

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: 13732/2017

In the matter between:

INNOVATIVE FLEXIBLES (PTY) LTD

Plaintiff

and

PIONEER FOODS (PTY) LTD

First Defendant

t/a ESSENTIAL FOOD: GRAINS

PIONEER FOODS GROCERIES (PTY) LTD

Second Defendant

ORDER

First Defendant

- (a) Payment to the plaintiff of the sum of R3 642 729.48;
 - (b) Interest on the amount of:
 - (i) R1 844 777.25 from 1 July 2017;
 - (ii) R1 770 535.23 from 1 August 2017;
 - (iii) R27 417 from 1 September 2017'
- at the prescribed rate of 10,5% per annum, to date of payment.

Second Defendant

(a) Payment to the plaintiff of the sum of R4 288 713.37;

(b) Interest on the amount of:

(i) R905 734.57 from 1 July 2017;

(ii) R1 615 216.20 from 1 August 2017;

(iii) R1 767 762.60 from 1 September 2017;

at the prescribed rate of 10.5% per annum, to date of payment;

Both defendants, jointly and severally

The costs of the action, including the costs of senior counsel.

JUDGMENT

Ploos Van Amstel J

[1] The plaintiff in this matter is Innovative Flexibles (Pty) Ltd, a manufacturer and supplier of flexible packaging material. It is based in Durban. The first defendant is Pioneer Foods (Pty) Ltd and the second defendant Pioneer Foods Groceries (Pty) Ltd. They are both based in Tygervalley in the Western Cape. I refer to them herein, collectively, as the defendants, or, where that is convenient, as Pioneer Foods.

[2] The plaintiff's claim is for the agreed purchase price of packaging material which it had manufactured and supplied to the defendants pursuant to orders placed by them. The defendants do not dispute that they ordered and received the packaging and used it in the course of their business. They however contend that the contract pursuant to which the orders were placed was induced by criminal conduct, including fraud, and that consequently they will contravene s5 of the Prevention of Organised Crime Act 121 of 1988 (POCA) if they pay for the materials. They also contend that holding them liable to pay will offend against public policy.

[3] The quantum of the claim is not in issue. The defendants admit that if it is found that the appointment of the plaintiff as a supplier to them was regular then an amount of R7 931 442,85 will be payable by them to the plaintiff. That is the amount claimed by the plaintiff.

[4] The background of the matter is as follows. Pioneer Foods purchases its ingredients and packaging materials from outside suppliers. In order to become a supplier a process has to be followed. The entity involved would approach Pioneer Foods, present its profile, with an overview of who they are, what they can offer, their capabilities, their business case, their quality certification, BEE credentials, corporate identity, registration, VAT certificates, banking details, and so on. If successful, the vendor's details are captured on Pioneer Foods' master data, with a registration number. A vendor number is allocated, banking details are loaded and the vendor will be ready for trade. The plaintiff was such a supplier on the Pioneer Foods data base.

[5] When Pioneer Foods wanted to acquire material, such as packaging, they would contact suppliers on their data base and issue a document, headed Request for Quotation (RFQ). The document contained information as to what Pioneer Foods required, and requested information from the tenderer as to its business plan, pricing structure and so forth. The responses are assessed by a procurement manager, who makes a recommendation to a procurement committee.

[6] The plaintiff responded to such a request in February 2017, for the supply and delivery of flexible packaging. Its bid was successful and on 15 February 2017 it was notified in writing of its appointment to supply packaging to Pioneer Foods.

[7] The RFQ is not a contract. The document itself specifies this and Mr. Weyer, a procurement manager who testified for the defendants, said the only written contract in

this regard was the appointment letter of 15 February 2017. Pursuant thereto Pioneer Foods placed orders for packaging material with the plaintiff, who manufactured and delivered the material. He said each such order and the acceptance thereof constituted a separate contract, albeit subject to the relevant terms and conditions of the supply contract of 15 February 2017.

