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

Reportable/Not Reportable

Case no: 3977/2023

In the matter between

HYDRO HYPE (PTY) LTD	**Applicant**
and	
CONSORTIUM BEEF AGRICULTURAL PRIMARY CO-OPERATIVE LIMITED (Previously Consortium Beef (Pty) Ltd)	**First Respondent**
JOHANNES CASPARUS DE VILLIERS	**Second Respondent**
PIETER WILLEM ADRIAAN NEL	**Third Respondent**
JAN JACOBUS DE VILLIERS	**Fourth Respondent**
ISOBEL STOLS	**Fifth Respondent**
NICOLAAS JOHANNES ZAAYMAN	**Sixth Respondent**

Coram: Naidoo J

Heard: 23 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be 11h00 on 24 March 2025.

Summary: Law of contract – fixed date for termination of contract – terminated by effluxion of time – payment on termination in accordance with contract – calculation of value of cattle units in terms of formula and method of calculation stipulated in contract

ORDER

1. The interlocutory application in this matter is granted.

2. The agreement entered into between the applicant, Hydro Hype and the first respondent, Consortium Beef, is declared to have terminated by the effluxion of time, on 17 January 2023;

3. The first respondent is directed to calculate the value of applicant's 469 cattle units and provide the calculated value, with a full detailed breakdown of the calculation, to the applicant, within thirty (30) calendar days of the service of this order upon the first respondent.

4. For the purposes of the calculation referred to in para 3 above, the parties will be guided by clause 9 of the agreement, any other relevant provision of the agreement and any further terms and conditions that they may agree upon.

5. The costs of the application and the interlocutory application are to be paid by the first respondent, such costs to include the costs consequent upon the appointment of two counsel, on scale C in respect of senior counsel and scale B in respect of junior counsel.

JUDGMENT

Naidoo J

[1] This is an application by the applicant, Hydro Hype, essentially for payment in respect of its cattle units by the first respondent, Consortium Beef Agricultural Co-operative Limited (Consortium Beef) alternatively, payment of the value of each head of cattle. The second to sixth respondents were joined in this application, by virtue of each being a director of Consortium Beef. No costs order was sought against them.

[2] Hydro Hype sought, in summary, the following relief, in the form of declaratory orders:

a) the agreement between it and Consortium Beef, which was regulated in terms of section A thereof, terminated, lapsed and/or alternatively came to an end by effluxion of time on 17 January 2023;

b) the value of Hydro Hype's 469 cattle units shall be R7 867 552.00, alternatively, R7 392 331.10.

Alternatively to b), Consortium Beef be directed to calculate the value of Hydro Hype's cattle units and provide the calculated value, with a full and detailed breakdown of the calculation, to Hydro Hype within 7 days of the service of the court order upon Consortium Beef. There were also extensive directives set out for how the calculation was to be done, what steps were to be taken in the event that the parties could not agree on the calculation, as well as how other post-termination procedures were to unfold.

[3] The brief background to this matter is that Hydro Hype entered into an agreement (the agreement) with Consortium Beef, in terms of which it made available to Consortium Beef, 413 cows, 267 calves and 8 bulls (being a total of 688 animals), in exchange for 469 cattle units. Although the agreement is dated 26 February 2018, it seems that the parties accept that the effective date was 18 February 2018. They also accepted that they were bound by the agreement in spite of it not bearing the details of Hydro Hype, nor being signed on behalf of Hydro Hype. Other details, such as the calculation of a cattle unit were also not completed. The cattle units mentioned entitled Hydro Hype to monthly profit sharing payments by Consortium Beef, which were calculated in terms of a formula agreed between the parties. The termination date of the agreement was 17 January 2023, which provided that upon termination, Hydro Hype was entitled to elect whether its cattle units should be sold or whether it would receive cattle of equivalent value. In August 2022, Hydro Hype indicated that it preferred to receive payment for its cattle units from Consortium Beef, upon termination of the agreement.

[4] I pause to note that the notice of termination is dated 15 June 2022, and was sent on the same day to a functionary, 'Johannes', at Consortium Beef. In a subsequent email on 18 August 2022, Hydro Hype reiterated its intention to receive

payment for its cattle units at termination and attached the notice of termination again. The reason for this appears to be that the email address of the functionary at Consortium Beef had changed and Hydro Hype was, subsequent to 15 June 2022, informed of this, hence the email of 18 August 2022. I note that it is not disputed that proper notice of termination was given.

