

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO 3051/2009

In the matter between:

FLYING TIME CARRIERS CC

PLAINTIFF

and

MONIER ROOFING SA (PTY) LTD

DEFENDANT

JUDGMENT

Date: 14 December 2011

PLOOS VAN AMSTEL J

[1] The plaintiff is a transport operator and the defendant a manufacturer of blocks, bricks and roof tiles. The action arises out of a contract between them for the transportation of crushed stone from a quarry in Hluhluwe to the defendant's factory in Richards Bay. The plaintiff's claim is for damages arising out an alleged breach of the agreement by the defendant, pursuant to which the plaintiff cancelled the agreement.

[2] The case is somewhat unusual in the sense that both parties seek rectification of the agreement, but in different respects. At the commencement of the trial I made an order in terms of rule 33 (4), by consent, that the issues be separated and that the following issues be decided first:

- a) What were the terms of the agreement between the parties?
- b) Whether on the terms of the agreement determined by the court:
 - (i) the defendant breached the agreement; or
 - (ii) the defendant is excused from performance by supervening impossibility of performance.
- c) In the event of it being held that the defendant breached the agreement, was the plaintiff entitled to cancel the agreement and did the plaintiff validly do so?

[3] The issue relating to the terms of the agreement included the issue whether the agreement should be rectified in any of the respects referred to in the pleadings.

[4] The background is briefly as follows. The plaintiff had been conveying blocks, bricks and roof tiles for the defendant for a number of years. These products were manufactured by the defendant at its factory in Richards Bay and transported and delivered to its customers by the plaintiff. It was not the only transporter to do so.

[5] In the latter half of 2007 the defendant's production manager in Richards Bay, Mr Mynhardt, enquired from the majority member of the plaintiff, Mr Fernandes, whether the plaintiff would be interested in transporting crushed stone from a quarry in Hluhluwe to the defendant's factory in Richards Bay. Fernandes testified that Mynhardt mentioned three loads a day for a period of three years. Fernandes said he was interested but would have to acquire a specialised trailer to do the work. He needed a tri-axle side tipper trailer. He told Mynhardt that he required a written commitment to the volumes if he had to incur the expense of acquiring a specialised trailer. It would also be easier to obtain finance from a bank if he had a written contract. Mynhardt told him that he had no authority to conclude a written contract and referred him to Graham Whittock, the defendant's operational manager in Durban, and Mynhardt's superior.

[6] It was not disputed that a meeting took place in Mynhardt's office in Richards Bay, which was attended by Fernandes, Mynhardt and Whittock. Fernandes testified that he had the draft agreement with him and that they discussed it. The other two disputed this. They said the purpose of the meeting was simply for

Whittock to meet Fernandes. Be that as it may, it was common cause that on 4 October 2007 Fernandes faxed an unsigned agreement to Whittock for his signature. Whittock telephoned Mynhardt and told him about the agreement. Mynhardt said he knew about it, that it was required by the bank in connection with the application for finance, and that he could sign it. He signed the agreement on behalf of the defendant and faxed it to Fernandes, who also signed it. This is the agreement which both parties seek to rectify.

[7] Fernandes testified that the agreement was drafted by one of the members of the defendant, Bheki Ngcobo, who adapted other transportation agreements which they had. This probably explains some of the clauses in the agreement which are clearly more suited to a contract for the transportation of finished products, for example those which provide for deliveries to the defendant's customers.

[8] The agreement records that the contractor was 'presently transporting crushed stone on behalf of the client' and that the parties wished to formalize the arrangement. In terms of clause 3 the agreement would continue for a period of three years unless terminated earlier and in terms of clause 5.1 the defendant agreed to provide the plaintiff with three loads of crushed stone for delivery per working day.

[9] Clauses 3 and 5.1 were the subject of the main dispute between the parties. The other matters in respect of which rectification was sought are really ancillary to the main dispute, although one must have regard to the whole of the agreement in assessing the evidence and the probabilities and not consider any of the issues in isolation.

[10] I deal firstly with clauses 3 and 5.1. The starting point is the written agreement. The approach in our law to the interpretation of a written contract is to determine the intention of the contracting parties by looking at the words which they used and giving those words their ordinary meaning. In cases of ambiguity there are rules of interpretation which are employed in an endeavour to determine the intention of the parties and save the contract from being void for vagueness.

[11] A party is ordinarily not allowed to give evidence as to what the parties

intended, or to aver that the agreement is different from what is recorded in the written memorial of it. Such evidence is precluded by the parol evidence rule. An exception is when a party to the contract seeks rectification thereof on the basis that due to a mistake common to the parties it does not reflect their true agreement. The emphasis is on the fact that the mistake must have been common to the parties. It is not enough, in a case for rectification, for a party to say that now that he has read the contract properly he realises that it reflects something that he had not intended to agree to. In the absence of a common mistake he is bound by what he has signed, unless of course he can void the contract on the basis of fraud or iustus error.

