

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal Case No. : 84/08

Case No. : 68/2002

In the appeal between:-

BANDINI CHEESE

(Defendant in the Court *a quo*)

Appellant

and

P J JANSE VAN RENSBURG

(Plaintiff in the Court *a quo*)

Respondent

CORAM: VAN DER MERWE, J *et* NXUSANI, AJ

HEARD ON: 4 MAY 2009

JUDGMENT BY: NXUSANI, AJ

DELIVERED ON: 7 MAY 2009

JUDGMENT

[1] This is an Appeal against the decision of the
Magistrate's Court for the District of Lindley. The Appeal

relates to a claim instituted by the Respondent for payment of R7 433,60 for milk delivered to the Appellant [‘the milk supply agreement’].

- [2] The Appellant has sought condonation for the condonation of the late noting of the Appeal and the late filing of the Volume 2 of the Appeal record. The prospects of success are good and there is no prejudice to the Respondent. I am satisfied that there are good grounds to grant the application. The Respondent does not in any event oppose the grant of condonation.
- [3] It is common cause that it was a term of this milk supply agreement that the milk had to be of such a standard that it could be used to manufacture cheese.
- [4] The Appellant has pleaded that the Respondent’s milk was contaminated rendering it unsuitable for the manufacture of cheese and related products.

[5] The Appellant pleaded that the agreement to supply milk consisted of several express, alternatively implied, further alternatively, tacit terms, namely:-

5.1 the Plaintiff [Respondent] would supply milk to the Defendant for the purpose of manufacturing cheese and related products;

5.2 the Defendant [Appellant] would only accept milk if it passed three tests, namely:

- a) the smell test;
- b) the acidity test; and
- c) the antibiotics test.

5.3 the Plaintiff [Respondent] warranted that the milk supplied to the Defendant would be fit for the purpose of manufacturing cheese.

[6] Accordingly, contended the Appellant, it was not liable to pay the amount claimed by the Respondent. The

Appellant counterclaimed for damages it suffered and in essence repeated the contents of its plea.

- [7] The Respondent, if he wished to succeed, had to prove, on a balance of probabilities, that he supplied milk which was suitable for the production of cheese. He has, with respect, not done so.

See: **TOPAZ KITCHENS (PTY) LIMITED V NABOOM SPAR** 1976 (3) SA 470 (A).

- [8] The Respondent contended that it was unlikely that milk obtained from the same cows during the morning could have tested positive for antibiotics whereas the milk expressed later that day from the same cows tested negative for the presence of antibiotics or “inhibitors”. This reasoning is premised on the assumption that there is some accuracy and reliability to the DELVO test results. In fact the receipts put up by the Respondent make reference to the DELVO test.

[9] It is common cause that during the month of June 2002 the Respondent delivered milk to the Appellant. The date when this occurred was in dispute. The Respondent testified that he received a telephone call on a Sunday morning from Mr. Bandini. Mr. Bandini told him that the milk supplied to the Appellant had been contaminated with antibiotics. Mr. Bandini also told him [the Respondent] that the incident occurred on 8 June 2002. He made a note of the date in his diary. This was handed up as Exhibit D. This Court has not had sight thereof.

[10] The Appellant's witnesses testified that the incident occurred on 22 June 2002. Mr. Bandini was regarded by the Magistrate as an outstanding witness. I agree. He testified that he telephoned the Respondent on the evening of 22 June 2002 and told him that the milk which he supplied had been contaminated with antibiotics. The Respondent did not dispute this at that

stage. He also telephoned the Respondent on the Sunday following the incident.

[11] The documentary evidence also corroborates the evidence of the Appellant's witnesses. I am satisfied that the incident occurred on 22 June 2002. The Respondent's recollection of when this phone call occurred and when he took samples suggests that his evidence may be susceptible to mistake.

