"REPORTABLE"

CASE NO.: I 2305/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SERENITY MANUFACTURING **PLAINTIFF**

and

MINISTER OF HEALTH AND SOCIAL SERVICES **1ST DEFENDANT**

THE CHAIRMAN OF THE TENDER BOARD OF NAMIBIA **2ND DEFENDANT**

CORAM: **DAMASEB, JP**

Heard on: 20th – 22nd.09.2005

Delivered on: 30.06.2006

JUDGMENT

[1] DAMASEB, JP: The plaintiff claims damages for breach of contract arising from an alleged breach of an agreement entered into between the parties following the award of a tender to the plaintiff by the second defendant, the Tender Board of Namibia created in terms of the Tender Board of Namibia Act, 16 of 1996 ('the Act').

[2] The Tender Board, acting under the authority of s20 of the Act, read with regulation 2(9) of the Tender Board Regulations (1996), adopted a Code of Procedure which, in relevant part, states as follows:

> "General agreements
>
> 7. (1) Where the Tender Board considers it desirable, the Board may enter into a general agreement for –
>
> (a) a specified quantity of goods which may not be varied without the mutual consent of the parties to such an agreement;
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> (b) an estimated quantity of goods subject to an increase or decrease of 10 per cent;
>
> (c) a maximum quantity of goods where the minimum quantity ordered cannot be guaranteed, but where the maximum quantity may not be exceeded without the mutual consent of the parties to such an agreement; or
>
> (d) an unspecified quantity of unguaranteed estimated quantity of goods.

(2) The Board shall indicate in a title of tender the terms and conditions of a general agreement." (my emphasis)

It is this clause which the plaintiff relies on in support of the first part of its claim.

[3] The particulars of claim, as amended, allege that it was an implied term of the "general agreement" between the plaintiff and first defendant that the estimated quantities set out below, would increase or decrease in terms of the Code and that the first defendant did not comply with the terms of the Code in that, during the contract period, the first defendant did not order at least 90% of the contracted goods. In the alternative, it is alleged that even if the Code is found not to be of application, the plaintiff relies on an alleged undertaking given by the first defendant's employers that the quantities to be ordered would not decrease by more than 20% over the entire contract period. In respect of this first part of the claim, the plaintiff alleges that it was an implied or tacit term, reinforced by the alleged undertaking aforesaid, that same was subject to normal bona fides of contracts in terms whereof the estimated quantities would not decrease by more than 20% over the contract period.

[4] The second part of the claim alleges that the first defendant, during the contract period, placed an order of 1215 small napkins but thereafter put the

same on hold and never took delivery thereof either during the contract period, or at all. The plaintiff therefore seeks to recover the profit it would have made had the first defendant taken delivery of the items ordered but not taken delivery of.

[5] The defendants admit in the plea that the plaintiff and the first defendant signed a 'general agreement as defined in the Act', and subject to the Act, the Regulations and the Code, although they add that it was further subject to the tender contract schedule; schedule of orders and deliveries, a performance security computation and a format for performance security; and the first defendant's terms and conditions of contract in respect of the supply of medicines and related supplies. Defendants also admit that the agreement between the parties was subject to an increase and decrease as provided for in the Act, read with the Regulations and the Code, but then also rely on clause 26 *infra* of the special conditions of the first defendant. The defendants deny the alleged implied and tacit terms. In a nutshell, in respect of the first part of plaintiff's claim, the defendants deny any liability premised on the allegation that first defendant should have ordered either 90% or 80% of the quantities over the contract period; and they rely on clause 26, *infra*, for this purpose. They also deny any liability in respect of the small napkins actually ordered but not taken delivery of, again relying on clause 26 for this purpose; alleging they were under no duty to take delivery because of the clause.

[6] It is common ground that on 1 September 2000, the second defendant awarded the plaintiff Tender A13 – 04/2000 (items 72 and 73) for the supply of (a) an estimated quantity of 6 (six) million large baby napkins at a price of N$160,00 per pack of 200 for the first year of the agreement, and N$170,00 per pack of 200 for the second year of the agreement, and (b) an estimated quantity of 1.2 million small napkins at a price of N$300.00 per pack of 400 for the first year of the agreement and N$320.00 per pack of 400 for the second year of the agreement. The tender was for the period 01 July 2000 to 30 June 2002. In February 2001, the plaintiff and the first defendant concluded a written agreement to formalise the award of the tender aforesaid. This agreement provides that the tender document, with all its constituent parts "shall be deemed to form part and be read and construed as part thereof". The constituent parts are: the tender contract schedule and the price offered therein by the tenderer; the letter of intent to supply; the technical specifications, among others, including those provided under clauses 30, 31, and 35 of the first defendant's tender special conditions; the first defendant's tender special conditions; the second defendant's conditions, and the confirmation of award signed by the permanent secretary of first defendant, or anyone authorised thereto by the permanent secretary.

