THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: A244/2012

In the matter between

GLOFRESH (EDMS) BPK	Appellant
versus	
ELJOHNA DU TOIT	1st Respondent
FRANCOIS DU TOIT	2nd Respondent
MARTHA CATHARINA DU TOIT	3rd Respondent

JUDGMENT: 29 NOVEMBER 2012

MacROBERT, AJ

INTRODUCTION

[1] On 30 January 2012 Appellant noted an appeal in the Worcester Magistrate's Court against the whole of the judgment delivered under case number 8874/09 on 21 October 2011 in which the court *a quo* dismissed the Appellant's defence and entered judgment for the respondent for payment of the sum of R64 800 together with interest a *tempore morae* from date of demand to date of payment and costs of suit. For the sake of convenience I shall refer to the parties as they were in the court *a quo* namely the Appellant as Defendant and the Respondents as Plaintiffs.

[2] There is an application for condonation for the late prosecution of the appeal, which was noted on 30 January 2012.

The notice in terms of Rule 50(4) of the rules of the Magistrate's Court was filed on 7 May 2012, some 25 days (or 5 weeks) later whilst the application for condonation was only filed on 31 October 2012, almost 6 months later.

[3] The application for condonation is supported by an affidavit of Mr Jacobs, the sole director of the Defendant in which he seeks to explain the delay. The condonation application was not opposed by Plaintiffs.

[4] Judgment in the said amount was entered by the court *a quo* pursuant to an oral marketing and sale agreement in terms of which the Plaintiffs, trustees of the Eljohna du Toit Trust which farms table grapes in the De Wet area, Hex River Valley, delivered to the Defendant for onward export, marketing and sale in the European market, 2160 cartons of sunred seedless grapes at a fixed cost of R30 per carton.

[5] The essence of the dispute between the parties was the precise nature of the oral contract – i.e. whether it was one of a fixed price per carton as alleged by the plaintiffs or one of the consignment as alleged by the Defendant, as also the precise terms of the agreement as pleaded and as relayed by the evidence at the trial.

[6] The Defendant raised three grounds of appeal namely that the court *a quo* erred in finding that the Plaintiffs proved on a balance of probabilities that the Defendant had breached the contract; that the Plaintiffs had delivered grapes of good quality and that the contract implied that the *exception non adempleti contractus* was not applicable (a ground which has not been pursued on appeal).

[7] A further ground has been put up in Defendant's heads of argument on appeal, namely that the terms of the oral contract as pleaded by the Plaintiffs in their particulars of claim and in their reply to Defendant's request for further particulars were not the terms of the contract as testified to at the trial.

[8] Ms E du Toit, trustee, and daughter of the two other trustees, was the sole witness for Plaintiffs

[9] In February 2009 she telephoned Mr Jacobs of Defendant with regard to the marketing and sale of 2160 cartons of sunred seedless table grapes, having contracted with another agent, Supreme Fruits to market and sell the balance of the same varietal picked from the same block at the same time. That agreement was on a consignment basis.

[10] She had contracted with Defendant to market and sell in excess of R200 000 worth of table grapes that season, all on a fixed price basis save for the varietal crimson which was on consignment. The other varietals so contracted were apparently destined for the Far East market.

[11] In the initial call, a fixed price of R45 per carton was agreed although Mr Jacobs who was the only witness for Defendant remained adamant that at all times the agreement was one of consignment which was the only basis upon which he did business in Europe and that he only ever provided a price estimate or indication, and not a fixed price.

[12] Subsequent to that call Jacobs advised her that there was something of a quality problem but he could definitely offer R30 per carton and so she contended was it thus

agreed, and the initial agreement so novated. Jacobs confirms mentioning an initial price indication of R45 per carton and after the grapes had landed in Rotterdam and had been inspected that he had contacted Ms du Toit to advise her of the slight quality problem and that a revised price indication was R30 per carton.

[13] The grapes had been approved by a Perishable Product Export Control Board (PPECB) inspection, placed into cold storage and then delivered for shipping. They were shipped in two different containers along with other cartons of table grapes on 23 February 2009, arriving in Rotterdam on 10 March 2009. However, Plaintiffs grapes could not be separately identified on inspection as will be seen below.

[14] There is a condition report on arrival by surveyor Arnold Pijpers dated 17 March 2009. The overall quality score per his opinion was 04 moderate ("selective receivers only marketing problems to be expected").

This is presumably what led Jacobs to contact Ms du Toit and advise her of quality problems and when the discussion revolved around a drop from R45 to R30 per carton.

[15] There is a quality report in respect of the Supreme Fruits consignment of Plaintiffs Sunless seedless grapes from Rotterdam Fruit surveyors, the overall opinion showing a quality score of 06, "mainly acceptable".

