, De Klerk took control and on 16th March advised that “with the help of my new boss in the US” he had “managed to track down exactly who is in charge of the Statlok IV SA kits” .

Instructions had been given “to prioritise the 2 orders in the system” and the result was plaintiff had been able to “move the completion date forward” “Both orders will be completed and ready for shipment on April 18th” [27]. This 18th April is only “ready for shipment from our global DC on April 18th” This 18th April was described as “already a big stretch, 2 months quicker than the usual/normal lead times”.

Thirdly, defendant had written to the invoice clerk in Germany advising “we urgently need stock” who informed defendant on 30th March that plaintiff “have not received any better ETA than the ones I already communicated to your earlier VEN 126 18th May and VEN 127 11th June” .

Finally, it must be noted that on the packing list of 18th April, Bard makes it clear it was only shipping portion of the VEN 126 order. On 23rd April De Klerk was trying to provide reassurance that there would be shipping that very week and in two weeks’ time and then “in progress”.

In summary, Natali’s view that there was an “erratic nature” to the deliveries, a lack of “predictability” and “confusion within the organization” is confirmed by the evidence. Plaintiff quotes lead times in 2012 of four to four and half months. After discussions and obviously complaints, De Klerk in March 2012 has been able to obtain help from his new superior in the US and only then has the plaintiff been able to locate exactly which individual was “in charge” of the orders. Once priority was given to these orders shipping dates (not delivery date) of two and a half months and just over two months were promised. The cargo still had to travel from Mexico via the Netherlands to South Africa and then to defendant. As it turned out, the full orders were not shipped on 18th April.

It is no wonder that De Klerk described these recent events as “the immediate crisis”[28] and Natali gave evidence that De Klerk appeared to being trying to “better things” but it was “out of his control”.

Minimum Purchases

I have no doubt that this clause meant and was intended to mean that the distributor undertook to place a minimum number of purchases in each contract year. Otherwise, why would plaintiff grant an “exclusive” right of distribution to a distributor who might or might not order one IV device per annum

I am not in the least persuaded by Natali’s evidence that he understood this clause of the contract sheet to give no more than a “guideline”.

However, the first contract year (1st December 2011 to 30th November 2012) still had almost five months to run by the time plaintiff complained about cessation of orders on 7th June 2012. Plaintiff could not reasonably demand, as it did, that defendant must “immediately... place an order for the Products sufficient to meet the minimum required by the Distribution Agreement”[29] . Defendant responded that it did note plaintiff’s intention to terminate the agreement but did “not accept such termination on the grounds of breach as you allege” and maintained that it was defendant which “was placed in an untenable position of not meeting its clients orders due to BARD’s non-performance of its own obligations”.[30] And so the correspondence continued. What is important is that firstly, the annual minimum value of purchases could not yet be computed because the year had still a long way to run; secondly, plaintiff’s demands were nonsensical; thirdly, defendant did not, at that stage, concede that it had ceased to place and would not place any further

orders.

By the time pleadings were exchanged , defendant's plea admitted that it had ceased to place orders during March 2012[31].

In the symphony of complaints from defendant and undertakings to resolve those complaints by plaintiff, is the minor scale aria from plaintiff offering or trying to tempt defendant into interest in another product in Bard's range. It is noticeable that this offer is dangled from time to time by De Klerk and Marshall without any apparent interest or response from Natali [32]. It reads as though de Klerk is trying to sweeten the acknowledged difficulties by offering an additional string to defendant's bow.

Tacit or Implied Term - "Execution Promptly and Expeditiously and without Disruption"

I have no doubt that the common cause facts as I have set them out above and heard them in evidence suggest that such a term was implied.

The 'Cover Sheet' or 'Cover Page' is silent on any obligation by the plaintiff to deliver on defendant's

orders within any specified time, in accordance with any identified expectations or to meet any commercial or industry norms. De Klerk conceded that the 'Terms and Conditions' offer no guidance in this regard. Yet plaintiff and defendant had operated without anything in writing for a number of years during which time issues of (mis)timing had caused dissatisfaction and led to discussions and undertakings and use of the internal customer relations team. Certainly, prior to concluding any written document early in 2012, both parties knew that supply and delivery times in response to orders were of the essence of their relationship.