[7] The parties agreed to, and had recorded, before the commencement of the trial to, in terms of Rule 33, separate the trial on the merits from the trial

on *quantum* so that the Court only determine, at this stage, whether or not the plaintiff is entitled to claim damages, and if so, at what percentage such damages should be calculated.

[8] In his opening address Mr Heathcote, for the plaintiff, set out the case as follows: That the contract between the parties is not in dispute. That the real dispute between the parties is the plaintiff's allegation (vide paragraph 7 of the particulars of claim) that the defendants agreed that the quantities to be ordered by them would not decrease with more than 20% over the contract period, and that, in respect of the second part of the claim, even if the Court were to find that the defendants were under no obligation to place any orders over the contract period, the defendants cannot rely on the variation clause after an order had been placed. That, by law, the maximum deviation upwards or downwards could only be 10%; and that the evidence will show that, during negotiations after the tender was awarded, the defendants informed the plaintiff that government normally orders at least 20% of the quantities over the contract period.

[9] Mr Marcus, for the defendants, summarised their case as follows: The defendants put in issue the plaintiff's claim that it is entitled to payments claimed based on the allegation that the defendants were obliged, by the agreement or the law, to place a certain quantity of orders for the goods. In terms of the agreement, he says, there can be no talk of minimum quantities

that the first defendant had to order. In was agreed that the quantities were only an estimate and that there was no ceiling upwards or downwards as to the quantities the first defendant had to order. He stated that the agreement between the parties exhaustively regulated the affairs of the parties. As for the order placed but not taken delivery of, he stated that the plaintiff did not comply with all the terms of the agreement and that, for that reason, the defendants were not under obligation to take delivery.

[10] The clause in the agreement concluded by the parties which is at the centre of the main dispute between them is that contained in clause 26 which reads as follows:

> "26. The quantities contained in the attached contract schedule are an estimate based on usage statistics of the past, and as such can vary. The Purchaser reserves the right at the time of award of contract and/or during the period of contract to increase or decrease the quantities specified in the Schedule without any change in price or other terms and conditions as specified in this contract."

[11] The first witness for the plaintiff was its Operational Manager, Stuart Grant Salt. He was involved in the tendering and concluded the agreement with the first defendant. He, in fact, completed the tender document eventually accepted by the second defendant. He confirmed that he was aware of the clause quoted in paragraph 10 above (hereafter 'clause 26').

He testified that the tender was awarded to the plaintiff in September 2000 and the plaintiff began to deliver the goods as and when ordered by the first defendant. He testified that after the award of the tender to the plaintiff, he dealt with Ms Angula and Ms Onesmus of the second defendant, and Ms Simataa and Ms Lima of the first defendant's Central Medical Stores (CMS).

[12] Salt testified that upon being awarded the tender the plaintiff proceeded to secure premises and raw materials for the manufacture of the goods; and to employ staff – all in order to deliver the quantity of goods as 'indicated' to them by the first defendant. Initially the plaintiff employed 20 people and after receiving the first orders, an additional 20/24 employees for an extra shift to deliver an order of 3 500 bales initially ordered. Salt testified that the plaintiff also purchased a 'machine', followed by additional three 'machines' at the cost of about N$90,000.

[13] Salt was then invited to comment on how he understood the effect of clause 26 at the time the plaintiff was awarded the tender and he concluded the agreement. He testified that he thought that the variation would not be too much - by which I understood him to mean that the first defendant's demand for the goods tendered would not be less than the average usage statistics of the past. His belief for this, he said, was based on the normal growth in the population and the resultant increase in usage of napkins. He said that even the original orders placed by the first defendant gave him the

impression that the plaintiff would be required to supply more than the estimated quantities. Salt's attention was then drawn to an internal memorandum of the first defendant (p. 89 of bundle A of the discovered documents) showing that between September 2000 and June 2001, for only large napkins, the first defendant had placed orders amounting to 7 030 bales.

