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

CASE NO: 52746/2014

5/12/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

30/11/16
DATE

SIGNATURE

In the matter between:

FAER S.A. KITCHEN CUPBOARDS (PTY) LTD t/a FAER FURNITURE TECHNOLOGY	Plaintiff
and	
PHILIP JAMES DE JONGH KIRBY	First Defendant
EASYLIFE KITCHENS MANUFACTURING CAPE (PTY) LTD	Second Defendant
EASYLIFE KITCHENS MANAGEMENT CAPE (PTY) LTD	Third Defendant
EASYLIFE KITCHENS MANAGEMENT (PTY) LTD	Fourth Defendant
EASYLIFE KITCHENS MANUFACTURING (PTY) LTD	Fifth Defendant

JUDGMENT

Baqwa J

Contract *– Formation of – Whether alleged agreement of sole distributorship between the plaintiff and Italian manufacturer binding in South Africa – Only oral agreement supplemented by e-mail correspondence alleged – No proof of signed agreement – Supply of kitchen furniture components – No presumption or contractual obligation not to supply anyone else particularly when supply through an overseas subsidiary not party to agreement between manufacturer and the plaintiff – Plaintiff failing to establish even* ***prima facie*** *that sole distributorship agreement between itself and manufacturer – Mere knowledge and dealing with defendants and defendants franchisees not sufficient to impute knowledge of nature of contract between the plaintiff and manufacturer – Plaintiff failing to establish basis for alleged interference with contract – Plaintiff failing to establish basis for delictual liability.*

Summary

Volpato was a manufacturer of kitchen furniture components in Italy and the plaintiff who was involved in the same industry sought to establish an agency/distributorship relationship with the manufacturer. Even though they ended up not entering into a signed contract, the plaintiff was given the go-ahead to do business in South Africa on a commission basis. The defendants are kitchen furniture manufacturers in South Africa and operate mainly from Johannesburg and Cape Town not only as manufacturers but also as franchisors. They sourced Volpato kitchen products from the plaintiff for a period of about ten years.

A misunderstanding arose during that period causing the defendants to source Volpato components through a local supplier, Eclipse, which in turn purchased the products from a distributor of the manufacturer ATI located in China. The plaintiff was informed of that relationship by the manufacturer. The latter had no objection to the ATI relationship between Eclipse and the defendants. The plaintiff instituted action against the defendants on the basis that they had induced the manufacturer to breach an alleged sole distributorship contract entered into between the plaintiff and the manufacturer. The plaintiff alleged that the defendants had acted unlawfully and that they were delictually liable. These allegations were denied by the defendants.

Held, that the plaintiff had failed to prove the existence of contract of sole distributorship.

Held, that the plaintiff had failed to prove awareness on the part of the defendants of such a contract and that they could not thus have induced a breach of same.

Held, that in any event, even if such a sole distributorship had been in existence, it would be untenable to bar other individuals or companies from sourcing the product from parties who had not been participants in the sole distributorship contract as that would be clothing such a contract with a status of a patent which would in turn be contrary to ordinary consequences of competition and the **boni mores**.

Annotations:

Reported cases

Atlas Organic Fertilizers v Pikkewyn Ghwano 1981 (2) SA 173 (N) at 186 D

Taylor & Horne (Pty) Ltd v Dentall (Pty) Ltd 1991 (1) SA 412 (A) at 422G-423B

Wilkins NO v Voges 1994 (3) SA 130 AD 136 H – 137 C

Tor Industries (Pty) Ltd v Gee - Six Superweld CC and Others 2001(2) SA 146 W at 154 A – B

Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others 2003 (1) SA 11 SCA

Introduction

[1] This is a delictual claim for damages ensuing out of an alleged unlawful interference with the contractual relationship between the plaintiff and an Italian manufacturer (Volpato).

The Parties

[2] The plaintiff is FAER S. A. Kitchen Cupboards (Pty) Ltd t/a Faer Furniture Technology (Faer) a private, for profit company with limited liability, registered in accordance with the Company Law of the Republic of South Africa, with registration number 1997/000229/07 and with registered address at Cabernet House West, Brandwacht Office Park, Trumall Road, Stellenbosch, Western Cape.

[3] The first defendant is Philip James de Jong Kirby, an adult businessman residing at Bryanston Court Houses, Peter Place, Bryanston. The first defendant is the Managing Director of the third and fourth defendants and a director of the second and fifth defendants.

[4] The second defendant is Easylife Kitchens Manufacturing Cape (Pty) Ltd, a private for profit company with limited liability, registered in accordance with registration number 2003/031123/07 with registered address at 381 Ontdekkers Road, Florida Park Extention 3, Roodepoort.

[5] The third defendant is Easylife Kitchens Management Cape (Pty) Ltd, a private company with limited liability, with registration number 2003/031740/07 with its main place of business at Units B1 and B2 Steel park, Modderdam Road, Bellville - South and with registered address at 381 Ontdekkers Road, Florida Park Extension 3, Roodepoort 1709.

[6] The fourth defendant is Easylife Kitchens Management (Pty) Ltd, a private company with limited liability, with registration number 1995/000678/07 and with registered address at 381 Ontdekkers Road, Florida Park Extension 3, Roodepoort 1709.

