IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE, PORT ELIZABETH CASE NO 1580/11

Date Heard: 8 December 2011

Date Delivered: 12 June 2012

In the matter between:

SUNDAYS RIVER CITRUS COMPANY APPLICANT

And

VALOR FRUIT PROCESSORS (PTY) LTD FIRST RESPONDENT

RENEÉ PAUL VAN ROOYEN SECOND RESPONDENT

JUDGMENT

DAMBUZA J,

INTRODUCTION

[1] The applicant seeks an order declaring that the first respondent has consented to the second respondent sitting as an arbitrator and determining whether there exists an "arbitrable dispute" between the applicant and the first respondent. In the event that I find that the first respondent has not consented to the second respondent determining this issue then I should determine whether there is an "arbitrable dispute" between the applicant and the first respondent.

PARTIES

[2] The applicant, the **Sundays River Citrus Company (SRCC**) is a private company which conducts business as a packer, marketer and distributor of citrus fruit produced by citrus farmers in the Sundays River Valley. It is a wholly owned subsidiary of the Sundays River Citrus Company Holdings Limited whose members are citrus farmers in the Sundays River Valley. The farmers supply fruit to the first respondent for packaging, marketing and distribution on their behalf.

[3] The first respondent, **Valor Fruit Processors** (Pty) Ltd (Valor) conducts business as a processor of fruit for the production of fruit juice concentrates which are blended with water for consumption as fruit juices and ancillary products.

[4] The second respondent, Adv. Reneé van Rooyen SC, is a practicing advocate and Senior Counsel who was appointed by the chairman of the Eastern Cape Society of Advocates as an arbitrator in this matter. No order is sought against him. For that reason, reference in this judgment, to "the parties" shall only be in reference to the applicant and the first respondent.

BACKGOUND

[5] In terms of written supply agreements between the Sundays River citrus farmers and the applicant, the farmers are obliged to supply their citrus fruit to the applicant for packaging, marketing and distribution. In packaging, marketing and distributing the fruit the applicant acts as an agent for the farmers. The applicant's core functions are to maximize profits for the farmers and to add value to the farmers' farming operations.

[6] The citrus fruit produced by the farmers is classified into four quality classes for purposes of sale. The fruit is graded on external appearance and size. The applicant then exports the class 1 and class 2 fruits to overseas markets. Class 3 fruit is sold to markets in South Africa. Class 4 fruit is sold to fruit processors such as the first respondent.

[7] The applicant contends that it has been supplying class 4 citrus fruit to the first respondent for decades. Until 2008 the first respondent was the only fruit processor in the Eastern Cape. There was, however, another fruit processor, Grano Passi, operating in the Laangkloof area, less than 200 kilometres from Sundays River Valley, but in the Western Cape Province.

[8] Previously, the applicant held a controlling interest in the first respondent. On 1 May 2006 the applicant sold its interest in the first respondent to the Barnes Family Trust, in terms of a written sale agreement. Clause 11 of that written sale agreement makes provision for a supply agreement to be concluded between the parties for supply of class 4 citrus fruit to the first respondent. Indeed a fruit supply agreement was concluded between the parties in September 2006. It was effective from 1 January 2006 to 31 December 2010.

[9] The agreement stipulates, amongst others, that the applicant is obliged to supply a minimum of 20 000 tons of class 4 fruit per annum to the first respondent. The first respondent is obliged to give preference to the applicant in its fruit processing capacity.

[10] The price at which the applicant supplies fruit to the first respondent is regulated by clause 8 of the supply agreement which provides that:

"8.1 The purchase price of the fruit shall be a minimum of R150 00 per tonne plus VAT during the first 5 (five) years of this agreement irrespective of variety or mix;

8.2 Valor shall inform SRCC annually of the weighted average price that the market can support for SRCC's fruit. Should market conditions improve to such an extent that Valor could afford to pay more than R150.00 per tonne minimum purchase price, after having recovered any price subsidization in previous years, in terms of the minimum price requirement of R150.00 per tone, the parties shall enter into good faith negotiations to agree to increase the purchase price of the fruit during the following year, provided the purchase price shall never be less than R150.00 per tonne plus VAT."

