REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

Case No.: 15453/2010

15/6/2012

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

2012-06-11
DATE

SIGNATURE

In the matter between:

MORGAN TRADING (PTY) LTD **PLAINTIFF**

and

NATIONAL BRANDS LIMITED **DEFENDANT**

J U D G M E N T

HIEMSTRA AJ

[1] The plaintiff instituted action against the defendant for payment of the sum of R67 150.36 for potatoes delivered to the defendant in terms of a written agreement. The defendant counter-claimed for an amount of R646 250.95 on the grounds set out in due course in this judgment.

[2] The plaintiff, Morgan Trading (Pty) Ltd, conducts farming operations, including the cultivation of potatoes. It entered into a contract with the defendant for the supply of 750 tons of a cultivar known as Up-to-date potatoes of the quality and size set out in

an annexure to the agreement. The defendant is National Brands Limited, the manufacturer of the potato chips brand, Willard. The plaintiff's sole director is Mr George Barnard and he represented the plaintiff at all times. Mr Jaco Joubert represented the defendant in all dealings between the parties.

[3] As stated, the plaintiff claims payment of R67 150.37 in respect of potatoes delivered in terms of the agreement. The agreement provides that payment must be made to the supplier within 7 days after receipt of a faxed or electronic copy of the original invoice. In the event of a party being in breach of any of the provisions of the agreement, the aggrieved party shall give the defaulting party seven days to comply, failing which the aggrieved party may forthwith cancel the agreement without prejudice to any right it may have to claim damages. The plaintiff issued an invoice for the amount of R67 150.37 on 22 October 2009, which was payable on 29 October 2009. The defendant failed to pay this amount, and on 3 November 2009 the plaintiff caused its attorneys to write a letter of demand to the defendant. On 8 November 2009 the defendant received the letter of demand at the Rivonia post office. Despite the said demand the defendant failed to pay the amount as a result of which the plaintiff cancelled the agreement by letter from its attorneys, which letter the defendant collected at the Rivonia post office on 26 November 2009. The defendant initially made an issue of the fact that the letters of demand and cancellation were sent by express post ("spoedpos") instead of by registered post as required by the agreement. This caused the plaintiff to call a secretary in the office of the plaintiff's attorney and two witnesses in the employ of the defendant to prove that the letters had been dispatched to the defendant and had been received by the defendant. During closing argument counsel for the defendant abandoned this point. It must therefore be accepted that the agreement was duly cancelled and that the defendant is indebted to the plaintiff for R67 150.37.

[4] The defendant counter-claimed for an amount of R646 250.95. This claim is founded on clause 1.4.2 of the agreement, which provides that the defendant may purchase potatoes from other suppliers if the plaintiff fails to deliver within 10% of the contracted 750 tons of potatoes. The amount claimed is the difference in price for which the parties had contracted and the price paid for potatoes sourced elsewhere. Clause 1.4 of the agreement reads as follows:

"1.4 The SUPPLIER shall be liable to supply the quantity of potatoes contracted for in annexure C.

1.4.1 Should the total quantity supplied be within 10% above or below the contracted quantity, the contract will then be deemed to be fulfilled.

1.4.2 Any short supply greater than 10% may be purchased elsewhere by NBL and the price differential will be for the account of the SUPPLIER, unless it can be proved that the yield shortage was due to natural disasters.

1.4.3 NBL reserves the right of first refusal to purchase any excess crop at a mutually agreed price. Should the parties fail to agree on a price within 5 days, the right will lapse automatically and the SUPPLIER will be free to dispose of the excess crop as he deems fit."

[5] It is common cause that the plaintiff supplied only 316 tons of potatoes to the defendant, leaving a shortfall of 359 tons. It is further common cause that the defendant purchased the following quantities of potatoes from other suppliers on the following dates:

1. Between 1 and 9 October 2009: 80 tons from a certain Maritz and 96,525 tons from a certain Kruger at respectively R4,00 and R4,50 per kilogramme.
2. Between 6 and 11 November 2009: 191,7 tons from Easy Greens at R3,50 per kilogramme.

The total tonnage purchased elsewhere is 368,225, slightly more than the 359 tons that the plaintiff had not delivered. The counter-claim is in respect of the price differential between 359 tons of these purchases and the price agreed between the parties hereto. The defendant claims that it had been obliged to purchase these potatoes because of the plaintiff's failure to supply the required quantity of 750 tons within a 10% margin stipulated in clause 1.4.1.

[6] Before dealing with the plaintiff's defence to the counter-claim, it is necessary to set out some of the further relevant background facts.

1. The plaintiff planted potatoes during May 2009. He had a similar contract with Nature's Choice for the supply of potatoes, but for larger potatoes. Mr Werner Naudé represented Nature's Choice. During the growing phase Mr Joubert and Mr Naudé made regular inspections on the plaintiff's farm to monitor the progress of the plaintiff's crop.

