IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

25/8/2016.

Case Number: 61116/2013

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED. ✓

25/8/16 .....
DATE

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SIGNATURE

In the matter between:

GERT FREDERICK GROBLER PLAINTIFF

And

GREENFEED GROWING SYSTEMS (PTY) LTD DEFENDANT

JUDGMENT

Fabricius J,

1.

Plaintiff instituted action against Defendant based on the breach of an oral agreement in terms of which it purchased a complete semi-automated grow-room unit. Defendant undertook to install this unit on Plaintiff's farm, and it was to be used to cultivate feed in order to feed Plaintiff's cattle. It was alleged in the Particulars of Claim, that at all times prior to – and at the time of concluding - the agreement, the Defendant represented to the Plaintiff that the green-feed, which the Plaintiff would be able to cultivate in the unit, "shall":

1.1 Contain a protein content of 21%;

1.2 Depending upon the size of the particular cattle, a daily feed required by the cattle would be 3% - 3.5% of its own weight;

1.3 The cattle would show an increase in weight of at least 2kg per day;

1.4 The production of the green-feed in the unit would be a better and cheaper alternative to conventional dry-feed.

It was accordingly pleaded that it was an implied term through the operation of law that this unit would be fit for the purpose for which it was sold by the Defendant. Plaintiff paid the purchase price and alleged that it planted feed in accordance with the instruction furnished by the Defendant, and utilised this feed in order to feed his cattle.

2.

It was pleaded that the unit sold and delivered was however not fit for the purpose for which it was sold to the Plaintiff in that:

2.1 The green-feed cultivated in the system did not contain a protein content of 21%, but only contained a protein content of approximately 2%;

2.2 The cattle did not gain 2kg weight per day, but in fact gained no weight;

2.3 The unit could therefore not be utilised for the purpose to cultivate green-feed for Plaintiff's cattle.

3.

In addition, so it was alleged, the unit was not fit for the purpose for which it was sold to the Plaintiff, because the Defendant made the material representations that I have set out. Plaintiff acted on these representations, so it was pleaded, and, but for those representations, the Plaintiff would not have entered into the agreement with the Defendant.

4.

Accordingly, Plaintiff was entitled to cancel the agreement and demand restitution upon delivery of the unit.

5.

In its plea, Defendant relied on a written agreement which was however a "pro-forma invoice", dated 23 November 2012. It described the unit as a "complete semi-automated grow-room 1800kg capacity green-feed growing system excluding building:

The production capacity of your semi-automated grow-room unit will be I, 8OO tons per day. This quote excludes the flooring, building and isolation requirements..."

It is common cause that 1, 8OO tons correctly meant 1, 8 tons per day.

6.

Defendant pleaded that the terms of the agreement were that Defendant would supply and install this unit in an insulated building supplied by the Plaintiff. Plaintiff was further required to supply the necessary water, electrical power connection, cement slab and feed seed. Defendant would supply a water reticulation system, grow-racks with trays, an automated air-conditioner, automated grow-lights, thermometers, a floor scale and a water recycling system. The relevant agreement was also entered into subject to Defendant's prevailing terms and conditions. Defendant pleaded, and that was in essence its case at the trial as well, that the grow-room so purchased and installed was in fact fit for such purpose at the time of final commissioning of the grow-room. It was therefore denied that the Plaintiff had the right to cancel the agreement and demand repayment of the purchase price.

7.

Plaintiff called an expert, Dr W. A. Schultheiss. His special expertise was the relationship between nutrition, nutritional management and health in ruminants. Prior to the trial he delivered an Expert Notice with reasons, dated 21 June 2015. He did not inspect the grower on Plaintiff's premises. He also did not see Plaintiff's feed. He read the Particulars of Claim and had a conversation with Plaintiff. His Expert Notice, significantly is introduced by the following preamble: "My understanding is that, at the time:

a) The Defendant positioned themself as an expert in the field of ruminant nutrition, and,

b) The Plaintiff accepted, in good faith, the claims that the Defendant made – most likely as a result of personal communication and claims made on the webpage of the Defendant".

