IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A2022-005788
REGIONAL COURT CASE NO: 0574/2018
(1) REPORTABLE: **No**
(2) OF INTEREST TO OTHER JUDGES: **No**
(3) REVISED.
SIGNATURE:
DATE: **9 OCTOBER 2023**

In the matter between:

ALUDAR HOLDINGS (PTY) LTD	Appellant
(Registration no: 2012/076161/07)	Plaintiff in court *a quo*
and	
THE COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICE	First Respondent (First defendant in the court *a quo*)
THE MINISTER OF FINANCE	Second Respondent (Second defendant in the court *a quo*)

JUDGMENT

COWEN J (BARIT AJ CONCURRING)

Introduction

[1] The appellant, Aludar Holdings (Pty) Ltd, instituted an action for damages, as a plaintiff, against the first respondent, the Commissioner of the South African Revenue Services (SARS) in the amount of R309 748.28 with interest and costs. The trial proceeded before Regional Magistrate Myambo on 24 February 2022 and 31 March 2022. On 13 May 2022, the Magistrate granted absolution from the instance with costs. The appellant now appeals that order.

[2] The appellant's cause of action arises from an alleged repudiation of an agreement, specifically a purchase order for the supply of bullet proof vests for SARS. The appellant claims lost profit. The Magistrate concluded that the appellant had failed to prove that such a contract had been concluded and accordingly granted absolution from the instance.

[3] The appellant contends that the Magistrate erred in granting absolution from the instance, centrally, because, it says, it presented evidence in support of its cause of action – including in support of the conclusion of a contract – and the test for absolution was incorrectly applied to the evidence. The test for absolution is set out in *Claude Neon Lights*:[1]

> 'When absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the 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.'

[4] The contract in issue was allegedly concluded under what the appellant describes as a transversal contract regime as employed in government tender processes. As will appear, a feature of the dispute is whether there was only one contract in issue, or whether there were two. In the view that I take of the matter, this is ultimately immaterial as I conclude that in either event, the Magistrate's decision should be upheld.

---

[1] *Claude Neon Lights (SA) Ltd v Daniel* 1976(4) SA 403 (A) (*Claude Neon*). The Court assumes, in the absence of special considerations such as inherent unacceptability of the evidence adduced, that the evidence is true: *Atlantic Continental Insurance Company of South Africa v Vermaak* 1973(2) SA 525 (E) at 527C-D.

The appellant's pleaded case

[5] To contextualize the pleaded contract or contracts, and in turn the appeal, it is helpful to commence by referring to the appellant's pleaded case as set out in its particulars of claim as amended. In doing so, I refer to material provisions of the alleged contracts as recorded in documents proven in evidence and attached to the particulars of claim.

[6] In March 2016, the second defendant, the Minister of Finance,[2] issued a written tender invitation (under bid number T[...]) for the supply and delivery of clothing to the State for the period ending March 2017 (the invitation to bid). The item description specified in the invitation to bid is as follows: 'Jacket, Bulletproof, Kevlar, Unisex, Siz: All, Colour: SARS Charcoal, CKS 129. A sample must be submitted' (the Kevlar vests).[3] On 4 March 2016, the appellant submitted a tender to supply the Kevlar vests for a unit price of R5105.00 for a quantity of 1000, later reduced to R4995.94 (the appellant's bid). The brand name referred to in the appellant's bid is (Du Pont) Zebra Sun.[4]

[7] On 15 July 2016, the second defendant – through a Dorah Kgotse for the Chief Director: Transversal Contracting, addressed a letter of acceptance to the appellant in which the appellant was informed:

> '[The appellant's bid] has been accepted. This acceptance is subject to all the terms and conditions embodied therein, for the supply of the items indicated as per the attached circular and annexures.
>
> This letter of acceptance constitutes a binding contract, but no delivery should be effected until a written official order has been placed, which *inter alia,* indicates delivery instructions. Orders will be placed as and when required during the contract period by participating institutions listed

[2] No relief is sought against the second defendant, who is not participating in the proceedings.
[3] In testimony it was explained that Kevlar is the material used to make the jackets.
[4] Du Pont (Zebra Sun) is the company or companies that make(s) and manufacture(s) the vests.

in the contract circular and on whose behalf the contract has been arranged.'

