IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No :AR675/10

In the matter between :

Fed Trade CC Appellant

and

Estcort Limited Respondent

Judgment

Lopes J

[1] This matter comes before us by way of leave to appeal granted to the appellant on the 21st September 2010. The appellant as plaintiff, sued the respondent as defendant in the court a quo, and had its claim dismissed with costs by Nicholson J. I shall refer to them in this judgment as the plaintiff and the defendant respectively.

[2] The plaintiff's case comprised seven different claims for varying amounts. The claims were all based on contracts allegedly concluded between the plaintiff and the defendant for the delivery of meat products. The plaintiff is an importer of meat products from around the world. It imports and

distributes these products to manufacturers of processed meat products, such as the defendant.

[3] At the outset of the trial, Nicholson J was asked to grant an order separating the issues. He did so. The two issues which fell to be considered by him prior to any other evidence being led were :-

a) whether agreements were concluded with regard to certain of the products; and

b) whether the claims by the plaintiff against the defendant were thereafter compromised.

[4] In his judgment Nicholson J found that it was not necessary to decide the first issue because he had arrived at a firm conclusion on the second issue – i.e. that the plaintiff's claim had been compromised.

[5] In his judgment Nicholson J set out in brief the history of the relationship between the parties and it is not necessary for me to deal with that evidence. The crucial evidence is that it became clear to the parties that a dispute had arisen between them with regard to the nature and extent of the defendant's contractual obligations.

[6] A series of emails were exchanged. Those emails which are relevant appear in Bundle 'A' from pages 6 to 14. On the 8th September 2005 the defendant sent an email to the plaintiff ('the offer email') setting out various proposals clearly designed to settle the issues which had arisen between

them. To assist with an overstocking situation which was causing the plaintiff severe financial difficulties, the defendant offered to purchase certain products (including Machine Deboned Meat, or MDM, at a price of R3,45 per kilogram) delivered in Estcourt, on a monthly basis, for a specified period. The email contained various proposals for different meat products but significantly ended with the following sentence : 'The above arrangement should be seen as a package and will be conditional to the MDM proposal price of R3,45.'

[7] The plaintiff replied to the defendant's email on the 14th September 2005 with an email ('the acceptance email') containing the subject heading : 'your proposal on orders not executed'. After complaining that the defendant had placed the plaintiff in a dire financial position because of its failure to fulfil its commitments, and after drawing attention to the fact that defendant's failure to accept delivery of the product continued to cause the plaintiff to incur storage bills, Mr van Rensburg, the CEO of the plaintiff stated : 'We are forced to accept your proposal to draw this product but reserve our rights.'

[8] The defendant contended that this email constituted an acceptance by the plaintiff of the defendant's offer of compromise. Mr van Rensburg maintained that the words 'but reserve our rights' at the end of the acceptance email indicated that the plaintiff still wished to persist against the defendant for what it claimed was due to it, and was not compromising its claim.

[9] In cross-examination by Mr *Bergenthuin* SC for the defendant, Mr van Rensburg conceded that orders were placed by the defendant in accordance

with the offer of the 8th September 2005, deliveries were made by the plaintiff in accordance with those orders, and the defendant paid the plaintiff the amounts due in terms thereof.

[10] The question which remains is whether the so-called reservation of rights by Mr van Rensburg was sufficient to negate his acceptance of Mr Prinsloo's offer.

[11] Mr *Rowan* SC, who appeared for the appellant submitted that one needs to pay close attention to the words contained in both the offer made by the defendant and its alleged acceptance by the plaintiff. In this regard he pointed to :-

(a) the fact that in the offer email there was no resolution of the issue of the supply of pork cutting fat. This had been raised in previous emails. In the offer email, Mr Prinsloo recorded that Mr van Rensburg had promised to provide him with figures regarding the historical provision of that product. Mr *Rowan* SC submitted that because this was only referred to, but not dealt with, that was clearly one of the aspects with regard to which Mr van Rensburg reserved his rights. In my view this could not have been intended by Mr van Rensburg because :-

(i) the day after the acceptance email was sent the defendant placed orders with the plaintiff which did not include any provision for pork cutting fat;