2. During September 2009 Barnard, Joubert and Naudé met on Plaintiff's farm and carried out an inspection of a sample to establish whether the crop was ready for harvesting. It was decided between them that the crop should be harvested during the second week of October 2009.

3. On 12 October 2009 a meeting was held between various farmers on the one hand, and the defendant on the other, regarding the defendant's decision to purchase potatoes in the following year from a small group of farmers, excluding the plaintiff and others. The group of farmers became known as the "Up-to-Date Consortium" under the chairmanship of Mr Barnard. Although there was no evidence to that effect, it was put to Mr Barnard that the defendant had assured the farmers that it did not intend to exclude any farmers but wished to deal with a single entity comprising all the farmers in the area.

4. Harvesting took place in the second week of October 2009 and the plaintiff made its first delivery of the season on 13 October 2009. On 14 October 2009 the plaintiff also delivered potatoes to Simba. Mr Barnard admitted that the delivery to Simba had caused the plaintiff to have insufficient potatoes of the required quality and size to meet its obligations to the defendant. He also admitted that the plaintiff had not previously supplied potatoes to Simba, but that he had done so because the prevailing market price was almost double what the defendant was liable to pay in terms of the agreement. He said that that the plaintiff could still meet its obligations towards the defendant by purchasing potatoes from other suppliers.

5. On 14 or 15 October 2009 Mr Joubert, accompanied by another supplier, Mr Willem Veldsman, visited the plaintiff's farm. Mr Veldsman was asked to accompany Mr Joubert as kind of mediator between the plaintiff and the defendant. Mr Barnard on that occasion assured the defendant that the plaintiff would comply with its contractual obligations.

6. On 15, 16, 17 and 19 October 2009 the plaintiff made further deliveries of potatoes to the defendant.

7. On 22 October 2009 Mr Barnard informed Mr Joubert that he was suspending the delivery of potatoes to the defendant. He did so as a result of the unhappiness about the defendant's indication that it would in the future only contract with a small group of suppliers, excluding the plaintiff.

8. On 28 October 2009 the defendant caused its attorneys to address a letter of demand to the plaintiff calling upon the plaintiff to furnish an undertaking to that it would comply with its obligations in terms of the agreement. On 28 October 2009 before the plaintiff had received the letter, Mr Barnard had a reconciliatory discussion with Mr Joubert and he undertook to continue deliveries. He did so on 28, 29 and 30 October 2009.

9. On 2 November 2009 Mr Barnard visited the plaintiff's attorney, Mr Beyers. By that time the defendant had not yet paid the plaintiff's invoice. Mr Beyers advised Mr Barnard that pending payment of the invoice, he was not obliged to make further deliveries.

10. 31 October 2009 was the last day of harvesting. The final consignment of potatoes was rejected by the defendant because they did not comply with the criteria specified in the agreement.

11. As already stated, the plaintiff cancelled the agreement with effect from 26 November 2009 because of the defendant's failure to pay the outstanding invoice.

12. On two occasions, the first during the beginning of November 2009, and the second towards the middle of November 2009 Mr Joubert invited Mr Barnard to source potatoes elsewhere in order to meet the plaintiff's obligations. On both occasions Mr Barnard said that he would do so once the outstanding invoice is paid.

13. It is common cause that Mr Veldsman, who testified on behalf of the defendant, had concluded an identical contract with the defendant for the supply of potatoes. Mr Veldsman agreed under cross-examination that did not plant and cultivate any potatoes during 2009 and that he had supplied

the quantities that he had contracted for by purchasing from other suppliers.

14. According to Mr Barnard, it is common practice for suppliers contracted to the defendant in terms of identical agreements to purchase potatoes from other producers in order for them to supply the tonnage for which they had contracted.

15. It appears from a schedule compiled by the defendant that of seven suppliers contracted to the defendant in 2009, six, including the plaintiff, supplied less than their contracted tonnage. Mr Veldsman, who delivered 2235 tons short, was not held liable for the price difference, and Mr Botha, who delivered 359 tons short, was allowed to purchase 232 tons elsewhere.

16. According to the defendant's statistics the different suppliers delivered 3385 tons short during 2009. The defendant purchased in 1674 tons, leaving a shortage of 1711 tons.

17. Mr S.J. Erasmus, a member of Easy Greens CC, is also a supplier to the defendant. He testified that if the plaintiff had asked to purchase potatoes of the required quality and size towards the end of November 2009, Easy Greens would have been able supply to it. He also said that the plaintiff had sold potatoes to Easy Greens during 2008 in order to make up Easy Greens's short supply.

