IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION)

REPORTABLE

CASE NO: 7753/05

In the matter between:

JOHAN VAN LEENDERT BV Plaintiff

and

KLEIN KAROO INTERNATIONAL TRADING (PTY) LIMITED Defendant

JUDGMENT DELIVERED ON 23 FEBRUARY 2010

ZONDI, J

INTRODUCTION

[1] This is an action in which the plaintiff claims from the defendant payment of a sum of €454 953-80 for damages for loss of profit it allegedly suffered as a result of the defendant's breach of contract.

[2] The parties agreed on the separation of the merits and quantum aspects of the claim and that the issue for determination in this trial is one relating to the merits and that quantum aspect of the claim would stand over for later determination.

[3] It is common cause that during or about June 2003 and at Oudtshoorn the parties concluded an oral agreement in terms of which the defendant agreed to supply to the plaintiff ostrich meat. The agreement was partially confirmed in the written document.

[4] The dispute between the parties is about what the exact terms of the contract were. The plaintiff contends that in terms of the contract the defendant was obliged to supply to it 200 tons of ostrich meat over an agreed period at a fixed price. The defendant rejects the construction contended for by the plaintiff. It contends that its obligation in terms of the contract was to deliver meat to the plaintiff as and when the defendant had sufficient stock at the price prevailing at the time. The conditions of payment would be arranged with each order.

Pleadings

[5] The terms of the contract as pleaded by the plaintiff in its particulars of claim are as follows:

> *"3.1 During or about June 2003 and at Oudtshoorn the plaintiff and the defendant concluded an oral agreement, which agreement was partially confirmed in the written document annexed hereto marked "X1".*

3.2 In concluding the said agreement, the plaintiff was represented by Johan van Leendert, and the defendant by one Mr Gomes.

3.3 The express, alternatively tacit, further alternatively implied terms of the said agreement are inter alia, as follows:

3.3.1 The defendant undertook to supply to the plaintiff 200 ton ostrich steak and 40 ton ostrich fillet ("the products") at the plaintiff's special instance and request, as follows:

3.3.1.1 160 tons ostrich steak over the period July to December 2003 at the rate of approximately 27 tons per month;

3.3.1.2 40 ton ostrich during January to April 2004 at an average of approximately 10 tons per month;

3.3.1.3 ostrich fillet and/or steak as and when required by the plaintiff to be delivered to Swartland;.

3.3.2 The agreement as aforesaid was concluded on the basis and on the understanding that:-:

3.3.2.1 the South African season for the supply of the aforesaid meat products runs from July to June;

3.3.2.2 the defendant had and will have sufficient supplies of meat in order to supply the agreed quantities to the plaintiff

3.3.3. the plaintiff undertook to pay to the defendant:

3.3.3.1 4.25 Euro per kilogram and to be responsible for payment of the transport costs;

3.3.3.2 4.50 Euro per kilogram where the defendant is responsible for the transport costs from Oudtshoorn to Rotterdam, and the plaintiff responsible for the costs pertaining to clearance, unloading and import duty".

[6] The terms of the contract as pleaded by the defendant in its plea are as follows:

"3.1 Op of ongeveer 18 Junie 2003 en te Oudtshoorn, het die partye (Johan van Leendert namens Eiser, en Nuno Gomes names Verweerder) 'n mondelinge ooreenkom ("die ooreenkoms") met die volgende uitdruklike terme, aangegaan:

3.1.1 Dat eiser van tyd tot tyd volstruisvleis van verweerder sou aankoop op bestelling, en dat Verweerder oor genoegsame vooraad sou beskik;

3.1.2 Dat elke bestelling onderhewig sou wees aan die heersende pryse (wat weens marktoestande fluktuerend van aard is) tesame met BTW indien dit betaalbaar is, soos in die geval van plaaslike bestellings;

3.1.3 Dat lewering sou plaasvind soos per eiser se instruksies met elke individuele bestelling; en

3.1.4 Dat die betalingsvoorwaardes met elke individuele bestelling ooreengekom sou word."

[7] It is common cause that during the period July 2003 to November 2003 the defendant delivered to the plaintiff 46170 kg of ostrich meat and that those deliveries took place pursuant to June 2003 agreement.

