REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 12/3/14

CASE NO: A903/2011

(1) REPORTABLE: ~~YES~~ / (NO)

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / (NO)

(3) REVISED.

2014:03:12
DATE

SIGNATURE

In the matter between

GONDWANA MARKETING (PTY) LTD First Appellant

WYNAND SCHALEKAMP Second Appellant

and

SIDNEY BONNEN BIRCH t/a LF BIRCH & SON Respondent

J U D G M E N T

MAKGOKA, J:

[1] This is an appeal and a cross appeal (both with leave of the court below) against the orders in the judgment of a single Judge of this court made on 19 August 2011. The appeal and cross-appeal concern the competence of the court below to order compliance with an earlier order of this court, and whether the applicant is entitled to payment of a full contractual amount following non-compliance with an undertaking to pay an agreed reduced contractual amount.

[2] The appellants were the respondents in the court below, where the cross-appellant was the applicant. For the sake of convenience, I refer to the parties as described above. The genesis of the dispute between the parties is a written agreement concluded between the first respondent and the applicant in terms of which the applicant supplied ostrich meat at an agreed price expressed in euros, for exportation to Europe. The first respondent took delivery of a consignment of the meat by collecting it from the Commercial Cold Storage where it was stored for the applicant. Subsequently, the first respondent exported the meat to Europe. Sometime after the meat arrived in Europe, the first respondent alleged that the meat was rotten.

[3] The applicant, though not agreeing with the allegation, agreed to accept a reduced price for certain quantity of the meat, and to the destruction of the rest. This was conditional upon the first respondent providing the applicant with copies of the export documents as well as the records and photos of the meat as inspected in Europe, in order to establish the veracity of the first respondent's allegations. The first respondent undertook in writing to provide these records, but failed to comply with the undertaking. The applicant launched an application seeking an order to compel the first respondent to do so.

[4] On 16 April 2010 this court ordered the first respondent to furnish the applicant with certain documentation. It is worth noting that paragraphs 1 and 2 of the order followed the wording of the applicant's acceptance of the reduced amount. The applicant's acceptance, contained in an email dated 12 December 2007, reads:

> 'I accept the €5/kg provided that I can first have copies of the export documents as well as the records and photos of the meat as inspected in Europe...'

[5] It is convenient to set out fully, the terms of the order:

'1. The respondent is directed and compelled to furnish the applicant with copies of all documents relating to the exportation of all ostrich meat ('the ostrich meat') supplied by the applicant to the respondent in the period between 1 July 2007 to 30 November 2007; and

2. Copies of any and all records and photographs of the ostrich meat as inspected in Europe;

3. The documentation to be provided shall include but not be limited to:

3.1 Documents relating to the shipping and arrival of any meat in Rotterdam;

3.2 Documents relating to the storage of the meat in Rotterdam between 24 September 2007 and 18 October 2007 or any other time;

3.3 Documents evidencing the core and container temperature readings prior to the departure of the ship referred to by the respondent's representative in paragraph 28.2 of the respondent's answering affidavit;

3.4 Veterinary inspection documents produced in Europe;

3.5 Documents that connect container MWCU 564.717-7 referred to in annexure 'TC' to the shipment in question and the allegedly rotten meat;

3.6 Documents relating to the storage and freezing of meat from the time when it was removed from commercial cold storage until the moment it was opened in Holland;

3.7 Documents relating to the disposal of any allegedly rotten meat;

3.8 Documents relating to the amount that the respondent was paid by any customer of the respondent in relation to any meat supplied by the applicant to the respondent.''

(my emphasis)

[6] Dissatisfied with the first respondent's efforts in complying with the order, the applicant lodged a further application, seeking a declaratory order that the first respondent was in contempt of court of that order and seeking to imprison the second respondent, as the sole director and thus the 'directing mind and will' of the

first respondent. In addition, the applicant sought an order for the first respondent to pay the full (original) price of the meat.

[7] On 19 August 2011 the court (Mngqibisa-Thusi) dismissed the contempt application against both the respondents, but ordered the first respondent to comply with the order of 16 April 2010, within three months of the judgment, failing which the first respondent was to pay €88 560 to the applicant. The first respondent was also ordered to pay the applicant's costs. The respondents and the applicant are aggrieved with the terms of the order, for different reasons, hence the present appeal and cross-appeal.