These grapes yielded a price of R26.32 per carton for large grapes and R30.41 for extra large grapes.

[16] Jacobs contended that the Plaintiff's grapes had botrytis and were ultimately sold at a loss. The Defendant's European client was Heinrich Hodorff and in a statement dated 6 May 2009 containing a reconciliation of 3600 cartons of sunred seedless grapes

(amongst which appeared to be the Plaintiffs) reflecting income from sales and cost of sales including freight, transport, import, storage etc, a net loss of 1,980.00€ is reflected.

[17] It became clear that there was no quality report available which ring-fenced the Plaintiffs' grapes as they had been shipped in two containers with other producers grapes, something I return to below.

[18] Ms du Toit stated that had she been alerted earlier by Jacobs as to there being a possible loss due to quality problems, she could have taken timeous and precipitate action.

[19] Jacobs contended that the grapes could not be sold to the supermarket client that had been lined up, but rather wholesale, for much less and at an overall loss.

He stated that the Defendant had not received any payment from the sale of the grapes but rather suffered a loss in respect of which it originally counterclaimed but withdrew the counterclaim at the outset of the trial for reasons he found difficult to explain in cross-examination, blustering somewhat. The withdrawal of the counterclaim seemed incompatible with Defendant's version of the nature and terms of the oral agreement it alleged to be one of consignment and in terms of which Plaintiffs would bear any loss.

[20] A contract of consignment was explained by Defendant to be one where the Defendant would act as agent for the grower; would market and sell the grapes for the export market at the highest achievable price (usually providing a possible net price indication per carton), and after all costs associated with export, marketing and sale, as also Defendant's commission had been deducted, the grower would receive the net realisation. If the cost of marketing and sale exceeded the proceeds of sale the grower would be liable to refund these to the Defendant. Ms du Toit greeted this proposition with incredibility and said she would never have contracted on that basis.

[21] A contract based on a fixed price per carton entails the Defendant carrying the risk (but also a prospect of gain). The grower receives the amount contracted for irrespective of the ultimate selling price which, if the net proceeds are in excess of the argued fixed price, the Defendant would pocket the excess. However, if less, the Defendant would bare the loss.

[22] The Defendant described a third variant of contract, namely one based on a minimum price per carton which I shall not go into as it was not in issue in this matter.

[23] There are in essence two crisp issues for decision in this appeal mainly:

23.1 The precise nature and terms of the oral argument between the parties, i.e. whether it was one of a fixed price per carton or a marketing and sale on consignment agreement.

23.2 whether the nature and terms of the agreement as testified to by Ms Du Toit on behalf of Plaintiffs corresponded in whole or part with the agreement as pleaded by Plaintiffs and if not, what the legal effect of this is given that this involves pleadings of the Magistrates Court.

[24] **The following constitutes common cause facts or factual averments not challenged in cross-examination:**

24.1 the was an initial telephonic discussion between Du Toit and Jacobs in February 2009 with regard to the Defendant marketing and selling 2160 cartons of sunred seedless grapes for export in the European market during which a price of R45 per carton was mentioned (Du Toit alleging this was a fixed price, Jacobs that it was a price indication only for consignment purposes);

24.2 there was a subsequent discussion on a date DuToit could not recall (but probably in March 2009 after the grapes had landed in Rotterdam) in which Jacobs advised her that there was a slight ("effens") problem with the quality of the grapes and a reduced figure of R30 per carton was mentioned (du Toit contending that she agreed to a reduction in a fixed price and hence a novation of the contract, Jacobs contending that this was a reduced price indication or expectation);

24.3 Jacobs did not show du Toit any evidence of the quality problems initially (that is such evidence as may have been available) and she only came into possession of the quality reports on 31 August 2009 after the Defendant refused to pay;

24.4 A at 26 August 2009 Jacobs advised du Toit that he could still get Plaintiff's R30per carton (which is strange considering Heinrich Hodoff's account on 6 May 2009 and the fact that the grapes had, to Jacobs knowledge, already been sold at a loss);

24.5 Jacobs told du Toit on 26 August that, she would receive the R30 per carton for her if Plaintiff's provided Defendant fruit for export the following season. (this was described by Plaintiffs' legal representatives as blackmail);

24.6 On 27 August 2009 the Defendant denied all liability to Plaintiffs for payments of any amounts;

24.7 The sunred seedless grapes marketed and sold on consignment by Supreme Fruits and which was picked from the same block fetched R26.32 and R30.41 per carton respectively;

24.8 The business relationship between du Toit and Jacobs was based on trust;

24.9 All of Plaintiff's grapes marketed and sold by Defendant that season where on a fixed price per carton basis save for the crimson varietal.

[25] The court *a quo* found du Toit to be a credible witness.