This rather surprising preamble clearly indicates that this witness relied on hearsay evidence and personal impressions. There is certainly no factual basis laid for these allegations. It is clear from his written reasons that he repeatedly arrived at

conclusions based on his own impressions in the absence of personal knowledge as to what in fact had occurred on the farm when the cattle were fed. He purported to give a definition of what was meant by the term "fit for purpose". He made conclusions as to what was communicated by the Defendant to the Plaintiff, in the absence of any personal knowledge thereof whatsoever. He concluded that cattle lost weight and remained hungry, again without any personal knowledge thereof. He concluded in this written reasoning, again without any evidence, that Defendant "acted as a nutritional advisor". He stated that information provided by Defendant "is seriously lacking precision". In contradiction to everything that he had stated previously, he then also concluded that "hypothetically given a perfectly installed SGRU by the Defendant, operated perfectly by the Plaintiff, the unit could, under these circumstances, not termed "DEFECT" as stated in paragraph 13.7 of the Combined Summons document". He then also concluded, again, without having had any personal knowledge thereof, the following: "Rather, the fact that it did not comply with the requirements (=EXPECTATIONS) of the Plaintiff, is, in my opinion, due to most likely a DEFECT COMMUNICATION by the Defendant on the exact

nutritional value of the green-feed required for a defined number of cattle within a defined nutrient requirement based on defined body mass and defined production status..." The obvious question is: how would he know this in the absence of any personal knowledge or investigation? He concluded that in the field of ruminant nutritional advice and consultancy, in particularly for cattle, there is no room for vague, generic guidelines and sloppy communication. Again, without having had any personal knowledge whatsoever of the relevant facts, he stated the following at the end of his written summary: "It is my opinion that the Defendant did not fully understand the exact requirements/needs/feed resource capabilities of the Plaintiff, or failed to gain an insight into the needs of the cattle as a herd on a daily basis as a whole. The sale of the SGRU was merely pushed through – not taken responsibility for any post-sale scientific support and abdicating all responsibility for failures that result from pure communication initially, to the farmer, the Plaintiff". His final conclusion then was that Defendant failed to comply with his company's own undertaking which stated that it would render a professional service and strive to ensure that the purchaser was completely satisfied.

8.

It is almost not necessary to state that these generalisations, moralising admonishments and opinions, are not based on any facts that he could have been aware of at the time or even at the time of the trial. The written reasons given for him are a good (bad) example of what an expert witness should not do. He should confine his evidence, by way of assistance to the Court, to matters within his expertise and experience, and should rely on facts, not inferences, assumptions and conclusions. In the absence of facts of which he had personal knowledge, his views cannot even be said to be founded on logical reasoning.

9.

He was examined in some length on the content of what appeared on Defendant's website. I do not intend dealing with that, because his evidence as a whole is subject to the same criticism that I have already formulated. Neither on the facts, nor in law, is there any basis for him concluding that Defendant held himself out as an expert on nutrition in the present context, and that as a result thereof he was subject

to certain duties *vis a vis* the Plaintiff. It is therefore my view that the evidence of Dr Schultheiss, in this instance, is of no value whatsoever. That he usurped the function of an Advocate and even of this Court.

10.

The information that appears on Defendant's website was put before me and it is not in issue. (Bundle C page 10 to 21). Plaintiff himself testified that he only read the part pertaining to cattle. If this document is read as a whole, it is clear that the Defendant warranted its product. When it gave information pertaining to "barley/oats analysis", by way of example, it stated that this information had been obtained from a third party. Similarly, when it referred to "CATTLE FEED LOT – WESTERN CAPE", it referred to figures supplied by a client farmer from the Western Cape with the effective date being 14 November 2012. It also referred to certain "feeding rations" in the context of a table for a semi-automated device and in such table referred to "number of feed lot beef fed per day (14kg per head) for 143 cattle".

Beneath that table the following appears: "Please note, the prescribed GFGS rations herein simply represent the normal wet-feed ration applied across the board on various farms by green-feed clients. It only represents barley/oats high protein sprouts and does not include ad-lib access to DM (Dry Matter) like hay, straw or baled grass or concentrates that might be included in animal feed rations depending on the specific animal needs". In the context of "feeding green-feed to beef cattle", it is stated on the same page beneath that column that: "In our experience, feeding green-feed daily at a rate of 3% to 3.5% of the animal's body weight then supplementing it with a good-quality roughage will yield the best results". It is clear to me from the information on the website as a whole, that the onus is placed on the farmer to ensure that his animals are properly fed, and that it is Defendant's duty only to supply an actual unit which was fit for that purpose. Defendant would have no personal knowledge of all the details surrounding a farmer's requirements in the context of the number of cattle, their age, their weight, their requirements, when and how they feed, by way of example only, and when it referred in that document to "enhanced nutritional value", it gave facts which it obtained from third party sources,

and these were quite clearly stated. There is no evidence that these topics formed the basis of the contract between the parties.

