Verslagwaardig: Ja/Nee
Sirkuleer aan Regters: Ja/Nee

Sirkuleer aan Landdroste: Ja/Nee

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

CASE NUMBER: 765/99

DATE DELIVERED: 29-06-2001

In the matter between:

THE SNACK FACTORY (PTY) LTD — Plaintiff

and

MONANDA LANDBOUDIENSTE (EDMS) Bpk — Defendant

Coram: Majiedt J

JUDGMENT

MAJIEDT J: -

1. The purchase and sale of ground nuts form the factual background to the issues between the parties. Two issues require adjudication, viz.: -

   a) who were the parties to the agreement; and
   b) what were the terms of the agreement.

2. Plaintiff sues the Defendant for various amounts, alleging that

such amounts are due and owing in terms of an oral agreement for the purchase and delivery of ground nuts to it by the Defendant.

Plaintiff averred in its Particulars of Claim, amplified by the Further Particulars for Trial, that: -

a) the Plaintiff was represented by Craig Lowenthal (one of its Directors) as one of the principal parties to the agreement (i.e. as purchaser) and the Defendant by its director, Charles de Villiers, as seller. Plaintiff further avers that Hannes Koen, sole member of Triotrade CC, was present at the conclusion of this agreement, as Plaintiff's agent.

b) The material terms of the agreement were as follows: -

   i) that the Defendant would purchase ground nuts in raw, unshelled form from farmers and would sell same to Plaintiff at the Defendant's cost price which was agreed to be the price paid to the farmer;

   ii) the Defendant would pack the nuts in 250 ton stacks and shell, weigh and grade the ground nuts for the Plaintiff;

iii) a representative of Triotrade would do control grading (as Plaintiff's agent) on the Defendant's site to ensure that grading was done in accordance with agreed grading and industry standards;

iv) after the processing of the nuts as contemplated in paragraph (ii) above, the Defendant would furnish to Triotrade (as Plaintiff's agent) documentation regarding a weigh bridge certificate for the nuts purchased from each farmer, a grading certificate in respect of each load purchased, a payment advice indicating the sum paid to each farmer and a composite summary of the aforegoing which reflects the total sums which the Plaintiff owed to the Defendant in respect of each stack;

v) the aforementioned documentation would be forwarded by Triotrade to the Plaintiff, who would pay the amount reflected on each summary to Triotrade who, in turn, would effect the payment so received from the Plaintiff, to the Defendant in respect of each stack;

vi) ownership of each stack of ground nuts would pass to the Plaintiff once it has paid the Defendant for each such stack;

vii) the Plaintiff would pay to the Defendant the sum of R180.00 per ton for the handling, shelling, grading and administration of the ground nuts (these were referred to as *“handling charges”* during the trial and I shall continue using that description in this Judgment).

3. The following salient aspects requires emphasis at this early stage: -

3.1 Plaintiff avers that Triotrade acted as its agent during the conclusion of the oral agreement and throughout its dealings with the Defendant in terms of the said agreement.

3.2 There was a peculiar, seemingly cumbersome, process agreed to and employed in practice between the parties whereby documents and payments were routed through Triotrade as a conduit (so Plaintiff avers).

3.3 Ownership of the stacks of ground nuts would, according to the Plaintiff, pass to it once it has paid the cost price of the ground nuts to the Defendant, i.e. prior to the processing and handling having been effected by the Defendant and prior to Plaintiff having compensated the Defendant therefor.

4. The Defendant, in its plea, amplified by the Further Particulars for Trial, denies the above averments.
It avers that:

4.1 The agreements was concluded orally with Triotrade CC (represented by the said Koen).

4.2 The agreement was to the effect that the Defendant would sell ground nuts to Triotrade (the Defendant having purchased same from producers for an agreed price). The Defendant would charge Triotrade the prevailing market price of the ground nuts.

4.3 It was specifically agreed between the parties that the normal losses (e.g. grading and fluid losses) which are normally borne by the seller, would be borne by the purchaser (Triotrade).

4.4 In terms of the agreement, the Defendant would render an invoice in respect of the sales to Triotrade who would then pay the Defendant accordingly.

4.5 Until such time as Triotrade had paid for the ground nuts, ownership thereof would remain vested in the Defendant.

4.6 Triotrade would indicate which of the ground nuts purchased were to be delivered to the Plaintiff – such nuts had to be shelled, administered and transported to the Plaintiff's factory at Bronkhorstspruit and the Defendant would be compensated therefor by Triotrade at R180.00 per ton. Defendant would render separate invoices in respect of the purchase price and handling charges to Triotrade.

