NOT REPORTABLE
15 JUNE 2007
IN THE HIGH COURT OF SOUTH AFRICA
TRANSVAAL PROVINCIAL DIVISION

CASE NO 33727/02

JONATHAN EGDES PLAINTIFF

And

NWK LTD DEFENDANT

JUDGMENT

Delivered on…….

R D CLAASSEN J:

1.

The first and most important question in this case is whether an oral (telephonic) contract was concluded between Plaintiff and the defendant, as represented by a Mr Johan Erasmus (Erasmus) on 28 February 2002. All the relevant conversations were recorded on audio tape, and transcriptions thereof were put before court as part of Exhibit B. (Admitted as being correct transcriptions.) Plaintiff's case is that there was a contract, but the defendant reneged on the deal, and he suffered a loss of profits as a result thereof and is now claiming damages. Defendant denies any contract and any consequential damages.

2

Plaintiff is a commodities broker dealing mainly in maize and wheat on the South African Futures Exchange (Safex). Defendant is in essence a co-op, also buying and selling grain in the same market. Erasmus was at that time one of three "traders" in the employ of and acting on behalf of defendant. It is common cause that most of the deals made on this market is done by way of telephonic conversations.

3.

At 12.53 on the 28th of February 2002, plaintiff called defendant and spoke to Erasmus, with whom he had had at least two previous dealings. He referred to an earlier conversation where Erasmus had "shown" plaintiff certain stock. Plaintiff specifically enquired about available Safex stocks of white maize grade 1("WM1"). Erasmus said he would have to check the available stocks and would get back to plaintiff. He then gave plaintiff a price of R1834.00 per ton, plus a R15 per ton premium, less the "differentials" (being the transport costs if not delivered at the Randfontein depot.) This price is not in dispute.

4.

At 13.12 Erasmus called plaintiff. He asked plaintiff in which silo's he is interested and plaintiff answered wherever he could show him. Erasmus then listed all the relevant silo's and the tonnages available at each. The total amount of stock was 4 679 tons. (in rounded figures). The following was then said (at B29):

Egdes: *Ok at R1834 plus R15 minus diffs.*

Erasmus: *Let me get into my screen here… (does calculations) Ja 1834 plus 15 minus differrentials, yes.*

(Having listened to the tape recording, I heard the word *Ja* before the price was mentioned and therefore incorporate it here.)

Egdes: *OK, I come back to you now.*

Erasmus: *Ok I will be out, so it will be after two.*

Egdes: *Ok.*

Erasmus: *Because I am leaving my cell here to charge. Its battery is flat.*

Egdes: *Ok, Cheers.*

5.

At 14.09 plaintiff called the defendant again, but Erasmus was not there and the call was taken by Mr J Vorster ("Vorster", one of the three traders and the man in charge of them). The deal with Erasmus was discussed, but Vorster told him to complete the deal with Erasmus. Plaintiff was very eager to get the deal concluded and he was obviously trying to get Vorster to confirm the deal. He told Vorster that Erasmus had confirmed the availability of the stock at the different silo's, and then Vorster said "*It could have also been that it was offered to somebody else, that I don't know. So stocks are subject to availability. We will first have to confirm that the stocks are still* ***available*** *by the time you confirm the deal and I will see if I can get hold of him"* (Plaintiff testified that the word on the recording is not *available* but *there.)* Plaintiff then told Vorster that he is ready to confirm the deal right away, i.e. the whole stock at the given price. (Only the Nooitgedacht silo's 56 tons were not included, which is not in dispute.)

6.

At 14.13 Erasmus calls plaintiff. The latter says that his client wants to confirm the deal in respect of "the whole lot". The different silos were again named and confirmed. Then Erasmus says "*Ok, let me just check with the other traders, if nobody* ***sold*** *anything now*". After a discussion about other grade 2 maize, plaintiff says "*Ok, confirm the ones to me"*. (The "ones" being the grade 1 white maize). Then plaintiff says "*Just make sure nobody else has* ***sold*** *them."* (My emphasis). Later on plaintiff says "*First of all check on that the WM1 that you showed me are not sold on offer. If on offer it does not matter. I am the first one to come."* Erasmus replies by saying "*Right"*. In evidence Erasmus said that the word *right* referred to the fact that he will first check that all the stock is not sold or offered to anyone else. He did not confirm the last part of the sentence.