(ii) those orders were filled by the plaintiff;

iii) the defendant paid for the goods delivered, and in the case of

the MDM, paid the compromise price;

(iv) no further correspondence was referred to during the trial alluding to a continuing dispute regarding the pork cutting fat, or any further request that Mr Prinsloo take delivery of it;

iv) in his evidence-in-chief and cross-examination Mr van Rensburg made no reference to any further discussions regarding the pork cutting fat; and

vi) had Mr van Rensburg entertained reservations in his offer with regard to this item, he would undoubtedly have dealt with it both in correspondence, and in his evidence;

(b) Mr *Rowan* SC referred to the words 'We are forced to accept your proposal to draw this product …'. He submitted that this indicated that the only acceptance of the offer made by Mr Prinsloo, was an acceptance of the agreement to accept delivery of the MDM product until the end of January 2006. However, :-

(i) from the further conduct of the parties this was not the only part of the offer which was accepted by Mr van Rensburg. This is evident from the orders which the defendant placed thereafter and which were accepted. They not only included MDM but also rinds and pork bellies;

(ii) the wording of the offer email makes it absolutely clear that Mr van Rensburg was to view the offer 'as a package' and that it was conditional upon Mr van Rensburg accepting the MDM proposal price of R3,45;

(iii) that he did so is clear from the orders placed the day after the

acceptance email. The MDM product was reflected at R3,45 per kilogram, which was delivered by the plaintiff, and paid for by the defendant, at that price; and

(iv) had the plaintiff wished to refuse the offer, Mr van Rensburg should have said so in clear terms. It was not open to him to accept only part of the offer. See Turgin v Atlantic Clothing Manufacturers 1954 (3) SA 527 (T) at 532 A.

[12] A reservation of rights of its own has no magic. It cannot be seen to convert what was otherwise an express agreement into a partial agreement by the plaintiff, and a partial reservation of its right not to agree and to dispute the defendant's contentions.

See : Paterson Exhibitions CC v Knights Advertising & Marketing CC 1991 (3) SA 523 (A) at 529 B – D

[13] In the last sentence of the offer email Mr Prinsloo clearly set out that all the conditions in its email were to be seen as a package which was conditional upon acceptance by the plaintiff of the MDM proposal price of R3,45 per kilogram. Not only was this accepted by the plaintiff but it acted upon it by accepting the orders, delivering the product and accepting payment of the purchase price.

[14] In establishing a defence of compromise, the onus is on the party alleging the compromise to prove it. See The Torch Moderne Binnehuis Vervaardiging Venn. (Edm.) Bpk v Husserl 1946 CPD 548 at 550 – 551. I

also accept that an offer of compromise should be strictly interpreted in accordance with the ordinary requirements for proving a contract.

See Be Bop a Lula Manufacturing and Printing CC v Kingtex Marketing (Pty) Ltd 2006 (6) SA 379 (C), paras 18 to 25.

It is also important in determining whether a compromise has been established to have regard to the evidence and the conduct of the parties concerned. Whether or not the compromise has been established will depend upon the facts of each case – see Hubbard v Mostert 2010 (2) SA 391 (WCC), para 11.

[15] Having regard to the evidence which was led and the documents concerned, there can be no doubt that an offer was made by Mr Prinsloo in clear and unambiguous terms. That offer was understood and accepted by Mr van Rensburg. The fact that he added the rider 'but reserve our rights' cannot assist him. It is clear from the tone of the emails that Mr van Rensburg found himself and the plaintiff under tremendous pressure to reach a compromise with the defendant. Given his circumstances it comes as no surprise that he did so, and his continued conduct after the acceptance email confirms his intention in accepting the offer of Mr Prinsloo.

[16] In those circumstances, Nicholson J was correct in his analysis of the issues and the conclusion which he arrived at dismissing the plaintiff's claim with costs.

[17] In the circumstances I would dismiss the appeal with costs.

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Lopes J

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Roberts AJ I agree.

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D Pillay J I agree and it is so ordered.

Date of hearing : 8th June 2011

Date of judgment : 10th June 2011

Counsel for the Appellant : P Rowan SC (instructed by Grundlingh Attorneys)

Counsel for the Respondent : J G Bergenthuin SC (instructed by van der Merwe du Toit Inc)