[8] The first respondent appeals against the part of the order ordering it to comply with the order of 16 April 2010, as well as the order for payment in the event of a default, and the costs order against it. It contends that it was not competent for the court below to make an order in those terms. On the other hand, the applicant contends that it was incompetent for the court to again order the first respondent to furnish the information, as such an order had already been made on 16 April 2010. The applicant argues that the court should simply have ordered the first respondent to make payment of the balance of the original price. In addition, the applicant cross-appeals against the dismissal of his contempt application.

[9] The issue for determination is substantially two-fold:

(i) whether the court below was competent to order the first respondent to comply with the order of 16 April 2010;

(ii) whether it was competent for the court below to order payment of the full (original contract amount) €88 560 in the event of the first respondent not complying with the order of 16 April 2010.

[10] It is disputed between the parties whether or not the first respondent has complied with the order of 16 April 2010. The applicant contends that there has not been compliance. The respondents argue the contrary. But this does not really matter now, as the court below has, impliedly, on 19 August 2011, found that the first respondent had not complied with the order (by extending the period during which the first respondent had to comply with the order). That finding has not been challenged in the respondents' notice of appeal. In fact, it is contended in the notice of appeal, which argument was also advanced in the heads of argument, that the first appellant does not have in its possession, the documents referred to in the court order of 16 April 2010.

[11] During argument before us, this argument was persisted with, especially with regard to the contempt cross-appeal. But that argument is not open to the first respondent, for the simple reason that since it became aware of the court order of 16 April 2010, it has not, once it realised its inability to comply with it, approached the court for reconsideration of the order. An order of court is valid and enforceable, until it is set aside or varied by that court or a higher tribunal. As a result, it must be assumed that since the court order came to its attention, the first respondent accepted its terms, and had to comply with them.

[12] Even if this conclusion is wrong (that the court below has already found the first respondent to have failed to comply with the order of 16 April 2010), the applicant has persuasively demonstrated that the first respondent has dismally failed to furnish the documents mentioned in the court order. For example, in its attempt to comply with paragraph 2 of the order, which enjoins the first respondent to furnish

copies records and photographs of the meat as inspected in Europe, the respondent provided a video purporting to demonstrate that the meat was rotten.

[13] However, that video turned out to be irrelevant, as it had been taken in South Africa, and not in Europe as ordered by the court. The date of the video is 12 November 2007, nearly two months after the meat had already been shipped from South Africa to Europe, on 24 August 2007. The date of production of the meat in the video is 18 March 2007, whereas the date of the production of the meat in question is, according to the respondent's commercial invoice for export purposes, 25 May 2007.

[14] I therefore have no doubt in concluding that the respondent has failed to comply with the order of 16 April 2010. What should be considered next, is the effect of that failure. In particular, we should determine whether that failure entitles the applicant to judgment for the balance of the original purchase price. The respondents contend that the applicant is not entitled to judgment in the full agreed amount without issuing a summons.

[15] Two points are proffered for this argument. First, that there are disputes of fact, which cannot be resolved on the papers as a result of which the matter has to be referred for either oral evidence or trial. Second, that the agreement in terms of which the applicant accepted the reduced price, constituted a novation of the initial agreement between the parties. I consider these contentions, in turn.

[16] The disputes of fact, are said to be constituted by the following:

(a) The applicant was aware that there was a problem with its ostrich meat, hence it agreed to a reduced price;

(b) The laboratory tests show that the meat was not suitable for human consumption;

(c) The applicant dispatched only 7 150 kilograms of meat to Europe, which was the quantity that the settlement was accepted, as opposed to the 12 600 kilograms;

(d) Independent and impartial parties have deposed to affidavits to the effect that the applicant's meat was rotten and not fit for human consumption.

[17] The argument that there was a problem with the meat cannot now be said to constitute a dispute of fact, due to following circumstances: The applicant accepted, provisionally, the respondents' averment of the meat being rotten. The condition was that the respondents would furnish acceptable proof for that allegation. Having failed to do so, it therefore does not lie in the mouth of the respondents to say there was a problem with the meat, as the respondents now seek to do.

[18] The failure to furnish proof, in the form of documentation set out in the court order of 16 April 2010, means that the respondents' claims regarding the meat cannot be substantiated. This leads to an irresistible inference that such documentation does not exist, and logically, that there was nothing wrong with the meat. As a result, it cannot tenably be argued that a dispute of fact exists on this aspect.

