REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between: Case No: 3228/2010

M G REYNOLDS (PTY) LTD Plaintiff

And

CROWN CHICKENS (PTY) LTD t/a SOVEREIGN FOODS Defendant

Coram: **Chetty, J**

Date Heard: **7 and 8 November 2011**

Date Delivered: **24 November 2011**

Summary: ***Contract*** *– Supply Agreement – Whether evidence established that defendant repudiated agreement – No such repudiation established – breach caused by plaintiff's failure to supply agreed quantity of bales – Plaintiff's claim dismissed – Defendant's counter-claim upheld.*

JUDGMENT

<u>Chetty, J</u>

[1] The defendant company is a large scale chicken producer conducting business on thirteen (13) broiler farms in the city of Port Elizabeth and its environs. In conformity with its production methodology the day old chicks are from day zero[1], introduced into and confined in chicken houses. The defendant

1 The terminology used in the industry.

has one hundred and ten (110) chicken houses in total ranging from four (4) to thirteen (13) per farm. To achieve optimum production results, wood shavings are evenly spread throughout the rearing area in the chicken houses to a depth of thirteen (13) millimetres to which the chicks are confined pending their eventual slaughter, forty two (42) days hence, a period, euphemistically referred to in the evidence as, a crop cycle. The shavings are then removed and a new bed laid for the next crop cycle. During the latter half of 2008, the plaintiff's principal, Mr *Martin Reynolds* (**Martin**) was introduced to the defendant's head of agricultural purchases, Mr *Andre Kapp* (**Andre**), by its general manager as a potential supplier of wood shavings. Its existing major supplier was a company based in the East London area. I shall henceforth refer to the various witnesses who testified by name, in conformity with the manner they were referred to during the trial.

[2] The plaintiff's business had hitherto not encompassed the manufacture of wood shavings. It owned land in fairly close proximity to the defendant's major broiler farms and over the passage of time had accumulated a vast quantity of raw material necessary for producing wood shavings. This confluence provided the catalyst for the parties to conclude a written agreement for the plaintiff to manufacture, supply and sell wood shavings to the defendant. The plaintiff could generate an income from a hitherto dormant commodity and the defendant could access an essential component of its production requirements locally with its attendant cost savings.

[3] Following upon the initial discussions between the parties, **Martin** gave **Andre** the assurance[2] that he could commence production by 1 August 2008 initially producing five hundred (500) to a thousand (1000) bales of shavings (bales) for the first month and thereafter to increase production to six (6000) to seven thousand (7000) bales monthly. Mollified by **Martin's** assurance and cognisant that given the exigencies of poultry farming, a secure and long term supplier of wood shavings was of paramount importance, the parties concluded a written agreement based upon the plaintiff's guarantee of a continuous supply of fine pine wood shavings for five (5) years[3], during which the plaintiff would supply no less than six thousand five hundred (6500) bales per month to the defendant commencing on 1 December 2008. In addition to the aforegoing terms, the other essential terms of the agreement were that the plaintiff undertook to supply the defendant solely; the mass of each bag would be at least twenty five (25) kg; for the duration of the five (5) year term, the price per bag would be R21.95 for the period 1 December 2008 to 20 November 2009, payable thirty (30) days from month end statement, with a settlement discount of 2.5%; annual price escalations would be determined by the official consumer price index (CPI); further price increases, necessitated by fluctuations in the price of electricity and diesel, would be determined according to a specified formula as per clause 7 of the agreement.

2 Martin's e-mail to Andre dated 22 July 2008 (Annexure "A1")
3 Clause 2.1 of the Agreement

[4] On 5 August 2010, ***Martin*** e-mailed **Andre** conveying his decision to cancel the agreement by reason of what he contended was the defendant's breach, or repudiation (or a combination of both) of the agreement, and in due course instituted an action for damages. In its plea the defendant denied being in breach of the agreement and pleaded that the plaintiff was in breach by consistently being unable to fulfil its contractual obligations to supply it with six thousand five hundred (6500) bales of shavings per month. Consequently, it contended that by reason of the ***"breach (es) and repudiation"***, the defendant cancelled the agreement with effect from April 2010. It counter-claimed, seeking damages for R963 672.00 and R3 158 295.00, the first amount representing the additional amount expended by it for payment of shavings which the plaintiff failed to deliver, and the second, being the difference, over the remaining five (5) year period of the agreement, between the contractual amount and that which it would in future have to pay to another supplier[4].

