THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 136/2010

In the matter between:

F J SMITH	**Appellant**
and	
T W VAN DEN HEEVER NO	**First Respondent**
E M MOTALA NO	**Second Respondent**
J D PEMA NO	**Third Respondent**

Neutral citation: *Smith v Van den Heever* (136/10) [2011] ZASCA 5 (4 March 2011)

Coram: Harms DP, Nugent and Bosielo JJA

Heard: 21 February 2011

Delivered: 4 March 2011

Summary: Contract – exceptio non adimpleti contractus – breach – calculation of damages

ORDER

On appeal from: North West High Court (Mafikeng) (Hendricks J and Kgoele and Moloto AJJ sitting as Full Court):

1 The appeal is upheld with costs.

2 The order of the full court is set aside and replaced with an order in the following terms:

a. The appeal of the liquidators is upheld with costs.

b. The cross-appeal of the defendant is upheld with costs.

c. The order of the trial court is amended to read: 'Claim and counterclaim are both dismissed with costs.'

JUDGMENT

HARMS DP (NUGENT AND BOSIELO JJA concurring)

INTRODUCTION

[1] The plaintiffs (the present respondents) are the joint liquidators of Agrichicks (Pty) Ltd (in liquidation). The defendant, Mr F J Smith, farms in the Zeerust district. Initially, the plaintiffs sued Mr Smith for goods sold and delivered but later amended their summons and filed a declaration claiming payment of R469 604.96 allegedly due in terms of a written innominate agreement between Mr Smith and the company. The declaration quoted the terms of the agreement extensively and concluded by alleging that the company had performed all its obligations in terms of the agreement and that the said amount was owing 'in respect of day old chickens, poultry feed, medication and vaccination delivered' to Mr Smith under the agreement. Mr Smith admitted the agreement but denied liability based on breaches by the company. In essence his plea raised the *exceptio non adimpleti contractus*. He, in addition, instituted a counterclaim

for damages, alleging that the company had breached the contract in a number of respects.

[2] The trial court (Landman J) upheld the claim in part and granted judgment against Mr Smith for R242 628. The counterclaim was upheld to the extent of an award of damages in the sum of R317 366.50. Both parties appealed to the Full Court of the North West High Court, Mafikeng, comprising of Hendricks J and Kgoele and Moloto AJJ. The plaintiffs' appeal was upheld and Mr Smith's cross-appeal was dismissed. The net effect of that judgment was that Mr Smith was ordered to pay the plaintiffs' claim in full and that his counterclaim was dismissed. Mr Smith sought and obtained special leave to appeal to this court.

THE CONTRACT

[3] I do not intend to quote the terms of the contract at any length but will set out its general scheme. As Hendricks J pointed out, the contract was not a 'simple' contract of purchase and sale but rather regulated the relationship between the company as supplier of day-old chickens and feedstuff and Mr Smith, on the other hand, as contract farmer-grower. The company had to supply Mr Smith with day-old chickens, with the required poultry feed for the different stages of their short lives, and with medication and vaccination as and when required. Mr Smith had to rear them until they reached the marketable age at about 37 days. The company, within 45 days after supply of the day-old chickens, had to collect the live broilers, weigh and slaughter them and market them as processed broilers ('slaghoenders').

[4] Ownership of the chickens, poultry feed, medication and vaccination did not pass to Mr Smith but remained the property of the company. The goods were to be used exclusively for rearing the company's chickens and Mr Smith was not entitled to purchase feedstuff from other sources or to dispose of chickens to third parties.

[5] An important aspect of the agreement is the fact that it operated in cycles. A cycle commenced with the first day of delivery of a consignment of day-old chickens and it ended with the delivery of the next batch – an agreed average period of 56 days. However, as mentioned, the company had to collect the broilers for slaughter within 45 days after the inception of a cycle. The final date of collection within a cycle was referred to as the date of completion of that particular crop. This meant that the chicken

houses were to be empty for about 11 days, presumably to prepare them for the next batch.

[6] Each cycle had to be accounted for individually. The company had to credit Mr Smith's account with the agreed 'price' per live kilogram of broilers collected for slaughter and had to debit his account with the agreed 'price' of the day-old chickens, feed, medication and vaccination. The accounting date was to be 30 days subsequent to the date of completion of any particular crop, and any credit balance of that particular crop had to be paid to Mr Smith on that date.