[7] The fifth defendant is Easylife Kitchens Manufacturing (Pty) Ltd, a private company with limited liability, with registration number 1996/011710/07 and with registered address at 381 Ontdekkers Road, Florida Park Extension 3, Roodepoort 1709.

Background

[8] The parties herein are companies involved in the kitchen manufacturing indutstry. Faer concluded an agreement with an Italian manufacturer of kitchen components, namely Volpato Industrie Societa Azioni (S.P.A) "*Volpato*". In terms thereof Faer was appointed as distributor, that is an entity which would purchase Volpato products on its own account and then sell them with a view to making a profit. Faer would buy at a discount to Volpato's cost price to enable it to on-sell to its customers.

[9] There is however a dispute between the parties mainly on two issues, the first one being whether Faer had an exclusive right to distribute Volpato products in South Africa (sole distributorship). The second issue is whether Volpato was prohibited from selling its products to any other distributor if that distributor intended to sell them to any customer or former customer of Faer in South Africa.

The Pleadings

[10] According to the plaintiff's particulars of claim, the plaintiff represented by Armandt Kotze and Volpato Industrie Societa Azioni (S.P.A) ("*Volpato*") represented by Gulio Baldon, entered into a partly written partly oral distribution agreement dated 29 August 2002. In terms of that agreement Volpato would produce components for kitchen and furniture retailers and the plaintiff would act as an agent and would distribute the products throughout South Africa.

[11] The relevant express alternatively tacit terms of the agreement were briefly that:

11.1 The agreement would commence on or about February 2003 and unless terminated by either party on written notice, for whatsoever reason, would continue for an indefinite period of time.

11.2 The agreement could not be terminated by Volpato whilst orders for customers who had already been canvassed were being processed and on less than reasonable, being at least one year notice.

11.3 Volpato would supply the products to the plaintiff at an agreed retail price which was payable within 60 (sixty) days of delivery.

11.4 The plaintiff agreed to use its best endeavours to promote the distribution and sale of the products throughout the Republic of South Africa and the SADC countries in which, according to plaintiff, it had an exclusive agency to distribute Volpato products.

11.5 The plaintiff would purchase products from Volpato according to agreed retail prices per specified product but with a 25% discount.

[12] The plaintiff further alleges that during May 2011 the first defendant approached one Chisini, acting on behalf of Volpato, Italy, together with one Willis, of Eclipse with a proposal that the defendants and Eclipse import Volpato products to South Africa directly, without the involvement of the plaintiff.

12.1 Chisini advised the first defendant and Willis that Volpato had an agreement of sole distributorship with the plaintiff and that the proposed course of action only be taken by agreement with the plaintiff.

12.2 Kotze on behalf of the plaintiff having become aware of the defendants' intention to import directly, asked Chisini to provide a letter of confirmation that it was the Volpato distributor in South Africa which Chisini duly did. Kotze sent this document to the first defendant who disregarded it because he was not going to be deterred by the contractual relationship between Volpato and the plaintiff.

12.3 On 9 November 2011 and at the instance of Kotze (for the plaintiff), Chisini, Kotze and the first defendant met in Johannesburg, at which meeting the possible direct supply by Volpato to the defendants and Eclipse was discussed. At that meeting Chisini made it clear that such direct imports could only take place provided an agreement to that effect was reached between the plaintiff, the defendants and Eclipse.

12.4 An interim acknowledgement of liability to pay commission to the plaintiff was made regarding two sales it had made to Eclipse and the defendants during the course of 2011.

12.5 It was only during May 2012 that Volpato for the first time through one Bilotto repudiated the agreement with Faer at the instance and the unlawful conduct of the defendants.

[13] According to the plaintiff, the defendants induced and/or procured the breach of the agreement between the plaintiff and Volpato and the plaintiff's agreements with the defendants' franchisees without justification. As a consequence of the defendants' actions Volpato breached and/or repudiated the agreement and the plaintiff cancelled alternatively accepted Volpato's repudiation thereof.

[14] As a further consequence of the defendants' aforesaid actions, the plaintiff claims damages in the sum of R3 604 400.00 being loss of profit the plaintiff would have made on the sale of Volpato products in South Africa to the defendants , its franchisees and/or Eclipse but for the defendants' breach of the contract and distributorship relationship between the plaintiff and Volpato and estimated damages in respect of the period up to February 2022, in the amount of R24 million being 8 years at an average profit of R3 million per year.

[15] The defendants pleaded that at all relevant and material times they did not have knowledge of the terms of the agreement between the plaintiff and Volpato. They admitted however that during the course of 2002, the plaintiff represented by Armandt Kotze and Volpato represented by Giulio Baldan entered into a partly written, partly oral agreement.

[16] They pleaded that the relevant express, alternatively tacit terms of the agreement were, **inter alia**, that the plaintiff would purchase products from Volpato according to agreed retail prices per specific product, which include the 25% discount and that the plaintiff would be liable for payment of the amount invoiced on the Volpato invoices, payable in 60 (sixty) days after delivery.