4.7 Triotrade would, in similar fashion, indicate to the Defendant which of the ground nuts purchased were to be delivered to Rhys Evans (Pty) Ltd (*"Evans"*) at Viljoenskroon – these were to be in unprocessed and unshelled form and would cost R140.00 per ton (primarily administration and delivery charges).

5. I highlight the following important features of the Defendant's version:

5.1 Triotrade was a principal party, as purchaser, and not a mere agent to the agreement.

5.2 Ground nuts were destined for the Plaintiff's factory in Bronkhorstspruit in shelled and processed form and for Evans in Viljoenskroon in unshelled and unprocessed form.

5.3 Although some of the ground nuts which Triotrade had purchased from the Defendant would end up being delivered to the Plaintiff (in shelled and processed form), the Defendant specifically denies that there had been any agreement whatsoever concluded between itself and the Plaintiff.

6. The terms of the above agreement had been amended twice, according to the Defendant. I shall refer to the said amendments in due course.

7. At the commencement of the hearing, I was requested by Counsel to determine the aforementioned two issues separately (see paragraph 1, *supra*).

It was further agreed that, in the event that I find for the Plaintiff on the question of who the parties to the contract were, then judgment would follow for Plaintiff in the sum of R147 910.88 (the Defendant has tendered payment of the said sum to Triotrade), on condition that Triotrade releases the Defendant unconditionally in writing from the obligation of payment to it. Counsel informed me that Triotrade had fulfilled the aforesaid condition. I had therefore ordered in terms of Rule 33(4) a separation of the issues as aforestated. The balance of the Plaintiff's claims would stand over for later determination.

8. The parties were *ad idem* that the Plaintiff bears the onus of proof in respect of the two issues, *supra*. There are before me two mutually destructive versions on the two issues requiring determination. The version of the Plaintiff was advanced by the *viva voce* evidence of Messrs. Lowenthal and Koen. The Defendant's version, on the other hand, was given by Mr. De Villiers.

9. The Plaintiff can only succeed if:

> *"he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected.*
>
> *In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities.*
>
> *The estimate of the credibility of a witness will therefore*

be inextricably bound up with a consideration of the probabilities of the case and, ***if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and the defendant's version is false".***

Per Eksteen JA in ***National Employers General Insurance Co.Ltd v. Jagers*** 1984(4) SA 437(A) at 440 E-G, (my emphasis).

See also: ***Transcash SWD (Pty) Ltd v Smith*** 1994(2) SA 295(C) at 303 B-C;

Plaatjies & another v Road Accident Fund [1999]1 All SA 162 (SE) at 168e-i.

10. I now summarise the oral evidence before me.

10.1 (a) Mr. Craig Lowenthal is a director of the Plaintiff company. He testified that the Plaintiff had become a significant participant in the ground nut market, subsequent to the deregulation thereof in the mid 1990's.

Plaintiff had dealings with Triotrade through its sole member, Hannes Koen, since before 1998, when Plaintiff had purchased relatively small quantities of ground nuts directly from Triotrade.

(b) In the ground nut industry it had become common knowledge that 1998 would be a difficult year for the industry since there was an anticipated shortage of supply of nuts on the market. Consequently, Mr. Lowenthal on behalf of the Plaintiff engaged the services of Triotrade to act as its agent for the procurement of ground nuts.

c) During March or April 1998, Koen set up a meeting with de Villiers representing the Defendant, at which meeting Lowenthal was also present. It was at this meeting, held at the Defendant's premises at Jan Kempdorp, that an agreement was concluded between the Plaintiff and the Defendant, in the terms as set forth in paragraph 2(b) *supra.*

(d) The terms of the agreement were given effect to. One Wessel Higgs, an employee of Triotrade, acted as the Plaintiff's on-site agent to supervise the grading of the ground nuts on the Defendant's premises.

(e) Problems arose right at the outset – the first consignment of ground nuts, delivered by the Defendant to the Plaintiff in shelled, processed form and labelled stack M1 by the Defendant, fell short of what was invoiced out by the Defendant. This shortage related primarily to weight inasmuch as what was received fell far short of what was invoiced out, i.e. far beyond the norm for standard losses accepted in the industry (and as prescribed in the Government Gazette).

f) Two meetings were held to address these problems. According to Lowenthal, Koen set up both of these meetings at his request. Both meetings were held at the Defendant's premises, the first on 2 July 1998 and the second on 30 July 1998.

