Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

Case number: A381/2010

In the matter between:

JOHN VAN LEENDERT BV	APPELLANT
versus	
KLEIN KAROO INTERNATIONAL TRADING (PTY) LTD	RESPONDENT

JUDGMENT delivered this 25th day of May 2011

NDITA, J:

[1] This is an appeal to the Full Court of this Division against the judgment of Zondi J handed down on 23 February 2010 ordering that the plaintiff's claim be dismissed with costs.

[2] For the purpose of convenience I will refer to the parties as they were at the trial. The plaintiff, instituted action against the defendant for payment of a sum of €454 953-80 for damages for loss of profit it allegedly suffered as a result of Respondent's breach of contract.

[3] The plaintiff is a limited company based in the Netherlands, that obtains game meat, more specifically ostrich steaks from various countries for distribution in Europe and is a regular customer of the defendant which supplies such meat.

[4] It is not in dispute that the parties during June 2003 concluded an agreement in terms of which the defendant would supply ostrich meat to the plaintiff. The plaintiff contended that the terms and conditions governing the contractual relationship between the parties were that the defendant was obliged to supply it with 200 tons of ostrich meat at a fixed price. The defendant acknowledged the terms of the agreement regarding the supply of meat but denied that the price was fixed. The defendant averred that the contract was subject to the condition that its obligation was to deliver meat to the plaintiff as and when it had sufficient stock and at the price prevailing at the time of delivery as the ostrich market, depending *inter alia* on availability of stock, fluctuates. Furthermore, the conditions of payment on receipt of stock were to be arranged per order.

[5] After hearing oral evidence, the trial Court, as earlier indicated dismissed the plaintiff's claim. The crisp issue for determination therefore is

whether contract between the parties was for a fixed price subject to the availability of stock.

[6] The legal principles applicable to the standard terms of the contract are trite. Where a party alleges an agreement, that party bears the onus of proving the terms of the agreement. In the present matter, the determination of the issues is essentially a factual one.

[7] It is necessary to refer to the pleadings in this appeal because the arguments presented at the hearing bear reference to them. The terms of the contract as pleaded by the plaintiff are as follows:

The plaintiff in its particulars of claim pleaded an oral agreement between the parties on or about June 2003, which agreement was partially confirmed in an email of 18 June 2003. The agreement obliged the defendant to supply to the plaintiff 200 tons of ostrich steaks at an agreed price. The plaintiff further alleged that the contract was concluded on the understanding that the season of the aforesaid supply of meat in South Africa runs from July to June. In addition, according to the plaintiff, both parties understood that the defendant would have sufficient supplies of meat in order to meet the obligation of providing 200 tons of ostrich steaks.

[8] The defendant on the other hand pleaded that:

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

3.1.1 Dat eiser van tyd tot tyd volstruisvleis van verweerder so 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 betaal is, soos in die geval van plaaslike bestellings;

3.1.3 Die lewerig sou plasvind soos per eiser se instruksies met elke individuelle bestelling; en

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

[9] Business dealings between the parties commenced on or about 1992 or 1993. Mr Johan van Leendert's evidence was to the effect that the negotiations for the supply of 200 tons of meat began sometime in April 2003. Then, the defendant offered a fixed price of €4.35 per kg for the meat and awaited acceptance of the offer by the plaintiff by 11 June 2003. When the plaintiff failed to accept the offer, it lapsed as correctly held by the court *a quo*. For the purpose of this appeal the crucial aspect of Mr van Leendert's evidence relates to an agreement between the parties on 18 June 2003 ("June agreement"). Mr van Leendert testified that at a meeting held with two representatives of the defendant, Mr Gomez and Mr Dampsey, at Oudtshroon

during June 2003, the parties orally agreed that the defendant would supply to the plaintiff 200 tons of Ostrich meat at Euro rate. Mr van Leendert further testified that he took notes of the terms of the agreement as well discussions pertaining thereto. On his return to the Netherlands, he wrote a letter to the plaintiff dated 24 June 2003, confirming what he understood to be the terms of the agreement and stated thus:

"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 we will take fresh by containers or by air and/or frozen. In order to avoid any misunderstandings the product which Swartland will pick up will always be fresh not frozen!!

4. *Fresh Product*

The best option to load fresh goods is Wednesday evening, end (sic) or late afternoon. As you mentioned, in that case the truck will be sealed and Normal Certificate of Health will be issued to the 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 in detail but I suppose "within 14 days" is acceptable to you. In case of C+F deliveries payment condition will be "Cash against Documents at arrival of the boat."