[11] The applicant's case is that until 2010 the first respondent never furnished the applicant with the weighted average price that the market could support for each of the years 2006, 2007, 2008 and 2009. In 2006 and 2007 the first respondent supplied fruit to the applicant at the price of R150.00 per ton. In 2008 the parties agreed on an increased purchase price, on an incremental basis, in respect of different types of class 4 fruit. The average price at which the first respondent supplied fruit in that year was R266.03 per ton. In 2009 and 2010 the purchase price reverted to R150.00 per ton.

[12] In 2009 another fruit processor, Cape Fruit Processors, commenced juice processing operations in the Sundays River Valley. The contention by the applicant is that Cape Fruit Processors paid substantially higher prices for class 4 fruit than the first respondent during the 2009 and the 2010 seasons. On the mix and volume of class 4 fruit supplied by the applicant to the first respondent, Cape Fruit Processors would have

paid R334.00 per ton in 2009 and R524 in 2010, so contends the applicant.

[13] According to the first respondent, the increased price payment was not based on improvement in the markets. It was rather made after the first respondent had been approached by Mr J Stumpf who was the applicant's managing director at the time, and who asked the first respondent to consider paying more for the class 4 fruit supplied by the applicant. Mr Stumpf undertook to urge the board of the applicant to agree to a better supply agreement with the first respondent at the expiry of the then current supply agreement. The price increase in 2008 was therefore agreed on in anticipation of a more favourable and extended supply relationship between the parties, beyond the expiry of the then current supply agreement on 31 December 2010. The first respondent contends further that the purchase price of R150,00 per ton was always an inflated price, it being common cause that immediately prior to the conclusion of the supply agreement (in 2005), the applicant had provided for revenue from class 4 fruit at R28,00 per ton (in its 2005/2006 budget). The fact that the first respondent was obliged, in terms of the supply agreement, to accept whatever mix of fruit the applicant supplied, regardless of non profitability of some types of fruit only served to aggravate the distortion in the purchase price of the fruit.

[14] In each of the years 2009 and 2010 the parties entered into negotiations regarding possible increase in the purchase price of class 4 fruits. But because Mr Stumpf had left the applicant's employment by then, the negotiations aimed at concluding a supply agreement which would be more favourable to the first respondent fell by the wayside. The first respondent was therefore not willing to agree to a price increase. According to the first respondent in 2009, it was made clear to the applicant

that the first respondent would only pay the stipulated price of R150,00 per ton. When the parties could still not reach an agreement on an increase in the purchase price (in 2010), the applicant resolved to refer the matter for arbitration. The applicant disputes, in the replying affidavit, that the price increase agreed on in 2008 was based on the promise of an extended and more favourable supply agreement in the future. The applicant refers in this regard to correspondence between Barnes and Stumpf preceding the price increase. According to the applicant the correspondence shows that the price increase was agreed on the basis of clause 8.2 of the supply agreement. In my view the basis of the price increase in 2008 is peripheral to the determination of whether there is an arbitrable dispute between the parties.

REFERAL TO ARBITRATION

[15] On 15 June 2010 the applicant wrote to the first respondent, declaring a dispute in terms of section 14 of the supply agreement. Initially, the first respondent was agreeable to the matter being referred to arbitration. I will revert to the question of the nature of the dispute that was to be referred for arbitration. Correspondence between the parties in this regard reveals that their attitude was that an accounting expert would be best suited for appointment as an arbitrator. **Mr Mike Smith,** a Chartered Accountant, was then appointed as an arbitrator.

[16] It however became evident in the correspondence between the parties, preceding the anticipated arbitration, that they had not been *ad idem* as to the nature of the issues in dispute. The parties ultimately agreed that a legal expert should be

appointed as an arbitrator. **Smith** withdrew his consent to act as an arbitrator. The matter was referred to the chairman of the Eastern Cape Society of Advocates, Port Elizabeth, for appointment of an arbitrator with legal experience. The second respondent was then appointed.

[17] The second respondent invited the parties to file statements of claim and defence respectively. The problems regarding delineation of the issue(s) that were being referred for arbitration persisted. The first respondent, having sought legal advice, took the view that there was no "arbitrable dispute" between the parties and that the second respondent could not sit in judgment on whether he did have jurisdiction to determine whether there was an arbitrable dispute between the parties (i.e to determine his own jurisidiction)

[18] The applicant, on the other hand, insisted that there was an "arbitrable dispute" between the parties, and contended further that, the first respondent had consented to the dispute between the parties being referred for arbitration. The applicant's attitude was further that the second respondent could determine the question of whether he had jurisdiction to determine his own jurisdiction; but it accepted that the first respondent who insisted that the second respondent did not have such jurisdiction, would not be bound by the second respondent's ruling on the issue. Hence the institution of these proceedings.