The Evidence

[8] The plaintiff relied on the evidence of Mr Van Leendert in support of the allegations contained in the particulars of claim while the defendant presented the oral evidence of Mr Gomez to support its case.

[9] Mr Van Leendert testified that the plaintiff, whose principal place of business is in the Netherlands, had been the defendant's regular customer since 1993 in relation to ostrich meat. Prior to June 2003 the plaintiff did not have a fixed commitment arrangement with the defendant for the supply of meat in terms of quantity and price.

[10] Discussions to establish a fixed commitment arrangement with the defendant began in and about April 2003. In this regard Mr Van Leendert referred to a letter dated 16 April 2003 from the defendant to the plaintiff informing the plaintiff as follows:

> *"Kindly note that the price quoted is as currently applicable, subject to change with market fluctuations. Should you prefer to have a fixed commitment and price for a specific volume over a fixed period, kindly indicate the volume and period so we can quote accordingly."*

[11] In a letter dated 22 April 2003 the defendant advised the plaintiff as follows:

> *"We refer to your telephonic discussion with Nuno regarding the delivery of 200 tons of steak to Swartland in Malmesbury.*
>
> *We can deliver the steak on a weekly basis to Swartland in Malmesbury over a 1 year period starting in May 2003.*

The fixed price for this commitment over this period is Euro 4-35 / kg FOB Malmesbury."

[12] The plaintiff accepted the defendant's offer by way of a letter it faxed to the defendant on 11 June 2003.

[13] In response to the plaintiff's acceptance of the offer, the defendant wrote back to the plaintiff on 12 June 2003 stating the following:

"Given the exceptionally late confirmation of this order, since the offer on 22 April 2003, we accept your order on the following basis:

- *A maximum of 15 tons can be delivered by end June 2003.*

- *No deliveries possible during July 2003.*

- *You submit to us immediately your planned monthly requirements from August 2003 onwards…*

For the price to hold at Euro 4-35 per kg, delivered to Swartland until April 2004, 80% (160 tons) will have to be delivered before the end of December 2003. Should the above quantity of 160 tons not be taken between August and December 2003, quantities delivered between January and April 2004 will be subject to a price increase of Euro 0-25 per kg.

The total volume over the period is for 200 tons and will not be reduced or increased without prior agreement.

Your acceptance of this Agreement in writing is to be received by latest 13 June 2003, together with the delivery forecast per month, in order to validate and confirm this order."

[14] It is common cause that the plaintiff did not react to the defendant's offer by 13 June 2003 as requested.

[15] Mr Van Leendert further testified regarding the meeting which he had with Mr Gomez and Mr Dempsey of the defendant at the defendant's offices on 18 June 2003. He minuted what they discussed at the meeting and when he got back in the Netherlands he sent a letter to the defendant confirming their discussion on 18 June 2003.

[16] In this regard Mr Van Leendert referred to a letter which he forwarded to the defendant on 24 June 2003 and which, in his understanding, was a memorial of the terms of the agreement the plaintiff reached with the defendant regarding the supply of the committed volume of meat at a fixed price.

[17] The letter starts by referring to the meeting on 18 June 2003 and thereafter proceeds to record the following:

"1. ***Purchase***

I have bought 200 tons of ostrich steak from you of which 160 tons are to be delivered during July – December 2003 and of which the remaining 40 tons are to be delivered during January – April 2004.

2. ***Prices are***

- *ex works Klein Karoo* *€* *4.25 /kg*

- *C+F Rotterdam* *€* *4.50 /kg*

3. ***Planning***

We like to know what you can deliver month by month. About the 10th of every month you will inform us about the delivery possibilities of the next months. As soon as we have received your monthly planning we will react and tell you how much product Swartland will take and how much product we will take fresh by container or by air and/or frozen. In order to avoid any misunderstanding the product which Swartland will pick up will be always fresh and not frozen!!