7.

At 14.21 plaintiff calls Erasmus again and asks about other grade 2 maize, but Erasmus could not talk further for being in a meeting, but undertook to call back in 5 minutes. He then did call back in 5 minutes. At this stage Erasmus tells plaintiff that the deal will have to be put on hold until the next day, because someone at defendant's had "*offered it to somebody else and has been given time."* Then the following conversation ensues:

Egdes: *And they offered it to somebody?*

Erasmus: *yes*

Egdes: *No*

Erasmus: *And they gave him until tomorrow*

Egdes: *No man, I don't believe it*

……

Egdes: *When we spoke earlier nobody had offered it to anybody. Just check with the other traders.*

Erasmus: *No I checked on the computer on the stock list.*

……

Erasmus: *I did not check with the others*

Egdes: *But it is always subject to prior sale. You must whoever offer it offer it prior to sale. That is what Johan Vorster just told me. Always subject to prior sale. Nobody bought it so I stand first in line to buy it.*

Erasmus: *Let me just speak again and see what I can do here.*

Two points emerge from this conversation. It contradicts Bester's evidence that the maize was already allocated to Noordfed; secondly it seems as if Erasmus himself was unsure about the whole thing, otherwise he could have told plaintiff straight off that it was not available.

9.

More conversations took place after this, but in each case each party is only setting out his own view of the matter. Plaintiff maintains that the deal was concluded at the stage quoted above during the 13.12 conversation ("B 29") after the availability of stocks was confirmed, the price again confirmed, and Erasmus said "yes". From a reading of the transcript, and having listened to the recording, albeit only once, it seems clear to me that at this stage a clear and firm agreement had been reached, subject only to plaintiff confirming it after confirming with his client. It is also clear that Erasmus was expecting a call from plaintiff after 2.00 for confirmation. Moreover, both Erasmus and plaintiff talked about *sold,* and not *offered* or anything else.

On behalf of defendant Erasmus and Vorster maintained that their practice, as in this case, was always that a deal is subject to confirmation that the stock was not either sold or offered to another party. Erasmus talked about an "option". Erasmus testified that he would not and could not have confirmed the deal with plaintiff before first establishing that someone in the company had not already either sold it or offered it to someone else.

Therefore at the end of the 14.13 conversation he not only had to get confirmation from plaintiff that his (plaintiff's) client wants the maize, but also had to check whether it was still available to be sold, i.e. not *offered* or sold to anyone else.

10.

The defendant's case is further that at the beginning of each season, i.e. at the beginning of 1st May (*in casu* 2001) agreement is reached with its three affiliates about quantities of products to be delivered to them during the season, which runs until end of April. In this instance an agreement was reached with NOORDFED, to procure 23 000 tons for them during the season. Apparently the parties were in touch on a monthly basis, and the quantities could vary during the season. The evidence on behalf of defendant was that on the morning of the 28th of February, its financial manager, Mr L Bester ("Bester") told his financial staff to complete all outstanding orders and paperwork, because it was the end of the financial year. It then transpired that Noordfed still had some outstanding orders and therefore he (Bester) put all the available maize on hold until Noordfed's orders were fulfilled. That is why plaintiff's order could not be finalized.

11.

Plaintiff testified on his behalf. The essence of his evidence is basically as already set out in the excerpts from the conversations. He was quite adamant that the deal was finalized as set out above. Plaintiff is a very well spoken person, albeit a bit verbose, but one cannot find any fault with his evidence as such. The fact is that he had a certain perception of the dealings with Erasmus, and he stuck to that version.

12.

Plaintiff also called his "client" Mr Jarlet of Cargill (Jarlet's company). The latter testified that he had many dealings with plaintiff. He could not recall any specifics about this particular deal, except that he recalls there was an issue about a deal with defendant at some stage. He does not recall giving plaintiff a "firm bid" on this deal.

13.