DID THE FIRST RESPONDENT CONSENT TO THE SECOND RESPONDENT DETERMINING HIS OWN JURISCTION AND IS THERE AN ARBITABLE DISPUTE BETWEEN THE PARTIES?

[19] The applicant has not set out any express factual basis in the founding affidavit for its contention that the first respondent consented to the second respondent's jurisdiction in respect of the determination of whether there is a dispute between the parties or not. But at the hearing of this matter Mr Buchanan, who appeared on behalf of the applicant, submitted that by agreeing to issues relating to determination of an increase in the purchase price of class 4 fruit being referred to an arbitrator, the first respondent was agreeing that there was a dispute between the parties and was consenting to the arbitrator determining his own jurisdiction if or when jurisdiction was contested. To this extent, so the applicant contended, it was at the first respondent's instance that the matter was referred to the Chairman of the Eastern Cape Society of Advocates for appointment of a legal expert, the first respondent insisting that a "practicing and experienced" attorney or advocate would be more suited to the task, because the arbitrator would be required to interpret provisions and determine application of the supply agreement.

[20] As to whether generally an arbitrator has jurisdiction to determine his own jurisdiction, the Learned author, Ramsden,[1] writes:

> "If an arbitrator's jurisdiction is challenged or questioned, an arbitrator is entitled to inquire into the merits of his jurisdiction for the purpose of satisfying himself as a preliminary matter whether he ought to proceed with the arbitration. If the arbitrator rules that he has jurisdiction, he should proceed to resolve the merits of the parties' dispute. If the arbitrator rules that he has no jurisdiction, he cannot proceed to an award on the merits.

1 Ramsden Peter; The Law of Arbitration; South African & International Arbitration, 2009 at 92

An arbitrator cannot however make a binding award as to the initial existence of the contract (ie an arbitration agreement), if in fact no contract was ever made. In such a case the arbitration provisions of the supposed contract never bound the parties; and an arbitrator appointed under those conditions could not have authority to act."

[21] Mr Ford who appeared on behalf of the first respondent compared the second respondent's position to that of the appeal arbitrator in **Gutsche Family Investments (Pty) Ltd v Metle Equity Group** 2007 (5) SA 491(SCA) at 494-495, wherein **Cachalia JA,** writing for the full Court, held that:

"Where the parties themselves disagree as to the powers conferred on an appeal arbitrator, the appeal arbitrator cannot extend the area of jurisdiction over the very matter which he is required to resolve. And if he does, he will act beyond his mandate. The contention advanced by the appellants is that the appeal agreement empowered the appeal arbitrator finally to determine his own jurisdiction. It is a far reaching contention implying that the agreement constituted an ouster of the court's jurisdiction. Such an agreement must be provided for specifically, and in the clearest terms."

I agree. The second respondent would, in this case, be determining the existence of the arbitration agreement. If the first respondent intended to grant him that authority and thus oust the court's jurisdiction, it would have had to provide for that authority specifically. It would be improper to imply such authority from clause 8.2 of the supply agreement as the applicant contended. It is perhaps in recognition of this fact that the submission was made that the first respondent's consent is contained in the correspondence which preceded the appointment of the arbitrators. But that submission does not take the applicant's case any further.

[22] Firstly, it is common cause that the applicant declared a dispute in terms of clause 14 of the supply agreement and not as agreed in the correspondence between

the parties. The relevant portion of this clause provides that:-

14.1 "Any difference or dispute between the parties in connection with the interpretation or application of the provisions of this agreement or its breach or termination shall be referred to and be determined by informal arbitration in terms of this clause."

14.2 "Either party to this agreement may demand that the dispute be determined in terms of this clause by written notice given to the other party."

[23] It is also common cause that the second respondent was appointed as an arbitrator in terms of the clause 14.4 of the agreement of which provides that:

14.4 "The arbitrator shall be agreed upon between the parties. Should the parties fail to agree on an arbitrator within seven (7) days after the giving of notice in terms of clause 14.1, the arbitrator will be appointed at the written request of any party to the dispute by the chairman for the time being of the East Cape Society of advocates (Port Elizabeth)"

[24] The basis of first respondent's objection to the arbitration was that the supply agreement did not entitle the applicant to an increased purchase price. And the deadlock in the negotiations aimed at an agreement on an increased purchase price was not a dispute envisaged in clause 14 of the supply agreement. I agree. Clause 14 regulates resolution of disputes arising in connection with the interpretation, application or breach of the supply agreement. An increased purchase price does not necessarily flow, as a right, from clause 8.2 of the supply agreement.