[12] The defendant's case is that there was an oral agreement between the parties, which Fernandes said he wanted reduced to writing to help him obtain finance for the trailer. It says the plaintiff drafted the agreement and Fernandes got Whittock to sign it. It however does not reflect what had been agreed. The defendant contends that this is due to an intentional act on the part of Fernandes, alternatively mutual errors on the part of the plaintiff and the defendant. The defendant bears the onus to prove this, as the plaintiff bears the onus with regard to the rectification which it seeks.

[13] Although Mynhardt confirmed that a period of three years had been agreed, he was adamant that he had not agreed to commit the defendant to three loads per day. He said he did not guarantee any quantity per day. Fernandes was equally adamant that Mynhardt had agreed to three loads per day, and referred him to Whittock when he said he wanted a commitment in writing. Mynhardt admitted that Fernandes asked him for a written agreement and that he said it was required by the bank. When Whittock received the unsigned agreement from Fernandes he looked at some of the provisions, but did not read all of it. He saw the agreement was for a period of three years, and he saw the provision that the defendant would provide the plaintiff with three loads of crushed stone per day. He testified that he was willing to commit to three loads per day because the defendant was doing very well at the time. He did not then foresee the downturn in the economy which occurred later. Whittock and Mynhardt testified that when Whittock telephoned Mynhardt about the contract they did not discuss any of the contents of it. I think that is improbable. It is more likely that the provisions relating to a three year period and three loads per day

would have been mentioned during that conversation. Mynhardt gave Whittock the go-ahead and he signed the agreement.

[14] The probabilities seem to me to fit in with Whittock's evidence that he was willing to commit to three loads per day for a three year period, and that he signed the agreement on that basis.

[15] Mynhardt could only have thought that the agreement would assist in obtaining finance if it provided for a commitment by the defendant with regard to volumes and the duration of the contract. A contract which allowed the defendant to say it did not need any more stone at any time would have provided neither Fernandes nor the bank with any comfort.

[16] Mynhardt testified that Fernandes kept reminding him that he had a contract with Whittock for three loads per day. He said he contacted Whittock, who confirmed that Fernandes had a contract. He first said he had to go along with it, but later tried to retract this by saying that he did not ask Whittock whether the contract was for three loads per day. Why then did he phone Whittock? I regard this part of his evidence as untruthful. Whittock's evidence under cross-examination was that when Mynhardt phoned him he confirmed that Fernandes had a contract for three loads per day. It is also worth noting that according to Mynhardt it was he who was responsible for ordering the crushed stone, which was stockpiled. He said at one stage there were 76 loads on the stockpile, although they only used two per day. This tends to suggest that Mynhardt accepted at that stage that he could not simply stop the plaintiff's deliveries of stone.

[17] In May 2008 Mynhardt wrote to the plaintiff and said the defendant was forced to stop the deliveries 'for now'. The tone of the letter is apologetic and explanatory. It includes the following statement: 'The economic situation and Eskom load shedding was not a foreseen matter when the contract was discussed in 2007. Monier Roofing is in the process of installing a bigger block manufacturing plan that will cope with the delivery's (sic) from Flying Time Carriers'. (My underlining). It is difficult to reconcile this letter with Mynhardt's suggestion that the oral contract allowed the defendant to stop the delivery of stone whenever it suited it to do so.

[18] On 9 May 2008 the plaintiff's attorney wrote to the defendant, recorded the defendant's obligation to make three loads available per working day and suggested an interim arrangement until such time as the contract could be put back on a proper footing. Whittock handed this letter, together with the written agreement, to the defendant's attorney and instructed him to reply. The reply, dated 17 June 2008, includes the following:

'It is correct that Flying Time Carriers entered into an agreement with your (sic) clients, and that Lafarge Roofing was the client (client in the matter).

It is further correct that certain clauses of the agreement have not been complied with which resulted and was dictated by the present state of the economy as reported and proposed by the government of the country (sic).

Having said that the possibility does exist that after July that sector of the economy will pick up and our client will then again be in the position to engage your client in more work and particularly to the extent that the original intention was.'(My underlining).

[19] On 8 September 2008 the plaintiff's attorney wrote to the defendant again, with a copy to its attorney. The letter records that in terms of clause 5.1 the defendant was obliged to provide the plaintiff with three loads of crushed stone for delivery per working day and that the defendant was in breach of that obligation. It contains a notice requiring the breach to be remedied within fourteen days, failing which the plaintiff would be entitled to cancel the agreement. The reply from the defendant's attorney, dated 10 September 2008, merely enquired whether the plaintiff was interested in trying to resolve the matter without referring it to litigation. In a further letter, dated 19 September 2008, the defendant's attorney said the following:

'Your client was very well aware of the risk involved in this matter.