[17] The defendants also admitted that the third and fourth defendants, on occasion, purchased products from the plaintiff, which included Volpato products and that certain franchisees that trade under the same name and style of Easylife Kitchens conducted business with the plaintiff. They however denied that the agreement between the plaintiff and Volpato had been expressly or tacitly entrenched and confirmed during the ensuing period in the manner alleged in the plaintiff's particulars of claim.

[18] The first defendant pleaded that he approached Chisini of Volapto together with Andrew Willis of Eclipse and Enrico Fontana of E & M (later ATI) to discuss the possibility of E & M purchasing Volpato products for on-sale to Eclipse in South Africa and potential on-sale of some products to an ELK entity or entities. The first defendant further pleaded that he was informed by Chisini that Volpato was not precluded from being a party to such arrangement and that there would be no problem in supplying Volpato goods to ATI for on-sale to Eclipse in South Africa.

[19] It was also admitted that on 18 July 2011 Kotze provided the first defendant with a letter from Volpato in which it was stated that Volpato was renewing, for the year 2011, the agreement with the plaintiff as "*agent for SADC region*".

[20] The first defendant replied to Kotze's email on 19 July 2011 stating **inter alia**, that he did not know what was contained in the agency agreement and that he was not party to such an agreement. He denied that the letter from Volpato established that the plaintiff had a sole distributorship.

[21] It was also admitted that the second defendant since late 2011 and the fourth defendant during the period October to November 2011, purchased goods from Eclipse who in turn purchased the said goods from ATI who purchased such goods from Volpato. It was further admitted that the fifth defendant similarly purchased goods since May 2012.

[22] The second, fourth and fifth defendants admitted that they purchased the aforesaid goods without the involvement of the plaintiff and that they utilised Volpato products in their kitchen manufacturing processes. They however denied receiving such goods from Volpato or that Volpato breached or repudiated its agreement with the plaintiff.

[23] The defendants further denied that they intentionally induced and/or procured a breach and/or repudiation of such agreement between the plaintiff and Volpato. The defendants pleaded that each of the second to fifth defendants are separate corporate entities which cannot be held jointly liable in the manner as set out in the plaintiff's particulars of claim.

[24] In the alternative they pleaded that in the event of the court finding that Volpato had breached the agreement and that one or more defendants with knowledge of the terms of the agreement had intentionally induced or procured the breach or repudiation then the defendants pleaded in justification that

24.1 During or about 2006 the plaintiff sold and supplied the third and fourth defendants with inferior, substituted plinth legs falsely representing that they were Volpato legs;

24.2 During a meeting held between the first defendant and Kotze, representing the plaintiff, during or about 2006 and at the factory of the fourth defendant situated in Strijdom Park, Johannesburg, Kotze admitted the sale of inferior substituted plinth legs. As a consequence thereof the first defendant informed Kotze that the third and fourth defendants would discontinue their business relationship with the plaintiff.

24.3 The third and fourth defendants wound down their purchases from the plaintiff by ordering remaining Volpato stock from the plaintiff only on occasion and no longer on a large scale. The second, third and fourth defendants from 2006 sourced comparable products from a company known as Raiel.

24.4 In response to the decision not to conduct business with the plaintiff, the plaintiff proceeded to interfere unlawfully and unethically with the contractual business relationship between the defendants and Easylife Kitchen franchisees by resorting to discredit the plinth leg sourced from Raiel and causing discord between the said defendants and the franchisees.

24.5 In the circumstances and as a result of the plaintiff's unlawful conduct, the defendants' conduct was justified, and neither wrongful nor unlawful nor dishonest nor unfair.

[25] The defendants pleaded further that the plaintiff was seeking to recover the same damages which it sought to recover from Volpato in its counter claim in the arbitration between itself and Volpato before arbitrator Smit SC.

[26] The arbitrator determined that the plaintiff suffered damages in the sum of R767 237.00 which sum, together with interests and costs, he ordered Volpato to pay. Volpato paid the said damages together with interest and costs. The defendants pleaded that any claim which the plaintiff might have was extinguished when Volpato paid the damages and that alternatively the sum of R767 237.00 ought to be deducted from any award this court might make against the defendants.

Separation of Issues

[27] At the commencement of these proceedings an order was made by the court in terms of which certain issues were to be determined at the first hearing and others to be determined at a second hearing. In this hearing it was ordered that the court determines the merits of the plaintiff's claim against each of the defendants and all elements of causation of loss and if it should be found that the defendants (or any of them) are liable for damages, how such damages are to be determined, but not the quantification or calculation of such damages, which would be determined at a subsequent hearing. As regards the quantum of the claims the court was asked to determine, **inter alia**, whether the damages for breach of contract paid by Volpato to Faer fall to be deducted from the damages for which the defendants might be found liable to the plaintiff.

Terms of an Agreement

[28] The determination of the terms of an agreement involves not only the weighing of the evidence presented by the parties but also the contents of the contemporaneous documents. The approach was succinctly summarised by Nienaber JA in **Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others** 2003 (1) SA 11 SCA para 5 when he held as follows:

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows: To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and c) the probabilities. As to a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn depends on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact with his own extra curial statements or actions (v) the

probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of the other witnesses testifying about the same incident or events. As to b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing the latter. But when all factors are equipoised probabilities prevail."

