IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 642/2015

In the matter of:

LEZMIN 3038 HANDELDRYWEND AS CG BOTHA BOERDERY Applicant

And

TOBIE DU PLESSIS Respondent

CORAM: MBHELE, AJ

HEARD ON: 21 MAY 2015

JUDGMENT BY: MBHELE, AJ

DELIVERED ON: 20 AUGUST 2015

INTRODUCTION AND BACKGROUND

[1] This is an application for contravention of cancellation of oral agreement alleged to have been entered into between the Applicant and the Respondent.

1.1 The Applicant is Lezmin 3038 trading as CG Botha Boerdery a close corporation registered in terms of the laws of South Africa with registration number [2……..], and with its place of business at [Box 3……], [T…….] Free State.

1.2 Respondent is Tobie Du Plessis an adult male commercial famer residing on a farm [V…….], [T……] Free State.

1.3 C.G. Botha (Botha) concluded a verbal agreement with the Respondent in terms of which he sold two yellow [B…….] rams to the Respondent.

1.4 On the 11th February the Applicant launched the instant application following a sms notification sent to the Respondent by Botha, notifying him of the cancellation of contract. The respondent opposes the notice on the basis that the cancellation was invalid and that he was not *in mora* at the time the sms notification was sent by the Applicant.

[2] The alleged contractual relationship between the applicant and respondent arise as a result of a purchase of the aforementioned [b…...] rams by the Respondent.

[3] The two yellow [b……..] rams were delivered to the Respondent on the 21st March 2014. The first payment of R120 000.00 was made on or about the end of March 2014.

[4] The remaining amount was payable at the end of May 2014.

[5] At the end of May respondent informed Botha that he would only be able to pay the outstanding amount at the end of June 2014, after harvesting peanuts.

[6] On the 8th July 2014 the Respondent paid an amount of R70 000.00 to the Applicant. Towards the end of July 2014, the respondent was confronted with low market price for maize and requested Botha to grant him a further extension to see whether the maize price would escalate or improve for the better.

[7] On 18 January 2015 Botha sent a sms message to the Respondent informing him of his decision to cancel the contract.

DISPUTE

[8] The respondent disputes, that the Applicant has *locus standi* as the sale agreement was not concluded with the Applicant but with Botha on his personal capacity. He further contends that the purchase price agreed upon, was R120 000.00 and not R125 000.00 as alleged by the Applicant. It is contended that ownership of the two [b…….] rams passed with delivery thereof.

[9] Respondent, further, disputes that he was in *mora* as there was no specific date set for final payment after extension was granted.

CONTENTIONS BY THE PARTIES

[10] Mr. Le Grange, for the respondent, submits that the applicant had no right to cancel the contract. He submits, further, that if there is no material breach of contract, one is not allowed to cancel the contract. He further contends that time is of essence to

determine when the respondent fell *in mora*. He argues that in the current contract Mr. Botha granted extension without specific date for the last payment of the outstanding amount.

[11] It is further contended that the reason the applicant wants to cancel the contract is because the value of the [b…….] rams appreciated tremendously from the time he took possession of the yellow [b…….] rams. He further, contends that he acted on behalf of a Mr. Smith at the time the contract was concluded.

[12] The first yellow [b……] ram was delivered to Mr. Smith and it would be impossible for the respondent to perform, should the court order the return of the two [b…….] rams as prayed for by the Applicant.

MR. COETZER

[13] On behalf of the Applicant Mr. Coetzer contends that the respondent paid incomplete amount for the two yellow [b…..] rams. He, further, contends that the right to cancel the contract accrued because there was a material breach of the contract. He contends that payment constituted a material term of the contract and failure to pay is a serious breach of the contract. He argues that the respondent should have settled his debt after selling his maize on 16 October 2014 which he failed to do.

APPLICABLE LEGAL PRINCIPLES

[14] The parties are in agreement that the breach must go to the root of the contract to warrant its cancellation. The breach must be so serious that the only remedy available is rescission of the

contract. (**<u>See: Singh v McCarthy Retail Ltd t/a McIntosh Motors</u>** 2000 (4) SA 795 and contract, **General, Principles**, 1st edition 1993 at page 255 by Van der Merwe et al).

[15] A real, genuine and *bona fide* dispute of fact can exist only where the party who purports to raise the dispute has unambiguously and clearly addressed the disputed facts in its papers. (**<u>Wightman t/a J.M. Construction v Headfour (Pty) Ltd and Another</u>** 2008 (3) SA 371. SCA.

[16] **<u>In Kalil v Decotex (Pty) Ltd & Another</u>** 1988 (1) SA 943 (A) at 979 (H-I) it was said:

> "…in exercising its discretion to refer the matter for oral evidence, the Court should be guided to a large extent by the prospects of *viva voce* evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the court would be to exercise the discretion in his favour."

[17] In application proceedings, where there is a material dispute of facts the respondent's version can only be rejected if it is farfetched or clearly untenable. (**<u>See: Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd</u>** 1984 (3) SA 623 (A).

<u>APPLICATION OF PRINCIPLES AND FINDINGS</u>

[18] It is clear from the papers that the respondent unambiguously disputes issues relating to the material and essential terms of the

contract. The dispute relates to the price of the goods delivered and the date of final performance on the part of the respondent.

[19] In my view the probabilities are evenly balanced insofar as there exist a possibility that the yellow [b……..] rams were sold for either R120 000.00 or R125 000.00.

[20] I am satisfied that the oral evidence and cross examination will disturb the balance of probabilities apparent from the papers.

ORDER

1. The application is postponed to 05 October 2015 for certification, as ready for hearing of *viva voce* evidence, by the pre-trial judge.
2. The issues to be determined are the following:
   2.1 The exact purchase price for the sale of the two yellow [b……..] rams
   2.2 Whether ownership was to pass to the Respondent on the date of delivery or the date of final payment of the purchase price.
   2.3 Whether Mr. Botha gave the respondent an indefinite extension for payment of the last amount owing.
3. For the purpose of such a hearing, the respondent shall deliver sworn statements of witnesses he wishes to call, inclusive of any supplementary affidavits, within 10 days, calculated from the date hereof.
4. On its part the applicant shall deliver sworn statements of witnesses it wishes to call, inclusive of any supplementary affidavits, within 10

days from the date on which the respondent shall have delivered statements or was supposed to deliver statements.

5. Within 10 days after the delivery of statements or supplementary affidavits by the applicant, the parties shall make discovery under oath in terms of the provisions of Rule 35 of Uniform Rules of Court and the provisions of Rule 35(6) with regard to inspection and production of discovered documents or items shall apply.
6. The costs shall be costs in the application.

MBHELE, AJ

On behalf of applicant: A. Conradie
Instructed by:
CONRADIE ATTORNEYS
BLOEMFONTEIN

On behalf of respondent: J.H. Conradie
Instructed by:
ROSSOUWS ATTORNEYS
BLOEMFONTEIN