



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

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: **918/2021**

In the matter between:

KP DE LANGE TRADING (PTY) LTD

Plaintiff

and

HWBH GROUP (PTY) LTD

Defendant

JUDGMENT BY: REINDERS J

HEARD ON: 19 JANUARY 2024

DELIVERED ON: 10 MAY 2024

This judgment was handed down in open court and circulated to the parties' representatives by electronic mail communication on 10 May 2024.

- [1] During 2017 the plaintiff (as represented by Mrs Elaine de Lange) and the defendant (represented by Mrs Hannelie Pienaar [now Roux]), commenced business dealings acting respectively on behalf of the parties herein, both being

companies. The parties were, at the time, both trading as brokers in maize chop (chop), and neither produced chop or had the same in stock. A milling company named Zesto Mill (Zesto) was the producer of the chop. It is common cause that the plaintiff bought tonnages of chop from Zesto, and the defendant in turn then bought such tonnages from the plaintiff and sold it to its customer(s).¹ These tonnages were loaded on the trucks of a transport company as arranged by the defendant's buyer(s), at the premises of Zesto. It is common cause that chop was supplied by the plaintiff to the defendant in the aforesaid manner during the time period from 1 March 2018 to 4 April 2018. For ease of reference and with no disrespect intended, the witnesses will be referred to by their first names as was done throughout the trial.

- [2] The plaintiff issued summons against the defendants for payment of R732 289,20 plus interest and costs. In the particulars of claim it is averred that the parties entered into a verbal agreement for the supply of the chop at the price that would be agreed to between the parties (in accordance with the average market price plus commission) and that the defendant would pay within 48 hours from delivery of an invoice. It is averred that in terms of the agreement plaintiff duly performed by supplying the chop to the defendant from 1 March 2018 until 4 April 2018. However, so plaintiff avers, defendant breached the agreement by short paying and non-payment of the goods in the claimed amount.
- [3] Under the heading "Claim 1", plaintiff avers that the amount claimed is due and payable and that, as a result of the breach of the agreement by the defendant, "damages" had been suffered by plaintiff in the aforementioned amount. In what is referred to as an alternative, plaintiff pleaded that it obtained default judgment against defendant in the High Court of Kwa-Zulu Natal for the claimed amount. Defendant applied for rescission of the judgment and in support of that application Hannelie (on behalf of the defendant) stated in an affidavit that defendant had made payments to plaintiff in respect of the claimed amount

¹ Referred to as back-to-back transactions.

leaving an outstanding amount of R316 282,29. Plaintiff averred that the aforementioned affidavit constituted an acknowledgment of debt.

- [4] Defendant in its plea admitted that the parties entered into a verbal agreement. It averred that in terms of the agreement the plaintiff would sell all the chop produced by Zesto to the defendant, however defendant would pay R100 per ton more than the average market price for the maize chop produced by Zesto during March 2018 in order to assist Zesto financially. During April 2018 defendant would pay R100 per ton less than the average market price for the chop to "balance out the over recovery during March 2018." From May 2018 until 31 December 2018 plaintiff was to sell to the defendant the chop at the market price. In addition, plaintiff would not earn commission on sales for the months March 2018 and April 2018. Defendant avers that plaintiff failed to fulfil its obligations by adding R30 per ton commission on the chop during the period 1 March 2018 to 4 April 2018.
- [5] Defendant avers that plaintiff over charged the defendant for the same mentioned period in respect of the purchase price in the amount of R154 743,80. Defendant pleads that plaintiff refused to sell chop to defendant after March 2018 resulting in a loss of R136 082,00 in respect of defendant's right to recover for the over-payments for the March period. It was further alleged that two invoices relied upon by plaintiff were fictional. Defendant relied thereon that it made five payments during the period 12 March 2018 to 27 March 2018 totalling R224 834,60 and which defendant avers plaintiff failed to take into account. Defendant denied that plaintiff suffered any damages as alleged.
- [6] At the conclusion of the trial much was made by defendant in respect of the allegation in plaintiff's particulars of claim in as far as it averred that plaintiff suffered damages as a result of defendant's breach of the agreement. Holistically considered, I am of the view that plaintiff claims the shortfall or non-payment of the invoices in the claimed amount. It is nowhere in plaintiff's particulars of claim averred that it cancelled the agreement with defendant. On the contrary, it is explicitly averred that these amounts were not paid, that plaintiff duly performed in terms of the agreement and that plaintiff claims the

amounts due to them. That approach aligns with the evidence adduced by the plaintiff and at the same time aligns with the evidence tendered by defendant. I am therefore satisfied that plaintiff's claim as set out in the particulars of claim is to be construed as a claim for payment of the balance due and owing to it.