[14] Salt also confirmed that he, on behalf of the plaintiff, signed the agreement for the supply of the tendered goods, with the first defendant (i.e. Annexure "A" to the particulars of claim.) He says the signing, which was on 20th February 2001, was well after the tender was awarded to the plaintiff. By reference to paragraph 3 of Defendants' plea, Salt denied any suggestion that the agreement concluded between the parties limited the plaintiff to supply only the quantities stated in the tender contract schedule and the schedule of orders and deliveries accompanying the agreement. I find it useful to make specific reference to the contract 'schedule of orders and deliveries'. It shows that of the small napkins, the estimated quantities by 7 February 2001 was 3,000. By that date the quantity actually delivered was 38 while the quantity on order was 1,812. The estimated monthly usage for the same period, for small napkins, was, however, zero. Of the large napkins, the estimated quantities by 7 February 2001 was 30,000. By that date the quantity actually delivered was 1,732 while the quantity on order was 2,918. The estimated monthly usage for the period was 600. The

indicative schedule of orders and deliveries for the same period, for large napkins, was however, zero. Based on this, Salt testified that the indicative schedule of orders and deliveries was not correct if regard is had to what they had already supplied at that stage. He added that the performance security guarantee the plaintiff had to provide was at the rate of 50% of the average total contract price of N$5,880,000.00, representing N$294,000.00, based on average usage statistics of the past. He testified that had the indicative schedule of orders and deliveries been correct, the performance guarantee would have been substantially less. Salt insisted that he had no indication the quantities would be less.

[15] According to Salt, the plaintiff received orders for the large quantities of napkins up to February / March 2001, but from June the orders began to "dry up". He then made inquiries and suggested the 'staggering' of orders. Salt then referred to a document (p. 46 of bundle A) addressed to the plaintiff by one Nicodemus of the defendant's CMS, dated 10 April 2001. It purports to be an "urgent facsimile" and relates to "OVERDUE TENDER CONTRACT ORDERS". It then gives "details of OVERDUE ORDERS which are currently showing against your company. THESE ITEMS ARE REQUIRED URGENTLY AND MUST BE DELIVERED BY: NOW":

napkins, baby, disp. large: 600 due on 15.03.01

napkins, baby, disp. small: 612 due on 11.03.00

napkins, baby, disp. small: 1200 due on 03.10.00."

[16] Salt testified that the overdue 600 had been delivered while the remainder (612 & 1200) the plaintiff was told to keep on hold because the first defendant was experiencing a storage problem. He stated that the plaintiff was able and prepared to deliver those items if asked to. It is these two undelivered items (612 and 1200) to which the allegation in paragraph 9.2 of the particulars of claim (as amended at the Rule 37 Conference) relates. That paragraph, as amended at the Rule 37 Conference held on 22nd April 2003, reads as follows:

> "the first defendant breached the agreement because the first defendant did order 1215 x 400 [486 000] small napkins but subsequently during the agreement period, refused to take delivery thereof."

[17] Salt testified that during the remainder of the contract period, the defendants never placed orders for the goods and that if such orders were placed, they could have delivered – a fact – he said – he made clear to an official at the CMS. Salt also testified about the correspondence that ensued between him, on behalf of the plaintiff, and the permanent secretary of the fist defendant. In a nutshell, what it amounts to is that in his letter dated 15 August 2001 he alleged that the tender quantities indicated in the tender document were as follows:

small napkins: 1 200 000

large napkins: 6 000 000,

of which in respect of the small 55 200, and in respect of large, 1 218 000 had been delivered, and that, for the remaining 13 months of contract, the following orders were outstanding:

small napkins: 1 144 800

large napkins: 2 622 000.

Salt testified that the purpose of this letter was to require the first defendant 'to live up to the original estimated orders'. Salt's letter also points out that the plaintiff has no alternative market for the napkins which are manufactured according to the specific tender specifications of the first defendant and that 95% of plaintiff's operation is geared to performing on the tender.

[18] The permanent secretary's response was predictable. He replied on September 6, 2001. Pertinently he stated, amongst others:

> "The supply contracts with the Ministry are term contracts rather than fixed quantity contracts; meaning that the Ministry, within the period of the contract, may purchase the contracted item(s) from the contracted supplier as needed. This condition has been categorically stated in the MOHSS Tender Special Conditions Clause 26 … " . (emphasis supplied)
>
> (He then quotes clause 26 verbatim and proceeds)

> "Your participation in this tender and consequently your acceptance of the award of contract to supply these items signified your agreement to this condition. Further, I am informed that, the CMS has large quantities of the nappies at the moment and is unable to take any more of the items because its usage has apparently dropped to lower level than formerly estimated. This is not uncommon for pharmaceutical products and its related supplies purchased by the Ministry, hence the option for the Government preference for estimated quantity contracts rather than fixed quantity contracts."