4. ***Fresh product***

The best option to load the fresh goods is Wednesday evening, end (sic) or late in the afternoon. As you mentioned in that case the truck will be sealed and normal Certificate of Health will be issued to Swartland factory.

5. ***Payment by Swartland***

In case goods are taken by Swartland, then Swartland will take care for the payment and goods have to be invoiced to Swartland at a price mentioned of €4.25 times the spot rate of Absa Bank Euro/Rand on Wednesday noon-time.

6. ***Terms of payment***

We did not discuss it in detail but I suppose "within 14 days" is acceptable for you. In case of C+F deliveries payment condition will be "Cash against Documents at arrival of the boat."

[18] Mr Van Leendert denied the suggestion by the defendant that it was a term of the contract that the price for the committed quantity of 200 tons was subject to fluctuation or that the quantity of meat would be made available to the plaintiff as and when it was available. He stated that he would not have accepted the deal on those terms. In his view the letter of 24 June 2003 correctly reflected and conveyed the terms of the agreement reached at the meeting of 18 June 2003. He

pointed out that in a letter dated 26 June 2003, by which the defendant acknowledged the receipt of the letter of 24 June 2003, the defendant confirmed the discussions and undertook to advise the plaintiff by 10 July 2003 of the quantity of steak it would be able to deliver to the plaintiff in August 2003.

[19] Mr Van Leendert further testified that the plaintiff was surprised when the defendant in a letter dated 13 September 2003 advised the plaintiff that it intended to increase prices for the meat due to a drastic shortage of slaughter birds which the defendant said it was experiencing.

[20] In terms of the new price regime the defendant charged the plaintiff €11-50 for a kilogram of fresh fan fillet, or €10-25 per kilogram for frozen fan fillet, €7-50 per kilogram for fresh steak or €5-50 per kilogram for frozen steak.

[21] In explaining its decision to increase prices the defendant went on to state:

> *"We understand that some orders have already been placed and confirmed at the previous prices prior to this adjustment. With the current shortage and cost of slaughter birds, it will be impossible to fulfill these orders at previous prices.*
>
> *In as much as we would regret that orders be cancelled as a result of the inevitable increase in prices, we understand that you may have to cancel some orders and kindly request that you inform us accordingly."*

[22] On 16 September 2003 the plaintiff wrote back to the defendant rejecting the price increase which the defendant sought to introduce contending that it was never a term of the contract that the committed meat quality would be subject to a price increase.

[23] On 16 September 2003 the defendant wrote back to the plaintiff rejecting the suggestion that the contract it concluded with the plaintiff precluded it from increasing prices. The defendant's letter went on to state:

> *"The shortage/availability of slaughter birds is far worse than expected and we have no option but to adjust meat prices accordingly. Furthermore, this abnormal shortage of slaughter birds will have an impact on volumes available.*
>
> *Thus, I kindly request the confirmation of your position concerning the new prices prior to proceeding with packing any product for yourselves..."*

[24] The defendant's letter elicited the following response from the plaintiff:

> *"Dear Nuno*
>
> *Conc.: ostrich deliveries and prices*

Once (sic) thing has to be clear: whether you call it a contract or a deal, for sure we have a deal. The second thing; next time we make a deal you have to take note that we will not be prepared to do any kind of concessions at all. If you make long term contracts then both parties know the risk.

Our proposal to show our goodwill is that you reduce the 200 tons of steaks are reduced to 160 tons in total to be delivered as follows:

- *160 tons originally to be delivered during July – December 2003 are reduced to 120 tons against old prices and*

- *40 tons originally to be delivered during January – April 2004, starting with 20 tons to old prices and then 20 tons to new prices…"*

[25] Mr Van Leendert further testified that when it became clear to the plaintiff that the defendant was not prepared to reconsider its decision to increase prices, the plaintiff referred the matter to its attorneys of record, who on 25 September 2003, wrote to the defendant informing it, inter alia, that its failure to perform in terms of the agreement constituted a breach of the agreement which had caused the plaintiff to suffer damages.