Lowenthal, Koen and de Villiers attended both these meetings; at the first meeting Higgs was also in attendance.

The minutes of the said meetings form part of the voluminous documents handed in at the trial. More about that later.

g) Despite these meetings and various interactions between Koen (acting on behalf of the Plaintiff) and de Villiers, matters did not improve. The proverbial last straw which broke the camel's back was a letter from de Villiers (for the Defendant) to Triotrade, in terms whereof the amount of R147 910.88 was tendered (presumably as full and final settlement of all outstanding claims) to Triotrade, subject to certain conditions.

Koen handed this letter to Lowenthal who in turn handed same to his attorney. A formal letter of demand to the Defendant from Plaintiff's attorneys ensued and this was met by a written response from the Defendant's attorney.

These documents will, in my view, have an important bearing on assessing the probabilities in this case and I shall revert to them shortly.

h) In conclusion – Lowenthal was adamant that he had, on behalf of the Plaintiff, contracted with the Defendant (represented by de Villiers) on the terms as alleged hereinbefore. He was equally steadfast in his view that he had engaged Triotrade to act as the Plaintiff's agent in its dealings with the Defendant.

10.2 (a) Mr. Hannes Koen is the sole director of Triotrade

CC. This close corporation is involved in the total sphere of the ground nut business and also acts as procurement agent for buyers. He had known and done business with Lowenthal for more than 4 years. During 1997 Triotrade did business with the Plaintiff on a principal to principal basis, with Triotrade as seller of ground nuts (procured from the producers/farmers) directly to the Plaintiff as buyer.

(b) According to Koen he has no interest whatsoever in the outcome of this litigation. He also has no axe to grind with the Defendant.

(c) Koen confirmed Lowenthal's version in his testimony that he was approached by Lowenthal at the end of 1997 or beginning of 1998, to act as procurement agent for the Plaintiff. Triotrade had previously done business on a large scale with the Defendant. Koen knew de Villiers well; in fact it transpired later during de Villiers' testimony that they had worked together until 1994 for the Vaalharts Co-operative. Koen identified Defendant as a reliable and viable source for the supply of ground nuts to meet the Plaintiff's requirements.

(d) Koen also testified to the meeting at the Defendant's premises during March/April 1998 where he, de Villiers and Lowenthal were present. According to Koen, Triotrade acted at all times as the Plaintiff's agent and it was so understood by all present at the meeting. In fact, according to Koen, this was pertinently stated at the meeting. He testified further that Triotrade did not have the financial means to contract for the purchase of ground nuts for itself on the scale envisaged and that de Villiers was very well aware of this fact.

(e) Koen's evidence accords with that of Lowenthal as far as the terms of the oral agreement is concerned. He also testified to the problems which had arisen and the two meetings which had been held to resolve same. As author of the minutes, he confirmed the correctness thereof.

(f) According to Koen, the agreement reached with de Villiers was that ownership of a stack of ground nuts would pass to the Plaintiff as soon as Plaintiff had paid the cost price thereof to the Defendant (i.e. the price which the Defendant had paid to the producer/

farmer for the nuts). This meant that the Defendant would be paid while still in possession of the nuts (for purposes of processing and shelling them), but would not as yet have been paid for its handling charges.

I must point out here that Lowenthal had earlier testified that this agreement on ownership of the ground nuts was reached between Koen (acting as the Plaintiff's agent) and de Villiers (as director of the Defendant). It follows therefore that this had not been one of the terms agreed between the parties at their initial meeting.

This is one of the peculiarities which abound in this matter, to which I shall refer in due course.

(g) I conclude my synopsis of Koen's evidence with three important observations:-

(i) Koen was, like Lowenthal, persistent and consistent in his averment that he acted as an agent for the Plaintiff from the outset and throughout his dealings with the Defendant.

As an illustration (and a significant one at that) he testified that he had regarded the tender by the Defendant, contained in the letter which I had alluded to earlier in this judgment (see par. 10(1)(g), *ante*), as relating to monies due and owing to the Plaintiff. He had therefore passed this letter on to Lowenthal.

(ii) In cross-examining Koen Mr. Danzfuss questioned whether he, on behalf of Triotrade, had ever done business in a similar fashion, i.e. where documents had been routed through Triotrade in its name as an agent. Koen replied in the affirmative and referred to one such deal (amongst several others) done with Tiger Oats where the documents had been in Triotrade's name, although it had merely acted as an agent.