[29] **In casu**, the court has to consider not only the purpose of the agreement between the plaintiff and Volpato but also the words used in the contract and any possible ambiguity in those words. The court has also to consider the contextual setting in which the contract was carried out and the subsequent conduct of the parties not only between themselves but also with regard to the subsequent business agreements and the consequences and inferences that may be drawn therefrom.

Tacit Term

[30] It is not alleged in the plaintiff's pleadings that Volpato would not be entitled to sell its products, directly or indirectly, to any other person or entity in South Africa without the involvement of the plaintiff. In other words this was not an express term in the agreement. Logically therefore the plaintiff's case is that this was an unexpressed provision of the contract or a tacit term.

[31] It was held in **Wilkins NO v Voges** 1994 (3) SA 130 AD 136 H – 137 C as follows:

"Being unspoken a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The onus to prove the material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional."

The Evidence

[32] The evidence presented by both parties consisted of testimony by witnesses, documentary evidence and portions of testimony which had been given by some of the witnesses in an arbitration which was concluded before this hearing.

[33] The plaintiff called only one witness, Armandt Kotze who was the founder and owner of the plaintiff. The defendants' evidence was presented by seven witnesses, namely; Chisini, Billoto, Kirby, Hauser, Dammerman, van der Straaten and Tersia de Wet. Kotze's testimony was by and large in support of the pleaded case. He testified how he had engaged Baldan in 2002 and sought to establish an exclusive agency or distributorship agreement. They were still in negotiation when Baldan agreed that Kotze could launch even before an agreement was signed. He was provided the price lists and Baldan confirmed his entitlement to a 25% discount thereon. A draft contract was subsequently forwarded to Kotze but was never signed.

Kotze testified further about how he went on to supply the defendants with kitchen accessories, training and showroom designs. In particular, he supplied them with Volpato products such as sink trays and legs which were uniquely designed and had hitherto not been widely used in the South African market. This relationship had continued until 2006 when the defendants began utilising products procured from a company known as Raiel. Kotze tried to prove to the defendants that Raiel legs were of an inferior quality and in doing so tried to convince some of the defendants' franchisees against the use of Raiel legs. This did not please the defendants and more specifically the first defendant who advised Kotze to desist from his conduct. Kotze denied that he was the cause of the breakdown of the relationship between himself and the defendants.

[34] More particularly he stated that in 2006 the defendants had utilised more than 60 000 legs which they had forecast and that he had offered to source more legs from a company known as Mepla at a higher price. He testified that the Mepla legs were Volpato legs. This was contrary to the defendants who maintained that Kotze had fraudulently supplied them with non-Volpato legs without informing them.

[35] Kotze denied that the defendants stopped ordering Volpato products from him from 2006 because of the alleged fraudulent conduct and that business had continued as usual until they began doing business directly with Volpato.

[36] According to Kotze the defendants were in competition with him as directed by the first defendant and they had devised a strategy to source products directly from his supplier whilst he as sole agent had been excluded and that they then sold those products directly to his customers. Kotze however did concede that it would be cheaper if the defendants dealt directly with Volpato.

[37] The defendant's case was presented in the main by Philip Kirby (Kirby). Kirby was the Financial Director of the company known as Easylife Kitchens. He later became its Managing Director in 2004. The company operated in Johannesburg and Cape Town and was managed separately in the two regions even though there was collaboration in policy and operational matters. ELK in the main, manufactured carcasses for franchises who constituted about ninety five per cent (95%) of its customer base. The accessories would be added by the franchisee purchasers and they were sourced from various suppliers. The plaintiff was one of those suppliers. According to Kirby ELK was the protector of the brand for the franchisee network and he was the co-ordinator of the activities between ELK (Cape) and ELK (Johannesburg).

Evaluation of the Evidence

[38] Baldan was not called as a witness even though he managed Volpato and was the initiator of the relationship between the plaintiff and Volpato. He received the proposal for the plaintiff to become the Volpato distributor in Southern Africa and they exchanged copious correspondence to try and agree the terms on which they would do business, but no actual written agreement was entered into and signed. Evidence tendered in this regard was in the form of e-mails between Baldan and the plaintiff and subsequently e-mails between Chisini and the plaintiff. Chisini was Baldan's successor.

[39] Baldan testified at the arbitration which took place before this hearing and a record of those proceedings was made available to the court by agreement by the parties. Baldan denied in those hearings that the plaintiff would have '*exclusive*' mandate for South Africa and the SADC countries. He testified that no such agreement had been finalised. It was therefore understood even before this trial commenced that it was not common cause that the agreement for the distributorship agreement to commence by Baldan implied acceptance of exclusivity on his part.

[40] Baldan who testified that a written contract would be required before exclusivity could be agreed to and that the procedures and investigations necessary for the appointment of Faer as a sole distributor had never taken place.