[7] The plaintiff raised several defences against the counter-claim. They are all premised on the assumption that the plaintiff was entitled to purchase potatoes from other sources in order to comply with its obligation to supply 750 tons of potatoes of the size and quality specified in the agreement. The primary defence is that the defendant's purchases from other suppliers, in respect of which the defendant seeks to hold the plaintiff liable for the price difference between these purchases and the contract price, is precipitous.

[8] Clause 6 of the agreement provides that the agreement shall endure for the period set out in annexure C. Annexure C provides that delivery shall be in October/November 2009. Mr C.F. Heyns, appearing for the plaintiff, submitted that the plaintiff therefore had until midnight on 30 November 2009 to deliver the 750 tons. He submitted accordingly that the purchases which the defendant made from other suppliers during October and November 2009 were premature and not in accordance with clause 1.4.2. He further maintained that insofar as the plaintiff could not deliver the full tonnage from its own crops, it was entitled to purchase potatoes of the same specifications and quality from other producers in order to supply the full 750 tons by midnight on 30 November 2009.

[9] Mr Hitchings, appearing on behalf of the defendant, argued that it had become apparent already on 31 October 2009 that the plaintiff would not be able to supply the full 750 tons, mainly because it had delivered part of its crop to Simba instead of to the defendant. On 31 October 2009 the plaintiff harvested the last of its crop. He argued that on a proper interpretation of the agreement, the plaintiff had been obliged to supply the potatoes from its own crop, and had not been entitled to purchase-in from other suppliers.

[10] According to Mr Hitchings, there are several indications in the wording of the agreement that point to the conclusion that the plaintiff was only entitled to supply potatoes planted, cultivated and harvested on its own farm. These are the following:

1. The preamble reads as follows:

> "**WHEREAS**
>
> NBL manufactures and distributes potato chips and extruded snacks;
> The SUPPLIER cultivates potatoes and is willing to supply potatoes to NBL;
> NBL is prepared to buy potatoes from the SUPPLIER in terms of this agreement
>
> **THEREFORE IT IS AGREED AS FOLLOWS:**
>
> 1. **SUPPLY OF POTATOES**
>
> 1.1 The SUPPLIER undertakes to plant and cultivate potatoes and to supply NBL in accordance with the price as per annexure A, the quality grade as per annexure B, and the quantity as per annexure C. Any input costs of the Supplier, if any, paid by NBL for whatever reason, remain the liability of the SUPPLIER and is repayable as agreed. The parties specifically agree that

NBL retains the right to set off the amounts so owing against the first accounts payable to the SUPPLIER for potatoes supplied."

The following words and phrases, so goes the argument, would be superfluous if the parties had contemplated that it would be permissible for the plaintiff to deliver potatoes sourced elsewhere:

1. "The SUPPLIER cultivates potatoes ..."
2. "The SUPPLIER undertakes to plant and cultivate potatoes ..."
3. The contemplation of "input costs of the Supplier" being paid by the defendant.

2. The provision in clause 1.3 entitles the defendant "to suspend the balance of potatoes not yet harvested". It reads as follows:

"1.3 In the case where:

1.3.1 any breakdown of machinery and/or installations of NBL's factory occur;

1.3.2 any building and/or equipment of NBL becomes unusable, or threatens to become unusable;

1.3.3 any other cause outside the reasonable control of NBL including but not limited to, strikes, work stoppages, lockouts, affecting production;

shall entitle NBL to suspend the balance of potatoes not yet harvested, by verbal notice to the SUPPLIER, until such time as the abovementioned production problems have been cleared...."

3. Clause 1.4.2, entitles the defendant to purchase potatoes elsewhere "unless it can be proved that that the yield shortage was due to natural disasters";

4. In terms of clause 1.4.3 the defendant has a right of first refusal "to purchase any excess crop at a mutually agreed price" in clause 1.4.3.

5. Clause 2 restricts the harvesting of potatoes in adverse weather conditions, and exposure of potatoes to the elements after harvesting.

6. Clause 3.1provides that the risk of crop loss, rests with the supplier.

[11] These clauses are indisputably premised on the assumption that the potatoes would be planted, cultivated and harvested by the plaintiff on its farm. Whether the agreement as a whole, properly interpreted in its context, obliged the plaintiff to supply only potatoes from its own crop is, however, less clear. There is no provision that specifically forbids of permits the supply from other sources. It is true that the starting point in interpreting written instruments such as legislation and contracts is the ordinary grammatical meaning of the words and phrases in question. However, having regard only to the literal meaning of the words and phrases could lead to unintended, absurd or unbusinesslike results.

[12] In *Coopers & Lybrand and Others v Bryant*[1] Joubert JA dealt with the correct approach to interpretation of contracts. He held that the provisions of the contract must, after the literal meaning had been ascertained, be interpreted by having regard to the context in which the words of phrases are used, the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted.