[8] The appellant pleads that according to the circular that was attached (the Circular), the contract would be subject, *inter alia,* to the following terms and conditions: the General Conditions of Contract issued in accordance with Chapter 16A of the Treasury Regulations (the General Conditions), the Special Conditions of Contract, which prevail should there be a conflict (the Special Conditions) and the Circular which constitutes the official pricing and binding agreement between the contractor and the State. The Circular states that SARS will participate in the contract as a government institution and the appellant is one of the contractors.

[9] The appellant pleads that a contract was thereby concluded between the appellant and SARS for the supply and delivery of the Kevlar vests (the main Contract) and that in concluding the main Contract, the second defendant acted as the agent or representative of SARS.

[10] The plaintiff specifically pleads reliance on Clause 25.1 of the Special Conditions of Contract pursuant to which:

10.1. The contractor will be required to submit three (3) pre-production samples to the South African Bureau of Standards at the written request of the purchasing institution concerned.

10.2. In the event that the first pre-production samples fail the test and a second set (3 samples) of pre-production samples incorporating corrections / improvements are required, the corrected samples must reach the South African Bureau of Standards within 14 working days after the relevant institution had notified the contractor of its findings.

10.3. In the event that the second pre-production samples fail the test and a third set (3 samples) of pre-production samples incorporating corrections / improvements are required, the corrected samples must reach the

South African Bureau of Standards within 7 working days after the relevant institution had notified the contractor of its findings.'

[11] Reliance is also placed on Clause 8.7 of the General Conditions which is concerned with inspections, tests and analyses and provides (insofar as it is pleaded):

'8.7 Any contract supplies may on or after delivery be inspected, tested or analyzed and may be rejected if found not to comply with the requirements of the contract. Such rejected supplies shall be held at the costs and risk of the supplier who shall, when called upon, remove them immediately at his own cost and forthwith substitute them with supplies which do comply with the requirements of the contract. Failing such removal the rejected supplies shall be returned at the suppliers cost and risk.

[12] According to the appellant's statement of claim, on 16 March 2017:

12.1. SARS issued a purchase order for 155 Kevlar vests described as 'Combat B/P Kevlar Charcoal Chest 3L/142, Unisex, Customs-SARS spec no Du Pont (Zebra Sun);

12.2. Mr Sebone, on behalf of the appellant, requested Ms Smit of SARS' Procurement Centre to provide the plaintiff with the SARS specification, as stated on the order as there was no confirmed specification detailed for the project;

12.3. Ms Pretorius of SARS requested the plaintiff to provide a sample of the jacket based on the pricing the plaintiff gave on the bid item awarded to it;

12.4. Mr Sebone requested Ms Pretorius to inform the plaintiff of the immediate risks and day-to-day tasks that the persons who will be wearing the bullet proof jackets are involved in, to narrow down the variety and offer the best

possible solution, because of the wide list of available options within the quoted price range.

[13] The plaintiff pleads that while it complied with its obligations in terms of the contract, on 29 June 2017, the first defendant, represented by Ms Pretorius, repudiated the contract in writing informing the plaintiff that the bullet proof vests failed every test that they were subjected to, do not meet the minimum requirements and that the purchase order was cancelled. The plaintiff elected to accept the repudiation and claimed damages.

The evidence

[14] Two witnesses testified on behalf of the appellant, Mr Kgaogelo Sebone and Ms Annelle Burroughs, a SARS employee. It is only necessary to deal with features of Mr Sebone's testimony to determine the appeal. At the relevant times he was a director of the appellant.

[15] Mr Sebone's evidence confirmed that, as pleaded, the appellant submitted its bid in response to the invitation to bid understanding that any contract would be subject to the general and special conditions. Mr Sebone signed the bid on behalf of the appellant in his capacity as a director. With reference to the bid documentation, he confirmed the bid related to the Kevlar vests. In respect of the item specification which read: 'Jacket, bulletproof Kevlar, unisex size. All colour. SARS. Charcoal CKS129. A sample must be submitted', he testified that the bid documentation did not say when the sample must be submitted.