Both plaintiff and defendant operated within the same industry as suppliers. De Klerk was in agreement with Natali's

evidence that this is a 'competitive "industry involving tenders to both state and private sector and that there is an obligation on distributors to meet the demands of hospitals and that it is "critical to make sure that [one has] enough inventory". He himself used the words "competitive market". Both plaintiff and defendant had contracts with Life Health[33], for example, as suppliers and both were held to more or less the same terms – De Klerk having confirmed that certain clauses of the contract of defendant with Life Health also applied to plaintiff. Both plaintiff and defendant were held to requirements of speedy supply and penalties for failure to meet hospital requirements as well as the obligation to substitute with alternate products under certain circumstances. There was no dispute that hospitals require products of requisite standard for the treatment of patients and that meeting such requirements timeously is central to both their businesses as distributors//suppliers to such clients. The evidence of Natali that he was under pressure from the procuring officer at Life Health in 2012 who not only wanted to

know about plaintiff's price increases but was not interested in any supply problems experienced by defendant

with plaintiff, merely reminding him of the terms of contract – “the supplier shall ensure that the Specific Category Products are always available for delivery to the Purchaser”[34] failing which the supplier is obliged to use best efforts to source an alternative product at no higher price.

De Klerk’s apparent ease in knowing that all orders placed were ultimately fulfilled is clearly of no relevance to either party’s real understanding of their relationship. Both testified that delivery times plaintiff needed to be shorter. De Klerk was clearly working towards such an outcome. But it would appear that his best endeavours did not lead to greater certainty, predictability, speed or satisfaction.

There can be no doubt that defendant wanted and plaintiff undertook to provide product as expeditiously as possible in a manner which would meet the requirements of defendant’s customers.

Natali was questioned at length on whether the defendant had informed plaintiff of the dates by which product was required by defendant’s clients/hospitals; whether defendant had specified to plaintiff the date by which product had to be received in hand by defendant. In other words, it was very pertinently put that defendant had never actually made it clear to plaintiff of the need for responsiveness to orders. It was thus also very pertinently put that plaintiff was not informed of the deadlines which had to be met in order for defendant to satisfy its customers. It was also pertinently put that such details were needed because the implied term contended for by defendant are vague and general and give no useful guidance to anyone. Natali’s response was very practical. He said “what purpose [would there be] for me to stipulate date if unlikely to be met” and further that the “contract to hospitals to [require me to] deliver within 48 to 72 hours of order”.

Similarly, Natali was questioned whether he had informed plaintiff of any occasion that the defendant had been unable to satisfy a client. Again his answers were practical. He said that defendant was “able to meet [the client’s orders] with other product” and that the defendant “Didn’t lose orders” because defendant “supplied alternates”.

Should defendant have spelt out chapter and verse to plaintiff each time an order was placed? The answer must be not. Plaintiff knew what was required and why; plaintiff was well aware that three to four months was inadequate supply time and neither sufficiently responsive nor expeditious; plaintiff undertook to do better and made efforts to so do. In short, plaintiff knew what was wanted by defendant and undertook to meet that requirement.

I can only but conclude that both parties had, over the years prior to the written document, and subsequent to 1st December 2011, treated as axiomatic that plaintiff was expected to and undertook to respond to orders and supply product in a manner and as promptly as business efficacy in this particular industry required.

The difficulties are common cause. Was plaintiff in breach of the implied term that there be expedition in meeting orders? The answer is yes.

There was stress on defendant's business – Natali explained that he had moved all noncontract clients to Griplik and was under pressure from Life Health; correspondence is replete with unhappiness and dissatisfaction. Plaintiff in South Africa did not have control over the process - Germany did not know what South Africa and the USA were arranging and plaintiff therefore issued contradictory advice to defendant. Dates for delivery chopped and changed and the only constant was the lack of certainty in lead times for delivery – four and a half months reducing downwards then upwards and certainly not consistent with de Klerk's hopes for 90 days.

Natali identified "reputation" as an important attribute in this particular industry (and indeed in every industry). He complained that defendant's reputation depended upon "consistent and reliable source of supply [as] required by patients and hospitals" but that this reputation was at risk where defendant was subject to the vagaries of an inconsistent

and unreliable source of supply. Fortunately, he had an alternative source, Zefon, who could supply a product, Griplik,

which was supplied promptly and expeditiously and therefore could be used to protect the reputation of defendant.

Meaning or content is given to the words "prompt" and "expeditious" both in their ordinary usage and in their attachment to the responses required to orders for IV product in the hospital industry. The words are repetitive – speediness is included in definitions of both[35].