[8] Pioneer Foods ordered packaging material from the plaintiff on numerous occasions thereafter, which were delivered and a number of payments were made. On 13 June 2017 Pioneer Foods wrote to the plaintiff and said it had come to light that the plaintiff had a relationship with a company called Blakey Investments (Pty) Ltd (Blakey), which, according to Mr Weyers, was blacklisted by Pioneer Foods in 2014 due to alleged fraud and corruption. The letter stated that the matter was being investigated and in the meantime the contract was suspended.

[9] A firm of investigators was appointed, and on 24 July 2017 an attorney acting for Pioneer Foods wrote to the plaintiff's attorneys and cancelled 'the agreement in terms of which your client is supplying and delivering flexible packaging to our client.' Thereafter Pioneer Foods placed no further orders with the plaintiff. It however did not cancel the individual contracts in terms of which orders had already been placed. Mr Weyer said the reason was that Pioneer Foods needed the packaging material for its factories. He used the expression that they decided to 'honour' those contracts. The plaintiff's claim relates to those orders. It delivered the material pursuant to the orders, and Pioneer Foods used it in its factories.

[10] The basis on which Pioneer Foods cancelled the supply contract was that one Suman Panday, who owned Blakey, was a shareholder of the plaintiff, and that the plaintiff had submitted false BBEEE certificates to it. The defendants pleaded that the plaintiff's interest in the value which Pioneer Foods 'might have received' was derived through 'a calculated series of criminal acts by plaintiff's representatives and Balie, which included

fraud'; that the plaintiff's interest in such value represented the proceeds of unlawful activities as defined in section 1 of POCA; that Pioneer Foods is precluded by the provisions of POCA from making any payment to the plaintiff in respect of the value received by it; and that the plaintiff is precluded from recovering 'its performance (sic)' on the grounds of public policy'.

[11] The person 'Balie' referred to is a former employee of Pioneer Foods, who represented it in connection with the appointment of the plaintiff as a supplier, and also the RFQ and the plaintiff's subsequent appointment as a supplier of packaging material. He did not testify and what he said to the investigators and Mr Weyer would have been inadmissible hearsay evidence. Similarly, what the forensic investigators told Mr Weyer they had found would also have constituted inadmissible hearsay. Included in the trial bundle is an affidavit deposed to by Mr Weyer on 7 November 2017, for the purpose of laying criminal charges against a number of individuals, including Balie and the director of the plaintiff, Mr G Krishna. I propose to have no regard to the affidavit and will only have regard to Mr Weyer's oral evidence and of course to the documents to which he referred, where the contents are admissible. The same applies to the report of Mr Van Schie which he supplied to Pioneer Foods.

[12] The relevance of the stance taken by Pioneer Foods was that in 2014 it had severed all ties with Blakey, which was then one of its suppliers, on the basis of dishonest practices, and was not willing to continue to do business with it. Pioneer Foods contended that the plaintiff was Blakey in a different guise.

[13] The evidence that Panday was a shareholder of the plaintiff consisted of a number of documents that were on Balie's company computer, which he forwarded to Mr Weyer. Neither Balie nor Panday testified. The agreed status of the documents in the trial bundle is that they were what they purported to be, with no admission as to the contents of the documents. One of the documents is a share certificate that reflects one Ash Singh as

the sole shareholder of the plaintiff. It was not disputed that this was a name sometimes used by Panday. The person who signed the certificate did not testify, nor was the plaintiff's share register produced. The contents of the certificate were not proved and constituted inadmissible hearsay evidence. However, if Panday were a shareholder of the plaintiff then the certificate on Balie's computer showed that Balie knew this.

[14] On 23 November 2016 an email was sent to Balie at Pioneer Foods, purportedly by 'Ash', to which were attached 'company documents'. The documents consisted of a letter on the plaintiff's letterhead, dated 23 November 2016, in which it was recorded that Gonasagran Krishna was its sole director and Ash Singh its sole shareholder. The letter purported to have been signed by both of them. Also included were documents reflecting the plaintiff's tax registration, a certificate issued by the Companies & Intellectual Property Commission (which reflected Krishna's contribution and interest in the company as nil), and a share certificate that reflected Ash Singh as its sole shareholder. There was no evidence that Mr Krishna had in fact signed the letter, or even that the signature looked like his. He also did not testify. The contents of this document constitute inadmissible hearsay evidence. As in the case of the share certificate, if Panday were a shareholder, Balie had been informed of that.