[19] The respondents' contention that laboratory results showed that the meat was not fit for human consumption suffers the same criticism. In this regard, the respondents rely on a report by Swift Micro Laboratories (Swift) dated 19 June 2007 report, in which an analysis is purportedly given of batch number W19/098 at the top of the second page. This has a high TMA reading and a high coliform reading for

samples from the first respondent's plant. The respondents have furnished no proof for this bald statement.

[20] There is therefore no merit in any of the contentions by the respondents. However, in an addendum report by Swift dated 15 May 2007, the same batch has low readings. This raises questions about the correctness of all aspects of the Swift report since the same batch returns different readings. It should be borne in mind that both these documents emanate from the respondents. As a result, the respondents should not be permitted to use inconsistencies in its own evidence to create a dispute of fact.

[21] I turn now to the respondents' contention on novation. The argument is that the agreement in terms of which the applicant accepted the reduced price, constituted a novation of the original agreement. Therefore, so is the argument, the non-fulfilment of the novated agreement does not entail that the original agreement becomes effective again. The original agreement is no longer extant. The applicant should have sued for specific performance of the novated agreement. To consider this argument, it is necessary to restate the general principles applicable to how an agreement becomes novated.

[22] Novation occurs when an existing obligation is replaced by a new one, the existing obligation being thereby discharged (Christie's *The Law of Contract in South Africa*, 6 ed, p466). The onus lies on the party alleging novation to establish it. In view of the fact that it involves a waiver of rights, clear and cogent proof of the alleged novation would be required (*Woolfson's Credit (Pty) Ltd (formerly Vavasseur (SA) Credit (Pty) Ltd v Holdt* 1977 (3) SA 720 (N). It is furthermore trite that the parties can, through a novation, vary one obligation in an 'old contract' and replace it

with another obligation, leaving the other terms intact (*Tauber v Van Abo* 1984 (4) SA 482 (E) at 485C).

[23] The requirements for a successful defence of novation are neatly summarised in *Barclays National Bank Ltd v Smith* 1975 (4) SA 675 (D) as follows at 683B-D:

> '(a) the onus of proving novation rests on the person alleging novation (*Antonie en Andere v Koekoe* 1966 (2) SA 610 (O) at page 613; *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N) at 307;
>
> (b) the intention to novate is never presumed (*Van Coppenhagen v Coppenhagen* 1947 (1) SA 576 (T) at 578-581);
>
> (c) the question is one of intention and that, in the absence of any express declaration of the parties to effect novation can't be held to exist except by way of the necessary inference from all the circumstances of the case (*Electric Process Engraving and Stereo Co. v Irwin* 1940 AD 220 at 226-7;
>
> (d) the circumstances of the case ...include the conduct of the parties (*French v Sterling Finance Corporation (Pty) Ltd* 1961 (4) SA 732 (A) at 736. See also *Swadiff (Pty) Ltd v Dyke N.O.* 1978 (1) SA 928 (A) at 940G-H.'

[24] In the present matter, there is no express declaration of the parties to effect novation to their agreement. I am unable, on the facts before us, to infer from the circumstances of the case, that the parties intended to do so. Nothing in the conduct of the parties points to that direction, either. Bearing in mind that novation is not to be presumed, I conclude that the respondents have failed to discharge the onus on them to establish that the agreement between the parties was novated by the applicant's conditional acceptance of the reduced contractual amount on 12 December 2007. If anything, that acceptance, being conditional, logically means it fell off in the event of non-fulfilment of the condition on which it was premised, and the original agreement remains intact.

[25] To sum up on the respondent's contentions: there is no merit in either of the contentions on the alleged dispute of fact or novation. In light of that, there is nothing

standing in the path of the applicant obtaining judgment. Given this conclusion, I find it unnecessary to consider in detail, the applicant's contempt counter-application. The following brief remarks, would, to my mind suffice.

[26] I have already pointed out earlier, that it appeared to be the respondents' case that they were unable to give full effect to the court order as some of the documents the first respondent was ordered to furnish to the applicant, were not in its possession. I also remarked that under those circumstances, the prudent course for the respondents to adopt, would be to approach the court for variation of the order on the basis of impossibility of performance. It did not do so, and I think that can be attributed more to a relapse in legal counsel than to a deliberate and conscious non-compliance with the court order.