[16] Mr Sebone explained that in his understanding the Contract was a transversal contract which he understands to be a contract managed by the National Treasury on behalf of participating organs of the State. The testimony was to the effect that the Contract was concluded on 15 July 2016, when the Ms Kgotse sent the letter to the plaintiff advising that the plaintiff's bid had been accepted. The letter reads as set out above in paragraph 7. Mr Sebone emphasized that the Contract then concluded was a binding contract with the specification only that delivery is effected when the participating institution, in this case SARS, placed an order. The Contract was subject to the General

Conditions, the Special Conditions and the Circular. In terms of the Special Conditions, the contract period is stipulated to be for the period ending 31 March 2017 and refers specifically to SARS as the participating government institution.

[17] Mr Sebone referred to features of the documentation that deal with orders, testifying that the written order was received on 16 March 2017 when SARS issued the purchase order referred to in paragraph 12.1 above. He referred to Clause 23 of the Special Conditions which deals with Orders and Delivery[5] and the definition of Orders in the General Conditions.[6] Reference was also made in evidence to Clause 25 which is titled Post-Award Product Compliance Procedures and Clause 25.1 is referred to above in paragraph 10.

[18] A significant portion of Mr Sebone's evidence concerns the events that transpired after the appellant received the purchase order and SARS' letter of cancellation of the contract on 29 June 2017. These events are foreshadowed in the pleadings and referred to in paragraph 12 and 13 above. I return to this below but highlight that the testimony was to the effect that:

18.1. SARS at no point provided its specifications to enable the appellant to deliver the Kevlar vests.

18.2. The appellant, through Mr Sebone, repeatedly sought clarification from SARS regarding its specifications.

18.3. SARS requested samples.

18.4. The appellant at no point supplied samples of the Kevlar vests to be supplied. The only samples supplied were what he described as 'dummy samples' for purposes of assessing their 'look and feel'.

[5] '23.1 Orders. 23.1.1 Contractors should note that the order(s) will be placed as and when required during the contract period, and delivery points will be specified by the relevant purchasing institution(s). …'

[6] The definition of 'order' in the General Conditions is 'an official written order issued for the supply of goods or works or the rendering of a service.'

18.5. SARS, however, conducted tests on these dummy samples which failed.

18.6. The appellant was at all times in a position to supply the Kevlar vests but required SARS' specifications to do so as there were a range of possible options depending on the security requirements in question including what weapons the vests should protect against.

[19] The letter of cancellation, upon which the alleged repudiation is based, reads:

'The bulletproof jackets purchase order …. is attached. These bullet proof vests failed every test to which they were subjected. This failure is in a situation that if it had not been discovered by our team, it could have led to sad dire and unnecessary consequences. These bulletproof jackets have not met our minimum requirements, and therefore SARS has no option but to cancel this purchase order. …'

[20] Under cross examination, Mr Sebone confirmed that he had at no stage signed any contract but he understood that the contract came into existence between the appellant and SARS, as a result of the appellant's bid, submitted in response to the invitation to bid, which was accepted, with SARS as the participating institution, and a written purchase order then made by SARS. He willingly conceded that the absence of a specification was highly material not only for purposes of the ability to perform but in view of the purpose of a bullet proof vest.

The Magistrate's decision

[21] It is necessary only to refer to two features of the Magistrate's decision, first relating to the nature of the contract contemplated by the tender and second the findings on the evidence that no contract was concluded.

[22] In dealing with the nature of the contract or contracts in issue in this case, the Magistrate relied on the following passage in Christie's Law of Contract in South Africa (footnotes omitted):[7]

> '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 that 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.'

[23] Applied to the evidence, the Magistrate found that the Contract amounted to a standing offer to supply goods as may be required from time to time, but that a separate contract comes into existence when an order is made. On the evidence, the Magistrate found that the purchase order did not bring about a contract. When the appellant's bid was accepted, it remained necessary for there to be a separate signed written agreement between the parties, which never came about.

