

SOUTH AFRICA / JUDGMENT

**Blue Leaf Holdings (Pty) Ltd v Bison
Mining Suppies CC ta Witbank Distributor
and Industrial Supplies (1034/2022) [2023]
ZAMPMHC 43 (21 December 2023)
[2023] ZAMPMHC 43**

COURT

Middelburg High Court, Mpumalanga

BEFORE

Roelofse AJ

CASE / FILE NUMBER

1034/2022

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA

DIVISION (LOCAL SEAT)

Case

Number:

1034/2022

1.

REPORTABLE: YES/ NO

2.

OF INTEREST TO OTHER JUDGES: YES/NO

3.

REVISED.

21

December 2023

[SIGNED]

DATE

SIGNATURE

In

the matter between:

BLUE
LEAF HOLDINGS (PTY) LTD
Plaintiff
and
BISON
MINING SUPPLIES CC T/A WITBANK
DISTRIBUTOR
AND INDUSTRIAL SUPPLIES
Defendant

This

judgment is handed down by email to the parties and by publication on
SAFLII. The deemed time and date for the delivery of
this judgment is
at 09:00 on 21 December 2023.

JUDGMENT

Roelofse AJ:

- [1] The plaintiff supplies personal protective equipment (PPE) to consumers and resellers. The plaintiff does not manufacture or consume PPE itself. The defendant is a supplier of PPE and had supplied the plaintiff with PPE in the past.
- [2] In or about February 2020, and at the onset of the Covid-19 pandemic, the parties entered into an oral agreement in terms of which the plaintiff ordered 500 000 FF2 face masks from the defendant for purposes of fulfilling an order from one of the plaintiff's customers, Sinosteel.
- [3] Despite the plaintiff having paid the full purchase price to the defendant, the defendant failed to supply the face masks and repaid the purchase price to the plaintiff.
- [4] The plaintiff instituted an action against the defendant for the loss of profit the plaintiff allegedly suffered when it was unable to supply Sinosteel with the face masks. The plaintiff had to repay Sinosteel because it could not supply the face masks.

The plaintiff's pleaded cause of action

- [5] The plaintiff pleaded the conclusion of the agreement, its terms and fulfilment of its obligations in terms of the agreement.
- [6] According to the plaintiff, the terms of the agreement were that: the defendant would supply, alternatively deliver 25 000 units of face FF2 face masks, each unit consisting of 20 masks; the price of each unit; the defendant furnished the plaintiff with an invoice for the masks; the plaintiff duly paid the amount invoiced; the defendant breached, alternatively, repudiated the agreement by failing and/or neglecting to deliver the face masks; as a consequence, the plaintiff cancelled the agreement; as a consequence and as a result of the defendant's breach, alternatively, repudiation of the agreement, the plaintiff was unable to

sell the face masks to any third party for profit, the defendant being aware that the plaintiff intended to and would sell the face masks to a third party whom already had paid the plaintiff for the masks; and as a consequence, the plaintiff suffered a loss of R 2,673,750.00.

The defendant's defence

- [7] In its plea, the defendant admitted the oral agreement but pleaded different terms: that the defendant would endeavour to source and the face masks; payment for the face masks would be made by the plaintiff within 7 days of the order where after the defendant would “try” to source the face masks; the agreement was subject to a suspensive condition that the delivery of the face masks would be subject to masks being available to the defendant for supply to the plaintiff through the successful sourcing

of the face masks; in the event the defendant is unable to source the face masks, the defendant would repay the plaintiff; the plaintiff knew that the agreement was subject to the suspensive condition; the defendant was unsuccessful in sourcing the face masks, alternatively, performance was impossible due to the defendant's inability to source the face masks; and the plaintiff entered into the agreement with the third party at its own risk and peril.

The plaintiff's replication

- [8] The plaintiff replied that: the defendant, through its previous delivery of other masks in the past represented that it was capable of supplying the specific type of masks ordered and that the defendant supplied the plaintiff immediately with masks upon payment of the full purchase price; acting upon the correctness of the defendant's representation, concluded the agreement with the third party, therefore the defendant is estopped from denying that it would supply the plaintiff immediately upon payment of the purchase price and that the defendant is liable for the plaintiff's damages; and that the agreement was not subject to a suspensive condition as pleaded by the defendant.