[10] It is common cause that the defendant, in response to the above letter, confirmed the availability of steak for the month of July and August. The parties are *ad idem* that on 7 July 2003, 15, 000 kg of meat was delivered to the plaintiff and another 6,000 kg on 14 September 2003. However, on 13 September 2003 the defendant wrote a letter raising, according to Mr van Leendert, for the first time a drastic shortage of slaughter birds. The letter read as follows:

"We continue to experience a drastic shortage of slaughter birds to meet the normal demand of both fresh and frozen meat orders.

This shortage of slaughter birds is not only experienced by Klein Karoo but also other processors in Southern Africa. Naturally higher prices for slaughter birds are being paid as every role player attempts their normal share of the available birds.

With October slaughtering being only 40% of the allocated slaughtering for the month, we have no doubt that this situation will continue at least until year end and most likely into 2004.

It is for us inevitable to adjust the meat prices accordingly and with effect from 22 September 2003 (consignments arriving from week 14 onwards), the following prices will apply for both fresh and frozen products."

[11] When asked to comment on the contents of the above letter, Mr Van Leendert testified that the terms of the agreement were not subject to the fluctuation of meat prices or availability of meat. The plaintiff rejected the adjusted meat prices and suggested that tons of steak be reduced from 200 to 160. When the defendant refused to reconsider its decision to increase the prices, the plaintiff referred the matter to his attorney on the basis that the plaintiff had breached the June agreement.

[12] In cross-examination by Mr Van Riet who represented the plaintiff both at the trial and in the appeal, Mr Van Leendert re-affirmed that the agreement between the parties on the terms he was contending for was reached before the meeting of 18 June 2003. The witness denied that he was advised by the plaintiff's Mr Gomez during that meeting that the defendant was no longer in a position to give to it a fixed price commitment deal.

[13] The defendant in support of its contentions called Mr Santos Gomez. Mr Gomez sketched the background of ostrich farming and explained that ostrich meat is part of the exotic category and is prone to fluctuations in the

market. According to Mr Gomez, some of their transactions may include a package deal at a specific fixed price. However, the offer of a fixed term that was not accepted by the plaintiff, was the very first occasion for the defendant to consider a possibility of a fixed price. Regarding the June meeting with the plaintiff, Mr Gomez testified that he explained to Mr Van Leendert that given the change in the demand for ostrich meat over the preceding few months, as well as the fact that the offer for the fixed price had not been accepted, the defendant was no longer in a position to guarantee the volume initially offered as the demand for slaughter birds had started to increase. In addition, the defendant's ability to deliver the quantities envisaged could only be confirmed on a month to month basis. Mr Gomez further testified that at that meeting, he made it clear to Mr Van Leendert that the defendant would endeavour to deliver the best it could subject to the availability of the birds.

[14] In cross-examination by Mr Oosthuizen, who represented the plaintiff at the trial and the appeal, with regard to the plaintiff's letter of 24 June 2003 confirming the terms of the agreement, Mr Gomez refuted the suggestion that the words used by the plaintiff, namely, "*I have bought*" supported an inference that this was a fixed price agreement. Furthermore, according to Mr Gomez, the proper context of the letter is that the parties discussed in the meeting that the supply of ostrich meat was subject to availability of stock. In that sense, it could not be understood to refer to a fixed price agreement.

[15] In a matter such this, in which it is alleged that the trial's court findings are wrong, the powers of a Court of appeal are limited. A trial court has the

obvious and important advantage of seeing and hearing the witnesses and of being steeped in the atmosphere of the trial. Indeed this Court does not possess these advantages. Although Courts of Appeal are slow to disturb findings of credibility they generally have greater liberty to do so where a finding of fact does not necessarily depend on the personal impression made by the witness' demeanour but upon inferences from other facts and upon probabilities. In such a case a Court of Appeal with the position of an overall conspectus of the full record may often be in a better position to draw inferences, particularly with regard to secondary facts. (See for example **R v Dhlumayo and Another** 1948 (2) SA 677 (A) at 698, **S v Robinson and Others** 1968 (1) SA 666 (A) at 675 G-H)

[16] Zondi J in his evaluation of the evidence, inferences from other facts and probabilities commented as follows:

> *"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 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 that in the exh "A10" that these crucial terms were ever raised for consideration at the meeting of 18 June 2003."*

[17] There is no evidence of any kind to contradict Mr Gomez's version that the agreement was subject to the availability of birds for slaughter and that

there was no fixed commitment. In order for this Court to reject Mr Gomez's evidence, which was accepted by the trial court, the plaintiff would have to show some basis on which it can be concluded that the trial court erred. The plaintiff has not shown any ground upon which this court should find that Mr Gomez's evidence is unacceptable.