[7] Any debit balance, however, had to be carried forward as the opening balance of the next cycle. Should the debit balance of any specific cycle be carried forward more than two times as the opening balance of the following cycle, the amount of the debit balance had to be paid by Mr Smith to the company.

[8] The agreement also made provision for the issue of certificates of indebtedness by the company's auditor who could certify the balance of payments between the parties 'for any specific cycle' – it did not permit the issue of a certificate on any day within a cycle or in respect of any other indebtedness.

THE CLAIM AND THE EXCEPTIO NON ADIMPLETI CONTRACTUS

[9] The commencement date of the contract, which was signed during February 1999, was 15 June 1999 and it was to continue for five years from this date. Mr Smith required a signed contract to obtain financing from the Land Bank to build the necessary infrastructure for rearing chickens. However, a few days after the commencement date, on 2 July, the company was placed under judicial management and it remained under such management until its liquidation on 14 August 2002.

[10] In view of the fact that the claim and counterclaim both relate to the last two cycles it is necessary to consider them closer. The first of these was the May 2002 cycle. It commenced on 15 May and the broilers were slaughtered on 26 June. On the accounting date a month later it transpired that Mr Smith had suffered a loss and his account was debited with R87 154.49. This amount, in terms of the agreement, had to be carried over to the next cycle as its opening balance.

[11] The second cycle (referred to as the August cycle) began on 12 July which implied that the anticipated slaughter date was to be 22 August, a week after liquidation. The company supplied chickens, feed and medication for this cycle for a total of either R322 088.95 (or R321 576.95 on Mr Smith's version). However, on about 9 August the company became unable to deliver the required feed and medicines in terms of the agreement. Mr Smith was informed accordingly. He was also told that the company was abandoning the chickens and that he was free to destroy or dispose of them.

[12] To limit his losses he purchased broken maize – which does not qualify as a balanced diet – and other feed when that became available. No one on behalf of the company in liquidation took any steps to collect the broilers for slaughter on the anticipated date, and between 25 and 30 August he disposed of the chickens to third parties. Only on 18 September the provisional liquidators, cynically, sought to reclaim possession of the chickens. The application was not successful.

[13] Mr Smith was taken to task during cross-examination at both the liquidation inquiry and the trial in lawyerly language for having sold the chickens in spite of the reservation of ownership. I fail to understand the problem. In the light of his uncontested evidence the company abandoned its ownership and the chickens became *res derelictae*. Mr Smith appropriated them and became owner by means of *occupatio*. See *Reck v Mills* 1990 (1) SA 751 (A). In any event, it is not permissible to question witnesses on legal issues – the more so if the cross-examiner's knowledge of the law is not up to scratch – and courts and chairpersons conducting inquiries should not permit this type of debate.

[14] As mentioned, Mr Smith's main defence is the *exceptio non adimpleti contractus*. The principles of this defence are well established and a detailed restatement is not required. As stated in the title *'*Contract' in 5(1) *Lawsa* 2 ed para 210,[1] in the case of reciprocal contracts, one party undertakes to perform specifically in exchange for a particular counter performance by the other. In such cases, the principle of reciprocity applies: the first party is not entitled to demand counter performance from the other party unless the first party has him or herself performed or is prepared to perform, as the case may be.

1 By A D J van Rensburg, J G Lotz and T A R van Rijn (update by R D Sharrock).

[15] In *Motor Racing Enterprises*,[2] the court laid stress on the following relevant principles: First, the *exceptio* presupposes the existence of mutual obligations which are intended to be performed reciprocally, and that the parties' intention is to be sought primarily in the terms of their agreement. Second, interdependent promises are prima facie reciprocal. Third, the *exceptio* is often a temporary defence raised in order to compel the other contracting party to perform unfulfilled obligation(s) but only if defective performance of an *obligatio faciendi* can still be remedied. It is otherwise a complete defence. Fourth, the applicability of the *exceptio* is (subject to the *de minimis* principle) not dependent on the degree of non-performance.