Interestingly, the noun of 'expedition' pertains to 'definite purpose'. If plaintiff was to be prompt then it was to be responsive to orders placed. Yet as late as March 2012, three months after the effective date of the written agreement, de Klerk had only just identified the person in charge of the orders and all the efforts to "prioritise" were going to result in a shipment (not delivery) date two and a half months after placement of the order – certainly less responsive than de Klerk's evidence that ninety days from order to delivery to defendant was the average.

I find that defendant has proved an implied term in its agreement with plaintiff to the effect that plaintiff undertook to execute all orders placed by defendant "promptly and expeditiously" and that such execution would be carried out in a manner which would not "disrupt the business of the defendant" more particularly the "ability of the defendant to satisfy the reasonable purchase orders of its customers". I find that defendant has succeeded in establishing that plaintiff was in breach of such an implied term.

CONCLUSION

Plaintiff has failed to prove that defendant was in breach of their agreement by distribution of competitive products.

Defendant has succeeded in establishing that there was an implied term in the party's agreement as pleaded by defendant.

An order is therefore made as follows:

Plaintiff's claim is dismissed with costs.

Dated at Johannesburg on this day the 3rd of December 2013.

K. SATCHWELL

Counsel for Plaintiff: Adv. A J Daniels

Counsel for Defendant: Ivan Miltz SC

Attorneys for Plaintiff: Baker & McKenzie

Attorneys for Defendant: Tugendhaft Wapnick Banchetti and Partners

Date of hearing: 18th -20th November 2013

Date of Judgment: 4th December 2013

[1] Notwithstanding the wording of the written document which I find speaks for itself, the evidence of the background facts is relevant not only to the dispute concerning the distribution of competitive products but also to the breach of the tacit term concerning demand and supply/orders and deliveries. Numerous authorities which need not be cited have established that evidence of such background facts is admissible.

[2] Written memorandum dated August 2010.

[3] Page 61A – I of the trial bundle.

[4] Pages 76 and 77 of bundle.

[5] Paragraph 3.4 of the particulars of claim.

[6] Paragraph 3.1 of defendant's plea.

[7] Paragraph 3.2.2 of defendant's plea.

[8] Paragraph 3.4 of defendant's plea.

[9] Paragraph 3.3 of defendant's plea.

[10] Paragraph 3.5 of defendants plea.

[11] Annexure POC1 at page 10 of the pleadings.

[12] As has been stated in a long line of judgments from *Union Government v Smith* 1935 AD 232 to *Ekurhuleni Metro Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 SCA

[13] The Shorter Oxford English Dictionary defines 'applicable' as "capable of being applied; having reference" and 'apply' as "to put a thing into practical contact with another" and "to refer to".

[14] See the discussion at paragraphs [13] – [22] in *African Products (Pty) Ltd v WIG South Africa Ltd* 2009 (3) SA 473

[15] See *Hayne & Co Ltd v Central Agency for Co-Operative Society (In Liquidation)* 1938 AD 352

[16] See *Haynes supra*

[17] Paragraph 3.3 of the particulars of claim.

[18] Paragraph 8 of the particulars of claim.

[19] Paragraph 3.1 of defendant's plea.

[20] Paragraph 3.2.3 of defendant's plea.

[21] Paragraphs 4.2 and 4.3 of defendant's plea.

[22] Email at page 51 dated 7 April 2009

[23] Email at pages 76 and 77 of the Bundle.

[24] Page 60 of the Bundle.

[25] Emails and documents at pages 72, 74 and 87 of the Bundle.

[26] See pages 80 and 84 of the Bundle.

[27] Email on page 97 of the Bundle.

[28] Email of 16th March at page 93 of the Bundle.

[29] See the letter of demand of 7th June, annexure POC2.

[30] Letter of 15th June, annexure POC3.

[31] At paragraph 5 of Defendants Plea.

[32] See the emails of 23rd April, 2 May at pages 108 and 110 of the Bundle.

[33] Pages 67A – F of the Bundle.

[34] Clause 6 of the Life Health contract at page 67C of the Bundle.

[35] "Expedition" is defined by the Shorter Oxford English Dictionary as " prompt execution or supply", "sending or setting forth for some definite purpose". The definition of "Prompt" includes "

ready in action", "quick to act when occasion arises", "ready and willing", "readiness or quickness" and in the commercial world "for immediate delivery" or "done at the date fixed".

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