[41] What needs to be borne in mind however in weighing Baldan's testimony at the arbitration proceedings is the plaintiff's letter of 2 June 2016 (Z503) which stated as follows:

"*In any event, the exchange of correspondence and discussions with Chisini superseded same (i.e. whatever was agreed with Baldan) and preceded your client's actions which were the subject of our client's claim herein. It is therefore those facts which will be determinative of this issue.*"

The case which the defendants were called upon to meet was therefore limited to exclusivity commitments given or confirmed by Chisini. This brings us to the question of whether Chisini contractually committed Volpato to the disputed terms alleged by the plaintiff.

[42] What is common cause however is that Kotze did not have any contractually relevant dealings with Chisini prior to the May 2011 meeting which took place at the Volpato headquarters in Italy. When Chisini took over from Baldan the business relationship simply carried on as before with the plaintiff purchasing on own account at a 25% discount (for on-sale to its customers) and receiving the 10% commission on Volpato sales.

The May 2011 Meeting

[43] Regarding the May meeting both Kirby and Chisini testified that Chisini assured those present that as far as Chisini was concerned, there was no reason why ATI could not purchase goods from Volpato for on-sale to Eclipse and/or ELK entities. Chisini was therefore effectively discounting any suggestion that the plaintiff had any exclusivity rights.

[44] The plaintiff's counter was to suggest that subsequently, after the May meeting Chisini subsequently confirmed exclusivity in the form of documentary evidence such as "*declaration*" (Z74) and an e-mail from Chisini to Kotze dated 30 September 2011 in which he stated "*As I said our intention is to go on with you as distributor and exclusive agent...*"

[45] These documents do not, in my view support the plaintiff's contention as the declaration does not state that the plaintiff was appointed as an exclusive distributor. It does not even hint at the suggestion that as against Volpato the plaintiff was the only distributor Volpato was permitted to appoint in the SADC region.

[46] It was common cause that as a result of Kotze being upset with the ATI imports, Kotze attempted to negotiate an agreement in terms of which the plaintiff would be paid a commission regarding the imports by certain entities which would include Eclipse and ELK. Correspondence was exchanged in this regard in terms of which Chisini confirmed his intention to continue to negotiate the terms of a written agreement yet to be concluded which could then provide for the plaintiff to be a distributor and exclusive agent.

[47] Chisini was offering these terms to the plaintiff but he expected something in return such as the proposal that the intended agreement would contain a clause imposing penalties on the plaintiff should the latter in future fail to pay by due date for goods ordered. He further proposed that there would be customers "*treated on commission basis and supplied directly*". One would presume that this was a reference to customers such as Eclipse and ELK. It was upon compliance with these conditions that Chisini contemplated conferring the plaintiff with the status of "*distributor and exclusive agent in SADC*".

Conduct of the Parties

[48] It is quite apparent from the conduct of both Chisini and Kotze that they both understood that they were engaged in negotiations aimed at an intended agreement. Chisini's e-mail of 11 November 2011 (Z132) and the enclosed specimen contract (Z133) demonstrates this, more particularly where he states:

"*Give me your opinion and state which points you would like to modify or add. This is a draft based on which we'll prepare the official contract.*"

This in my view demonstrates beyond any doubt that there was no exclusive distributorship between the plaintiff and Volpato and that this was known to both Chisini and Kotze otherwise these negotiations and exchanges of e-mails would not make any sense.

The November 2011 Meeting

[49] Another significant event in the engagement between the plaintiff, Chisini, Kirby and Willis was the meeting of November 2011. Prior to this meeting, Chisini had already been involved in the negotiations referred to above which included a possible commission to the plaintiff. Kirby and Willis were not participants to the said negotiations nor were they informed of the contents thereof by Chisini and Kotze. At the said meeting however, which was confirmed by both Chisini and Kotze, both Willis and Kirby were quite upfront in their declaration that they would not be willing to purchase goods from the plaintiff. Kotze seemed to accept their stance but asked to be reimbursed for certain samples whereupon Kirby promised to consider the request.

[50] Chisini seemed to understand that he could not dislodge Kirby and Willis from the stand they had taken but he was still keen to try and retain the plaintiff as a client by coming to an agreement with it regarding a mutually acceptable business arrangement. This was the context which Chisini privately proposed paying Kotze a commission without suggesting thereby that that was because of the existence of a contractual exclusivity right.

Knowledge by the Defendants of an Exclusivity Right

[51] The plaintiff's case as pleaded is that the defendants "*intentionally induced and/or procured, a breach of the agreement*" between Volpato and the plaintiff. It is further pleaded that "*the first defendant, and therefore by implication the second to fifth defendants, were aware of*" the disputed contractual terms. The onus is on the plaintiff to prove such awareness and that being aware, the defendants "*intentionally*" induced Volpato to breach or repudiate the contract between itself and the plaintiff.