[5] At the commencement of the hearing before me and, at the behest of the parties, I ordered a separation of the merits of the action, the quantum component to stand over for later determination. Prior to closing the plaintiff's case, I acceded to Mr *van Rooyen's* application to amend the plaintiff's particulars of claim by substituting paragraph 7.3 with a new claim reading: -

> ***"7.3 From about July 2009, the Defendant refused to pay for shavings in accordance with the provisions of clause 7.5 of the contract, and unilaterally altered the period in the***

4 The second leg of the counter-claim was not persisted with and nothing further need be said about it.

clause to 60 days"

and amending clause 9 by the addition of the words ***"[a]nd/or pay on 30 days as provided in the said clause 7.5."***, the amended clause now reading:-

> ***"The defendant refused to place orders on (sic) the plaintiff and/or accept any price increase and or pay on 30 days as provided in the said clause 7.5"***

[6] During his closing argument Mr *van Rooyen* submitted that the plaintiff was entitled to cancel the agreement by reason of the defendant having repudiated it in three vital respects, viz, its refusal (i) to order the agreed monthly quota of six thousand five hundred (6500) bales; (ii) to accept and implement the price increase in accordance with the provisions of the agreement and, (iii) to make payment on thirty (30) days as stipulated in the agreement.

[7] The first leg of the argument is premised on the repeated allegation in the particulars of claim that the defendant was contractually bound to order a minimum of six thousand five hundred (6500) bales of shavings per month. Although the agreement itself makes no reference to orders being placed, **Martin** testified that by virtue of the constraints attendant upon delivering to thirteen (13) farms, practical considerations required that orders in respect of a particular farm's requirements be either telephonically placed or e-mailed to the plaintiff to facilitate deliveries. Consequently, in order to comply with its contractual

obligations, it awaited such orders to be placed by the defendant and suggested that clause 6.2 of the agreement was a material term of the contract. Neither in the particulars of claim nor in argument before me did Mr *van Rooyen* contend that clause 6.2 was a material term of the agreement.

[8] In my judgment, clause 6.2 was merely a provision inserted into the contract to regulate deliveries. It constitutes an operational requirement and was clearly not a term of the contract. The distinction between a provision and a term was succinctly articulated by Cameron J.A., in **Absa Bank Ltd v Swanepoel N.O.**[5] where the learned judge stated the following[6]:-

> ***"[6] At its simplest, a contract is an enforceable promise to do or not do something. But when parties record an agreement in writing, they often add provisions that do not embody such promises. A contract may have a preamble. It may contain 'recordals' and 'recitals'. It may document prior events, or record the parties' future intentions. It may contain clarificatory or explanatory statements. The parties may place on record matters that bear on the interpretation of what they have undertaken. It is therefore wrong to approach a written contract as though every provision is intended to create contractual obligations.***
>
> ***[7] It may be difficult to determine whether a written provision is intended to embody a promise to do or not do something, or whether, without itself constituting an undertaking, it merely bears upon what the parties have undertaken. A recent illustration of a dispute about the extent of a contract's operational provisions, about which this Court was divided, is MAN Truck & Bus (SA) (Pty) Ltd v Dorbyl Ltd***

5 2004 (6) SA 178 (SCA)
6 At page 181 para [6] and [7]

> ***t/a Dorbyl Transport Products and Busaf. But the question whether a contractual provision has operational content is fundamental to the ambit of the obligations the parties undertake, and it precedes the application of rules designed to establish the proper interpretation of their undertakings. Only once it is determined that a provision was intended to have contractual effect will the Court try to interpret it so as to give it business efficacy. If it was not so intended, those rules of interpretation do not come into play. No 'business meaning' can be conjured out of a clause that was not intended to have contractual effect at all."***

There can be no question that in *casu*, the clause was intended to have any contractual effect. It was a provision to facilitate delivery to the various farms and nothing more.

[9] It is not in issue that a delivery was preceded either by a telephone call followed by an e-mailed purchase order or merely a purchase order sent by e-mail. It is common cause that prior to a delivery taking place, **Martin** and **Andre** met and the defendant's requirements for the pending crop cycle discussed. The dispute that exists relates to whether the order placed by the defendant was limited to the amount of shavings the plaintiff was able to supply or not. According to **Martin**, the volume of the orders placed was entirely at the whim of the defendant and not occasioned by his supposed inability to produce the required volume of six thousand five hundred (6500) bales.

