

SOUTH AFRICA / JUDGMENT

Butsana Textile Services CC v National Treasury and Another (A913/2015) [2017] ZAGPPHC 670 (11 October 2017) [2017] ZAGPPHC 670

COURT

North Gauteng High Court, Pretoria

BEFORE

Ranchod, Maumela

CASE / FILE NUMBER

A913/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: A913/2015

Not

reportable

Not

of interest to other judges

Revised.

11/10/17

In

the matter between:

BUTSANA
TEXTILE SERVICES
CC APPELLANT
and
THE
NATIONAL
TREASURY FIRST
RESPONDENT
THE
DEPARTMENT OF
DEFENCE SECOND
RESPONDENT

JUDGMENT

RANCHOD J:

Introduction

- [1] This is an appeal against the judgment and order handed down by Mudau AJ (as he then was) who granted leave to appeal.
- [2] This appeal is the second Full Court appeal following from the institution of action by the appellant against the respondents. The matter initially came before Zondo J (as he then was) as a stated case. No evidence was led. Zondo J dismissed the appellant's claim but granted leave to the Full Court of this division. The appeal succeeded and the matter was referred back to the trial court for evidence to be led on the disputed issues which was then heard by Muda AJ who dismissed the action with costs.
- [3] At the second pre-trial conference held on 25 February 2011 the parties agreed to a separation of the issue of the merits from that of quantum. It is thus only the issue of liability that has been the subject for determination since the matter initially came before Zondo J and, thereafter, Mudau AJ and accordingly now on appeal.
- [4] The appellant's cause of action is based on the contract. The claim is for specific performance and, in the alternative, a claim for damages.

The

background

- [5] The appellant was the successful tenderer for a tender contract with number RT160/2004T (the contract) for the period 1 August 2004 to 31 July 2005.
- [6] The appellant was awarded the contract by the first respondent for the supply of fabrics and textiles to certain government departments, namely, the Department of Safety & Security, the Department of Correctional Services and the Department of Defence.
- [7] In terms of the letter of acceptance of the tender, the respondents stated that the plaintiff was awarded the tender to supply five items to the Department of Defence under reference numbers RT160/02/06/01T; RT160/02/09/03T; RT160/02/09/04T; RT160/02/09/09T and RT160/02/09/0ST .
- [8] It was a specific condition of the acceptance of the tender that no delivery of the items should be effected until such time that written official orders had been placed with the appellant.

- [9] It is common cause between the parties that the plaintiff received order for, delivered and was paid for the first four items. No order was issued to the appellant for the supply and delivery of the fifth item. For the sake of convenience I will refer to the goods making up the fifth item as 'the disputed item'.
- [10] It is the failure on the part of the respondents to issue an order to the appellant for the delivery and supply of the disputed item that led to the dispute between the parties and the action which the appellant instituted against the respondents.

Issue on appeal

- [11] The issue on appeal is whether the respondents were obliged to order all the items (including the disputed item from the appellant).

Contentions of the parties

- [12] In essence, the appellant contends that the respondents were obliged to issue an order for the delivery of the disputed item during the contract period. The respondents on the other hand contended that they had no obligation to issue an order for the disputed item as they had the choice on a proper interpretation of the contract, whether to issue an order or not.

Discussion

- [13] In the Invitation to Bid, the appellant was asked how much time it would need for the delivery of the required items (if it was the successful bidder). It stated, it will deliver the required fabrics '60 days after receipt of the order'.

- [14] In an undated letter from the first respondent to the appellant, inter alia, the following is stated:

'CONTRACT RT-2004T; SUPPLY AND DELIVERY OF FABRICS AND TEXTILES FOR THE PERIOD 1 AUGUST 2004 TO 31 JULY 2005.

Your bid RT160-2004T dated 12 April 2004 has been accepted, subject to all the terms and conditions embodied therein for the supply of the items indicated per attached circular.

This letter of acceptance constitutes a binding contract but no delivery should be effected until written official orders, which inter alia indicate delivery instructions, have been received. Orders will be placed by participating bodies listed in the bid document and on whose behalf the contract has been arranged as and when required during the contract period.' (My underlining.)

The letter is signed by one F Alexander on behalf of the Chief Director: Contract Management.

- [15] In addition to the conditions set out in the letter, the tender had its 'special conditions of contract' including one that:

'It is a condition that deliveries must commence as soon as possible after receipt of an official order, failing which the provisions of the general conditions of the contract may be applied'. (My underlining).

[16] With the exception of one document (dated 2 August 2004 and authored by F. Alexander on behalf of the Chief Director: Contract Management of the first respondent) the parties are *ad idem* about the documents making up the contract. They are:

16.1. The tender documents submitted by the appellant;

16.2. The General Conditions of Contract;

16.3. The Special Conditions of Contract applicable to tender RT160- 2004T; and

16.4. The undated acceptance letter (which was also attached as annexure "A" to appellant's particulars of claim.

[17] The document dated 2 August 2004 is addressed by Mr Alexander: 'To All Departments/ Administrations'.

[18] Mr Alexander refers to it as a 'contract circular'. Inter alia, the following is stated:

'1. . . .