[12] On the 24 June 2002 the Appellant's driver arrived at the Respondent's premises. He saw two 25 litre drums containing discoloured milk. In his experience the colour of the milk indicated the presence of antibiotics. The Respondent confirmed in his evidence that whenever cows were administered with antibiotics their milk would be collected separately in containers. This would be used to feed the calves. The presence of these two 25 litre drums suggests that, contrary to his recollection, the Respondent probably treated cows with antibiotics

in June 2002. The milk which was contaminated must have been collected as feed because there is no other plausible explanation for their presence. Given the Respondent's failing memory, the Court cannot exclude this as a probability.

[13] It is common cause that the milk which was delivered to the Appellant on 22 June 2002 tested positive on the DELVO test. It is common cause that the Appellant notified the Respondent that the milk in question contained antibiotics and that the contents of the entire compartment mixed with the Respondent's milk was not going to be used in the manufacturing of cheese. It is common cause that the Appellant relied upon the DELVO test to prove its defence.

[14] The Appellant did not bear the onus of proving that the milk was contaminated. It attempted, however, to lead considerable evidence about the use and reliability of the test. I accept, for purposes of this judgment, that the

Appellant has not led expert evidence to show the workings of the DELVO test. What the evidence does however demonstrate is that the Appellant's conduct is consistent with its assertion that the milk was not suitable for use in the production of cheese.

[15] It must follow therefore that the Respondent failed to discharge the onus resting on him.

[16] In my view there are two mutually destructive versions about the reason why the milk was not used in the manufacture of cheese. The Respondent could only have succeeded in his claim if he showed that his version was true and that of the Appellant false. He was not able to do so.

See: **NATIONAL EMPLOYERS' MUTUAL GENERAL
INSURANCE ASSOCIATION V GANY** 1931 AD
187.

[17] There is some merit in the submission that the Respondent could not have administered antibiotics which would have shown positive in the morning and then negative in the afternoon of the day of the incident and for several weeks thereafter. It is equally improbable that the Appellant would have sold the milk as “bottle milk” when it was in a position to sell the milk profitably to Clarabelle’s for the production of cheese. The evidence of the Appellant’s driver does suggest that the Appellant may well have administered antibiotics to one or more cows but due to an oversight this milk ended up in the milk tank. The Respondent may well have forgotten that this occurred.

[18] The probabilities are, at best, evenly balanced. In my judgment, this Court cannot make a finding on the relative credibility of the witnesses.

[19] In my judgment, the Magistrate ought to have arrived at the conclusion that the Respondent failed to discharge the onus resting on him.

See: NATIONAL EMPLOYERS' GENERAL
INSURANCE COMPANY LIMITED V JAGERS 1984
(4) SA 434 (E) at 444.

[20] There remains the question of the Appellant's counterclaim. The Appellant set off its damages by deducting the amount of R7 433,60 from the June 2002 payment schedule. The counterclaim must therefore fail. In my judgment the Magistrate ought to have granted absolution as against the Respondent with costs. He correctly dismissed the counterclaim but for different reasons.

[21] The Appellant has submitted that the complexity and duration of the action was of such a nature that the presence of Counsel was necessary. He submitted that

the Court should make a special order allowing Counsel's fee. I am not satisfied that Counsel was necessary or that the action was a complicated one justifying the granting of a fee higher than that allowable in the Magistrate's Court.

[22] Consequently, I make the following order:

1. The Appellant is granted condonation for the late noting of the Appeal;
2. The Appellant is granted condonation for the late delivery of Volume 2 of the Appeal record;
3. The Appeal is upheld with costs.
4. The Order of the Magistrate in respect of the main claim is altered to one of absolution from the instance with costs.

J. NXUSANI, AJ

C.H.G. VAN DER MERWE, J

On behalf of the appellant:

Adv. L.J. Engelbrecht
Instructed by:
Webbers
BLOEMFONTEIN

On behalf of the respondent:

Adv. S.J. Reinders
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JN/sp