The trial

- [9] Before the trial commenced, I requested the parties to set out in writing what they require the court to decide on. This was their written response (the parties' response):

“Council on behalf of the parties, at a request of Honourable Roelofse AJ, have compiled the points for determination in the above matter:

1. Whether the oral agreement was subject to the suspensive condition that the delivery of the masks would be subject to such masks being available and the defendant being able to successfully source same for the plaintiff.
2. In the alternative to paragraph one above, whether it was a term of the agreement that defendant would endeavor to obtain the masks from a supplier with in a period of approximately 50 days from the date of the order, however the delivery of the marks was subject to available of the masks and manufacturing materials in the industry at the time.

3. In the alternative to paragraphs 1 and 2 above, weather performance by the defendant of its obligations were objectively impossible.
 4. Whether defendant at knowledge of the pleaded agreement with a third party.
 5. Plaintiffs damages.”
- [10] The plaintiff called two witnesses to give testimony and the defendant one. I shall only refer to the parties’ witnesses’ testimony insofar as it is required for determining the dispute as appears from the pleadings and the parties’ response.
- [11] Mr. Olivier, the plaintiff’s managing director and an employee of Sinosteel. testified for the plaintiff.
- [12] Mr Olivier testified that he sought a quotation for the plaintiff from the defendant for purposes of supplying Sinosteel with the face masks. He spoke to Ms Anandi Wessels, who is a sales representative of the defendant and placed the order for the face masks with her. Mr Olivier testified that the defendant was at all times aware that the plaintiff wanted to procure the face masks for purpose of on selling it to Sinosteel. In order to ensure that the defendant would be able to supply the face masks, Mr Olivier first ordered a small quantity of face masks which was paid for and delivered to the plaintiff by the defendant on 6 February 2020. Mr Olivier testified that it was a term of the oral agreement that there would be a 2-week lead time from payment on the defendant’s pro-forma invoice within which delivery of the face masks would take place.
- [13] Mr Olivier also testified that the defendant issued a pro-forma invoice for the order of 500 000 face masks on 5 February 2020 and that the invoice indicated that no delivery would take place without payment being made by the plaintiff. The plaintiff paid for the masks on 7 and 10 February 2020. Mr Olivier considered the 2-week lead time a term of the agreement. However, Ms Wessels informed Mr Olivier that the lead time for the masks was extended to 50 days. Mr Olivier testified that upon learning that the lead time was extended, he consulted with Sinosteel. Sinosteel did not accept the extended lead time. Sinosteel, who has already paid the plaintiff for the masks, demanded a repayment of its money from the plaintiff. The plaintiff repaid Sinosteel. Mr Olivier subsequently learnt that Sinosteel purchased the face masks from the defendant’s supplier.
- [14] Mr Olivier testified that a meeting held at the premises of the defendant, the defendant confirmed that it would not be able to deliver the face masks and an instruction was given that the defendant repay the plaintiff. According to Mr Olivier there was no reason for the defendant being unable to deliver the face masks. Mr. Olivier testified that he had no doubt that the defendant would be able to deliver the face masks due to the experience he had with the defendant in the past.