[52] According to Chisini and Kirby's testimony, at the May 2011 meeting Chisini had assured the visiting party that there was no obstacle to orders being placed on E & M/ATI and delivered to the South African end-users. The meeting took place because what was being proposed was that Eclipse would purchase goods from ATI and that the latter would purchase same from Volpato. The meeting took place in May 2011 and the ELK management board placed the first order in July 2011. The inference that this court can draw from the set of facts is that the May meeting took place because the delegation that met Chisini was not aware of the terms of the agreement between Volpato and the plaintiff. In other words the ELK Johannesburg Management Company had no knowledge of any contractual exclusivity right held by the plaintiff. There is no suggestion anywhere in the plaintiff's evidence that the defendants had been apprised of the existence of such exclusivity save in a subsequent transmission of the "*declaration*" document (Z74) as a basis for such exclusivity.

[53] The plaintiff's pleaded case was not that the defendants should reasonably have been aware of the exclusivity right but that the defendants were aware of it. The plaintiff has however failed to prove such awareness. Mere production of Z74 was a belated and inconclusive attempt to prove such awareness. Z74 was produced to Kirby and not to the other defendants and it would be rather far-fetched to impute his knowledge even if he had it, to the other defendants. Such imputation would be even less credible in light of the evidence by Tersia de Wet who testified that the directors of the Cape Management and Cape Manufacturing companies had no knowledge of Kirby's initial dealings with Chisini and that they did not place any orders via Eclipse until April 2013. Ms de Wet was aware of Kirby's receipt of Z74 and had opined that that document was not in itself an agreement and that Kotze had to be invited to produce the real agreement which he alleged existed. Kotze failed to do so.

Absence of Inducement/Procurement of Breach

[54] The undisputed evidence which was tendered by way of invoices showed that Volpato sold goods to ATI and was paid by ATI. The evidence further shows that ELK orders were placed on Eclipse and that Eclipse placed orders on E & M/ATI. In turn ATI placed orders on Volpato and the relevant invoices were rendered to and paid by the parties concerned.

[55] It was Chisini's evidence that he only became aware of the initial ATI order when he noticed that the boxes prepared for collection by ATI were labelled for delivery to South Africa. He subsequently communicated with Kotze in this regard which in my view further demonstrated his **bona fides** in his dealings with the plaintiff. He would not have drawn Kotze's attention to the ATI transaction if he was engaged in an underhand relationship with the parties involved in that transaction.

[56] It is quite apparent from the evidence that none of the defendants induced Volpato to do anything regarding its contract with the plaintiff. It was ATI which procured orders from Volpato, paid for them and ensured their delivery to South Africa. In the circumstances the proper delict (if any) would in law lie with either ATI or Eclipse neither of whom have been sued **in casu**. It was Eclipse which wrote to Chisini on 27 September 2011 (Z124) in the following terms:

"*We would like to continue purchasing your products, through Enrico, but will have nothing to do with Armand. If you would like to continue the current relationship that is your decision.*"

In the premises there does not exist a basis for concluding that any of the defendants committed a delict against the plaintiff and in the result joint and several liability of the defendants does not arise.

The Passing off Incident

[57] It is also necessary to deal briefly with what has been dubbed the "*passing off*" incident. This is the incident which explains from the defendants' point of view their actions in discontinuing purchases of Volpato products from the plaintiff and the lawfulness of their subsequent actions in obtaining these products from Eclipse/ATI to the exclusion of the plaintiff.

[58] ELK Management (Johannesburg) discontinued purchasing Volpato legs from the plaintiff in 2006 and they sourced alternative legs from a supplier known as Raiel. According to Kirby the reason for the change was the fact that the plaintiff had supplied or substituted non-Volpato legs to ELK without disclosing it whilst continuing to charge Volpato prices. Kirby further stated that a meeting was subsequently held to discuss the issue of the non-Volpato legs. He states that it was also attended by Dammerman and Van der Straaten. He testified that Kotze represented the plaintiff and that he admitted and explained that he had been short of legs, hence the substitution.

[59] Kotze denies that the incident ever took place. He also denies a meeting at which he confessed the substitute products. Dammerman also did not recall such a meeting but Kirby's evidence was corroborated by Van der Straaten.

[60] The tables are however turned against Kotze when one considers the evidence he gave at the arbitration hearing. Whereas at the hearing Kotze also denies the passing off event, upon being questioned by the arbitrator, he came up with a new version namely, that he had with the approval of Van der Straaten substituted a different type of Volpato leg which he sourced from Mepla. Strangely however, this version was never put to Van der Straaten when he later came to testify at the arbitration.

[61] In the present hearing Kotze again stated that he ran out of stock and that the plaintiff was compelled after an alleged discussion with Van der Straaten, to provide substitute legs from Mepla. He further testified that he experienced stock shortages regarding the legs due to erroneous forecasts given to him by ELK Management. He also testified that some 40 000 legs had to be substituted.

[62] What Kotze's latterday evidence does is that it gives credence to the version that was tendered by the defendants. Stated differently, even on Kotze's version there was an incident when 40 000 legs were substituted. The probabilities are that once that was brought to Kirby's notice, the matter would have been discussed and there would have been consequences. This inference is drawn because Kotze's initial stance that no such incident ever took place is inconsistent with his subsequent explanation. This leads me to the conclusion that Kirby's version which is corroborated by Van der Straaten is the more credible one and that Kotze was not a credible witness.