(iii) At the end of his evidence I questioned Koen about the fact that he had not received any commission from the Plaintiff for Triotrade's agency functions as had been agreed and the reason/s therefor.

Koen's evidence earlier had been that Triotrade was to earn commission of R50.00 per ton of ground nuts purchased by the Plaintiff. This commission was payable in respect of its duties as the Plaintiff's agent. He had testified further that no commission had been paid to him by the Plaintiff. In reply to my question, Koen testified that Triotrade had not been paid due to the fact that the Plaintiff had sustained extensive losses in its dealings with the Defendant. He stated that Triotrade had lost an estimated R150 000.00 in commission.

According to Koen, Lowenthal had approached him again the following year (i.e. 1999) with a request to act as the Plaintiff's procurement agent, but he (Koen) declined to do so by reason of the aforementioned outstanding commission.

10.3 (a) Mr. Charles de Villiers is the sole director of the Defendant company. The Defendant can loosely be decribed as an agricultural commodities dealer.

De Villiers testified that the Defendant had had extensive business dealings with Koen since 1996. He alluded to the fact that they had previously worked together at the Vaalharts Co-Operative.

(b) De Villers testified that he had always done business with Triotrade on a principal to principal basis as seller and purchaser. Never in his dealings with Triotrade had the latter acted as an agent for a purchaser.

(c) De Villiers made mention of a transaction during 1997 when Triotrade had purchased ground nuts from the Defendant. These nuts were delivered to the Plaintiff. There were complaints about the grading and quality of the last two loads delivered to the Plaintiff and de Villiers and Koen travelled to the Plaintiff's Bronkhorstspruit factory to address the complaints. It transpired that there were in fact no problems with the quality and grading of the ground nuts and the Defendant was paid the monies due to it.

According to de Villiers, he found the attitude of Craig Lowenthal's brother, Darren, somewhat disconcerting and this visit left him (de Villiers) with a firm resolve never to do business with the Plaintiff in future.

(d) Koen had contacted him during December 1997 with a request to quote on prices for the supply and delivery of ground nuts to Sunland (one of Triotrade's business associates), to the Plaintiff and to Evans. He furnished a written quotation to Koen on 12 January 1998 – this document is also part of the exhibits before me.

(e) On 24 February 1998, Koen and Lowenthal visited his premises at Jan Kempdorp. An agreement was reached that the Defendant would sell to Triotrade 3500 tons unshelled ground nuts and 2500 tons machine cleaned ground nuts – the firstmentioned was to be delivered to Evans and the latter to the Plaintiff. It was agreed that the purchase and delivery of machine cleaned nuts was subject only to the price therefor being acceptable. Later Koen had reverted to him (de Villiers), advising that the price for the machine cleaned ground nuts was too high and it was agreed that ground nuts in shelled form would be purchased by Triotrade and delivered to the Plaintiff.

(f) De Villiers testified further that the details of the agreement were finalized between him and Koen on 2 April 1998 (according to the Villiers there was only an agreement <u>in principle</u> on the purchase and sale of ground nuts on 24 February 1998). On 2 April 1998 the agreement was finalized on price, deductions for standard industry losses, the method and manner of payment and the question of ownership.

As regards ownership, de Villiers testified that it was agreed between him and Koen that ownership of the ground nuts would pass once payment has been made and the product had been delivered. An important feature of the evidence here is that according to de Villiers, ownership would pass once not only the cost price of the ground nuts, but also the handling charges (where of course applicable) had been paid to the Defendant.

(g) De Villiers testified that he had not contracted with the Plaintiff as purchaser on the dates mentioned or at any other time. Triotrade was purchaser and principal party to the agreement. Triotrade was most certainly never an agent of the Plaintiff's – of that he was certain.

(h) The agreement was amended twice – these related to the fact that ground nuts had to be delivered in unshelled form to Viljoenskroon (at R167.00 per ton delivery and administration charges), as per the amendment of 27 July 1998. Subsequently when it appeared that the Viljoenskroon operation lacked the necessary capacity, a further amendment was agreed to whereby the Defendant would process and shell the nuts at an additional cost of R 235.00

per ton.

(i) de Villiers testified further that all the documents had been forwarded to Triotrade. Payment for the nuts were received from Triotrade. As a result of the problems which arose, he tendered payment in the sum of R 147 910.88 to Triotrade, subject to certain conditions. When he received a letter of demand from the Plaintiff's attorney, he consulted with his own attorney as a consequence whereof a letter in response was drafted and forwarded to the Plaintiff's attorney. It transpired during cross-examination that de Villiers had, prior to the said consultation, sent a written memo to a partner in the firm of attorneys representing him as a consequence of the aforementioned letter of demand. I shall discuss this in more detail later.

i) In conclusion – de Villiers was steadfast in his denial that he had contracted with the Plaintiff and that Triotrade had merely acted as the Plaintiff's agent.