- [15] In cross-examination, Mr Olivier conceded that the lead time for the delivery of the face masks were not pleaded in the particulars of claim. In particular, it was not pleaded that the lead-time time would be two weeks. Instead it was pleaded in the particulars of claim that delivery of the face marks would be made upon payment of the purchase price.
- [16] Mr Olivier also conceded that he received a WhatsApp message as well as an email from Ms Wessels on 6 February 2020 which clearly indicated that the lead- time for the delivery of the masks would be 50 days. Mr Olivier conceded that despite the indication by the defendant that the lead time would for the delivery of the masks would be 50 days, the plaintiff still proceeded to make payment of the full purchase price for the masks on 7 and 10 February 2020.
- [17] Also under cross examination, Mr Olivier conceded that Sinosteel cancelled the agreement with the plaintiff because the plaintiff would only be able to deliver the face masks after 50 days.
- [18] Ms Nikshani Bula was the second witness to testify for the plaintiff. Ms Bula is employed at Sinosteel. Ms Bula confirmed that the plaintiff was to supply Sinosteel with the face masks. When the plaintiff was unable to deliver the face masks as ordered, the plaintiff repaid Sinosteel the purchase price it already paid to the plaintiff for the masks. Ms Bula confirmed that Sinosteel purchased the masks directly from the defendant's supplier when the plaintiff was unable to deliver the masks.
- [19] The plaintiff closed its case and the defendant applied for absolution form the instance. I refused the application and gave my reasons ex tempore. I am not going to repeat the reasons herein.
- [20] Defendant proceeded to call its only witness, Ms Anandi Wessels. Ms Wessels is the defendant's sales representative. Ms Wessels confirmed that the defendant first supplied the smaller order face masks to the plaintiff. She confirmed that she was unaware of Sinosteel until Sinosteel contacted the defendant for face masks. She also confirmed that ultimately, Sinosteel purchased face mask directly from the defendant's supplier. Ms Wessels confirmed the WhatsApp and email messages of 6 February 2020 and confirmed that Mr Olivier was specifically informed that the lead-time for the delivery of the masks would be 50 days and later that the defendant was unable to procure the masks. Ms Wessels confirmed that she knew that the plaintiff was an on-seller of PPE products. She also knew that the plaintiff would be selling the marks for a profit and that should the masks not be supplied, the plaintiff would make a loss. Ms Wessels testified that the sale was not subject to delivery within two weeks but subject to a lead-time of 50 days. Covid-19 made it difficult to procure face masks. Ms Wessels testified that Mr Olivier was aware that the face masks still had to be ordered, yet he did not object.

Discussion

- [21] In respect of paragraphs 1 and 2 of the parties' response, the terms of the oral agreement (the conclusion of which was common cause), are at issue. If the terms of the agreement are at issue, consensus over such terms and therefore, the existence of a valid and enforceable agreement is at issue for without consensus between the contracting parties, no agreement comes into existence. Only if a finding is made that there had been consensus between the parties and therefore an agreement came into being and that one of the parties breached the agreement, then paragraphs 3 to 5 of the parties request it will become necessary to decide.
- [22] In the plaintiff's particulars of claim it pleads that the masks would be delivered upon invoice and payment. Yet Mr Olivier testified that the parties agreed to a lead time-time of two weeks. However, Mr Olivier concedes that one day after the order was make and one day before the plaintiff made the first payment for the order, he was informed that the lead time-would be 50 days. Ms Wessels testified that the execution of the plaintiff's order would be subject to the availability of masks.
- [23] In my view, and from the plaintiff's conduct paying for the masks after it became aware of the lead-time of 50 days, an agreement came into being in terms of which the quantity of face masks, their price and the date of delivery was agreed. Despite agreeing the lead-time to be 50 days, Mr Olivier accepted the cancellation of the agreement by accepting repayment of the purchase price for the masks. The agreement was therefore no more. The plaintiff, by expressly or tacitly accepting the lead-time of 50-days through payment of the full purchase price after being informed that the lead time would be 50-days, did not prove any misrepresentation of the defendant's part and did not prove that a lead time of 50-days constituted a breach of the agreement it that it was within the contemplation of the parties that such breach would cause the plaintiff a loss.
- [24] As a result of the aforesaid findings, there is no need to consider paragraphs 3 to 5 of the parties' request.
- [25] Costs should follow the result.
- [26] In the premises, I make the following order:

The plaintiff's claim is dismissed with costs.

Roelofse AJ

Acting Judge of the High Court

DATE OF HEARING: 29 and 30 November 2023 DATE OF JUDGMENT: 21 December 2023

APPEARANCES

For the Plaintiff: Mr J Delport instructed by Macintosh Cross & Farquharson. For the defendant: Mr NG Louw instructed by Manley Inc.

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Prepared on 12 October 2026 · Esheria