[13] Wallis JA restated the present state of the law on the interpretation of various instruments lucidly in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[2] It reads as follows:

"The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In the contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the lan-

[1] 1995 (3) SA 761 (A) at 768A-E
[2] 2012(2) All SA 626 (SCA) at 273 paragraph [18]

guage of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[14] The words and phrases referred to by Mr Hitchings are in isolation clear and unambiguous. They are, as I have said, premised on the assumption that the plaintiff will supply the defendant with potatoes from its own crop. Whether the plaintiff was obliged by the agreement to supply only from its own crop, is less clear. Annexures A, B and C to the agreement, suggest that the defendant's only interests were the required quality, size, price and quantity. As Mr Heyns submitted, somewhat facetiously, on Mr Hitchings's interpretation of the agreement, the defendant's interests can be satisfied even if the potatoes were produced in Australia or Cambodia, provided that the land belonged to the supplier and the potatoes were planted, cultivated and harvested by the plaintiff's employees or agents.

[15] The provisions referred to by Mr Hitchings are important and rational. However, they do not determine the nature and purpose of the agreement. They are peripheral and their purpose is to provide for certain unforeseen events and/or natural disasters. Clause 1.4.2 provides protection to the defendant in the event of short supply and also protection to the supplier in the event of its inability to supply within 10% of the agreed tonnage owing to natural disasters. The defendant is explicitly permitted to purchase potatoes from other suppliers to make up for short supply. There does not appear to be any rational reason why the supplier should not also be allowed to source potatoes elsewhere in order to comply with its obligations.

[16] The preamble to the agreement is clearly based on the assumption that the defendant would purchase the potatoes produced the plaintiff on its own farm. The preamble, however, does not contain operative provisions creating rights and obligations.[3]

[17] The purpose of the agreement is the sale and purchase of potatoes for the manufacture of potato chips and extruded snacks. Annexure B to the agreement provides

[3] See e.g. *Logista Inc & others v Van der Merwe* 2010 SA 105 (WCC) at 112, paragraph [11]; *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC* 2005 (5) SA 186 (SCA) at 194 paragraph [20]; *ABSA Bank Ltd v Swanepoel NO* 2004 (6) SA 178 (SCA) at 181 paragraph [6]

extensive provisions quality and size parameters with which the potatoes must comply. The cultivar, quality and size, price and quantity of the potatoes are the defendant's main, if not only interests. Furthermore, the agreement provides that the defendant may purchase potatoes elsewhere when the supplier fails to supply the contracted quantity. It further appears that other suppliers, at least Veldsman and Botha, had supplied potatoes sourced from other farmers. In addition, Mr Joubert had invited Mr Barnard on two occasions during November to purchase potatoes from other suppliers. It is plain from the above that there is no practical, nutritional, scientific or other rational reason why the potatoes must come from a particular farm.

[18] I find therefore that, read in its context and with regard to the material known to the parties when the contract was concluded, they could not have intended to prohibit the supplier from sourcing potatoes elsewhere when it is for any reason unable to supply them from its own crop. As Wallis JA said in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4], "[A] sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document." It is not sensible or businesslike to allow the defendant to make up for short supply by purchasing elsewhere, while the plaintiff has no right to do so.

[19] I therefore find that the plaintiff was entitled to purchase potatoes from other suppliers in order to meet its obligations to the defendant. He had until midnight on 30 November 2004 to perform. Therefore, the purchasing in by the defendant was precipitous.

[20] As I have already found, the plaintiff lawfully cancelled the agreement because of the defendant's failure to pay the plaintiff in accordance with its invoice. The defendant could not pre-empt the cancellation by purchasing potatoes from other suppliers and hold the plaintiff liable for the price difference.

[21] I therefore find that the counter-claim is misconceived. The plaintiff had until midnight

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[4] Supra at 273 paragraph [18]

In the result I make the following order:

1. The defendant is ordered to pay to the plaintiff the sum of R67 150.37;
2. Interest on the sum of R67 150.37 at the rate of 15.5% per annum from 30 October 2009 to date of payment;
3. The defendant is ordered to pay the plaintiff's costs on the scale of the High Court.
4. The defendant's counter-claim is dismissed with costs.

J. HIEMSTRA
ACTING JUDGE OF THE HIGH COURT

Date heard:	15 May 2012
Date of judgment:	13 June 2012
Counsel for the plaintiff:	Adv G.F. Heyns
Attorney for the plaintiff:	Beyers & Day Attorneys
Counsel for the defendant:	Adv. B.D. Hitchings
Attorney for the defendant:	Friedland Hart Solomon & Nicolson