[25] The correspondence relied on by the applicant does not reveal any consent by the first respondent; there is neither consent for the second respondent determining his own jurisdiction nor consent that the issues purportedly referred by the applicant for arbitration are arbitrable in the correspondence relied on. The principle that consent to

an arbitrator determining his contested jurisdiction must be provided for specifically and in the clearest terms applies equally in respect of the correspondence on which the applicant relies. I was not referred to any of the letters and emails expressing such consent and I could not find any.

[26] Having already found that the supply agreement does not provide for a breakdown in negotiations conducted in terms of clause 8 of the supply agreement being referred for arbitration I now turn to the issue of whether the first respondent, in the correspondence referred to, did consent to those issues being referred to arbitration, thereby agreeing that there is an arbitrable dispute between the parties.

[27] Prior to the appointment of both Smith and the second respondent as arbitrators, the issue(s) to be referred for arbitration were first set out in a letter dated 15 June 2010, addressed to the applicant by **Mr Ken Niewenhuizen,** the applicant's Managing Director, as follows:

> "It is obvious from our previous correspondence that we have reached a deadlock in our negotiations regarding the purchase price to be paid by Valour to SRCC in respect of fruit delivered by SRCC to Valor during the 2010 season. I do not propose recording details hereof in this letter, save to record that there is clearly a dispute between Valor and SRCC in this regard. I am sure you will agree.
>
> It is in the interests of Valor that the dispute be resolved speedily. This letter serves to advise that SRCC has elected to refer this dispute and the refusal of Valor to make a full and proper disclosure of its financial position in fulfillment of its good faith obligations, to informal arbitration in terms of clause 14 of the Supply agreement.
>
> Ancillary and inextricably linked to these disputes is the purchase price paid by Valor to SRCC for

fruit supplied to Valor during the 2006, 2007, 2008 and 2009 seasons. Valor and SRCC need to determine the extent of overpayments and underpayments in respect of these seasons.

[28] **Mr Wallace Barnes**, the first respondent's chairman, responding to the letter from the applicant agreed that "it is in both parties interests that the 2010 pricing be agreed as soon as possible." He undertook to think about possible candidates to be nominated as arbitrators.

[29] In terms of section 1 of the Arbitration Act 42 of 1965 an " 'arbitration agreement' means a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement , whether an arbitrator is named or designated therein or not". (my emphasis) I can discern no specified matter in the applicant's letter of 15 June 2010 read with the first respondent's response thereto.

[30] "An arbitration agreement is a contract. Thus, where an offer to submit to arbitration is made, the acceptance thereof must be unconditional, unqualified, failing which there is no proper acceptance and no binding agreement to go to arbitration. The agreement is construed according to the principles governing the interpretation of contracts."[2] For there to be a valid arbitration agreement, there has to be a defined or an identifiable dispute as the object of that agreement. And again the parties' intention to entrust resolution of (a) specific issue(s) to a private person or institution, rather than a court of law, must be expressed clearly. More specifically, if the first respondent intended to authorize an arbitrator to conclude an agreement on its behalf on the mooted price increase, such authorization would have had to be clearly articulated.

2 *LAWSA* first edition Vol 1 at 272. Para 415

[31] Whilst, in the letter of 15 June 2010 Nieuwenhuizen, referred to a number of issues that should be referred to arbitration, Barnes only referred to the "2010 pricing" which should be "agreed". I am not persuaded that the response by the first respondent that an agreement that the 2010 pricing be "agreed", resulted in an arbitration agreement. In my view that does not constitute an arbitration agreement in the sense that the parties agree on a defined dispute. Although Barnes was agreeable to involvement of an arbitrator, the exact role that the arbitrator would play was never defined. I therefore cannot find that the first respondent had consented to the referral of a defined dispute at that stage.