<u>Was the plaintiff able to produce and supply the required 6500 bales per month?</u>

[10] On the probabilities **Andre's** evidence must be preferred. He testified that given the problems encountered by the plaintiff's failure to supply the agreed six thousand five hundred (6500) bales, he held meetings with **Martin** in order to establish the amount of shavings the plaintiff would be able to supply. Once that amount had been determined orders commensurate therewith would be placed and the balance of the defendant's requirements sourced from other suppliers. On **Martin's** version the meeting would be superfluous – all it needed to do was to telephone the defendant and enquire where the bales were to be delivered. It is not in issue that notwithstanding the initial commitment to supply six thousand five hundred (6500) bales per month, the plaintiff was unable to do so. The commencement date for the supply was 1 December 2008. By 9 December 2008 no deliveries had been made, **Martin** advising **Andre** of a host of problems which he, rather optimistically, considered would be hastily resolved. By the end of January 2009 the plaintiff's problems persisted and **Martin** advised **Andre** to continue sourcing the shavings from his existing supplier pending the resolution of his supply problems. On 10 February 2009, **Martin** assured **Andre** that the plaintiff was ***"fully operational"*** five (5) days a week and producing fifty (50) bales per day and that production would be significantly increased once a second machine had been purchased. By 26 February 2009 the plaintiff's production capacity had not increased. On 5 March 2009, **Martin** finally admitted that he

could not comply with his contractual obligations and proposed that the parties form a joint venture to enable him to produce wood shavings. Further discussions ensued over the following weeks but nothing materialised. **Martin** testified that it was only in September 2009 that he was able to produce the required six thousand five hundred (6500) bales of shavings. That evidence is entirely inconsistent with the content of his e-mails to the defendant prior to December 2009. By his own admission he had failed to honour his contractual obligations for the entire first year of the agreement. The excuses proffered for his inability to render performance in terms of the contract ranged from adverse weather conditions to machinery malfunction and lack of capacity.

[11] On 8 April 2009, **Andre** provided **Martin** with a copy of the defendant's new trading terms and conditions and invited his response. Although **Martin** thereafter dispatched several e-mails to the defendant concerning the anticipated increase in production, it was only on 29 July 2009 that he requested the defendant to continue with the agreed payment terms. No favourable response was forthcoming. By 13 August 2009, production had still not increased. On 30 November 2009, **Martin** gave the defendant notice of the plaintiff's price increase effective from 1 December 2009 as per the supply agreement. The defendant responded by rejecting the proposed increase on the basis of the plaintiff's continued failure to supply in terms of the agreement. On 1 December 2009, **Martin** begrudgingly admitted the correctness of the defendant's averments but once more made extravagant promises to comply with the agreement.

[12] On 13 December 2009, **Martin** did a complete somersault. Notwithstanding his yearlong excuses for not supplying the defendant with the requisite amount of wood shavings, he now apportioned the blame to it because of their failure to have ordered six thousand five hundred (6500) bales per month. Thereafter, and for the next two months the plethora of e-mails continued unabated and by March 2010 the relationship had all but terminated. The defendant placed orders on an *ad hoc* basis in conformity with the plaintiff's increased price structure and finally, on 9 July 2010, **Andre**, following a flurry of e-mails between **Martin** and *Irma Rishworth* (**Irma**), the defendant's group procurement manager, berated **Martin** for his failure to perform his contractual obligations.

[13] **Martin's** e-mail response on 12 July 2010 that he had the ability and capacity to supply the defendant with six thousand five hundred (6500) bales per month was yet another example of his extravagant promises. During his testimony he remained steadfast that he could, had the defendant placed orders for the requisite amount of shavings, been able to supply same. It was clear from **Andre** and **Irma's** evidence that the plaintiff had neither the capacity nor the ability to do so. His own e-mail dispatches prove the contrary. It is furthermore apparent from the schedule[7] which **Andre** and **Martin** jointly compiled for trial purposes that at no stage during the subsistence of the contract was there any delivery made of six thousand five hundred (6500) bales. Over the period

7 Exhibit "A" at pages 53-54

February 2009 to April 2010 the average monthly supply amounted to two thousand six hundred and fifteen (2615) bales, considerably below that agreed upon.

[14] It follows from the aforegoing that the submission advanced by Mr *van Rooyen* that the contractual breach was occasioned by the defendant's refusal to accept the proffered amount of six thousand five hundred (6500) bales of shavings per month is entirely misplaced. As adumbrated hereinbefore, the submission is factually incorrect. The evidence, both documentary and *viva voce*, conclusively establishes that it was the plaintiff's failure to supply the agreed amount of shavings that constituted the breach.