[26] The defendant responded to the letter from the plaintiff's attorneys by a letter dated 29 September 2003 in which it denied the existence of a formal

agreement contending that "*alle gesprekke wat plaasgevind het onderhewig aan die beskikbaarheid van genoegsame volstruise*".

[27] During cross examination by *Mr Van Riet,* who appeared for the defendant, Mr Van Leendert testified that it was his understanding that when he walked into Mr Gomez's office on 18 June 2003 there already existed a contract between the plaintiff and the defendant. He stated that the agreement was concluded by way of a fax of 16 April 2003 and its final details were finalised by him in a meeting he had with Mr Gomez on 18 June 2003.

[28] When Mr Van Leendert was asked as to why the plaintiff did not accept the defendant's offer of 16 April 2003, his response was that, at that stage the plaintiff still had questions to clarify such as payment and delivery terms.

[29] He denied that on 18 June 2003 Mr Gomez had told him that the defendant was no longer able to give the plaintiff a fixed price commitment deal because of the plaintiff's failure to react to its offer by 12 June 2003.

[30] Mr Gomez, testifying for the defendant, stated that the ostrich meat market being part of the exotic category is subject to fluctuations in the market and the prices will rise where the demand is not sufficient to cover supply. In particular in June 2003 the demand for ostrich meat was starting to exceed the supply and it was clear that if the trend continued, prices would rise.

[31] He stated that he did not regard the plaintiff's letter of 11 June 2003 as an acceptance of the defendant's offer of 22 April 2003 as according to the plaintiff the price and quantity of meat of up to 200 tons were still to be discussed.

[32] He denied the suggestion by the plaintiff that it had concluded a fixed price commitment deal with the defendant. Mr Gomez stated a fixed price commitment deal would have been achieved had the plaintiff accepted the defendant's offer of 12 June 2003. That offer expired when the plaintiff failed to accept it.

[33] Mr Gomez stated that time for acceptance of the defendant's offer was crucial at that stage as the demand in the ostrich market had started to increase since its initial offer to the plaintiff in April 2003. The time of acceptance was important to it because it had to ensure that committed stock was available. After 13 June 2003 the stock which the defendant had initially earmarked and held for the plaintiff was released to the market.

[34] Mr Gomez denied that the visit by Mr Van Leendert on 18 June 2003 was to be utilised for the acceptance of the deal which failed to materialise on 13 June 2003.

[35] Mr Gomez was adamant that at the meeting of 18 June 2003 he informed Mr Van Leendert that due to the change in terms of demand over the last few months and the fact that the fixed price commitment deal offer had not been accepted by the plaintiff, the defendant would no longer be in a position to

guarantee the volume previously offered but would do its best to deliver the quantities required by the plaintiff, subject to availability of stock and price fluctuation.

[36] *Mr Oosthuizen* for the plaintiff extensively cross examined Mr Gomez on the content of the plaintiff's letter dated on 24 June 2003 and in particular on paragraphs 1 and 2 thereof in which the plaintiff confirmed to have purchased from the defendant 200 tons of ostrich steak at a price of €4-25 per kg.

[37] Mr Gomez testified that the price mentioned by the plaintiff in the letter of 24 June 2003 refers to the current prices which were discussed at the meeting of 18 June 2003 and rejected the suggestion that it refers to the fixed price commitment. In his understanding the deliveries were to be made to the plaintiff based on the availability of stock.

Statement of the issues

[38] The dispute between the parties concerns the interpretation of the agreement concluded by the parties in June 2003. The first question is whether it was a term of the contract that the defendant's obligation to deliver would be subject to availability of meat. Secondly, whether the price would be fixed for the entire duration of the contract.

