

Reportable: Yes / No
Circulate to Judges: Yes /
No

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: 107/04

Date heard: 2004-09-03

Date delivered: 2004-09-10

In the matter of:

ORANJE SOUTWERKE UPINGTON (PTY) LTD EXCIPIENT
(Defendant)

versus

MASTER FOODS SA (PTY) LTD RESPONDENT
(Plaintiff)

Coram: **MAJIEDTJ**

JUDGEMENT

MAJIEDTJ:

1. The Defendant has excepted to the Plaintiff's Particulars of Claim, alleging that it discloses no cause of action, alternatively that it is vague and embarrassing. The exception is based on two grounds.
2. It is necessary to set out in some detail the pleadings and the exception. The relevant parts of Plaintiff's Particulars of Claim read as follows:

"3.1 On or about 26 June 2001 and at Rosslyn, the parties entered into a partly written and partly oral contract in terms whereof the defendant agreed to supply plaintiff with salt on credit for the purpose of manufacturing pet food products.

3.2 A copy of the agreement is annexed hereto marked "A".

3.3 In concluding the agreement, the plaintiff was represented by its commercial director, Charles Cheah and defendant by a person whose identity is presently unknown to plaintiff.

3.4 The agreement, Annexure A, contained all the express terms of the sales agreement which are relevant for present purposes.

3.5 It was an implied term of the agreement that defendant would supply plaintiff with salt that was free of contamination, and/or that was suitable for the manufacture of pet food products, more particularly in that the salt supplied by defendant would not render the food products manufactured by plaintiff unfit for consumption.”

3.1 In its first ground of exception, the Defendant refers to clause 8 of the written agreement between the parties (Annexure A to the Particulars of Claim) which reads as follows:

“8. This document shall form the whole and only contract between the Seller and the Purchasers and no variation of this Agreement shall be binding upon the parties unless reduced to writing and signed by the parties hereto and no relaxation or indulgence shown by any of the parties to each other, shall in any way prejudice or restrict their rights hereunder”.

3.2 The Defendant then avers that:

a) the implied term of the agreement pleaded in par. 3.5

of the Particulars of Claim; and

b) the phrase “*partly written and partly oral*” which appears in par. 3.1 of the Particulars; and

c) the phrase “*for the purpose of manufacturing pet food products*” in the aforementioned par. 3.1 thereof, are all inconsistent and irreconcilable with the contents of clause 8 of Annexure A.

3.3 Consequently the Defendant avers that the Particulars fails to disclose a cause of action, alternatively is vague and embarrassing.

4.1 With regard to the second ground of exception, the Defendant quotes clause 13 of the written agreement, which reads:

“The Seller accepts no responsibility for any damages, or any other loss, whether direct or consequential, that may be suffered by the Purchaser, or any persons claiming through the Purchaser or by any other persons in connection with the delivery and or

specification of the goods, or otherwise. The Purchaser indemnifies the Seller and holds the Seller harmless against any such damages or loss that might arise.”

4.2 The Defendant avers that the Plaintiff’s damages claim is for damage and consequential damage caused by the alleged metal contamination of the salt purchased by the Plaintiff from the Defendant – a cause of action which is squarely covered by the exclusion in clause 13; consequently the Particulars discloses no cause of action or is vague and embarrassing according to the Defendant.

5. It will immediately be observed from the foregoing exposition that the provisions of Annexure A are central to the Defendant’s exception. It is therefore in my view a useful point of departure to examine Annexure A more closely.

6.1 Annexure A consists of two parts, firstly an application for credit facilities bearing the Defendant company’s name on top and completed by hand by a person presumably in the

employ of the Plaintiff company.

The second part of Annexure A is a printed document in Afrikaans and English, with the heading “*Standard Conditions of Sale & Deed of Suretyship*” (in Afrikaans: “*Voorwaardes van Verkope & Borgakte*”).

The English version of this document has been dated and signed by a person designated as “*commercial director Masterfoods SA*” (i.e. the Plaintiff company).

6.2 An important feature of this second part of the agreement is that both clauses 13 and 17 of the English version have been crossed out – in the latter instance (viz. clause 17) there is a signature appended adjacent to the crossing out.

6.3 A further important feature is that neither one of the two parts of Annexure A contains any of the following *essentialia* of an agreement of purchase and sale:

- a description of the *merx*;
- the purchase price;
- the quantity of goods.

7. Mr. Nel, for the Excipient /Defendant, has argued with considerable force that, in the first instance, a written agreement containing a sole memorial clause (clause 8) cannot in law co-exist with a partly oral agreement nor with an implied term as pleaded. He relies for this contention on the parol evidence rule as well as the clear terms of the sole memorial clause.

With regard to the second ground, Mr. Nel has submitted that the provisions of clause 13 are equally clear and also that the Plaintiff has not advanced any reasons why clause 13 does not have any operation in law.