[15] The defendants called a forensic information technology expert, Mr Brink. He said a number of emails were handed to him by one of the investigators, and he was asked to analyse their metadata. His evidence established that some of the documents which were referred to in the evidence as having been obtained from Balie's computer, were in fact attachments to the emails which he had analysed. This took the matter no further.

[16] One of the attachments to an email dated 17 November 2016 was a BBEEE certificate, ostensibly issued by MSC Verification Services. There can be no doubt that the certificate was a forgery and had not been issued by MSC Verification Services.

[17] When the plaintiff responded to the RFQ in February 2017, part of the documentation supplied by it was a BBEEE certificate purportedly issued by Platinum BEE Verification. It certified the plaintiff as a level 1 contributor, which Mr Weyer demonstrated was not possible. It reflected the plaintiff's annual turnover as between R5 million and R35 million, which Mr Weyer said was plainly false. However, the contents of the financial statements on which he relied were neither proved nor admitted.

[18] Apart from the contents of the emails, which were not admitted, there was no evidence as to who had sent the emails to Balie.

[19] Counsel for Pioneer Foods submitted that the documents to which I have referred had substantial probative value. Evidence that is inadmissible has no probative value. In terms of s3(4) of the Law of Evidence Amendment Act 45 of 1988 hearsay evidence is defined as 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'. Subsection (1) provides that hearsay evidence is inadmissible, save in the circumstances referred to in subsections (a) to (c), none of which find application here.

[20] It follows in my view that the defendants failed to prove criminal conduct on the part of the plaintiff. The evidence on which it relied in this regard was inadmissible hearsay evidence.

[21] I should say, in any event, that the alleged misrepresentations by the plaintiff concerned its appointment as a supplier to the defendants. I doubt that it can be said that the proceeds of the sale by it of packaging material to the defendants constituted 'the proceeds of unlawful activities' as contemplated in s5 of the Prevention of Organised

Crime Act 121 of 1998. Nor does it seem to me that Pioneer Foods would have contravened s5 by paying for the material.

[22] When a contracting party becomes aware that the contract had been induced by a fraudulent misrepresentation on the part of the other party, he may choose to abide by the contract or to cancel it. The contract is only void *ab initio* where the mistake on the part of the innocent party is of so fundamental a nature that such party's apparent assent to the contract is in truth not assent at all. When the innocent party decides to abide by the contract he remains bound to perform his obligations in terms of it. In Mr Weyer's own words, Pioneer Foods chose to honour the individual contracts where orders had already been placed, and did not cancel them. It received and used the packaging material, and has to honour its obligations in terms of those contracts. In other words, honouring the contracts means accepting delivery of what was ordered, and paying for it. Paying for the material does not amount to using the 'proceeds of unlawful activities...to make funds available...' as contemplated in s5(b).

[23] I do not consider therefore that the defendants are precluded from paying for the material, either by the provisions of POCA or by public policy.

[24] There will be judgment as follows:

First Defendant

(c) Payment to the plaintiff of the sum of R3 642 729.48;

(d) Interest on the amount of:

(i) R1 844 777.25 from 1 July 2017;

(ii) R1 770 535.23 from 1 August 2017;

(iii) R27 417 from 1 September 2017'

at the prescribed rate of 10,5% per annum, to date of payment.

Second Defendant

(e) Payment to the plaintiff of the sum of R4 288 713.37;

(f) Interest on the amount of:

(iv) R905 734.57 from 1 July 2017;

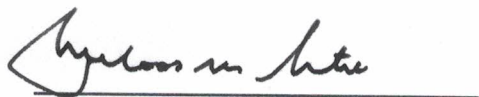
(v) R1 615 216.20 from 1 August 2017;

(vi) R1 767 762.60 from 1 September 2017;

at the prescribed rate of 10.5% per annum, to date of payment;

Both defendants, jointly and severally

The costs of the action, including the costs of senior counsel.



PLOOS VAN AMSTEL J

CASE INFORMATION

Date Judgment Reserved : **24 August 2022**
Date Judgement Delivered : **6 September 2022**

Appearances:

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