[32] Correspondence between the parties subsequent to the first respondent's response to the letter of 15 June 2010 takes the matter no further in as far as the first respondent's consent to arbitration is concerned. The correspondence only reveals that the parties directed their efforts at the appointment of an arbitrator. Nieuwenhuizen wrote to Smith advising that the parties had agreed to appoint him as an arbitrator. Smith enquired as to the issue(s) that were being referred for arbitration as follows:

"How was my appointment agreed and is it documented in some way. Can you clarify for me the nature of the dispute? i.e is it about Para.8 of the agreement and specifically sub-para 8. or is the more involved?"

[33] Nieuwenhuizen replied, advising that:

"Once your engagement has been finalized, I propose that the representatives of the parties meet with you to finalize the issues in dispute and the arbitration procedures."

And later, that:

"In summary, SRCC requires you, in your capacity as arbitrator, to determine:

12.1 The market value of the fruit during the 2009 and 2010 seasons having regard to prevailing market prices, i.e an objective test and

12.2 The purchase price Valor can afford to pay SRCC after recovery of any subsidization in previous years having regard to its financial position, i.e subjective test."

[34] Smith again inquired further as follows:

"At the commencement of the process which will be the date of acceptance of the terms of this letter by both parties, you are invited to submit an outline of the dispute from your perspective, in writing. This outline should include but not be limited to the following phrases in clause 8:

a) Your interpretation of 'Valor shall inform SRCC annually of the weighted average price that the market can support for SRCC's fruit' and whether this was done

b) Which market is being referred to, the citrus market generally or that pertaining only to Valor's products?

c) Your interpretation of '….. after having recovered any price subsidizing in previous years ….....' Does this wording indicate that the basic price of R150 per tonne might have been to high at the commencement of the contract?"

[35] The applicant's attitude was that the first respondent did not have to agree to the dispute as formulated by the applicant and that the dispute as raised by the applicant at the time, being that the dispute "lies within the ambit of clause 8" of the supply agreement raised an arbitrable dispute. According to the applicant, specific details of the dispute would appear in the parties' submissions to the arbitrator.

[36] On receipt of the applicant's response to his inquiry Smith inquired from

Nieuwenhuizen whether the first respondent was agreeable to the applicant's description of the dispute. A copy of this inquiry by Smith was sent to Wallace. It is at this stage that it became apparent that the parties had not been *ad idem* as to the nature of the dispute. The first respondent wrote to Smith that:

"Before there can be a reference to arbitration, an arbitrable dispute covered by a valid arbitration agreement, which is capable of formulation at the time that an arbitrator is to be appointed, must exist, conversely, no appointment of an arbitrator can be made in the absence of such an arbitrable dispute."

[37] The first respondent also expressed the view that there could be no arbitrable dispute regarding the purchase price for fruit delivered in 2009 season, that price having been already agreed on and paid. According to the first respondent there had not even been negotiations aimed at revisiting the price which the applicant had paid for the fruit in 2009. What the parties had been negotiating immediately prior to the applicant's letter of 15 June 2010, was a possible increase in the purchase price for the 2010 season. The first respondent's attitude was further, since the dispute to be referred by the applicant had evolved from that pertaining to pure financial issues to issues relating to application of the terms of the supply agreement, a legal expert would be a more appropriate arbitrator. Barnes then emphasized that the issues should be limited to:

"1 Did the market conditions in the 2009 season improve to such an extent that Valor could, after having recovered any price subsidization in previous years (ie. The years 2006,2007,2008 and 2009) in terms of the minimum price requirement of R150,00 per tonne minimum price, afford to pay more than R150,00 per tonne minimum purchase price for the 2010year?

2 If so what is the weighted average price that the market can support for SRCC"s fruit in 2010, after having recovered such price subsidization in previous years (ie. Years 2006, 2007, 2008 and 2009)?"

[38] It is at this stage that Smith withdrew his consent to act as an arbitrator and the second applicant was ultimately appointed in his place.

[39] It is common cause that at the first meeting between the parties together with the second respondent, Mr Oosthuisen, the first respondent's attorney, raised the issue of whether the disputes between the parties were arbitrable under clause 14 of the supply agreement. He suggested that this issue first be determined. An admission is made on behalf of the first respondent that at first Barnes was under the impression that the second respondent could determine the issue of whether there is an arbitrable dispute between the parties But that, in my view, does not necessarily vest the second respondent with jurisdiction on that issue. There is neither a written agreement between the parties in this regard nor any other clear expression of consent to arbitration.