8. I am *ad idem* with Mr. Donen, for the Plaintiff, that as far as the first ground of exception is concerned, the Defendant has completely misconstrued the Plaintiff's claim. It is abundantly clear in my view that the Plaintiff

has based its claim on contract and on the implied warranty against latent defects. The latter flows *ex lege* and not *ex contractu*; see:

Phame(Pty)Ltd v Paizes 1973(3) SA 397(A) at 416 H.

9. In addition, a merchant who sells goods which he has manufactured himself (such as the Defendant), is liable to a purchaser (the Plaintiff *in casu*) for consequential damages suffered by the purchaser by reason of any latent defect in the goods sold; see:

Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd. 1977(3) SA 670(A) at 682 H – 683 B.

10. A sole memorial/non-variation clause invariably has the effect of curtailing the common law freedom to contract and should consequently be restrictively interpreted;

see:

Randcoal Services Ltd and others v Randgold and Exploration Co Ltd 1998(4) SA 825(SCA) at 841 F.

11. There is furthermore authority for the proposition that such a clause does not bar investigation into the existence and contents of implied and tacit terms; see:

Kerr: *The Principles of the Law of Contract* 6th ed. at 139, footnote 589.

12. The Defendant's objection to the Plaintiff's reference to a "partly oral" agreement is also without substance. As I have indicated, certain of the *essentialia* of an agreement of purchase and sale e.g. description of the *merx* and price, are nowhere to be found in the written agreement. The inference is compelling that such matters were to be negotiated further, outside the written agreement.

13. For the reasons aforementioned, I am of the view that the first ground of exception is devoid of merit.

14.1 Turning to the second ground of the exception – I have already alluded to the fact that clause 13, on which the Defendant has placed much reliance, has been crossed out. This immediately raises the possibility of a potential factual dispute as to whether the clause was in fact part of the parties' agreement or not.

14.2 Even if clause 13 is to be regarded as part of the agreement, I am not persuaded that it was intended to be a blanket exclusion of liability. The use of the words “... *in connection with the delivery and or specification of the goods, or otherwise*” is quite instructive in this regard. By application of the *eiusdem generis* rule, I do not believe that the words “*or otherwise*” assists the Defendant, as has been contended by Mr. Nel. The Afrikaans version reads: “...*wat in verband staan met die aflewering en/of spesifikasie van goedere of andersins nie ...*”. In my view liability was intended to be excluded only in the instances mentioned. At the very least, this clause can hardly be described as a model of clarity and certainty.

14.3 An exclusion clause, such as clause 13 *in casu*, should

be construed “*bearing in mind that they seek to limit or oust a (contracting) party’s common-law rights*” per Lewis AJA in **Van der Westhuizen v Arnold** 2002(6) SA 453(SCA) at 464 D. A narrow interpretation is therefore called for: **Christie, *The Law of Contract***, 4th ed. at 214.

14.4 Furthermore, such a clause is to be construed *contra proferentem*, i.e. against the party for whose benefit the exclusion exists and at whose behest it has been drafted; see

Christie *op cit*, 255-7.

Van der Westhuizen v Arnold *supra* at 468 J - 469 A.

15. By virtue of the foregoing, I am satisfied that the second ground of exception also lacks merit.

16.1 In coming to the conclusion that the two grounds of exception must fail, I am ever mindful that it is required of a litigant that he/she/it pleads clearly and concisely the

material facts on which reliance is placed, with sufficient particularity to enable the other party to plead thereto [rule 18(4)].

16.2 The ultimate test is one of serious prejudice to the excipient in cases where it is alleged that a pleading is vague or embarrassing; see:

Levitan v Newhaven Holiday Enterprises CC 1991(2)

SA 297(C) at 298 A,

and the onus rests on the excipient in this regard.

16.3 The pleader is entitled to a benevolent interpretation; more importantly, matters of law need not be pleaded and the pleading has to be read as containing those allegations which are implied in the express allegations stated in the pleading; see:

Nel and others NNO v McArthur and others 2003(4)

SA 142 (T) at 149 F-G.

17. In the premises I take the view that the exception must fail on both grounds advanced.

18. **THE EXCEPTION IS DISMISSED WITH COSTS.**

**SA MAJIEDT
JUDGE**

ADVOCATE FOR THE EXCIPIENT	:	TJ NEL
----------------------------	---	--------

ADVOCATE FOR THE RESPONDENT	:	M DONEN SC
-----------------------------	---	------------

ATTORNEY FOR THE EXCIPIENT	:	ENGELSMAND BENADE & VAN DER WALT
----------------------------	---	----------------------------------

ATTORNEY FOR THE RESPONDENT	:	DUNCAN & ROTHMAN
-----------------------------	---	------------------

DATE OF HEARING	:	2004-09-03
-----------------	---	------------

DATE OF JUDGEMENT	:	2004-09-10
-------------------	---	------------

Judgement: Oranje Soutwerke v Master Foods
Case no. : 107/04