[19] Salt testified that the letter of the permanent secretary fails to mention the estimated quantities forming part of the contract concluded between the parties.

[20] Salt next testified that he was at some stage during the contract period led to believe by Ms Simataa and Ms Angula that, in order to address the vexed question of variances, the first defendant held a meeting and resolved that tender quantity variances would not be less than 20% of the awarded tender quantities. He then sought to have this confirmed by letter dated 29 November 2001 addressed to one Mrs Angula of the first defendant and copied to one Mrs Simataa. Salt then made reference to the letter dated 4 February 2002 from the first defendant's permanent secretary to one of the plaintiff's directors, Mr S Martin, in which the permanent secretary stated that it 'appears that there was an error in the data entry of the estimated requirements resulting in a significant overestimate on these items'. Salt

testified that this was the first time that he ever became aware of the possible error in the estimate of quantities. I think it deserves mentioning that the permanent secretary, although admitting the error, persisted that 'the tender quantities are only estimates, and the first defendant has a right to vary those quantities according to the needs of the hospitals.'

[21] Salt testified that he does not accept that there was an error in the estimated quantities and that he accepted the original estimate of quantities in the tender document as correct. Plaintiff's director, Martin, replied to the letter of the permanent secretary on 18 February 2002, reiterating that they made investments in order to deliver on the tender and that the question arises who will be accountable for the losses they suffered. He also pointed out that the plaintiff had no alternative market for the napkins which were manufactured according to the first defendant's requirements, and sought to have confirmation about the decision that variances would not exceed 20% upwards or downwards.

[22] Salt further testified that at the end of the contract period the plaintiff once again tendered for the next two years and was awarded a tender in respect of large napkins only. It was while the parties were in the second contract period that, on 9 September 2002, he wrote to the first defendant informing them that the plaintiff intends to deliver the small napkins which were kept on hold by the first defendant due to shortage problems at CMS.

By letter dated 19th December 2002, Salt was then informed by the defendant's Chief Pharmacist (p. 95 of bundle "A") that 'the first defendant has resolved the problem of storage space for the outstanding offered quantities of the Disposable Napkins; small. Please deliver the outstanding quantity of 1215 P/400 to the General Medical Stores." Salt says this letter came when he had already consulted with counsel and the particulars of claim in the present matter had been drafted, signed and issued. At that stage, the contract for the small napkins had already been awarded to another company. For that reason, plaintiff's legal practitioner (by letter dated 15 January 2003) informed the CMS that his client was not prepared to deliver the small napkins at the quoted price of N$320 per pack of small napkins, since the old contract had ceased to exist and manufacturing prices had 'increased drastically.' The legal practitioner offered that plaintiff deliver the small napkins in question at the price of N$538.11 per pack of 400 consistent with the 'new tender amount' for small napkins already awarded to another supplier. The legal practitioner further tendered delivery within 4 weeks of written confirmation of the new price. The letter of demand made clear that should the first defendant not accept the new price, the plaintiff would not deliver the outstanding small napkins. The first defendant replied (by letter dated 28 January 2003) stating that 'since the orders were placed during the time of the old contract the supplier is expected to deliver according to the terms of that contract' or that the plaintiff 'agree that these orders be cancelled'. The legal practitioner of the plaintiff replied to this

letter stating that because the first defendant at the time stated it would not accept additional small napkins because of storage space, the plaintiff stopped with the manufacturing process in respect of the balance and now seeks only to claim the profit of N$97 200,00 it would have made had delivery taken place at the time.

[23] Salt testified that during the contract period, the performance guarantee which the plaintiff had given to the first defendant was not called up, a fact, he said, which proves that the plaintiff throughout complied with all its obligations in terms of the agreement.

[24] Under cross-examination, Salt confirmed that he personally completed the tender document, having read through it, and agreed to the terms therein. His attention was drawn to the special tender conditions of the first defendant which he confirmed he was acquainted, and agreed, with. His attention was drawn specifically to clause 26 and to the following clauses, all of which, he said, he was acquainted with:

> "1.1 This tender is also subject to the conditions contained in the attached forms: TB 2/339, TB 2/489, TB 2/556 and TB 1288 which the Tenderer acknowledges to be acquainted with …"
>
> And

1.2 In case of any conflict with any other instructions and/or conditions, the Special Tender Conditions contained herein will prevail over any other conditions distributed with the tender."