[63] This leads to another portion of Kotze's evidence to the effect that even after the 2006 incident it was business as usual between the plaintiff and the defendants. The defendants refute this by providing documentary evidence which supports the version that orders by ELK Management were only in support of the franchisees and not for their consumption save for incidents like when Kotze requested assistance to get rid of Volpato stock which he could not dispose of, the so-called "*aflosplan*" which took place in May 2008. Even in this regard I did not find Kotze to be a credible witness.

Causation

[64] What is evident from the lengthy testimony given at this hearing is that after the "*passing off*" incident, relations between Kirby and Kotze were never the same. What is also apparent from the meeting of November 2011 is that Mr Willis of Eclipse and Kirby informed Kotze in Chisini's presence that they were no longer willing to purchase Volpato products through the plaintiff.

[65] What is also apparent from the evidence is that ELK Management which included Tersia de Wet and Kirby had taken a stance where they would have continued using Raiel legs rather than source Volpato legs through the plaintiff and that they were moving towards sourcing a European manufactured product from an alternative supplier to Volpato. Alternative companies were mentioned during the evidence such as OPES, SCILM and UNION PLAST together with German manufacturers such as HENKE and HETTICH, which could have been utilised by the defendants to supply products similar to the ones they were utilising in their business.

[66] It is therefore unlikely that, if the defendants were unable to purchase Volpato products through Eclipse or ATI, they would have gone back to source them through the plaintiff. Kirby had long searched alternative European products. He regularly visited major international fairs such as *Interzum* where hardware components were displayed and *Eurocucina* which is an end-user show and where complete kitchen units were displayed. He had also become aware of the substantial financial benefits of sourcing and importing products in bulk. He testified that by 2010 the ELK entities (Johannesburg) were in a position to afford purchasing kitchen component in bulk and to keep such products in stock for long periods.

[67] In the circumstances, the plaintiff has not succeeded to prove on a balance of probabilities that the defendants would have continued to buy from it from 2011 to February 2014 regarding the past damages claimed in the sum of R3, 6 million or from any foreseeable future date up to February 2022 regarding future damages of R24 million.

Unlawfulness or Delictual Wrongfulness

[68] Having discussed various aspects of the evidence tendered by the parties it now becomes necessary to determine whether the conduct of the defendants was unlawful or delictually wrongful.

[69] Similar facts were considered in **Tor Industries Pty Ltd v Gee-Six Superweld CC and Others** 2001 (2) SA 146 (W) in which Wunsh J dismissed an application for an interdict. The third respondent in that case (DovaTech) was a manufacturer of welding equipment, based in the USA. The applicant alleged that DovaTech was bound by a contract in terms of which the applicant had an exclusive right to distribute DovaTech's products in South Africa. The first respondent (Gee-six) was purchasing products manufactured by DovaTech from one of its sub-subsidiaries which operated as a distributor in Germany (D-Tech). The applicant applied for an interdict preventing Gee-six from purchasing products from DovaTech or its subsidiaries for resale in South Africa, alleging in a manner similar to the plaintiff in the present case that, because this interfered with its contractual exclusivity right, it was delictually wrongful for Gee-six to purchase the products from anyone other than the applicant.

[70] It was noted by the court that the applicant's claim was based on the existence of an exclusive distributorship agreement with the third respondent and that the applicant contended that the interference by the first respondent with that contractual relationship was wrongful. On the evidence the court was not persuaded that the exclusivity agreement alleged by the applicant had been proved. The court stated as follows at p 157 A - C:

"I shall deal with further problems that face the applicant with regard to the alleged interference with its contract with DovaTech. Assuming that DovaTech agreed that it would not sell Weldcraft products to any other party in South Africa, why should this have precluded any other trader, including Gee-six Superweld, from being supplied with such products by D-Tech. It is a separate corporate entity, carrying on business in Germany. The applicant's premised right to be the only purchaser in South Africa of the Weldcraft Products from DovaTech was never stated to extend to any of its subsidiaries that were not party to the agreement. There was nothing to preclude another South African trader from importing Weldcraft products from someone who is entitled to sell it (Taylor & Horne (Pty) Ltd v Dentall (Pty) Ltd 1991 (1) SA 412 (A) at 422 G – 423 B). Indeed, the applicant does not dispute that Gee-six Superweld acquired Weldcraft products from a supplier in Italy before the problems arose in this case."

[71] **In casu**, even if it was accepted that the plaintiff had an exclusive distributorship agreement with Volpato, there is nothing to preclude ELK entities (defendants) from being supplied with Volpato products by Eclipse or E & M/ATI (ATI). ATI was not under any legal obligation which barred it from supplying Volpato products to Eclipse. There was therefore nothing to preclude Eclipse or any of the defendants from importing Volpato products from ATI. As was found by Wunsh J in Tor Industries, their conduct in purchasing such goods from ATI was neither delictually wrongful nor unlawful even if the plaintiff had had the contractual exclusivity which it has claimed but failed to prove.