The appeal

[24] The appeal is based on various grounds amply traversed in argument. The appellant contends that the Court misunderstood the nature of and requirements for a transversal contract and that a binding contract had come into being on acceptance of the appellant's bid. In terms of the Contract, delivery should only be effected when a written official order was placed which

[7] The Magistrate relied on the 6th edition at p 46. I have to hand only the 7th edition but it contains the same quotation at p54.

would ensue as and when required. On the proven documents, the appellant submits a binding contract came into being that bound SARS.

[25] In my view, applying the test for absolution, there are compelling aspects to what the appellant submitted in respect of the contractual arrangements. Thus, I accept that a court, applying its mind reasonably, could or might conclude that the second defendant, in accepting the appellant's bid, did so on SARS' behalf and SARS thereby became bound by any resultant contract. Indeed, I do not understand the Magistrate to have found differently. I also accept that a court could or might conclude, on the evidence, that there was to be a single contract, with only delivery instructions outstanding, to be supplied when SARS issued a written purchase order. Moreover, I accept that a court could or might find, on the evidence, that the absence of any signature from the appellant on the purchase order is not fatal to its case.

[26] The appellant's difficulty, in my view, lies rather in the fact that on the appellant's own version, there was at no stage any consensus or reasonable certainty about the nature of the goods to be supplied. It is for this reason that there was no contract.[8] And that is so whether one views the contract sought to be concluded as a single contract or two contracts, the first a *pactum de contrahendo*. Although on the face of it, the goods are described with apparent clarity in the bid specification, the appellant's evidence is quite clear that they did not contain the specifications required to know what had to be delivered when the purchase order was placed. More was required. When regard is had to details of the appellant's evidence, the outstanding specifications concerned highly material matters such as what weapons the vests must be able to withstand. To the extent that this was an issue to be dealt with by way of a pre-award sample supplied by a bidder,[9] there is no suggestion that this ever happened. Moreover, the evidence is clear that to the extent that further specifications were required when issuing a purchase order, SARS at no stage supplied such specifications. It thus cannot be said that an effective written

[8] It is trite that a valid agreement of sale requires agreement on the goods to be sold, even if generic in nature. See eg *LAWSA* The Law of Contract Vol 36 (3 ed), para 259.
[9] Clause 17 regulates Pre-Award compliance procedures and makes it clear that bidders must submit samples. See eg 17.4.5 and 17.4.6.

purchase order was ever placed because there was never agreement as to what goods were ordered and thus to be supplied.

[27] Even if I am incorrect in this regard, and one accepts – contrary to the evidence of the appellant – that there was agreement regarding the goods to be supplied and that, in the result, a contract or contracts came into existence, then the appellant faces a different difficulty. There is no dispute that the onus is on the appellant to prove a repudiation, which may be stated to arise '[w]here one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract'.[10] In my view, the grant of absolution would still be justified because the appellant has not demonstrated that that the cancellation was without lawful ground.[11] At best for the appellant, its evidence demonstrates that no samples for testing were supplied as materially required by the contract.

[28] In the result, I agree with the order of the Magistrate.

[29] I would make the following order.

29.1. The appeal is dismissed with costs.

SJ COWEN

Judge of the High Court

I agree and it is so ordered.

L BARIT

Acting Judge of the High Court

Date of hearing: 6 June 2023

Date of judgment: 9 October 2023

Appearances:

Appellant: Adv J Mollentze instructed by Christo Coetzee Attorneys

[10] Nash v Golden Dumps (Pty) Ltd [1985] ZASCA 6; [1985] 2 All SA 161 (A).

[11] *Mobil Oil Southern Africa (Pty) ltd v Mechin* [1965] 2 All SA 533 (A); *Nedcor Bank Ltd trading inter alia as Nedbank v Mooipan Voer & Graanverspreiders CC* [2002] 3 All SA 477 (T).

Respondent: Adv L Isparta instructed by Alant, Gell and Martin Inc