[18] Because the plaintiff's case is based on earlier discussion between the parties, it is necessary to consider the letters which form the basis of the arguments advanced pertaining thereto. It is not in dispute that the parties as early April held discussion exploring the possibility of a fixed commitment. On 16 April the defendant wrote:

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

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

> *"We refer to our telephonic conversation with Nuno regarding the delivery of the 200 tons of steak to Swartland 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."*

[19] The question which arises is whether the undertaking contained in the above letter, arising from negotiations or discussions has been shown to have contractual force. The plaintiff accepted this offer by faxing to the defendant a letter dated 11 June 2003. Responding to the acceptance of the offer, the defendant stated in a letter dated 12 June 2003 that:

> *"Given the exceptionally late confirmation of this order, since the offer of 23 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 kg 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 and will not be reduced pr increased without prior agreement.*
>
> *Your acceptance of this Agreement is to be in writing is to be received by later 13 June 2003, together with the delivery forecast per month, in order to validate and confirm this order."*

[20] The above offer was subject to acceptance of the conditions in writing not later than 13 June of the same year. The plaintiff did not accept or react to

the offer by 13 June and it lapsed. That leaves the plaintiff with only the oral agreement of the 18th June 2003 for which Mr Van Leendert has not given any context of the discussions giving rise to the agreement, but for disputing the terms alleged by Mr Gomez. It may well be that Mr Van Leendert genuinely believed that on 18th June 2003, the parties' discussions were based on the earlier offer as well as discussions between his son and Mr Gomez. However, legally, the offer had lapsed and the exchange of facsimile messages amounted to no more than negotiations. In my view, Zondi J was correct in his assessment of the probabilities, which I believe fully support the defendant's version.

[21] Mr Oosthuizen sought to persuade us that the fact that the parties met only a week after the earlier offer had lapsed, followed by the plaintiff's confirmatory letter of 24 June wherein it stated that *"I have bought 200 tons of ostrich steak from you"*, further coupled with the fact that the terms of the expired offer are similar to the subsequent agreement which he contends was arrived at, is sufficient to swing the probabilities in favour of the plaintiff in this matter. As Mr Van Riet rightly pointed out, Mr Gomez testified that he was no longer prepared to conclude a fixed term contract because by 12 June the demand for Ostrich meat had increased substantially. Therefore the fact that during April he was willing to offer a fixed term commitment does not support the plaintiff's version in any way. In the trial court, Zondi J in considering the meaning of the words *"I have bought"* applied the legal principles relating to interpretation and thus said:

> *"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 that when the phrase is looked at in its context that it was used in the sense 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."

The conclusion reached by Zondi J cannot be faulted. When regard is had to the objective facts of this case, the phrase used in the letter is consistent with both versions of the contract. Similarly, the reference to quantity and price, as well as delivery, cannot be said to support particularly the plaintiff's version that the price was fixed. For all it is worth, the phrase referred to is in my view, neutral.

[22] Mr Van Riet further submitted that the plaintiff's letter of 24 June 2003, on Mr Van Leendert's own version, refers to a contract or agreement he (Mr Van Leendert) believed had already been concluded between Mr Gomez and his son, by way of an exchange of faxes. According to Mr van Leendert the June meeting added a few details to an otherwise existing agreement which contained exactly the same terms as fax discussions between Mr Gomez and Mr van Leendert's son. Again, on the evidence and objective facts, there clearly was no agreement between Mr Van Leendert' s son and Mr Gomez arising from the exchange of faxes as I earlier pointed out in this judgment. At best all that can be said for Me Van Leendert's view is that a putative agreement had been concluded, as contended by Mr Van Riet. Furthermore a thorough consideration of the oral and putative agreements reveals that there are no less than four different and material changes or

additions between the contracts. I deem it unnecessary to set out the points of differences as in any event nothing much turns on them. It would be wrong to draw the inference that the June agreement was a confirmation of the terms of what I refer to as a putative agrrement. Clearly therefore, on Mr Van Leendert's version the phrase *"I have bought"* refers to an unenforceable putative contract and not the oral agreement of 18 June 2003. The facts support Mr Gomez 's clearer version of the discussions of 18 June 2003 giving rise to the oral agreement concluded on the aforesaid date.