[25] In cross-examination, Salt also confirmed receipt of the 1st February 2001 letter from the permanent secretary of the first defendant confirming award of the tender to the plaintiff, together with all the annexures - confirming that the 'Tender Special Conditions" are part of the agreement he concluded. It was put to Salt, and he confirmed, that clause 26 has no limitation in the tender quantities variation of either 20% or 10%. Salt's attention was then drawn to the schedule of orders and deliveries which contains the first defendant's estimate of quantities over the contract period, and he agreed that in terms thereof, no orders were envisaged over a certain period. He agreed but said he was not 'comfortable' with the figures because already 5 500 napkins were ordered at the time when no orders were envisaged. He also agreed that nothing in the schedule suggests that the first defendant would order 80% or 90% of estimated quantities.

[26] Salt made the following additional concessions in cross-examination: that in respect of some deliveries (after orders were placed) the plaintiff did not deliver within the agreed 4-week period; that in accepting the tender award the plaintiff assumed the risk that the first defendant may order more (or less) of the quantities estimated – a risk assumed by the plaintiff to secure the tender; that in respect of the small napkins ordered by the first

defendant but put on hold on account of storage problems, the plaintiff did not incur any production costs and only seeks, in respect thereof, to claim the loss of profit. That whatever anyone said to him orally from the first defendant about the 20% limit on variances was never incorporated in the agreement concluded between the parties; and that whenever he raised the issue of the 20% limit on variances, the first defendant always relied on clause 26. Salt denied though that the first defendant, in terms of the agreement, was entitled to place orders but to refuse to take delivery thereof. In further cross-examination of Salt it was put to him that the agreement he concluded, on behalf of the plaintiff, was not with the second defendant but with the first defendant and that, for that reason, Regulation 7 of the Code of Procedure does not apply to his agreement. Salt's response was that it was a matter on which he relied on legal advice which was that the agreement was entered into with both defendants.

[27] In re-examination, Mr Heathcote elicited the following from Salt: that although he accepted clause 26, he never accepted the orders placed would be less than the estimated quantities which were based on past usage; that in instances where he did not deliver on any order in time, he had informed the first defendant's officials of the delay and that they were in agreement. The plaintiff then closed its case.

[28] Three witnesses were called on behalf of the defendants – the first being Mr Gilbert Habimana, who is the Chief Pharmacist at the CMS. In addition to co-ordinating the daily activities of the CMS, he is responsible for procurement and management of contracts awarded to suppliers, and also with the tendering processes. He testified that he is aware of the first defendant's Special Tender Conditions, in particular clause 26 which was part of the agreement with the plaintiff. He said that clause 26 is the 'crux' of their procedures dealing with suppliers and that it is not possible to commit themselves to quantities. He testified that the clause is intended to give the first defendant the right not to order all of the estimated quantities. He said that if the need for a contracted item decreases, clause 26 covers it. He said the suppliers are then informed in time, and that 80% or 90% limit on quantities that may be ordered is inconsistent with clause 26. Habimana added that suppliers are given 30 days to consider the agreement and he assumed the plaintiff accepted the tender conditions.

[29] Habimana testified that when, on 19 December 2002, he wrote a letter to the plaintiff to deliver the as-yet-undelivered small napkins which the first defendant put on hold, the plaintiff was to deliver in terms of the old agreement. He testified that he confirmed as much in his letter of 28 January 2003. As regards Regulation 7 of the Code of Procedure, Habimana testified that they were aware of it and that the Board had to request the first defendant before invoking it. He added that the special conditions

supersede any other conditions, including tender documents in terms of clause 1.2 of those special conditions of the first defendant.

[30] In cross-examination Habimana stated that he was not involved in the preparation of the tender documents which let to the agreement with the plaintiff. He said he did not know how many large napkins were used by the first defendant prior to 2000. He could also not say how many were used during the contract period. He took the view that the second defendant did not award the contract to the plaintiff and that it was the first defendant who did. When asked to give an example of another case where there was over 50% decrease over the contract period, he gave the example of contraceptives. Habimana also testified that when he called on the plaintiff to deliver the small napkins (which it is common cause was placed on hold by the first defendant) he was not aware that summons had already been issued by the plaintiff based on the fact that delivery was never made. He also did not know that someone in the first defendant had put the order on hold. Habimana, when asked to comment on Regulation 7 said that it was a reasonable clause intended to protect a supplier so that it does not 'lose out completely'.

[31] The next witness to testify was Harriet Brenda Lema who is the procurement and tender pharmacist at the CMS. She testified that she spoke

to Salt in connection with the contract and that she instructed him to put the small napkin orders on hold and that Salt agreed to do so. Lema confirmed that the first defendant had issued orders in September and October 2000 for the napkins which were put on hold.