[16] The plaintiffs' declaration stated, as it had to, that the company had performed all its obligations in terms of the contract and that the claimed amount represented the debit balance on Mr Smith's account with the company, which had been carried forward for more than two cycles, as contemplated in the agreement. But it is here where the plaintiffs' case broke down. The amount of R87 154.49, which represented the loss incurred in respect of the May cycle, was not carried forward for more than two cycles due the company's breach of contract and, accordingly, did not become payable. And although it is fair to accept that the company supplied chickens, feed and medication for the August cycle for some R322 088.95, the company failed to comply with its obligation to supply the necessary feed etc for the full cycle and, instead, abandoned the chickens and Mr Smith. As the plaintiffs themselves realized when they amended their summons, the company did not 'sell' chickens and feed and the like in batches or at all. In spite of this the plaintiffs sought to rely on an auditor's certificate which certified the alleged balance on a date during the August cycle while, as mentioned, it could only certify the balance of payments between the parties 'for any specific cycle'.[3]

[17] Landman J, in the first instance, and the full court in the second instance, although conscious of the nature of the contract and Mr Smith's defence, did not deal squarely with the issue. It would appear that sight was lost of the impact of their own

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2 *Motor Racing Enterprises (Pty) Ltd (In Liquidation) v NPC (Electronics) Ltd* [1996] 4 All SA 601 (A) also reported as *Motor Racing Enterprises (Pty) Ltd (In Liquidation) v NPS (Electronics) Ltd* 1996 (4) SA 950 (A) per H J O van Heerden JA.

3 It is not necessary to deal with the other palpable defects in the certificate such at that it does not purport to have been issued by the company's auditor or that it merely stated what the company books reflected and the effect of an alleged admission at the pre-trial conference. Furthermore, as Landman J correctly found, the amount certified was even on the plaintiffs' case patently incorrect.

findings that that the agreement operated in cycles and was, within a cycle, not divisible, and that the company had failed to comply with its obligations during the August cycle and that the May debit had not become payable.

[18] Landman J referred to the fact that Mr Smith used the feed and this, too, appears to have influenced the full court. Obviously, as was said in *Motor Racing Enterprises* in connection with the fourth point mentioned above, a plaintiff who fails to prove full and proper performance is not necessarily remediless. If a proper case is made out for such relief, he may be entitled to claim a lesser amount than that provided for in the agreement. However, unless the lesser amount is claimed, it is not for the court to speculate what the amount should be. In claiming a lesser amount, it is necessary for the plaintiff to allege and prove:[4]

(a) that the employer has utilised his or her work to the employer's own advantage even though it fell short of the required contractual standards;

(b) the cost of remedying defects and supplementing shortfalls;

(c) that it would be equitable to award the contractor some remuneration even though he or she breached the agreement;

(d) that the circumstances as a whole are such that the court ought to exercise its discretion in awarding the contractor a reduced contract price.

The liquidators did not seek to avail themselves of this alternative and it need not be considered. In any event, it is questionable that they would have succeeded in the light of the facts of the case.

[19] It follows that the plaintiffs' submission that it is immaterial that the company did not comply with its contract after 9 August because Mr Smith's indebtedness was for payment in respect of chickens and goods actually supplied before that date is fatally flawed. This means that the plaintiffs' claim in convention should have been dismissed at the outset and that both courts below have erred in granting judgment against Mr Smith.

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4 P M Nienaber in 'Building and Engineering Contract' in 2(1) *Lawsa* 2 ed para 503.

THE COUNTERCLAIM

[20] As mentioned, Mr Smith's counterclaim, which was based on particular breaches of contract, was upheld by Landman J but dismissed by the full court. The two breaches, which were also used to ground the exceptio, will be dealt with briefly for reasons that follow.

[21] The plaintiffs submitted that they suffered under a disability in conducting their case because they could not reasonably be expected to have had direct knowledge of events prior to the winding-up of the company and that, consequently, the dearth of evidence on their side should not be held against them. The submission is without merit. The company was at all relevant times under judicial management and there is no indication that the judicial manager or the employees could not supply the necessary evidence.