[5] Hydro Hype alleges that this decision was initially noted by Consortium Beef, but shortly thereafter, the latter disputed that it was obliged to buy any cattle from Hydro Hype and tendered, instead, delivery of cattle to the same value. A few months later, in November 2022, it seems that Consortium Beef changed its mind again, withdrawing its tender of delivery of the cattle and advising that compensation would be paid in terms of the agreement. Two months later, on 10 January 2023, Consortium Beef once again had a change of mind and insisted that Hydro Hype collect the cattle at locations to be provided. Hydro Hype alleges that details of such locations were never provided to it, making it impossible to inspect the cattle tendered in order to decide whether to take delivery of the cattle or opt for payment for its cattle units. After the termination date for the contract had elapsed, Consortium Beef, on 20 January 2023, advised Hydro Hype that due to non-collection of the cattle, the agreement between the parties had automatically become renewed for a further five years. That was the catalyst for this application, as Hydro Hype disputed the renewal and approached this court for relief.

[6] Hydro Hype set out in detail the extensive interactions between the parties over a number of years. These interactions commenced in approximately 2017 when Hydro Hype agreed to participate in an investment plan devised by Consortium Beef, where Hydro Hype would give possession of its cattle to Consortium Beef, to farm with for five years, and would receive monthly payments. Hydro Hype would retain ownership of the cattle and be entitled to the return of the cattle at the end of five years. For the purposes of calculating the monthly return to Hydro Hype, the number of cattle it gave over was assessed as 'cattle units'. It was advised by the fourth respondent that Hydro Hype would be entitled to 550 cattle units.

[7] After the cattle were received by Consortium Beef, Hydro Hype was informed by a representative of Consortium Beef, that Hydro Hype might be entitled to fewer than 550 cattle units. Hydro Hype was dissatisfied with this, and it seems that correspondence was exchanged between the parties in this regard, until the fourth respondent, representing Consortium Beef, made a final offer on 24 February 2018 for an all-inclusive issue of 469

cattle units. Hydro Hype accepted the offer, in writing, on the same day. Another relevant point is that in a letter dated 10 April 2018, another functionary, Dr Paul Lubout, who was also involved in the transactions and interactions with Hydro Hype, confirmed to the latter, that '*You now own cattle units not specific animals*'. This was confirmed by Consortium Beef's attorney, in a letter dated, 15 November 2018, to Hydro Hype's attorney: '*We record that your client's cattle were converted to cattle units . . . After a five year period, your client has the decision to convert his cattle units to animals or receive payment of the value of the cattle unit/s*'.

[8] It is also evident that Consortium Beef accepted that section A of the agreement was applicable to Hydro Hype, as the agreement was forwarded to Hydro Hype where section A was circled and correspondence sent by Consortium Beef advising that section A applied to the agreement. Hydro Hype accepted this. The correspondence between the parties confirms that the termination date of the agreement was 17 January 2023. Hydro Hype also confirmed, repeatedly, that the agreement would terminate on that date, and gave no indication that it considered the possibility of renewing the agreement. Consortium Beef's responses indicate that it vacillated between accepting that the parties agreed to the conversion of its cattle into cattle units, for which it paid a monthly amount to Hydro Hype, and the insistence that it collect these cattle units by physically loading them onto a truck. Consortium Beef's letter to Hydro Hype, dated 17 January 2023, is evidence of this. In that letter, Consortium Beef noted its acceptance of Hydro Hype's previous election that, upon termination of the agreement, to receive a pay out in respect of the cattle units, and referred to Consortium Beef's letter of 19 September 2022, confirming that it would assist Hydro Hype with the correct count.

[9] Based on the above, Consortium Beef alleged that it, at no stage, agreed to make payment of cattle units upon termination of the agreement. In addition to the letter sent by Consortium Beef's attorney, which I referred to earlier, a reference to the agreement indicates a distinction between physical cattle (referring to animals) and cattle units. Under the heading 'The Parties Agree to the Following', the distinction is created by reference to 'A', being '*That the owner buys cattle units. . .*', and 'B' '*That the owner entrusted his herd to the management of CB. . .*' Under 'Interpretation', the agreement defines what a cattle unit is and proceeds to set out a detailed formula for the calculation of a cattle unit, which both parties considered binding on them. Section E of the agreement deals with 'Selling and Reclaiming after Termination of the Agreement'. Clauses 6.1 provides that '*If the owner wishes to sell his/her cattle units*

after termination of the contract, the following will apply', and clauses 6.2 to 6.3 set out the formula for calculation of the selling price. Clause 6.4 deals with 'Repossessing' and provides for the valuation by an independent valuer of the cattle or cattle units. Clause 6.4.2, which provides that '*Notice of intention to repossess animals will be done in accordance with Section 4.3 read together with 6.2.1 whereupon animals will be returned to the owner*' (my underlining). The distinction between cattle units and the physical animals is clear. In my view, it appears *ex facie* the agreement as well as the correspondence between the parties, that cattle units were the paper calculation of the value of an agreed number of cattle and not physical animals, after appraisal of the type and condition of the physical animals to match those that were originally given over to Consortium Beef. Cattle units were therefore not capable of being collected by being loaded onto a truck and removed, as claimed by Consortium Beef.