[32] In answer to questions from the court Lema testified that the purpose of the schedule of orders and deliveries is to warn the supplier that during the specified period the first defendant may order the quantities indicated so that the supplier makes itself ready to deliver if an order is placed. In respect of instances where the schedule shows a zero or very low demand, but a sudden surge in demand is experienced, she testified that the matter would be discussed with the supplier in that event.

[33] In cross-examination Lema explained that the purpose of the performance security bond is that if the supplier defaults on delivery, the first defendant will call up the security and buy the items required from another supplier. She stated also that the estimates shown in the schedule of orders and deliveries is a 'minimum indication' of what the first defendant intends to order and that it could be more. This, at first blush, seems inconsistent with the averment made by other witnesses of the defendants that the first defendant is under no obligation of a minimum number of orders. But I take the view that the concession must be viewed in the light of

the agreement actually entered into between the parties and whether it supports such an interpretation.

[34] The last witness for the defence was Ms Frieda Simataa. She is currently the managing director of Ocean Pharmacy but at the relevant time was the chief pharmacist at the CMS. She bore knowledge of the plaintiff''s contract. She, in that capacity, drew up tender specifications, made recommendations to the second defendant, and placed orders with contracted suppliers. She did not know if the second defendant entered into an agreement over the supply of napkins with the plaintiff but said she knew the first defendant did. Simataa is the one who prepared the schedule of orders and deliveries accompanying the agreement concluded between the parties. She described the purpose of the schedule as follows:

> "... to make it easier to us at the Medical Store and the supplier also if you could schedule it, by this time we will order so much and will expect delivery by this time. This was the purpose." (I make the same comment here as I did in paragraph 33 in respect of the testimony of Lema.)

Simataa also confirmed that certain of the orders placed by the first defendant were not delivered by the defendant within the agreed 4-week period. She confirmed also that, being one of two people who had the authority to do so, she probably gave an instruction to plaintiff at some point

during the contract to hold back on the delivery of some napkins and confirmed the reminder sent to Serenity to deliver on ‘outstanding orders’. Simataa also confirmed that she drafted, for the signature of the permanent secretary, the letter of the first defendant to the plaintiff dated 6 September 2001.

[35] Simataa confirmed preparing the estimated quantities in the schedule of orders and deliveries. As regards what was confirmed in a letter from the first defendant that there was an error made in the statistics of past usage, Simataa insisted she was correct in her estimates. Simataa testified that she does not remember attending a meeting where it was discussed that the first defendant would fix the estimated quantities not to decrease by more than 20%, although she attended a meeting with suppliers at which the suppliers complained about the issue of estimated quantities. She said that at the meeting she and a colleague explained clause 26 to the suppliers and that they had no authority to make any undertaking in conflict with it. Simataa also stated that in her understanding of clause 26, the first defendant could place an order but refuse to take delivery. In cross-examination Simataa was asked about the whereabouts of the minutes of the meeting she attended with suppliers and said they could be at the CMS. She says the minutes do exist. She testified that she does not remember discussing the minutes with Salt.

[36] In further cross-examination Simataa confirmed that the first defendant had placed orders in September and October 2001 with the plaintiff before the agreement was signed in February 2001, and said the orders were placed because the notification of the award to the plaintiff served as the agreement between the parties; i.e. when the tender was awarded by the second defendant.

That concludes the evidence in the case.

The Law

[37] Section 7 of the Act provides as follows:

> "7 Powers and Functions of Board
>
> (1) Unless otherwise provided in this Act or any other law, the Tender Board shall be responsible for the procurement of goods and services for the Government, and, subject to the provisions of any other Act of Parliament, for the arrangement of the letting or hiring of anything or the acquisition or granting of any right for or on behalf of the Government, and for the disposal of Government property, and may for that purpose –

(2) (a) on behalf of the Government conclude an agreement with

any person within or outside Namibia for the furnishing of goods or services to the Government or for the letting or hiring of anything or the acquisition or granting of any right or on behalf of the Government or for the disposal of Government property;

(b) with a view to conclude an agreement contemplated in paragraph (a), invite tenders and determine the manner in which and the conditions subject to which such tenders shall be submitted;

(c) inspect and test or cause to be inspected and tested goods and services which are offered or which are or have been furnished in terms of an agreement concluded under this section, and anything offered for hire;

(d) accept or reject any tender for the conclusion of an agreement contemplated in paragraph (a);" (emphasis supplied)

Section 16 then provides as follows:

"16 Acceptance of tenders, and entry into force of agreements

(1) The Board shall in every particular case –

(a) notify the tenderers concerned in writing of the acceptance or rejection of their tenders, as the case may be, and the name of the tenderer whose tender has been accepted by the Board shall be made known to all the other tenderers:

(b) on the written request of a tenderer, give reasons for the acceptance or rejection of his or her tender.