[23] For the sake of completeness, I ought to mention that Mr Van Riet, argued that apart from the reasons advanced by the court *a quo* for finding for the plaintiff, at a procedural level, the plaintiff has not proved the oral contract it has pleaded. It is so that in its particulars of claim, the plaintiff placed reliance on an oral agreement of on or about the 18 June 2003. In amplification, the plaintiff averred that in concluding the oral agreement, it was represented by Johan van Leendert, and the defendant by one Mr Gomes. The evidence presented clearly establishes that indeed a meeting took place between the parties on the said date. According to Mr Van Leedert, even if the meeting referred to had not taken place, the parties would still be in court "today". Whilst it is so that the plaintiff failed to prove the oral contract it had pleaded, I do not agree that at procedural level this is the case. I am well aware that in case of a contract it is necessary to state in the pleadings whether the contract relied upon is written or oral and to state when and where and by whom such contracted was concluded and the breach. (See **Vorster v Herselman** 1982 (4) SA 857 (O). The plaintiff has complied with

these requirements in its particulars of claim. I am not of the view that Mr van Leendert's statement that there was an earlier agreement should be viewed as a departure from his pleadings. Erasmus J, in **John Williams Motors v Minister of Defence and Another** 1965 (3) SA (O) 729 at 732 H-733, considered facts in evidence in conflict with facts pleaded and held that:

> *"In matters of contract, for instance, it may sometimes be difficult to ascertain precisely the extent to which the evidence is covered by the cause of action made out on the pleadings and there is greater scope for allowances. This to my mind is so because of the technicalities of the contract itself and the shades of thought in the mind of the contract parties which may lead to a genuine dispute in Court of law."*

Under the circumstances, I am of the view that given the fact that the facts that emerged from the evidence are no more than the plaintiff's understanding of the discussions preceding the June agreement, there therefore can be no merit in this contention.

[24] Mr Oosthuizen submitted that if the plaintiff in the letter confirming the agreement was mistaken and that no transaction had been concluded for the acquisition of the 200 tons of meat, the defendant should have unequivocally corrected plaintiff's assertion that the plaintiff had bought the quantity of meat alleged. The record does indeed reveal that the plaintiff did not. Whilst it must be accepted that there is a clear and urgent duty to speak against an incorrect recording of the terms of a contract in the process of negotiation, failing which the recorded terms will bind the party who remained silent, the facts of this case do not call for the application of this principle. (See for example **Sun**

Radio & Furnishers v Republic Timber & Hardware 1969 (4) TPD 378 at 381 D-E). This assertion must be considered in the context of Mr van Leendert's evidence that when the parties met in June 2003, they already had an agreement. It is difficult for me to imagine how it could be expected that Mr Gomez must assign a meaning to the term and move swiftly to correct it when the plaintiff in the confirmatory letter had failed to mention or confirm to Mr Gomez that they had agreed on a fixed commitment, a term of the contract far more material than the phrase "*I have bought*". Neither is it reasonable to ask him to attach a meaning to a phrase used by the plaintiff. He testified that he understood it in the context of the discussions that took place, namely, that the contract was subject to market fluctuations and availability of stock. The submission that the defendant should have corrected the plaintiff when he wrote that he had bought 200 tons of ostrich meat is for all these reasons unmeritorious.

[25] I conclude therefore that the plaintiff failed to prove the contract it had pleaded and that the findings of the court a quo were justified when regard is had to the pleadings, the evidence and the objective facts.

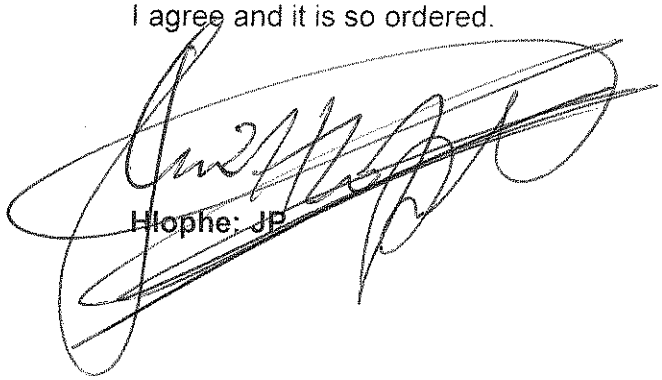
[26] For all these reasons, I would dismiss the appeal with costs.

NDITA: J

I agree.

Cleaver: J

I agree and it is so ordered.



Hlophe: JP