[22] Mr Smith relied on a tacit term of the contract which obliged the company to deliver F1 day-old chickens. F1 crosses or hybrids are high quality because, in terms of Mendel's law, they tend to be uniform. Instead, he alleged, the company breached this term by having provided poor quality day-old chickens instead of F1 chickens. In this regard he was able to show that F1 chickens were used industry-wide for producing broilers, that the company initially provided F1s, that as the company's financial difficulties increased it began supplying cheaper F2s, and that it instructed its employees to hide the change from the farmer-growers. All this, as found by Landman J, sufficed to establish the tacit term and it is not an answer to a reliance on a tacit term to hold, as the full court did, that the written contract did not mention F1s but 'chicken' only. If the word in context cannot include bantam or ostrich chickens there is little reason to hold that it cannot in context be limited to F1 chickens.

[23] The other ground on which Mr Smith relied was that that the company delivered sub-standard chicken feed in contravention of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947. There were two aspects to this part of his case: it meant that having acted illegally the company was not entitled to recover the contract price and also that the company had breached a tacit term that only standard feedstuffs would be supplied. Landman J found in favour of Mr Smith but the full court, relying on an interpretation of the Act, held otherwise. Although I prefer the approach of

Landman J, it is not necessary to decide the point for reasons that follow.

[24] I am prepared to assume for purposes of the judgment that the terms of the contract and the breaches have been established and that Mr Smith is in principle entitled to recover any losses suffered in consequence of the breaches. However, I am not satisfied that Mr Smith has suffered any recoverable loss and will consequently limit the judgment to that aspect.

[25] A certain Dr Viljoen was called by Mr Smith to quantify his loss. Landman J accepted Dr Viljoen's assumptions and calculations and held that the loss amounted to R317 366.50 This was only R9.00 less than Dr Viljoen's calculation. Because the full court had found that the breaches were established its findings about quantum were obiter and can be discounted.

[26] The counterclaim was limited to losses suffered during the May and August cycles. During the May cycle Mr Smith received 85 889 day-old chickens and produced and delivered 65 784 broilers to the company but, as mentioned, he suffered a loss of R87 154,49 after deducting the cost of the chickens, feed etc. During the August cycle he received 63 927 day-old chickens. We do not know the mortality rate or how many were sold as broilers but one can fairly assume that not more than 60 000 would so have been sold. One could also assume in Mr Smith's favour that if the company had complied with the relevant contractual obligations the mortality rate would have been lower and that he would have been able to deliver some 80 000 chickens during the May cycle. This means that one has to determine what Mr Smith's reasonable margin of profit on 140 000 broilers should have been.

[27] The evidence of Dr Viljoen was that a reasonable return per broiler would have been between 70c and R1.00 each. He later sought to up the figure to R1.77 with reference to the profit made during the relevant period by another farmer, Mr Harman, who also produced broilers under contract with the company and, presumably, received more or less the same type of day-old chickens and feedstuff. Although Mr Harman's results are prima facie destructive of Mr Smith's case that the losses suffered were as a result of the company's breaches, I am prepared to assume in his favour that his return would have been R1.00 per broiler, giving a total of R140 000.

[28] In assessing Mr Smith's loss, if any, it is necessary to take into account any benefits received from the company and his income from the sale of the abandoned broilers to third parties. It will be recalled that Mr Smith did not pay the company anything for the goods received during the August cycle. The only expenses which can be taken into account for present purposes were the costs relating to the purchase of feed after the company had reneged on its contract. These amounted to R58 595.00. But with sales of R249 743.48 it means that Mr Smith made a profit of some R191 148.48, which is substantially more that the projected loss of R140 000.00. It would have been different if he had paid or had to pay the company or the plaintiffs, in which event his loss in respect of the August cycle would have been R130 428.47 plus the assumed R80 000.00 loss in relation to the May cycle.

CONCLUSION

[29] This means that the correct order in the high court should have been a dismissal of both the claim and the counterclaim. Since both were upheld the parties were justified in appealing and the full court should have upheld both appeal and cross-appeal. The appeal in this court has to succeed. Costs are to follow the different results.

[30] The following order issues:

1 The appeal is upheld with costs.

2 The order of the full court is set aside and replaced with an order in the following terms:

a. The appeal of the liquidators is upheld with costs.

b. The cross-appeal of the defendant is upheld with costs.

c. The order of the trial court is amended to read: 'Claim and counterclaim are both dismissed with costs.'

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L T C Harms

Deputy President

APPEARANCES:

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