[10] With regard to termination of the agreement, reference to clause 5.3 is instructive: '*If the owner does not give notice to CB at least 6 months prior to termination of this agreement, the agreement will automatically renew for the same terms and conditions as contained in this agreement*'. As indicated earlier in this judgment, the notice of termination was given, and there is no dispute that it was properly given. However, this clause should be read with clause 5.2 which stipulates that '*[i]f the owner has the intention to resume ownership of the animals that was delivered to CB in terms of this agreement before the expiry date of this agreement, the owner will give written notice of such decision to CB of at least 6 months prior to the date of termination*' (my underlining). It seems to me that if the owner possessed cattle units, it was unnecessary to give that notice. The fact that such notice was given by Hydro Hype serves to reiterate its intention to regard the agreement as having been terminated on the agreed date.

[11] I turn now to deal with the interlocutory application brought by Hydro Hype. It sought an order substituting annexure FA32 attached to the founding affidavit in this matter with annexure 'X' attached to the interlocutory application. Consortium Beef opposed the interlocutory application. For ease of reference, I repeat the content of para 25.7 of the founding affidavit in the main application:

'*From the statement provide by Consortium Beef (Annexure "FA32"), it appears that Consortium Beef calculates the value of a single cattle unit at R15 761.90, which means that the 469 cattle units of Hydro Hype are valued at R7 392 331.10 (R15 761.0 x 469) on Consortium Beef's own version.*'

[12] Hydro Hype's explanation is that when counsel was briefed in this matter, annexure 'X' was attached to the statement marked FA32 as well as an email from Consortium Beef, dated 22 March 2023. Counsel concluded that the two documents went together, hence the wording of para 25.7. The annexures to the founding affidavit were collated by the attorney's correspondent, who attached only FA32, without picking up that it did not refer to the cattle unit value referred to in para 25.7. Consortium Beef did not raise this in their Answering Affidavit, so the error went undetected until 6 April 2024, when counsel was preparing heads of argument in preparation for the hearing of the matter on 16 April 2024. The matter was postponed on that day to allow the parties to file the answering and replying affidavits for the interlocutory application to be heard.

[13] The explanation in respect of annexure 'X' is that it was prepared and sent to Hydro Hype by Consortium Beef as part of the negotiations regarding the calculation of the number of cattle units that Hydro Hype would be entitled to in respect of the 688 heads of cattle that it gave over to Consortium Beef. Annexure 'X' shows values for 478 and 458 head of cattle. The final number which was agreed upon was 469. Hydro Hype alleges that while the number of cattle units was subject to negotiation and varied during the period of negotiation, the individual cattle unit value of R15 761.90 remained the same. Hence, the calculation in para 25.7. Hydro Hype asserted that substituting annexure 'X' for the statement in FA32 will not cause prejudice to Consortium Beef.

[14] Consortium Beef's opposition to the interlocutory application was based essentially on two grounds, firstly that replacing FA32 with annexure 'X' will create the incorrect impression that it was attached to Consortium Beef's dated 22 March 2023, which is not the case, and secondly that annexure X did not emanate from Consortium Beef and could have been prepared by Hydro Hype. In reply, Hydro Hype stated that Consortium Beef sent an email dated 19 February 2018, under the hand of Paul Lubout, who was part of the negotiations relating to the calculation of cattle units, to which was attached a Microsoft Excel spreadsheet, containing two tabs. Annexure 'X' came from the first tab. A colour copy of annexures was also attached. Another email dated 20 February 2018 emanated from Paul Lubout which discussed the agreement between the parties about details regarding the cattle units and other details. Colour copies of further annexures, relevant to the email dated 20 February 2018 and reflecting again details of various figures relating to cattle units, were also attached. Hydro Hype also indicated that the reference to the email dated 22 March 2023 was incorrect and should have referred to the email dated 19 February 2023. Paragraph 25.7 should therefore,

read accordingly. Hence, they maintain that the opposition by Consortium Beef is technical and has no merit.