(2) Where in terms of a title or tender –

(a) a written agreement is required to be concluded after the acceptance of a tender, the Board and the tenderer concerned shall, within 30 days from the date on which that tenderer was notified accordingly in terms of subsection (1)(a) or within such extended period as the Board may determine, enter into such an agreement;

(b) a written agreement is not required to be so concluded, an agreement shall come into force on the date on which the tenderer concerned is notified in terms of subsection (1)(a) of the acceptance of his or her tender."

[38] From these provisions the following immediately becomes apparent: the Tender Board alone, unless the contrary is provided in any other law, is

responsible for procuring goods and services for the government. For that purpose they may conclude an agreement with any person. The successful tenderer must always be informed of the acceptance of their tender. Such notification consummates the agreement between the tenderer and the Tender Board, unless the Board wishes to have a written agreement. Two conditions must be satisfied before a written agreement is concluded between the Tender Board and the tenderer: first, that a written agreement will be concluded must have been announced in the "title of tender" and, second, the agreement must be concluded within 30 days of the notification of the award of the tender to the tenderer.

[39] I should mention at once that neither in the pleadings, nor in the evidence, has any reference been made to legislation which authorises the first defendant to have concluded the agreement of February 2001 with the plaintiff. The permanent secretary of the first defendant signed the agreement. He has not testified in this matter, and no claim has been made that he was duly authorised by the Tender Board to sign it, or to act as its agent. The agreement of February 2001 is therefore *pro non scripto*. The title of tender relevant to the present matter not having required a written agreement (and even if I am wrong in that and it actually did) and the Tender Board not having concluded a written agreement with the plaintiff within 30 days of notification, the agreement in respect of the tender which is the subject of the present case came into being in terms of s16(2)(b) of the Act.

[40] It now remains to consider if Regulation 7 is applicable to the agreement. I have set out the Regulation at the beginning of this judgment. In order to support the first part of the claim, the plaintiff had to prove that the Tender Board entered into 'a general agreement for an estimated quantity of goods subject to an increase or decrease of 10 percent'. Two things count against the plaintiff: first, it has not proved a title of tender issued by the Tender Board including such a term and, second, the tender issued by the Tender Board made clear it was, amongst others, subject to the special conditions of tender of the first defendant which included clause 26. I must agree with Mr Marcus that clause 26 has the effect that during the contract period the first defendant was under no obligation to place a minimum or maximum quantity of orders. There is a demonstrable public policy justification in the government concluding a contract of this nature in the field of medicines and related items: such items do have a life-span and or are based on the requirements of the health institutions which, in turn will base demand on the incidence of intake of patients and prevalence of a given pathology. Statistics of usage can therefore only be indicative and cannot be the basis for determining actual need at any given time.

[41] The part of the plaintiff's claim predicated on the premise that the first defendant was obliged during the contract period to order up to 90% of the estimated quantities must therefore fail. Mr Heathcote made the point that the defendants admitted that Regulation 7 is applicable to the agreement

and that the plaintiff's case based on that Regulation should therefore succeed on that basis alone. Mr Marcus now confirms that the concession was not properly made and that, in any event, it does not bind the court and that the court should satisfy itself before finding against the defendants that the claim of the plaintiff based on the Regulation, is sound in law. I agree with Mr Marcus. As I said, I am not satisfied such a claim is sound in law.

[42] The plaintiff also relies on an implied or tacit term that the first defendant would order not less than 20% of small and large napkins during the contract period. It is trite that a party relying upon the existence of an agreement, including any special conditions, must provide it: *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another* 2002 (4) SA 408 (SCA). Specifically the plaintiff alleges a tacit term that the first defendant was obliged to order a minimum number of napkins during the contract period. The plaintiff bore the burden of proving unequivocal conduct by the defendants capable of no other reasonable interpretation than that the parties intended and did in fact agree that the decrease in variation would not be more than 20% of the estimated quantities during the contract period. The only evidence given on behalf of the plaintiff as to the existence of such a tacit term is the alleged undertaking to that effect by one or more of the first defendant's employees, and subsequent inquiries Salt made, without success and without denial of the existence of a minute proving a decision of first defendant to that effect. Both of these are denied. True, Salt's letter

inquiring about the minute was not replied to, but it is hardly unequivocal conduct on first defendant's part that there existed the tacit term relied on by the plaintiff. Significantly, the permanent secretary of the first defendant, in writing, insisted throughout upon the strict application of clause 26 which undoubtedly negatives the alleged tacit term. The plaintiff has failed to establish that the express agreement (clause 26) was at any stage novated by the defendants in favour of the tacit term relied upon by the plaintiff: compare, *Nel v Nelspruit Motors (Edms) Bpk* 1961 (1) SA 582 (A).