11.

It is also common cause that Defendant sent an attachment to an email to Plaintiff which also appears in the trial bundle. (C page 22 to 26) It is clear from the first page of this document, the author of which is N. Kemp, who also testified on behalf of Defendant, that Defendant only guarantees its unit that is supplied.

12.

Mr Grobler testifying could in my view not contend that any single or particular fact contained in the website document or in the information sheet emailed to him by Mr Kemp were factually incorrect or a misstatement of the truth. His evidence amounts to the fact that the Defendant successfully installed a 1.8 ton producing grow-room

unit, that he was able to grow and convert 1kg of seed in 6.5kg of sprouted fodder and that the grow-room delivered and installed by Defendant did deliver in fact i.8 tons of green fodder per day.

13.

Mr Kemp denied that there were a number of telephonic conversations between him and Plaintiff during which all possible implications were discussed and during which he gave Plaintiff expert opinions or advice. These calls and their content were strictly limited to discussions regarding seed for the grow-room unit. I am unable, on the limited evidence before me in this context, and the conflicting, but vague versions presented to me, arrive at any conclusions as to what exactly was said by whom and when, and in which context at any particular time.

14.

During argument, Plaintiff's Counsel, in the context of the cause of action, relied on an innocent misrepresentation. As far as the misrepresentations are concerned, useful reference can be made to ***Standard Bank SA v Coetzee 1981 1 SA 1131 (A) at 1135 D to G.*** In this decision, the Appellate Division held that an allegation of this type of representation must be tested in the same way as an allegation of an implied or tacit term. There must therefore be clarity concerning the exact content of the misrepresentation, and it must be capable of clear and exact formulation. Furthermore, ***Christie, The Law of Contract, 6TH Edition 2011 at 285***, says the following, and I agree with that statement: "An expression of opinion which turns out to be mistaken is not a representation, nor is it speculation or prophesy concerning the future, which is simply one form of expression of opinion, so if the future does not unfold as forecast the other party normally has no remedy, except possibly in delict if he can show that the statement was made negligently". In the same vein, the dictum of Feetham J in ***Adam v Curlewis Citrus Farms Ltd 1930 TPD 68, at 82 to 83***, is relevant.

15.

A negligent misrepresentation was not pleaded, nor was Plaintiff's cause of action founded thereon. To the contrary, it is clear from the Particulars of Claim that Plaintiff's cause of action was based on the allegation that the feeding unit that was delivered was not fit for purpose inasmuch as it did not deliver the results that Plaintiff required, or allegedly expected. In the absence of precise and concise evidence as to what Plaintiff was promised or assured of by way of telephonic conversations, I cannot find merely from the information provided to Plaintiff or from that contained in the website, that Mr Kemp on behalf of Defendant, made promises which form the basis of the agreement between the parties, and which induced Plaintiff to purchase the particular feed unit. In the absence of such evidence relating to what was discussed, or promised, I cannot find that Plaintiff's cause of action has been established. It must be remembered that what was contained in the website, although it may have been confusing to Plaintiff, was not of such a nature that it can be said, and this was not even argued, that it formed the basis of the subsequent agreement between the parties. Furthermore, on the evidence as a whole, it is clear

that Defendant would not have had the requisite knowledge of a purchaser's activities, and would in the nature of things have no control thereof. Brief reference was made to one important fact in that context: stronger animals, when they feed at a troth, push weaker animals aside. A Defendant would therefore also not know, when and how often per day an animal feeds, nor would it know what mixture a farmer supplies to his animals. There are numerous other examples in this context which I do not need to refer to.

16.

In my view Plaintiff has not established the cause of action relied on and accordingly absolution from the instance is granted with costs.

JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number: 61116/13

Counsel for the Plaintiff: Adv A. F. Arnoldi SC

Instructed by: Jasper van der Westhuizen & Bodenstein Inc

Counsel for the Defendant: Adv W. J. Bezuidenhout

Instructed by: McCabe Attorneys

Date of Hearing: 1 – 4 August 2016

Date of Judgment: 25 August 2016 at 10:00