- [7] The plaintiff called three witnesses, namely Elaine, her brother-in-law Mr Kobus Theron (Kobus) and the owner of Zesto at the time, Mr Boeta Grobler (Boeta). It is common cause that both men, as well as the husband of Hannelie (Mr Ferdie Roux, testifying on behalf of the defendant) have extensive knowledge of the grain market.
- [8] Elaine, the plaintiff's administration director, testified on the business dealings between the parties and how she dealt with the processing and confirmation of orders received. From the start of business dealings, the practicality of the agreement between her and Hannelie was that Hannelie would contact her with a request for chop. She (Elaine) would then contact Zesto and establish the availability of chop, where after she would communicate back to Hannelie (via phone or the social platform WhatsApp) the tonnage of chop available, as well as the price thereof (as determined on the basis of the average market price at the time as reflected by the Sufex pricing index which varied on a daily basis) and place such an order with Zesto. The tonnages loaded was confirmed by Zesto in the form of a weigh bridge certificate. Elaine averred that invoices were duly sent to defendant, however defendant either failed to make payments or did short payments. She testified on the claimed amounts and payments with reference to several documents. In cross-examination she denied defendant's version that was put to her in respect of the terms of the agreement of 1 March 2018. In particular, she denied that she would have agreed to not earning any commission and stated that there would then have been no reason for plaintiff to do business as the commission constituted her only source of income. When confronted with the payments "in total 5" amounting to R224 834, 60 she testified that same was in respect of previous deliveries.
- [9] Kobus was involved in the business dealings between the parties since its inception. He testified on the Sufex price of chop during the relevant periods,

and confirmed it to have been R1 600,00 at the time. Kobus denied the existence of an agreement whereby the defendant would pay less or more as averred pleaded by the defendant, explaining that the plaintiff was not in a position to negotiate any other price than that asked by Zesto. If Plaintiff did not accept the price, Zesto would sell it to any other customer. He testified in respect of a meeting held at Zesto in April with Hannelie in relation to a discussion at the time about defendant's arrears account with plaintiff, and wherein she undertook to put up property as security for payment that must still be effected. I might add that Elaine testified similarly in this respect.

- [10] Boeta likewise testified that he was present when Hannelie made the undertaking to make payment and even agreed to put up security for the outstanding amount. He denied any agreement on lesser payments on the price of the chop as determined at the time to be effected, stating that the plaintiff never had any relaxation to the terms of the agreement between the plaintiff and Zesto that the chop was payable upon delivery thereof. He explained that he would never had agreed to any under or overpayments as it would not have made any business sense – that would have meant that he would either pay “himself” (Zesto) or write off the amount. He sold chop to several buyers at the time. No payment was received, nor was security put up by Hannelie.
- [11] Hannelie and her husband Mr Ferdi Roux (Ferdie) testified on behalf of defendant. She confirmed the verbal agreement to be along the lines pleaded by defendant. She testified in respect of the five payments and confirmed that she still held the view that the payments should have been subtracted from the claimed amount as it was payments in respect thereof. Ferdie testified in respect of factors that should be taken into account in the determination of the price of chop at the time, more specifically the role of the Sufex price on chop indicating that the price of chop (having less nutritional value than grain) is not correlated to Suffex as much as grain. He was, however, unable to tender any evidence in respect of the agreement as alleged by Hannelie, stating that the parties were not married yet at the time and resided separately.

- [12] The versions by the parties in respect of the terms of the agreement of 1 March 2018, are irreconcilable. The payments due and effected by defendant are also in dispute. In resolving these factual disputes I follow the guidelines as set out in *Stellenbosch Farmers' Winery Ltd and another v Martell & Cie S and others*².
- [13] I must say that the witnesses called on behalf of the plaintiff impressed me in the witness stand. Elaine, in particular, was a credible and honest witness who did not shy away from making concessions where she was questioned on discrepancies in her bookkeeping. I am satisfied however that she fully explained and furnished reasons for such discrepancies which were clearly of an administrative nature, for example where a typing error occurred on the numbering of the invoices. At the time her only income derived was from the commission that she earned from the business dealings with Hannelie. It is common cause that the defendant was the plaintiff's only client in the chop trading. Elaine testified that plaintiff did not survive financially as a result of money due but not paid.
- [14] In my observation of Hannelie it was evident to me that she is an intelligent, seasoned and successful business women who is diligent and dedicated in conducting business on behalf of the entities whom she represents. It is not defendant's case that it did not receive the tonnages of chop, but rather as testified by Hannelie that she had been overcharged as pleaded. What was not pleaded or adduced under evidence, is that no amounts had been due at the time. Had the defendant been bona fide in its opposition to the claimed amounts one would have expected the defendant to at least make payment of all of the transactions up until the last delivery on 4 April 2018 in the amounts which, on her version, were due and owing by the defendant, and provide proof thereof. This was not done. To the contrary, when confronted with the amounts not paid, Hannelie in my view confirmed non-payment by stating: "I stopped payment because I knew I was done in."