[72] In reaching this conclusion, Wunsh J relied on the views expressed by Van Heerden JA (four other judges of the Appellate Division concurring) in Taylor & Horne (supra) at 422 G to 423 B. Similar to the present case Taylor & Horne was a claim for delictual damages. The manufacturer based in West Germany (ESPE), had conferred an exclusive distributorship for South Africa on the plaintiff. The defendant procured supplies of ESPE's products from other distributors in Europe by recourse to so-called "*grey marketeering*". Van Heerden JA noted that the plaintiff had conceded, rightly in his view, that the defendant had not acted unlawfully in obtaining its supplies of the product and went on to hold that the defendant had not acted unlawfully in disposing of its supplies in competition with the plaintiff. More significantly Van Heerden stated as follows:

"*In the result it seems clear that the appellant must stand or fall by the contention that because of the existence of the exclusive supply agreement between it and ESPE, nobody may lawfully market Impregnum in the Republic in competition with the appellant. Acceptance of this contention would certainly lead to startling consequences. It would mean that for as long as the sole agency endures the appellant would enjoy a monopoly akin to that derived from a patent, in regard to the commercial distribution of Impregnum in this country. It would also mean that the agreement which created purely contractual rights between the parties thereto would in effect bind would-be competitors no matter from what source or however honestly they obtained supplies of Impregnum. A further result would be to impose an unwarranted restriction on the right of ownership of a person who legitimately acquired supplies of Impregnum (cf Consumers Distributing Co Ltd v Seiko Time Canada Limited 10 DLR (4th) 161 at 174).*"

[73] The Appellate Division sent a clear message that contractual exclusivity does not and cannot trump the normal consequences of competition. The fact, therefore that the defendants sourced Volpato products through Eclipse which in turn acquired them from ATI was in the context of normal competition and was not unlawful.

[74] In amplification of this reality the Appellate Division further stated as follows (at 421 J):

"*It has often been said that competition is the lifeblood of commerce. It is the availability of the same, or similar, products from more than one source that results in the public paying a reasonable price therefor. Hence competition as such cannot be unlawful, no matter to what extent it injures the custom built up by a trader who first marketed a particular product or first ventured into a particular sphere of commerce.*"

[75] A claim for damages in South Africa arising from unlawful competition is based on the principles of **lex Aquilia**. See **Atlas Organic Fertilizers v Pikkewyn Ghwano** 1981 (2) SA 173 (N) at 188 G - H and the norm to be applied in determining the dividing line between lawful and unlawful interference with a trade of another was enunciated by the court in Atlas Organic Fertilizers (**supra**) as follows:

"*According to Van Heerden Grondslae van die Mededingingsreg at 15-18 and 46-50 the criterion for unlawfulness in competition is in Germany boni mores and in the Netherlands the care required by society with reference to the person or property of another ("die sorgvuldigheid wat in die maatskaplike verkeer ten aansien van 'n ander se person of goed betaam"). What is needed is a legal standard firm enough to afford guidance to the Court, yet flexible enough to permit the influence of an inherent sense of fair play. I have come to the conclusion that the norm to be applied is the objective one of public policy. This is the general sense of justice of the community, the boni mores, manifested in public opinion. In determining and applying this norm in a particular case, the interests of the competing parties have to be weighed, bearing in mind also the interests of society, the public weal.*"

Applying this norm **in casu**, I do not find that the defendants acted outside the parameters ordinarily set and accepted generally in commerce for lawful competition.

[76] The principle to be gleaned therefore from Taylor & Horne and Tor Industries is that it is delictually not wrongful for a customer or a rival supplier to obtain or sell goods in a manner which interferes with an existing supplier's sole distributorship contract with the manufacturer. The underlying reason is that it is against the **boni mores** to allow a contractual exclusive distributorship right to be elevated to a legal right or monopoly effective as against third parties. Such a monopoly would impede competition and that would be inimical to public interest. This principle goes to the heart of the present case.

[77] In the circumstances, having considered all the facts, the law and submissions I make the following findings:

77.1 The plaintiff's contract with Volpato was not on the terms it alleges. More specifically the plaintiff failed to prove on a balance of probabilities that it had entered into an exclusive distributorship contract with Volpato.

77.2 The plaintiff failed to prove that the defendants were aware of the sole distributorship and even when they put him on terms by asking for proof of such distributorship he was unable to provide conclusive proof of same.

77.3 Logic dictates therefore that it would not be possible for the defendants to induce Volpato to act in breach of a contract which they had no knowledge of and which the plaintiff was unable to prove even when given an opportunity to do so.

77.4 The authorities referred to (**supra**) demonstrate that even if the court were to find in the plaintiff's favour in respect of 77.1; 77.2 and 77.3 above, the plaintiff's case as a matter of public or legal policy would fail.

[78] In the result, I make the following order:

ORDER

78.1 The plaintiff's case is dismissed.

78.2 The plaintiff is ordered to pay the costs of suit, including the costs of two counsel.

S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Heard on:	1, 2, 4, 5, 8, 10, 11, 12, 15 and 19 August 2016
Delivered on:	05 December 2016
For the Applicant:	Advocate R. S. van Riet SC
Instructed by:	Dirk Kotze Incorporated
For the First Respondent:	Advocate A. J. Freund SC Advocate A. M. Heystek
Instructed by:	Stefan Swart Attorneys