2. The requirements of the following departments/administrations are included in this contract:

South African Police Service

South African National Defence Force Correctional Services

3. . . .

4. Quantities shown in this circular are subject to a variation of 10%. All quantities must be taken up during the contract period.

5. Orders must be placed as soon as possible but not later than 3 months after commencement of the contract.'

[19] The appellant relies heavily on this contract circular for its argument that the respondents were obliged to issue an order for the disputed item. The respondents however, contend that it was nothing other than an internal memorandum from the first respondent to relevant government departments. Respondents also contend that in the particulars of claim no mention is made of the disputed internal memorandum by the appellant. The respondents were accordingly denied an opportunity to plead to this memorandum which the appellant now relies on.

[20] In my view, it is impermissible for the appellant to rely on a document which it did not plead to prove its case.

[21] In any event, the contents of the contract circular do not advance the appellant's case. The appellant's contention that the words 'All quantities which contractor was to supply which items to which department if they wanted to place orders for the items and that such orders must be placed within three months after the commencement of the contract period (which was from 1 August 2004 to 31 July 2005).

[26] The peculiar nature of the contract when a tender is accepted is to be noted. The learned author of Christie's Law of Contract in South Africa, 7th Edition by GB Bradfield states at p54

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'When a tender has been accepted, the contract thus formed must, of course, be interpreted in the same way as any other contract. The only peculiarity which may arise is when the tender is in the form of a standing offer, such as a tender to perform work or supply goods of a specified type as required from time to time. If accepted, such a tender results in a pactum de contrahendo. The resulting obligation may oblige the tenderer to supply the specified services or goods whenever ordered, without the reciprocal obligation to order exclusively from the tenderer, or there may be reciprocal obligations to supply whenever ordered and to order exclusively from the tenderer. In either event each subsequent order leads to a separately identifiable contract, although of an unusual nature in that either the acceptance of the offer or both the offer and acceptance are made in accordance with the standing contractual obligation.' (Footnotes omitted. My underlining.)

[27] In FMMC Holdings (Pty) Ltd and Another v Tender Board of the Province of the Eastern Cape and Others [2000] JOL 6350 (Ck) the plaintiff (who was the successful tenderer) contended in essence that the defendants were obliged to issue orders for and delivery of school furniture for a specified amount. The defendants contended that in terms of the contract the second defendant would order school furniture from the plaintiff during the duration of the contract if there was a need and the second defendant was in a financial position to do so. The court had to decide whether or not the tender contract bound the second defendant to place orders with the plaintiff. The second

defendant's permanent secretary had written a letter to the plaintiff which reads as follows -

'SUPPLY AND DELIVERY OF SCHOOL FURNITURE - PTB6 - 96/97-426.

1.1 It gives me great pleasure to inform you that the contract for the supply and delivery of school furniture has been awarded to your company at a Tender Board meeting of the 27 (sic) March 1997 to deliver to the following districts:

...

1.2 The procedure for your implementation of the two year contract will be as follows:

- (i) The Regional Office will issue government orders directing how you should execute orders.!' (My underlining).

Dhlodhlo J held (at pp 18-19):

'The onus is on the plaintiff to prove that the second defendant department is contractually bound to issue delivery instructions to the plaintiff to deliver [the] school furniture. . . .

It is clear that in terms of the tender contract the plaintiff would supply and deliver school furniture . . . only after the plaintiff company had received delivery instructions from the second defendants department. Therefore the order sought cannot be granted.'

[28] In FMMC Holdings the plaintiff did not claim damages in the alternative. Absolution from the instance was granted on the basis that it may have a remedy or remedies in a claim for damages.

[29] In this matter the appellant has claimed damages in the alternative to specific performance. The damages claim is based on the allegations that plaintiff had already procured raw materials for R1,390,490.88. The failure to place the order meant appellant suffered a loss of income of R866,000.00 and tendering cost of R252.00.

[30] The appellant had specifically been asked how much time it would require to deliver the product once an order was placed. It had said it required 60 days to do so. The appellant did not wait for an order to be placed and acquired the raw materials in the meantime. In the circumstances the respondents cannot be held liable and accordingly the alternative claim for damages must also fail.

[31] The appellant contends that the letter of acceptance created ambiguity compared to what is contained in the contract circular.

Therefore the contra preferentem rule (words are interpreted against or to the disadvantage of the party uttering them) should be applied against the first respondent as it was the author of the two documents. The contra preferentem rule is used as a rule of last resort when 'all the ordinary rules of interpretation have been exhausted in an attempt to arrive at the

intention of the parties[1]. As is apparent from what is set out earlier, a reading of the two documents do not result in any ambiguity.

[32] I would dismiss the appeal with costs.

RANCHOD J

JUDGE OF THE HIGH COURT

I agree

MAUMELA J

Appearances:

Counsel on behalf of Appellant

: Adv. M.P van der Merwe (SC)

Instructed by

: Tim Du Toit & Co Inc.

Counsel on behalf of Respondent : Adv. M.M Mojapelo

Instructed by

: State Attorney, Pretoria

Date heard

: 21 June 2017

Date delivered

: 11 October 2017

[1] Cairus (Pty) Ltd v Playdon and Co. 1948(3) SA 99 (A) at page 123.

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