THE QUALITY OF THE GRAPES

[26] The Defendant complained that the quality of grapes delivered by Plaintiffs was sub-standard and had botrytis which resulted in a loss. He claimed that the onus of proving the quality of the grapes that had been delivered rested on Plaintiffs.

[27] The Plaintiffs pleaded that they were required to deliver ordinary PPECB standard grapes. Du Toit's uncontroverted testimony was that the sunred seedless grapes in question had been inspected by a PPECB inspector and found to be in order for export. That successfully discharged the onus on them.

[28] The onus thereafter shifted onto Defendant upon assumption of the risk, that the grapes in question were indeed of unacceptable quality. In this regard a somewhat damning exchange of emails took place between Jacobs and Anton Bothma his overseas agent as late as September 2009, from which it is apparent that the inspection reports and photographs available were not able to pinpoint the condition of the Plaintiffs' grapes, undermining Jacobs's evidence of significant taint due to botrytis.

[29] In an email of 16 September 2009 to Bothma, Jacobs goes further to say that legal proceedings had been initiated against Defendant and if evidence as to the quality of grapes on arrival was not forthcoming Defendant would have no defence to the claim. No such evidence was submitted.

THE PLEADINGS

[30] The case pleaded by the Plaintiffs is one of an oral marketing and sale contract between Plaintiffs and Defendant in terms of which Defendant undertook to pay R30 per carton.

In Plaintiffs' reply to Defendants request for further particulars in which the contents of each and every term were requested, Plaintiffs response was:

30.1 The agreement was of a fixed price of R30 per carton delivered;

30.2 Payment of an advance ('voorskot') (in an unspecified amount) once Defendant received monies from the sale and the balance once Defendant had received all the money from the sale of the grapes, the balance normally being paid within 30 days of delivery of the grapes;

30.3 The Plaintiffs were required to deliver ordinary PPECB standard grapes.

[31] Defendant pleaded that a marketing agreement was entered into whereby it would market and sell the grapes overseas at the best available price. The sale price less marketing costs including freight, commission, transport etc, would be paid to Plaintiffs, but if the grapes achieved a poor price or could not be marketed, Plaintiff would nonetheless be liable for the marketing costs.

[32] Du Toit's evidence as to the content and terms of the agreement was that normally, as a matter of industry practice, an advance of "voorskot" was paid (presumably only if Defendant had received monies) and payment of the balance would follow within 60 days, but often that period would be stretched as agents such as Defendant are often not timeously paid.

[33] Du Toit's evidence throughout was steadfast, namely that the agreement was one of a fixed price per carton. The construction that Defendant seeks to place upon the

Plaintiffs reply to the request for further particulars is totally at odds with both her evidence and standpoint that the contract was one of a fixed price per carton.

[34] There is no basis for this court to interfere with the court *a quo's* finding that Du Toit was a credible witness. Mr Botha for Plaintiff has referred to the well known authorities which emphasise the limited grounds upon which an appeal court may interfere with such findings.

[35] On the other hand Jacobs's dealings with Du Toit and his actions and conduct throughout, as set out above, gainsay Defendant's, version that the contract was one of consignment.

[36] Insofar as the Plaintiff's pleadings are concerned they are unambiguous that a fixed price contract is pleaded. There may be some ambiguity as to the mode and time of payment which du Toit described in her evidence as being standard industry norms.

[37] Mr Botha for Plaintiffs has referred to some authorities in relation to pleadings.

There are: "***Robinson v Randfontein* Estates EMG** Ltd 1925 AD 173 @ 198 in which Innes CJ observed ":

> "The object of pleadings is to define the issue; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within these limits the court has a wide discretion, for pleadings are made for the court, not the court for pleadings."

[38] Insofar as pleadings in the Magistrate's Court are concerned reference was made by Mr Botha to the judgments in ***Ellisons Electric Engineers Ltd v Barclay*** 1970 (1) SA

158 (SCA) and ***De Beer v Sergeant*** 1976 (1) SA 246 (T) which adopt a more lenient approach to such pleadings and which emphasise that they should not be viewed through a magnifying glass and short comings and technical deficiencies should not be overemphasised with the result that justice does not prevail.

[39] In this matter whatever construction the Defendant seeks to place on the pleadings there was no prejudice established and a full enquiry into and ventilation of all the issues took place. Moreover du Toit's evidence as to the agreement was not a deviation from the crux as to what was pleaded.

[40] In the premises the Plaintiffs proved their claim on a balance of probabilities and there is no basis for this court to interfere.

[41] Accordingly, the following order is proposed:

1. Condonation for the late prosecution of the appeal is granted.

2. The appeal is dismissed with costs.

MacROBERT, AJ

I agree. It is so ordered.

SALDANHA, J