[40] Following the meeting between the second respondent and the parties, the statements of claim and defence were filed.

[41] In the statement of claim the applicant contends that it is an implied, alternatively, a tacit material term of the supply agreement that if the parties, negotiating in good faith are unable to reach agreement on the purchase price of the fruit, then either party may declare a dispute and refer such dispute for determination by an arbitrator in terms of clause 14. My understanding of the applicant's case had been that it was based on an express arbitration agreement. In any event, as I have already stated, for there to be a valid arbitration agreement, the parties must expressly make a provision therefore. In this case, if the parties intended that an arbitrator should conclude an agreement for them by fixing a price increase in circumstances where they fail to reach an agreement

on a price increase, they should have provided therefore expressly in the agreement. Clause 8.2 clearly provides no deadlock resolution mechanism in this regard.

[42] Regarding the purchase price of the fruit in 2009 the applicant contends, in the statement of claim, that the improved market conditions from 2008 continued in 2009, to such an extent that the first respondent could afford to pay more than the minimum price of R150,00 per ton. However, the first respondent failed or refused to furnish to the applicant, the information provided for in clause 8.2 of the supply agreement. This refusal by the first respondent frustrated the negotiations and consequently an agreement on a price increase.

[43] The applicant then declares a dispute as follows:

> "SRCC hereby declares a dispute in respect of the purchase price of the fruit supplied by SRCC to Valor during 2009 season and requires such purchase price to be determined by the Arbitrator after verifying any price subsidisation in previous years as set out in clause 8.2."

[44] A dispute in the same terms is declared in respect of the purchase price for the fruit for the 2010 season, except that in this respect the applicant states that an offer made by the first respondent, of an increased purchase price of R195,00 was not acceptable to the applicant. The applicant then estimates the difference in the minimum purchase price of R150,00 per ton and the market value of the fruit supplied by the applicant during the currency of the supply agreement is R12 million to R40 million. It then requests the arbitrator determines the disputes on the following basis:

1 by fixing the purchase price of fruit supplied by the applicant to the first respondent during 2009 and 2010 seasons, after verifying the subsidization in

the 2006, 2007 and 2008 seasons, as set out in clause 8.2; and

2 by ruling that the costs of the arbitration proceedings, including the costs of the SRCC's legal representatives, be paid by the first respondent.

[45] In its statement of defence the first respondent raises the defences foreshadowed in the correspondence between the parties. It contends, as a first point *in limine,* that clause 14 of the supply agreement, in terms of which the applicant referred the dispute to arbitration, does not entitle the parties to declare a dispute relating to determination of an increased purchase price and payment of costs, to arbitration. It also contends that the only disputes capable of referral to arbitration under clause 14 are disputes relating to interpretation of the provisions of the supply agreement, or application of the terms of the agreement, and/or disputes that relate to the breach of the agreement by either party. The first respondent then concludes by stating that there is no arbitrable dispute between the parties.

[46] I have already expressed my agreement with the submission that the supply agreement does not entitle the applicant to an increased purchase price or to any price other that the R150,00 per ton provided for in clause 8.1 of the supply agreement. Contrary to the applicant's contention, the supply agreement provides no resolution for a breakdown in negotiations aimed at exploring an increase in the price at which the applicant supplies class 4 fruit to the first respondent. Clause 8.2 only imposes a duty on the parties to negotiate in good faith. And as I have already stated, the first respondent had already agreed to referral to arbitration, of issues relating to possible improvement in the market conditions during the 2009 season together with the

weighted average price that the market could support for the applicant's fruit for the 2010 season. These are issues provided for in clause 8.2 of the agreement and disputes which could properly be arbitrable under clause 14 of the supply agreement. The applicant in this case has not referred for arbitration a dispute relating to the first respondent's alleged refusal to negotiate in good faith.[3] I can only conclude that the persistence in referring the issue of the "fixing" of an increased purchase price as the central issue on arbitration was, in my view, based on an incorrect interpretation of clause 8.2.

[47] It being my view that the "dispute" between the applicant and the first respondent is not arbitrable, it is unnecessary to deal with the propriety of the costs order sought by the applicant in the statement of claim.