[43] But ought such a term to be implied, as alleged in the alternative? As I have concluded, the parties reached agreement on the issue of variation. It was not an unreasonable clause and it is not the plaintiff's case that it was. It is also not the plaintiff's case that it was agreed with the second defendant that the plaintiff's facility, infrastructure and personnel would be devoted solely for performance under the tender awarded. Once it is conceded that clause 26 is reasonable and was in fact agreed to, it is not possible to imply a term which is in conflict with it and seeks to establish the very converse of what it stands for.

[44] I am therefore satisfied that the plaintiff failed to establish, on balance of probabilities, that there was any agreement reached between the parties that the supply of the napkins (small and large) could only decrease by 20% of the estimated quantities during the contract period. The allegation was

denied by the plaintiff, both in the pleadings and in the *viva voce* evidence adduced at the trial and the plaintiff has provided no such written evidence. Besides, such a notion is in direct conflict with the very clear and unambiguous language of clause 26, which clause – in any event – is to prevail in the event of there being a conflict with any other contrary undertaking. It is clear from the evidence that the plaintiff knew the risk it was assuming but proceeded to take it in order to get the contract.

[45] What remains is the part of the claim of the plaintiff based on the 1215 small napkins ordered but not taken delivery of. It is common cause too that the first defendant placed the order for those quantities. It is further common cause that the first defendant placed the orders on hold by telling the plaintiff, after the initial order was placed, not to deliver the same. The first defendant was, during the contract period, aware that the plaintiff wished to proceed and to deliver. At no stage during the contract period was the order ever cancelled. Opportunistically, the first defendant subsequently sought to take delivery of the napkins after the contract period had come to an end but at the ruling price of the expired contract when – and it was not disputed – the market prices of those items had increased. That the price for small napkins was higher at this point than it was under the old contract was not denied either in defendant's correspondence or in *viva voce* evidence. I think the defendant's reliance on clause 26 to defeat this claim of the plaintiff is misconceived. The moment the first defendant placed an order, in

terms of the scheme of the present agreement, the supplier had no choice but to deliver: it was not open to the plaintiff to refuse to deliver. That the first defendant no longer had need for the items after the order was placed is irrelevant once the order had been communicated to the plaintiff. To hold otherwise would create enormous injustice and hardship for the supplier under the kind of contract under consideration. I agree with the following dictum of Heerden DCJ in *Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) at para 24:

> "... in some cases providing for discretional determinations there may be no enforceable contract until the determination is made. But when made an unconditional contract comes into being."

[46] In *casu,* the first defendant made a determination and they are bound by it. In my view it matters not that the items were not actually delivered. They could not be delivered because the first defendant refused to take delivery; and they could not be delivered after the contract period came to an end because then the plaintiff could only deliver at a loss. The plaintiff is thus entitled to the profit it would have made had the items been delivered during the contract period.

[47] In the premises I make the following order:

(1) The plaintiff's claim based on the premise that the defendant is in breach of the agreement awarded by the second defendant to the plaintiff in respect of tender A13 – 14/2000 in failing, during the contract period, to order at least 90% or 80%, as the case may be, of the estimated quantities of napkins, is dismissed with costs.

(2) The plaintiff is however entitled to claim damages, with interest, for loss of profit, from the first defendant on the basis that the first defendant did not take delivery of the 1215 bales of small napkins from the plaintiff during the contract period. In respect of this claim, the defendants, jointly and severally, the one paying the other to be absolved, are condemned in costs, including the costs of one instructed counsel.

(3) The plaintiff is granted leave to set the matter down in respect of the order in paragraph (2) above for the determination of the *quantum* of damages, should the parties be unable to settle the *quantum* within one month of this order.

DAMASEB, JP

ON BEHALF OF THE PLAINTIFF: **Mr R Heathcote**

Instructed By: **Hennie Barnard & Partners**

ON BEHALF OF 1ST AND 2ND DEFENDANTS: **Mr N Marcus**

Instructed By: **Government-Attorney**