11.1 As has seemingly become custom with civil trials, there is a huge volume of documents which have been handed in as exhibits. Some of these are more relevant than others. Quite a number of them hardly bear any semblance of relevance whatsoever to the issues at hand. Of the four hundred or so pages of documentary exhibits, not even a tenth can be said to be of much assistance in resolving the issues under consideration. In most cases, the documents amount to overkill; the approach appears to be – why produce and hand up as an exhibit one invoice to prove a point when you can do so with fifty additional similar invoices?

Both parties are equally to blame and my comments should be read accordingly.

11.2 To my mind the most important documents are the following (I shall at the appropriate stage make reference thereto in the course of my deliberations on the probabilities in this matter): -

a) the minutes of the meetings referred to earlier;

b) the various payment advices issued by the Defendant (one of these, accompanied by an agreement between the parties that it represents a standard type of payment advice, issued in, for example, 50 such instances would have sufficed, instead the record is burdened with 50 or so of these documents);

c) <u>relevant</u> extracts from the ledgers of the Plaintiff, Triotrade and the Defendant;

d) the six tax invoices issued by the Defendant to the Plaintiff;

e) the letters between the Defendant and Triotrade;

f) the two letters exchanged between the attorneys for the parties in respect of the Plaintiff's demand for payment;

g) the memorandum forwarded by de Villiers to his attorneys.

11.3 During the course of the trial I made two rulings relating to documents, the contents whereof amount to self-corroboration (or, put differently, proof of a previous consistent statement). I had upheld the objection against the handing in of a draft affidavit, forwarded to Koen by the Defendant's attorneys for purposes of opposing an application for summary judgment. Later, during the Defendant's case, I had allowed the handing in of the memo referred to in par. 11.2(g) above.

These are my reasons for those rulings.

11.3.1 A previous consistent statement amounts to self-corroboration and would only be admissible as evidence in certain exceptional instances. One of these, relevant to the present case, is to rebut an allegation of recent fabrication.

See: ***Hoffman & Zeffert, The South African Law of Evidence,*** 4th ed., at 121 et seq., and cases there cited.

11.3.2 The draft affidavit was disallowed as admissible evidence for precisely that reason – Koen's notes thereon would have amounted to self-corroboration, i.e. to prove that he had on a previous occasion already denied that he had contracted as a principal party with the Defendant (as the draft affidavit would have it.

Conversely, de Villiers' memo to his attorneys, albeit tantamount to a previous consistent statement, became admissible when Mr. Antoni had pertinently put it to him in cross-examination that he had recently fabricated his defence as it appears in the pleadings.

11.4 Quite often documentary evidence constitutes the best evidence at a trial. I have been urged by Mr. Antoni, during his argument to take the opposite approach; as he put it – the documentary evidence should yield to the oral evidence. In my view the following is abundantly clear: -

a) that the overwhelming majority of the documents before me, reflect direct transactions between the Defendant (as seller) and Triotrade (as purchaser), i.e. consistent with the Defendant's version as to who the parties to the agreement were;

b) the documents which have a bearing thereon, support the Defendant's version of what the terms of the contract (as amended) were;

c) in a few instances, which I shall elucidate further shortly, the documents may well be the deciding factor in tilting the scales in favour of one of the sides in assessing the probabilities, which I now proceed to do.

12.1 This is not the type of case the evidence of which lends itself to easy assessment of which of the two versions are favoured by the probabilities. Bearing in mind the approach to be adopted in a matter such as this one (see the *dictum* of Eksteen JA in the ***National Employers General Insurance*** case, quoted at par. 9 above), it seems to me an appropriate starting point to consider the oral evidence.

12.2 None of the three witnesses were either exceptionally good or bad. There is no basis to make adverse demeanour findings against any one of them. In any event, I am mindful of the fact that a witness box in a courtroom can hardly be a place which inspires comfort in any witness.

See: ***S v V*** 2000(1) SACR 453(SCA) at 455 f-g, and authorities there cited.

I am not able to find that any one of the three witnesses has given deliberately false testimony.