[27] It has been said that where a party has not complied with a court order, but did attempt to give effect to the order, his inability to give full effect thereto was not of his own doing, that party will not be guilty of contempt (*Mynhardt v Mynhardt* 1986 (1) SA 456 (T). I therefore conclude that the applicant has not established, on a balance of probabilities, that the first respondent wilfully disobeyed the court order.

[28] What remains for determination is the *quantum* of the applicant's claim. The respondents claim that the applicant supplied only 7150 kilograms of meat, instead of 12600 kilograms. The applicant's purported proof of its claim that it supplied 12 600 kilograms of meat, is contained in its email dated 7 July 2007 in which it confirmed acceptance of the first respondent's quotation. The relevant part of the email reads:

'I hereby confirm that we accept your price of:

1. €12,00/Kg for all the Fan Fillet that we have in stock at Commercial Cold Storage in City Deep (Excepting for the approx. 1,3 Tonne of Fan Fillet deboned at EDPLA) which leaves us a balance of about 4,9 Tonne inclusive of;
2. €6,30/Kg for all the Big Steak that we also have in stock at Commercial Cold Storage in City Deep which is about 7,7 Tonne.'

[29] This is the high water-mark of the plaintiff's claim, from it is clear that the applicant has not proved its claim for the full price on a balance of probabilities. The respondents, have, on the other hand, have demonstrated, with reference to the invoices, that the applicant delivered 7150 kilograms of meat. Therefore, there seems to be merit in the respondents' assertion. The applicant is in the circumstances entitled to judgment for 7150 kilograms worth of meat. What that amount is in euros, is something we are not in a position to determine without the assistance of the relevant evidence, e.g. of the exchange rate variables.

[30] To sum up: the issues identified in para [9] are answered as follows:

(a) The applicant has not established that the first respondent was in contempt of the court order made on 16 April 2011;

(b) it was not competent for the court below to again order the respondents to comply with the order of 16 October 2010, as it was *functus officio*;

(c) the court below was correct in holding that the applicant was entitled to judgment, but misdirected itself in making that conditional upon the respondent complying with the order of 16 April 2010. The court also misdirected itself in not taking into account that the applicant had failed to prove that he supplied 12 600 kilograms of meat, instead of 7150 kilograms.

[31] The sum total of these findings is that the respondent's appeal falls to fail. The applicant's cross-appeal should succeed to the extent referred to above.

Costs should follow the event. However, to be fair to both sets of parties, the costs order should reflect the applicant's failure to establish contempt on the part of the first respondent, both in the court below, and before us.

[32] In the result the following order is made:

1. The appellants' appeal is dismissed;
2. The respondent's cross appeal is dismissed, save to the extent reflected in this order. The order of the court below is set aside and the following is substituted for it:

> '(a) The applicant's application to declare the first and second respondents to be in contempt of court is dismissed;
> (b) The first respondent is ordered to pay the applicant an amount (in South African rand equivalent of the euro 7150 kilograms of ostrich meat, as on 1 February 2008;
> (c) the respondents are ordered to pay 80% of the costs of the application, jointly and severally, the one paying the other to be absolved.'

3. The appellants are ordered to pay 80% of the costs of the appeal, jointly and severally, the one paying the other to be absolved;
4. To the extent necessary, the parties may approach this court, once the amount referred to in 1 (b) above has been determined, to make such amount, an order of this court. Should there be a dispute as to the determination of the amount, either of the parties may, on 5 days' notice to the other, set the matter down for this court, with the aid of the necessary evidence, to determine that amount.

T.M. MAKGOKA
JUDGE OF THE HIGH COURT

I agree

V.V. TLHAPI
JUDGE OF THE HIGH COURT

I agree

S.P. MOTHLE
JUDGE OF THE HIGH COURT

DATE OF HEARING	**: 5 JUNE 2013**
JUDGMENT DELIVERED	**: 12 MARCH 2014**
FOR THE 1ST & 2ND APPELLANTS	**: ADV. J VLOK**
INSTRUCTED BY	**: *DREYER & DREYER ATTORNEYS*, PRETORIA**
FOR THE RESPONDENT (CROSS-APPELLANT)	**: MR. K. VAN HUYSSTEEN**
INSTRUCTED BY	**: *VAN HUYSSTEEN INC.*, JOHANNESBURG AND *S. GERBER ATTORNEYS*, PRETORIA**