² (427/01) [2002] ZASCA 98 (6 September 2002).

- [15] The plaintiff duly discovered its banking statements for the time period from February to April 2018, and Elaine testified on the payments reflected therein as received from the defendant, leaving no doubt as to the amounts so paid. It is common cause that the defendant did not make discovery of its banking statements for the same period (or any other period for that matter). When confronted during cross-examination with the reason why the defendant did not discover its banking statements to serve as proof of payment, she testified that she did not have it at hand in court adding "I was their only client, but they were not my only supplier", ostensibly to indicate the vastness of such banking statements. This is, however, not an explanation that suffices for the non-discovery of the statements.
- [16] Apart from banking statements, the defendant company's bookkeeping system would also have served as proof of payments made to the plaintiff. The defendant did not discover documentation in this regard. However, the plaintiff discovered a ledger (file) of the defendant's bookkeeping. Elaine during her testimony alluded to the invoices reflected and payment thereof, to indicate that payments were indeed outstanding as averred by the plaintiff. Hannelie acknowledged that she was in fact the person who had provided it upon a request to do so, having retrieved and mailed it from a computer programme (Pastel). When confronted with amounts not reflected as paid, she explained that the detailed file was not audited. Although she could retrieve the audited statements, she did not know that it would be required of her to have it at court. It is common cause that the audited version was never discovered. According to her, she regrettably failed to send prove of "the last seven" payments to the plaintiff.
- [17] In my view it is safe to conclude from the evidence as a whole that plaintiff did in fact deliver to the defendant the chop as referred to in the particulars of claim and for the tonnages of and amounts as claimed. In my view, the probabilities favour the plaintiff that the terms of the agreement did not include any under- or over- payment of the claimed amount, nor that Elaine would have sacrificed her commission. I accept the market related price of the chop to have been R1

600,00. I am satisfied that the agreement between the parties included that defendant could pay within 48 hours from date of invoice. That explains how deliveries took place for which plaintiff had not been paid. The witnesses for the plaintiff corroborated each other in material respects which included testimony to the effect that defendant was in arrears, admitted it and attempted to reach an agreement in respect of payment and the putting up of security. I consider the affidavit made by Hannelie to be an important corroborating factor. In the affidavit Hannelie did not place in dispute the invoices in the amount of R732 289,20. Her version was rather that five payments in respect thereof had been made totalling R224 834,60 and that there was a counter-claim exceeding the balance of the claimed amount.

- [18] It is trite that a party pleading payment must prove such a payment.³ The payments relied upon were made respectively on 12 March 2018 (two payments), 16 March 2018 (two payments) and 27 March 2018, whilst the plaintiff's claims were based on deliveries and invoices from 20 March 2018. It goes without saying that Elaine's evidence in respect of the payments, namely that they related to deliveries before 20 March, should be accepted. After all, it is not the defendant's case that on 12 and 16 March 2018 it had already paid for deliveries that were still to be done.
- [19] In the same affidavit by defendant in support of the rescission application it was stated that the defendant had a counter-claim for damages and loss of commission as a result of plaintiff's breach of contract. Properly read in my view the affidavit conveyed that due to the counter-claim, defendant is not indebted for the outstanding balance it calculated. No counterclaim for the alleged amounts or losses were instituted.
- [20] In my view therefore the plaintiff, on a preponderance of probabilities, succeeded in proving that defendant is still indebted to it in the amount claimed. There is no reason why cost should not follow the event. In my discretion I deem it appropriate that such costs be taxed on scale B.

³ Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd (in liq) 1998 (1) SA 811 (SCA).

[21] I therefore make the following order:

Judgment is granted in favour of plaintiff and defendant is ordered to pay:

1. The amount of R732 289-20.
2. Interest on the aforementioned amount calculated at 10,5% per annum a tempora morae from 2 March 2021.
3. Cost of suit to be taxed on Scale B.



C REINDERS, J

On behalf of the plaintiff:

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