What is of more importance is that I assess their evidence against the probabilities, particularly with regard to the important, disputed aspects of this case;

See: ***Germani v Herf & another*** 1975(4) SA 887(A) at 903C-E, as referred to in:

Body Corporate of Dumbarton Oaks v Faiga 1999(1) SA 975 (SCA) at 979 B-I.

12.3 The question to be answered is: which one of the versions advanced in evidence by the witnesses is, on the probabilities, correct?

See: ***Body Corporate of Dumbarton Oaks v Faiga***, *supra*, at 979I-J.

12.3.1 Mr. Danzfuss has, understandably so, laid much emphasis in his argument on the fact that the documentary evidence overwhelmingly supports the Defendant's version on both the issues which require determination.

There is considerable substance in this argument.

A perusal of the mass of invoices, summaries, letters and payment advices before the Court resoundingly underscores this submission. They point almost persuasively in one direction only, viz. that the Defendant had contracted with Triotrade directly for the sale of ground nuts.

12.3.2 It is correct, as Mr. Danzfuss has submitted, that this case involves a considerable amount of circumstantial evidence and one needs to tread with care in drawing inferences therefrom. The issue to be determined is which one of the several inferences which present from the facts is *"the most plausible or probable inference";*

See: ***Cooper & another NNO v Merchant Trade Finance Ltd*** 2000(3) SA 1009(SCA) at 1027G,

Or put differently –

Which is *"the most natural or acceptable inference";*

See: ***Minister of Safety & Security v Jordaan t/a Andre Jordaan Transport*** 2000(4) SA

21(SCA) at 26G.

12.3.3 One must furthermore be mindful of the pitfalls of:

a) a party to a contract advancing its own interpretation of the terms of an oral agreement; and

b) relying on the mere say-so of a witness who describes himself as an *"agent"* or *"representative"* when the Court has to make a finding on precisely that matter.

12.4 If the documentary evidence tends to favour the Defendant's version on the probabilities, then the joker in the pack must surely be Koen of Triotrade.

Mr. Antoni has argued strenuously that I should find that Koen is a completely independent witness.

He has submitted further that, in order for me to find for the Defendant on the disputed issues, I would of necessity have to reject Koen's evidence as false. Mr. Danzfuss, on the other hand, has submitted that: -

a) Koen is not an independent witness in that he stands to gain from successful litigation by the Plaintiff. As I understand his submission, a finding in favour of the Plaintiff would ensure that action is not instituted against Triotrade. There is also an oblique suggestion that Koen may stand to benefit from success in this action by the Plaintiff in that his (outstanding) commission of some R150 000.00 may then be paid by the Plaintiff.

(b) Koen's evidence should be rejected, as against the probabilities, which is submitted to favour the Defendant.

12.5 Two matters create considerable difficulty in the adjudication of this case:

As I have said, the documentary evidence tends to favour the Defendant's version, while Koen's evidence strongly supports the Plaintiff's version. All three witness are *ad idem* that de Villiers had said to Koen that he (de Villiers) *"wants nothing to do with the Jew"* (referring to Lowenthal). The dispute arises in that they place a different spin on these words – Plaintiff's version, as advanced by Lowenthal and Koen, would have it meaning that de Villiers was prepared to do business with Lowenthal (and contract with him) but only through Triotrade/Koen acting as some type of conduit; de Villiers on the other hand, says it meant that he was not prepared to contract with Lowenthal/the Plaintiff at all.

12.6 Koen has made a very favourable impression upon me. He did not appear to me to have any ulterior motive to advance the Plaintiff's cause. On the contrary, his declaration, elicited at the very end of his testimony when I was questioning him, that he had lost some R150 000.00 in commission and that he had declined thereafter to act as the Plaintiff's agent when requested to do so again, is an important factor which enhances his credibility.

An opposing, cynical view may of course be that his testimony is aimed at recovering his lost commission. It was noticeable that Counsel for the Defendant did not avail himself of the opportunity to explore this possibility, when I gave another opportunity for questions emanating from mine.

This evidence which I refer to, would in my estimation have been of substantially less impact if it had been proferred in chief, to attempt to establish Koen's *bona fides* and impartiality.

I regard him as an independent witness. He appeared to be somewhat surprised, and taken aback by Counsel's suggestion in cross-examination that his motive for testifying for Plaintiff is to avoid action being instituted against himself/Triotrade.

I therefore have no hesitation in accepting his evidence.

12.7 I have never come across a business transaction of the nature contended for by the Plaintiff's witnesses, i.e. where documentation are routed through an agent/conduit, as is the case with payments. It does not, of course, mean that the agreement (assuming that Plaintiff's version is correct) was invalid, nor has Mr. Danzfuss contended otherwise. I have been told by Counsel that no tax or other advantages accrued to any of the parties through this arrangement. Again, Mr. Danzfuss has not contended otherwise.