[15] I refer to the allegations by Consortium Beef that it received invoices from Hydro Hype after termination of the agreement, and made payment in terms thereof, indicating that the agreement was renewed. An inspection of the statement attached to its affidavit opposing the interlocutory application reveals that the invoice from Hydro Hype was indeed dated 18 January 2023, being after the termination of the agreement. It is surprising, however, that Consortium Beef did not notice or was unaware that the invoice was for monies due to Hydro Hype during the currency of the agreement, and not for monies due after the termination of the agreement. Its argument that the invoice served as substantiation for its assertion that the agreement was renewed is without merit and cannot be sustained. The explanation tendered by Hydro Hype pertaining to its assertion that replacing FA32 with annexure ' would create the wrong impression that it was attached to its email dated 22 March 2023, is, in my view, satisfactory, probable and sufficient to read the founding affidavit in the correct context. Consotium Beef's argument that it did not compile annexure 'X' and that it probably emanated from Hydro Hype, as did FA32, also cannot be sustained. The annexures attached to the founding and replying affidavits make it clear that the document did in fact emanate from Consortium Beef.

[16] Having said that, I point out that annexure 'X' was clearly compiled in February 2018, whilst the parties were negotiating the terms of the contract, which only materialized a few days thereafter. Annexure 'X' does not reflect the final figure of 469 cattle units which was agreed upon, and while it is so that a single cattle unit value was reflected as R15 761.90, that was the price that would have been determined in 2018. The relevant date for calculation of cattle units would be the date of termination of the agreement, being 17 January 2023, some five years later. However, annexure 'X' may well be important as a starting point for the calculation of the value as at 17 January 2023. I am satisfied that, in the interests of justice as well as the interests of fairness and equity, annexure 'X' should replace FA32, with the necessary adjustments to correct the date of the email referred to in the relevant paragraphs (22.1 and 25.7) of the founding affidavit in the main application.

[17] Hydro Hype amended its notice of motion to reflect the name change registered in respect of Consortium Beef. The relief claimed remained the same as in the original

notice of motion. As indicated earlier, Hydro Hype requested the order of the court to incorporate extensive directives as to how the calculation of the value of the cattle units should be undertaken, the procedure for appointment of the senior auditor referred to in the agreement, and various other matters, such as the manner in which the identification of cattle should unfold. These aspects are not set out in such great detail in the agreement and it is impermissible for this court to make orders to this effect, as it may well amount to the court making a contract for the parties. The proper course would be for the parties to agree on these aspects and record it as they agree.

[18] With regard to costs, Hydro Hype submitted that, taking into account the amendments to the Uniform Rules of Court on 12 April 2024, where rule 67A was inserted and rule 69 was amended, the court should award the costs of Mr Snellenburg SC on scale C and that of Mr Johnson on scale B. It was submitted further that the court should allow the costs of two counsel, and in doing so, to consider the complexity of this matter, the value of the claim and that the relief sought is of importance (presumably to both parties and the public). Consortium Beef sought the dismissal of the application, with costs on scale C. In my view, this was a complex matter and required careful consideration. The value of the claim is high and would be of importance to the parties in this matter. The employment of two counsel by Hydro Hype is therefore, not unreasonable or unwarranted.

[19] In the circumstances, I make the following order:

1. The interlocutory application in this matter is granted.

2. The agreement entered into between the applicant, Hydro Hype and the first respondent, Consortium Beef, is declared to have terminated by the effluxion of time, on 17 January 2023;

3. The first respondent is directed to calculate the value of applicant's 469 cattle units and provide the calculated value, with a full detailed breakdown of the calculation, to the applicant, within thirty (30) calendar days of the service of this order upon the first respondent.

4. For the purposes of the calculation referred to in para 3 above, the parties will be guided by clause 9 of the agreement, any other relevant provision of the agreement and any further terms and conditions that they may agree upon.

5. The costs of the application and the interlocutory application are to be paid by the first respondent, such costs to include the costs consequent upon the appointment of two counsel, on scale C in respect of senior counsel and scale B in respect of junior counsel.

NAIDOO J

Appearances

For the Applicant:	Adv N Snellenburg SC with Adv JMC Johnson
Instructed by:	PWG Attorneys c/o Maree & Partners 46 Donald Murray Avenue Bloemfontein
For the Respondents:	Adv SJ Reinders
Instructed by:	Honey Attorneys Honey Chambers Northridge Mall Bloemfontein