Legal Principles

[39] The approach to be adopted in ascertaining the meaning of the contract is well established. The golden rule of interpretation is to seek the intention of the parties at the time the contract was entered into. To use the words of Innes JA in **Joubert v Enslin** 1910 AD 6 at 37-38:

> *"The golden rule applicable to the interpretation of all contracts is to ascertain and to follow the intention of the parties; and if the contract itself, or any evidence admissible under the circumstances, affords a definite indication of the meaning of the contracting parties, then it seems to me that a Court should always give effect to that meaning."*

[40] If the intention of the parties is to be ascertained from a written contract, the language in the document must be given its grammatical and ordinary meaning unless this would result in some absurdity (**Cooper & Lybrand and Others v Bryant** 1995(3) SA 761(A) at 767 E).

[41] In seeking to interpret a contract, words must not be examined in isolation and divorced from the context in which they are used. As Rumpff CJ correctly pointed out in **Swart en 'n Ander v Cape Fabrix (Pty) Ltd** 1979(1) SA 195 (A) at 202C:

"Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in 'n kontrak bepaal moet word, die woorde onmoontlik uitgeknip en op 'n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanselfsprekend dat 'n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel."

[42] *Mr Oosthuizen* submitted on behalf of the plaintiff that exhibit "A10" (letter of 24 June 2003) is evidence that a fixed price commitment contract was concluded. He placed great emphasis on the phrase "*I have bought 200 tons of ostrich steak from you...*".He advanced two grounds for his contention.

[43] First, he contended that the phrase in exhibit "A10" "*I have bought 200 tons of ostrich steak from you...*" is plain and unambiguous and means exactly what it says. He pointed out that the price referred to in para 2 of exh "A10" can only be the price governing the 200 tons and not the current market price prevailing at the time of the contract as suggested by the defendant.

[44] I disagree with *Mr Oosthuizen's* contention. The word "*bought*", (the past tense of "*buy*") is a word which has various meanings.

[45] As regards the ordinary grammatical meaning of the word "*buy*" the Concise Oxford English Dictionary, 10th ed. defines it to mean "*obtain in exchange for payment*".

[46] The word has also been judicially considered. Murray J in **R v Stander** 1955(1) SA 3 (T) at 5A held that the word "*purchase*" or "*buy*" is capable of meaning either the conclusion of the contract or the acquisition of ownership or possession pursuant to such contract.

[47] It is clear to me that it is inappropriate in the present matter to gather the intention of the parties by interpreting exhibit "A10" in the light of the ordinary meaning ascribed to the word "*bought*" appearing in the phrase "*I have bought 200 tons of ostrich steak from you...*" as it is clear that the plaintiff did not obtain 200 tons of meat from the defendant and neither did it pay for it.

[48] In my view the proper approach to follow, is to gather the intention of the parties by considering the words used within the context of exhibit "A10" in which they appear. Regard must be had to the entire exhibit "A10" which means that all the terms of exhibit "A10" must be read in conjunction.

[49] What is stated in para 1 of exhibit "A10" should be considered in conjunction with what is set out in the other paragraphs and in particular in paras 2 and 3.

[50] Paragraph 1 establishes the quantity of ostrich meat ordered and the period over which the deliveries were to take place. Delivery was to take place in stages in accordance with the method set out in para 3. In terms of para 3 of exh "A10" the parties were to agree on quantity to be made available to the plaintiff at a given time.

[51] Paragraph 2 of exhibit "A10" sets out the price per kilogram at which the meat would be made available to the plaintiff. Two prices are mentioned and the amount to be paid depended on whether the plaintiff would be responsible for transport costs.

[52] The price regime set out in para 2 is not qualified. It fails to indicate whether the quoted price is intended to mean a spot price or a fixed price.