12.8 The reason proffered for this peculiar, cumbersome *modus operandi* appears on the face of it to be rather unconvincing. Accepting for the moment that de Villiers wanted nothing to do with Lowenthal and his company, why would he then enter into a contract with him/them? Conversely, of course, one may say that de Villiers knew right from the start that the nuts were destined for the Plaintiff, that Plaintiff was the one who has the financial means to purchase and to pay for the considerable quantities of ground nuts in question (whereas Triotrade was not and de Villiers was well aware of that).

12.9 I have deliberated carefully over these anomalies and peculiarities, in particular the question of Triotrade acting as a conduit.

I have come to the conclusion that the Plaintiff's version is the correct one and that the probabilities favour it. I have done so for the reasons which follow.

12.9.1 Inasmuch as Lowenthal and de Villiers were on par as witnesses who had advanced conflicting and mutually destructive versions on the issues before me, Koen is an independent witness whose evidence I accept, for the reasons already mentioned.

12.9.2 Although the documents *prima facie* militate, on the probabilities, against the Plaintiff's version, it must be borne in mind that in the Defendant's own ledger, there appears an entry which reads:

> "*Verkope*: *502.1 Snack Factory 411*
> *(R) 115 481 6 55*
> *Verkope:* *503.1 Snack Factory 412*
> *(R) 558 973.80"*

This conveys the impression that the Plaintiff was the (direct) purchaser of the ground nuts for the amounts in question. De Villiers' explanation for this entry in the ledger failed to impress me at all. He blamed a manual program and proffered inadmissible hearsay evidence to attempt to explain this away. Of lesser import further is the fact that he had issued tax invoices directly to the Plaintiff. His explanation that this was done at Koen's request, for value added tax purposes, cannot be summarily rejected. It does not detract from the fact, however, that on those invoices the inscriptions again appear as *"Kontantverkope: Snack Factory".*

12.9.3 On Koen's evidence, it appears that this type of arrangement was not as unique as it would appear at first blush. His evidence, elicited under cross-examination, that Triotrade had previously acted as an agent where documents were issued in Triotrade's name and routed through it, *inter alia* with Tiger Oats, is of considerable importance. That evidence, furthermore remained uncontroverted.

12.9.4 It is clear, on the probabilities, that de Villiers knew who Lowenthal and the Plaintiff were, even before Koen had approached de Villiers for the supply of ground nuts to Plaintiff in 1998.

He also knew that Plaintiff was a significant player in the ground nuts industry and that Plaintiff had the financial muscle to do business on the scale contemplated (whereas Triotrade, to de Villiers' knowledge did not). He knew further that the ground nuts were destined for Plaintiff.

Al these factors lend credence to and support the Plaintiff's version.

12.9.5 The minutes of the meetings held also support the Plaintiff's version. These minutes stand uncontroverted as being a true reflection of the events which had occurred at the meetings.

It is noticeable and of considerable significance that these minutes reflect agreements as to performance and the manner thereof by Defendant *vis-à-vis* the Plaintiff. This lends strong support to the allegation that these were indeed the principal parties to the agreement. They also do not bear out what de Villiers had contended in evidence, namely that the meetings were called to address the problems which the Defendant had been experiencing.

12.9.6 The question of the passing of ownership is of some importance, not only regarding the terms of the agreement, but also as to the credibility of the witnesses. On this aspect, I find the Plaintiff's version more acceptable. I cannot see how, on the probabilities, the Plaintiff would risk not being the owner of a stack of ground nuts, even though he had paid the full purchase price of the nuts to the Defendant. This is even more improbable if one bears in mind the fact that, even after the full cost price of the nuts had been paid to the Defendant, the latter remained in possession thereof (for purposes of shelling and processing same).

12.9.7 Much was made in argument of the contents of the letter by Defendant's attorney, Mr. Terblanche (exhibit A113) in response to the letter of demand addressed to the Defendant by the Plaintiff's attorney. Exhibit A113 does not in any way, even obliquely, suggest that the Defendant had not contracted with the Plaintiff, but rather with Triotrade.

The adverse impact thereof on the Defendant's version is somewhat ameliorated by exhibit "F", the memo forwarded by de Villiers to another attorney in the same firm, prior to de Villiers' consultation with Terblanche. In my view one can say no more than this – for some inexplicable reason Terblance had been completely ignorant of the contents of exhibit "F" at the time that he had drafted the said letter.