However should your client wish to proceed by way of litigation then of course it is his own free choice but he should consider whether this situation arose as a result of our client's actions or that of the powers to be who then stopped all development in the area and was not prepared to carry on with the projects as had been proposed

and upon which the whole agreement was entered into.’

[20] There is no letter from either the defendant or its attorney in which it was contended that the real agreement between the parties did not oblige the defendant to provide the plaintiff with three loads per working day. The inference is inescapable that when the defendant’s attorney was instructed to reply to the letters from the plaintiff’s attorney he was not told that the written agreement did not correctly reflect the agreement between the parties.

[21] In the light of the evidence to which I have referred, and the probabilities, I conclude that the defendant failed to make a case for the rectification of clauses 3 and 5.1. I will return to the other respects in which it seeks rectification.

[22] The plaintiff contends that the agreement should be rectified in the following respects:

- a) The document which appears at page 18 of the pleadings should form part of the agreement, being the document referred to as annexure A in clause 7;
- b) The rate of escalation in clause 7.3 should be 10%;
- c) The word ‘client’ in clause 5.2 should be ‘contractor’;
- d) The word ‘customer’ where it first appears in clause 6.4 should read ‘contractor’ and where it appears for the second time should read ‘client’.

[23] Not much was said in the evidence about annexure A. Fernandes said he could not recall whether he had shown it to either Mynhardt or Whittock. The fact that such a document is referred to in clause 7 and should have been attached to the agreement is not a basis for rectifying the agreement by attaching it. There is no evidence that the contents of the document had been agreed or that Whittock even knew that clause 7 referred to an annexure. I do not consider that the plaintiff proved that the agreement should be rectified in this respect.

[24] It was common cause that Fernandes and Mynhardt agreed the rate of R9.36 per kilometre. Whittock said that was Mynhardt’s responsibility. Fernandes said

they also agreed an escalation rate of 10%, but this is denied by Mynhardt. It is unlikely that they would not have discussed escalation if they were talking about a three year contract. The escalation related to increases in salaries, overheads and so on. Increases in the price of diesel were catered for elsewhere. Mynhardt did not suggest in his evidence that 10% was too high or suggest any other reason why he would not have agreed to it. I am satisfied that the rate of 10% was agreed and that the omission thereof in clause 7.3 was due to a mistake common to the parties. Clause 7.3 must therefore be rectified.

[25] It was not disputed in the evidence before me that the word 'client' in clause 5.2 was an error and should have read 'contractor'. This clause must therefore be rectified.

[26] It was also not disputed that clause 6.4 should have referred to payment by the client to the contractor and delivery to the client, not a customer. This clause must therefore also be rectified.

[27] Before I deal with the other clauses in respect of which the defendant seeks rectification I should say that the agreement was a sloppy product of an attempt to adjust an existing contract to the circumstances of the transportation of the crushed stone. It does not follow that every clause which is incorrectly worded or inappropriate to the circumstances should be rectified. The test remains whether the particular clause reflects the true agreement between the parties, and if not, whether that is a result of a mistake common to them.

[28] The defendant seeks rectification of the agreement in the following respects:

- i) The first relates to the preamble under the heading 'Records'. This seems to me to be uncontroversial. The preamble suggested by the defendant accords with the agreement between the parties, while the reference in the written agreement to addresses in Hluhluwe is an obvious error. I propose to allow this rectification.
- ii) Clause 1.3 defines a 'customer' as customers of the client, to whom delivery is to be effected in terms of the agreement. Mynhardt's

evidence made it clear that delivery of the crushed stone was only ever contemplated at its factory in Richards Bay. That was where it used the stone to manufacture the finished products. There would never be a need to deliver crushed stone to a customer of the defendant. I do not accept Fernandes' evidence that he was told it might be required. I find that inherently improbable. The rectification sought by the defendant is the deletion of clause 1.3 in its entirety, and I propose to allow it.

- iii) Clause 1.4 defines 'Working day' as 'Monday to Friday'. The defendant says public holidays and builders' holidays should be excluded. I think that was obviously what was intended and I propose to allow this rectification.
- iv) The rectification of clause 2 sought by the defendant cannot be granted. The defendant did not prove that the proposed rectification reflects the true agreement between the parties, for the same reasons which I mentioned in relation to clause 5.1. Clause 2 is incorrect in that it refers to deliveries to the defendant's customers. The plaintiff however did not seek its rectification and the rectification sought by the defendant has not been proved. The clause must therefore stand with its imperfections.
- v) The rectification of clause 3 cannot be granted, for the same reasons as applied to clause 5.1.
- vi) The proposed rectification of clause 4.1 seeks to reflect the agreement that the crushed stone would be delivered to the defendant and not to its customers. I propose to allow this rectification, for the same reasons as applied to clause 1.3.
- vii) The proposed rectification relating to clause 4.4 is in the same category as clause 1.3 and I propose to allow it.
- viii) The same applies to clause 4.6 and I propose to allow the rectification.
- ix) I have already dealt with clause 5.1.
- x) Clause 5.2 is the only clause in respect of which the parties seek the same rectification, and I have already dealt with it.
- xi) I propose to allow the rectification of clause 5.3, for the same

reasons as clauses 1.3 and 4.1.