[53] In my view in the absence of qualification, the prices set out in para 2 of exhibit "A10" must be taken to mean the prices at which a kilogram of ostrich meat could be bought at that point in time. In other words a spot price was intended to apply and not a fixed price. My view is based on the fact that delivery was to take place in stages and as and when there was sufficient stock available at a given time to meet the plaintiff's desired quantity.

[54] Secondly, he contended that the letter, which the defendant wrote in reply to exh "A10" is a confirmation that the content of exh "A10" is a true reflection of what the parties had discussed and agreed upon at their meeting on 18 June

2003. He argued that if the defendant was not in agreement with the content of exh "A10" or some of it, it would have expressed its disagreement and the extent thereof in exh "A13". He argued that the defendant must be taken to have accepted the correctness of the assertions in exh "A10". In support of his contention he relied on **McWilliams v First Consolidated Holdings (Pty) Ltd** 1982(2) SA 1 (A). At 10 E-H Millers JA held:

> *"I accept that 'quiescence is not necessarily acquiescence' (see Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A) at 422) and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion."*

[55] I disagree with *Mr Oosthuizen's* contention. In my view exh "A10", properly construed, does not establish or create an obligation on the part of the defendant

to deliver to the plaintiff 200 tons of meat over an agreed period at a fixed price. It fails to establish that the price at which the defendant agreed to sell meat to the plaintiff would be fixed for the entire duration of the contract. The letter of 26 June 2003, (exh "A13") written by the defendant to the plaintiff and upon which the plaintiff seeks to rely to show that the agreement was concluded on terms pleaded by it, does not advance the plaintiff's case any further.

[56] In exh "A13" the defendant says: *"Thanks for your 2 faxes that confirms (sic) our discussions".* No where does it confirm that the prices referred to in exh "A10" were to remain constant for the entire duration of the contract. Commenting on exh "A13", Mr Gomez testified that its purpose was to confirm the discussion which took place between the parties regarding the prices and the quantity of meat. On his version the price quoted was a current price and the delivery was to take place on availability of meat basis.

[57] In the circumstances it is incorrect for the plaintiff to contend that Mr Gomez's failure to repudiate the assertion contained in the exh "A10" should be taken to constitute an admission by him of the truth thereof. The assertion which the plaintiff alleges Mr Gomez failed to repudiate is that the price for the committed quantity would be fixed for the entire duration of the contract. There is no such assertion in exh "A10" and being so it did not call for his response as it was unnecessary to do so.

[58] I am not persuaded that the phrase "I have bought 200 tons of ostrich steak from you" as used by the plaintiff in the letter of 24 June 2003 must be looked at in isolation, nor am I persuaded when the phrase is looked at in its context that it was used in the sense of creating an obligation on the part of the defendant to deliver to the plaintiff a committed quantity of meat over an agreed period at a fixed price. The price description in the second paragraph of exh "A10" does not, it seems to me, add any force to the contention advanced on plaintiff's behalf.

[59] The conclusion of the contract on the terms contended for by the plaintiff could only occur in terms of the defendant's offer conveyed to the plaintiff in the letter dated 12 June 2003. That offer was open for acceptance by the plaintiff until 13 June 2003. The plaintiff did not accept it and it lapsed. In terms of that offer the plaintiff was guaranteed a committed quantity of meat at a fixed price until April 2004. In particular in terms of that offer the total quantity of 200 tons over the period was not going to be reduced or increased without prior agreement between the parties. There is no indication in the exh "A10" that these crucial terms were ever raised for consideration at the meeting of 18 June 2003.

[60] Considered against this background Mr Gomez's version is more plausible. He testified that it was his understanding of the discussion of 18 June 2003 that the defendant agreed to deliver the committed volume to the plaintiff subject to availability and price fluctuations as at that stage the volumes which the defendant would keep for the plaintiff in terms of the offer of 12 June 2003 was no longer

available. In the circumstances I accept the defendant's version and find that the contract was concluded on the terms pleaded by the defendant.

Order

[61] In the result the plaintiff's claim is dismissed with costs.

ZONDI, J