It follows that de Villiers did not, again inexplicably, draw Terblanche's attention to the said memo. This conclusion accords with de Villiers' evidence under cross-examination that he had advised his attorney about the fact that he had contracted with Triotrade and not with the Plaintiff, for the first time when he had received the summons in the matter. His explanation later that he had misunderstood Counsel's question and had confused the summons with the letter of demand, is singularly unimpressive. This must obviously reflect adversely on de Villiers' credibility. This adverse aspect should, however, be considered in the context of the contents of exhibit "F". To conclude – I do not view this as a factor which by itself renders de Villiers' version unacceptable, but I take it into account together with other factors which militate against the Defendant's version.

12.9.8 Another factor which weighs against the Defendant's case is the fact that de Villiers' evidence as to when the agreement had been concluded is at variance with the Defendant's plea. It will be recalled that de Villiers had stated in his testimony that an *"in principle"* agreement had been reached on 24 February 1998 and the finer details thereof had been finalised on 2 April 1998. In his plea the averment is made that the agreement had been concluded on 24 February 1998; no reference whatsoever is made to 2 April 1998.

12.9.9 On a conspectus of all the evidence (oral and documentary) I am not persuaded that Lowenthal and Koen could have concocted their version. On the contrary, when I consider their evidence against the probabilities, I am satisfied that the Plaintiff's version is more acceptable.

12.10 Mr. Danzfuss has submitted that it is indeed a peculiar situation for an agent such as Koen to be so centrally involved in all the transactions between the Plaintiff and the Defendant.

What must be borne in mind, however is that: -

a) this was, according to Koen, not such a unique situation, since he had acted in this manner on other occasions, *inter alia* for Tiger Oats;

b) it would accord with the evidence (about which there is consensus) that de Villiers had wanted nothing to do with Lowenthal/Plaintiff); and

c) Koen was to earn a fairly handsome commission from the Plaintiff for his efforts.

13. As to the first issue between the parties, I accordingly find for the Plaintiff: the parties to the contract were the Plaintiff and the Defendant. I find further that Triotrade, represented by its sole member, Hannes Koen, had acted as the Plaintiff's agent at all material times in this matter.

14. On the second issue, I also find for the Plaintiff: the terms of the agreement concluded between it and the Defendant were as set forth in paragraphs 4.1 to 4.9 (both inclusive) of the Plaintiff's Particulars of Claim, save that the sum in par. 4.9 was R180.00 per ton of ground nuts.

It is clear, on the evidence of de Villiers (which is uncontroverted on that particular aspect) that the purchaser would bear losses normally borne by the seller. In similar vein there is uncontradicted and uncontested evidence from de Villiers that the agreement had been amended twice, as set forth in paragraphs 3.7 and 3.8 of the Defendant's Plea.

I accordingly find that the agreement between the parties had:

a) contained the further terms (i.e. over and above those as set forth in paragraphs 4.1 to 4.9 of the Plaintiff's

Particulars of Claim) as contained in paragraph 3.6.3 of the Defendant's Plea; and

b) been amended twice as set forth in paragraphs 3.7 and 3.8 of the Defendant's Plea.

15.1 In accordance with the agreement between the parties as contained in the pre-trial minutes, it follows that, having found for the Plaintiff, judgment must be entered for the Plaintiff in the sum of R147 910.88. Costs must follow the outcome and is awarded to the Plaintiff.

15.2 There remains the matter of the costs of the postponement on 7 November 2000 which I had reserved for determination at the hearing.

The Plaintiff had clearly been remiss in not furnishing its Further Particulars timeously and in complying with the Defendant's Rule 35(3) Notice only on the morning of the application. The Defendant had quite clearly been prejudiced by this dilatoriness. The documents which it had requested namely Plaintiff's ledger and the financial records with regard to Triotrade and the Defendant, have been of particular importance in this case. Without it, the Defendant could clearly not prepare properly for trial.

16. I issue the following order:

16.1 Defendant is ordered to pay to the Plaintiff the sum of R147 910.88.

16.2 Defendant is ordered to pay the costs of the action.

16.3 Plaintiff is ordered to pay the costs of the postponement of 7 November 2000.

S.A. MAJIEDT

JUDGE

Date heard: ***12-06-2001***

Date delivered: ***29-06-2001***

Counsel for Plaintiff: ***Adv. Antoni***
Counsel for Defendants: ***Adv. Danzfuss***