THE APPLICATION TO STRIKE OUT

[58] The first respondent seeks to have struck out from the applicant's founding affidavit paragraphs 84, 85 and 86 thereof on the basis that the contents of these paragraph amount to unsubstantiated, inadmissible hearsay. Further averments that the first respondent seeks to have struck out from the papers are contained in the following paragraphs of the replying affidavit; 12.4, 16.2, 29.5, 31.2, 131.1, 131.3 and 131.4 on the basis they are vexatious, argumentative, irrelevant and designed to prejudice the first respondent, paragraphs 12.5 to 12.9, 55, 38, 39, 59.3, 88.3 and 88,4 91.2, 113, 115.8 to 115.10, and the affidavit of Frans Von Ullman (Thalwitzer) on the basis that they are hearsay or should have been included in the founding affidavit on the basis that they are hearsay or should have been included in the applicant's founding affidavit and

3 Compare with Southernport Developments (PTY) Ltd v Transnet LTD 2005 (2) SA 202 (SCA)

are argumentative and designed to prejudice the first defendant, paragraph 29.5 as it is vexatious. The applicant opposes the application to strike out on the basis that the averments complained of constitute relevant material for proper determination of the issues in this matter, are in response to allegations made in the answering affidavit and are not prejudicial to the first respondent.

[49] The allegations in the founding affidavit which the first respondent seeks struck out relate to the purchase price allegedly paid by Cape Fruit Processors. Indeed these allegations are unsubstantiated. I also agree that if these allegations are not struck out the second respondent would be prejudiced.

[50] In the replying affidavit the applicant states that when Barnes was the applicant's director from 2001 to 2006 he had access to the applicant's financial records. I have difficulty in understanding what conclusion the applicant seeks to have drawn from this allegation. There is no explanation as to why it was not made in the founding affidavit. I am satisfied that the allegation is vexatious and would be prejudicial to the first respondent if allowed to stand.

[51] In the replying affidavit the applicant once more refers to the price paid by Cape Fruit Processors to other fruit farmers and attaches a supporting affidavit drawn by Thalwitzer of Cape Fruit Processors. There is no explanation why these allegations and more importantly the supporting affidavit, were not made in the founding affidavit.

[52] The applicant further states, in the replying affidavit, that "Granor Passi was prepared to pay market related prices for class 4 fruit, unlike the Valor". I agree that the statement is vexatious and would be prejudicial to the second respondent if allowed to

stand and taken into consideration. I am of the same view in respect of another averment in the replying affidavit that: “I note that Patensie Sitrus increased supplies of class 4 fruit to Valor from 2006 and that Barnes attributes this change in the business model of Valor without furnishing any details for such changes. I suspect that the actual reason was that Valor paid Patensie Sitrus a market related price for its class 4 fruit.”

[53] I am not persuaded however that the averments made on behalf of the applicant in the replying affidavit that Barnes must have had knowledge of the second respondent’s precarious financial position because he was a director of the second respondent are vexatious as alleged by the second respondent. These averments were made in response to a denial by Barnes that he had knowledge of this fact. I am of the same view in respect of the averments relating to withdrawal of the Patensie Beherend from the first respondent. These were made in response to allegations made by Barnes in the answering affidavit on how the applicant conducted itself in negotiations with Patensie Beherend.

[54] I am also not persuaded that the allegations made on behalf of the first respondent about the background against which the supply agreement was concluded are inadmissible and designed to prejudice the first respondent. Once again these were made in response to the averments in the answering affidavit that the agreement was drawn at the applicant’s instance.

[55] Equally the response in the replying affidavit to allegations about the negotiations that were conducted with Stumpf were, in my view, properly made.

[56] The application to strike out therefore succeeds only in respect of paragraphs 84,

85 and 86 of the founding affidavit, and following portions of the replying affidavit: paragraphs 12.4 to 12.9, the last sentence of paragraph 16.2, paragraphs 29.5, the last sentence of paragraph 31.2, paragraphs 59.3,113, and 115.8 to 115.10 (including annexures thereto.

The order I grant is therefore the following; that:

1 The application is dismissed with costs;

2 The portions of the founding affidavit and the replying affidavit set out in paragraph 55 of this judgment are struck out;

3 Each party shall pay its own costs in respect of the application to strike out.

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N. DAMBUZA

JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff: Adv. Buchanan (S.C) Instructed by Mike Nurse Attorneys, Richmond Hill, Port Elizabeth

For the defendant: Adv. Ford (S.C) and Adv. J. Nepgen Instructed by Schoeman Oosthuizen INC. Mill Park, Port Elizabeth