Did the refusal to agree to the price increase constitute a repudiation?

[15] It will be gleaned from the aforegoing that **Martin** notified the defendant of the price increase presaged in clause 7 of the agreement on 30 November 2009. On the same day, the defendant informed him that by virtue of the plaintiff's failure to supply it with the requisite amount of shavings, it would not agree to the increased price. As adumbrated earlier, this refusal was said to constitute a repudiation of the agreement. The short answer to the submission is succinctly articulated in **Moodley and Another v Moodley and Another**[8] where Nienaber J, said the following:-

8 1990 (1) SA 427 (D) at 431G

> ***". . . that a party to a contract ought not to be allowed, by his own wrongful conduct, to advantage himself or to disadvantage his counterpart. To permit the repudiating party to take advantage of the other side's failure to do something, when that failure is attributable to his own repudiation, is to reward him for his repudiation;"***

The defendant's refusal to agree to the plaintiff's price increase did not amount to a repudiation of the agreement.

<u>Did the defendant's unilateral variation of the payment terms amount to a repudiation?</u>

[16] Clause 7.5 of the agreement provides as follows:-

> ***"The supplier will allow Crown payment terms, 30 days from month end statement with settlement discount of 2.5%.***
>
> ***a The pricing will be said to contain all costs including***
>
> ***b Transport cost***
>
> ***c Labour cost***
>
> ***d Product, treatment and packaging cost"***

On 8 April 2009 the plaintiff was informed that the trading terms would be altered and payment effected sixty (60) days from month end statement. Although the plaintiff testified that he did not consent in the change to the payment regime future payments were made in conformity therewith until the agreement was terminated. After the first payment in terms of the new structure was made, further payments were made on a monthly basis. The variation of the payment terms clearly did not constitute a repudiation as contended for by the plaintiff. As Nienaber JA, trenchantly stated in **Datacolor International (Pty) Ltd Intamarket (Pty) Ltd**[9]:-

> ***"[16]'Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract. . . . Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated . . .' (per Corbett JA in Nash v Golden Dumps (Pty) Ltd 1985 (3) SA 1 (A) at 22D - F). This is the conventional exposition of the operation of the doctrine of repudiation leading to rescission, with its emphasis on the guilty party's intention and the innocent party's acceptance. At the same time this Court has repeatedly stated that the test for repudiation is not subjective but objective (Ponisammy and Another v Versailles Estates (Pty) Ltd 1973 (1) SA 372 (A) at 387A - C; Stewart Wrightson (Pty) Ltd v Thorpe (supra at 953E - H); Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou (supra at 845A - 846G); Tuckers Land and Development Corporation (Pty) Ltd v Hovis (supra at 653B - G); OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd and Another 1993 (3) SA 471 (A) at 480I - 481H; Highveld 7 Properties (Pty) Ltd and Others v Bailes 1999 (4) SA 1307 (SCA) at 1315F - G, 1318A - E, 1318H - J). Thus it has recently been said in Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd 1994 (3) SA 673 (A) at 684I - 685B:***

9 2001 (2) SA 284 (SCA) at paragraphs [16] and [18].

[17] . . .

[18] The conduct from which the inference of impending non- or malperformance is to be drawn must be clearcut and unequivocal, ie not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is 'a serious matter' (cf Ross T Smyth & Co Ltd v T D Bailey, Son & Co [1940] 3 All ER 60 (HL) at 72B; Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd (supra at 685B - C), requiring anxious consideration and - because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments - not lightly to be presumed."

[17] In applying the objective test postulated by the aforegoing authorities, I am unable to find that the variation in the payment regime amounted to a repudiation.

[18] It follows from the aforegoing that the plaintiff has not established that the defendant repudiated the agreement. As adumbrated hereinbefore, the agreement was breached by the plaintiff's failure to perform its contractual obligations as a consequence of which the defendant was obliged to source the wood shavings from other producers.

[19] In the result the following orders will issue:-

1. **The plaintiff's claim is dismissed.**
2. **The counter-claim is upheld to the extent that the plaintiff is liable to compensate the defendant for such damages as it may in due**

course prove by reason of the plaintiff's failure to supply it with the agreed minimum quantity of wood shavings, during the subsistence of the supply agreement.

3. **The plaintiff is ordered to pay the defendant's costs of suit.**

D. CHETTY
JUDGE OF THE HIGH COURT

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