- xii) I am satisfied that clauses 5.5, 5.6, 5.7 and 5.8 were inserted by mistake and should be deleted.
- xiii) The rectification of clause 6 cannot be granted in the form sought by the defendant, for the same reasons as applied to clause 5.1. The plaintiff only sought rectification of clause 6.4, and I have dealt with that. The rest of clause 6 will have to stand, with its imperfections. Clauses 6.2 and 6.3 are in any event academic because the events contemplated in them never happened and the agreement is no longer in force.
- xiv) The proposed rectification of clause 7 cannot be granted, for the reasons which I mentioned when I dealt with the rectification of this clause sought by the plaintiff.
- xv) The rectification of the heading of clause 8 cannot be granted, for the reasons which applied to clause 5.1.
- xvi) The rectification of clause 8.1 seeks to remove the reference to a delivery to a customer. For reasons already discussed, I propose to allow this rectification.
- xvii) The rectification of clause 8.2 cannot be granted in the form sought by the defendant, for the reasons which applied to clause 5.1.
- xviii) The rectification of clause 9.2 sought by the defendant cannot be granted, for the same reasons.

[29] It was not seriously disputed that if clauses 3 and 5.1 remain as they are then the defendant breached the agreement by failing to provide the plaintiff with three loads of crushed stone per day. No evidence was led to justify the defence of supervening impossibility of performance. The plaintiff gave notice of the breach as was required in terms of clause 9, the breach was not remedied and it validly cancelled the agreement. It follows that the defendant is liable to the plaintiff for damages arising out of the breach of the agreement.

[30] Although the defendant has not counterclaimed for rectification, it has pleaded rectification as a defence. The parties have asked me to determine the terms of the agreement in the light of the rectification pleaded by both parties. Those terms may

conceivably be relevant in the determination of the damages. I therefore propose to incorporate them in the order which I intend to make.

[31] I make the following order:

- a) It is declared that the terms of the agreement between the parties are those set out in the written agreement which is annexed to the particulars of claim, subject to the rectification thereof in the following respects:
 - i) The whole of the preamble, under the heading 'Records' is deleted and replaced with the following: 'That whereas the client deals in crushed stone and whereas the contractor is willing and able to transport crushed stone on behalf of the client from the place of its manufacture, namely Lancaster Quarries whose address is in the Hluhluwe area and the parties wish to formalise the arrangement'.
 - ii) Clause 1.3 is deleted.
 - iii) The following words are added to clause 1.4: 'excluding public holidays and builder's holidays'.
 - iv) In clause 4.1 the words 'Client's customers' are deleted and replaced with the word 'client'.
 - v) Clause 4.4 is deleted.
 - vi) The contents of clause 4.6 are deleted and replaced with the following: 'To furnish the client with documentary proof of its acceptance of a delivery of crushed stone from the place of its manufacture in Hluhluwe.'
 - vii) In clause 5.2 the word 'Client' is deleted and replaced with the word 'contractor'.
 - viii) The contents of clause 5.3 are deleted and replaced with the following: 'To furnish the contractor with documentary proof of its delivery of crushed stone to the client in Richards Bay.'
 - ix) Clauses 5.5, 5.6, 5.7 and 5.8 are deleted.
 - x) The contents of clause 6.4 are deleted and replaced with the

following: 'Payment shall be made by the client to the contractor not later than the last day of the month following that in which delivery to the client takes place.'

- xi) The escalation rate in clause 7.3 shall be 10%.
- xii) The contents of clause 8.1 are deleted and replaced with the following: 'In the event of the contractor being unable to accept delivery of a load of crushed stone for delivery to the client then the client shall be able to employ another transport company to deliver the said load of crushed stone.'

b) It is declared that the defendant breached the agreement by failing to provide the plaintiff with three loads of crushed stone for delivery per working day, that pursuant to such breach the plaintiff validly cancelled the agreement and that the defendant is liable to compensate the plaintiff for such damages as it is able to prove resulted from the breach and cancellation of the agreement.

c) The question of costs is reserved.

PLOOS VAN AMSTEL J

Appearances:

For the Plaintiff : Mr. H. A De Beer SC

Instructed by : McClung Mustard
Durban

For the Defendant : Mr. J .E Hewitt S C

Instructed by : Du Toit Havemann & Lloyd
Durban

Date of Hearing : 9 November 2011

Date of Judgment : 14 December 2011