Erasmus, Vorster and Bester testified on behalf of defendant. There evidence has also been dealt with to a large degree. What is important is that they strongly confirmed that their policy was always that sales are subject to *availability,* meaning that a sale cannot be confirmed until it is verified that no one else in the company (including ALL personnel) had offered or sold it to anyone else. When Erasmus and Vorster were asked by plaintiff as to whom the stock was offered, they could not give him an answer except to say that they would have to check with the financial manager (Bester), who might have offered it to someone else and *was given time* until the next day. Again this contradicts Bester's evidence.

14.

Bester's evidence was that 28th of February was the end of the financial year. He wanted

to finalise all outstanding orders and paperwork. He then told his department to complete the job. That meant all the paperwork had to be analysed to see what was still outstanding. He then put a reserve on all the available stock, including the stock offered to plaintiff. The next day, 1st March, he then allocated all the available stock (which included that stock offered to plaintiff) to Noordfed, except for 817 tons. Exhibit B 90 is a stock account of defendant in respect of white maize delivered to Noordfed as at 28 February 2002, (for the period since 1/9/02.) From that it appears that defendant had already bought 24 153 odd tons of maize for Noordfed, had sold 15 890 tons, and still had stock of 8263 tons in hand to sell/deliver to Noordfed. What is interesting is that he did not bother to tell any of his traders that he had put a reserve on the available stock. He could not explain that. He also could not explain why it was necessary to specifically complete the order on that day, because the season still had two months to run before all the maize had to be delivered to Noordfed. It is also of interest to note that plaintiff only wanted 4679 tons, whereas much more than that was still available at that stage.

15.

When reading the transcripts of the conversations following on the ones already referred to, it is clear that both Erasmus and Vorster are hedging about the alleged offer to someone else. It is obvious they must have talked to Bester during the lunch break, because he is the only one who knew about the reserve put on the stock. However they could not give plaintiff any indication as to whom it was offered. Yet, if they had talked to Bester, which they must have, they would have known immediately to whom it was offered. Bester was very clear that he had reserved (not *offered*!) the stock that morning and allocated it the next day. This puts a very big question mark around their evidence on this issue.

16.

During cross examination, it was suggested that defendant reneged on the deal because, as plaintiff testified, a huge upsurge in the market was expected the next day, and during the lunch hour, defendant became aware of this fact. (The upsurge did in fact take place.) Erasmus was then told to hold off the deal because defendant would get a better deal elsewhere. The uncontested evidence is however that defendant sold the stock (i.e. all except 817 tons) to Noordfed for less than the price given to plaintiff. It was explained that as part of the annual planning between defendant and Noordfed, a certain average price is agreed upon for the season. That meant that defendant's price to Noordfed was then less than the daily *mark to market* price given to plaintiff, and as established daily by Safex. It is important to note that Noordfed is a 100% subsidiary of defendant. That means the profit of any later sales would eventually enure to defendant in any event.

17.

Considering the evidence as a whole, it seems totally improbable that Erasmus would have no hesitation before lunch to offer the stock to plaintiff, but then after lunch begins

hedging about a possible offer to someone else. It is also inconceivable that Bester would have reserved all stock that morning, but not tell any of his traders about it. It is also improbable that Bester would suddenly decide that morning that all orders had to be completed, when the season still had two months to run. Although the defendant's witnesses did not make a bad impression on the court while giving evidence, the situation changes when their evidence is weighed up against the abovementioned probabilities. It was also argued on behalf of defendant that Jarlet's obvious lack of any recollection of giving plaintiff a firm bid, shows that plaintiff was in fact lying. I cannot accept that. Plaintiff very clearly testified that he used Cargill's name as a wedge to try and impress on defendant's people that he, and they, would be in great difficulty if the deal did not go through. Jarlet's evidence actually, to my mind, strengthens plaintiff's version.

18.

For the reasons set out above, I am satisfied that plaintiff has proven on a balance of probabilities that his version is to be accepted in preference to defendant's version. Therefore plaintiff has proven that a contract did actually come into being, or put differently, that the suspensive condition, that plaintiff only had to come back to Erasmus to confirm his client's acceptance, was fulfilled.

19.

Defendant also raised the issue that plaintiff did not act as principal, but as an agent, and therefore cannot sue in his own name. Firstly this was not pleaded. It was only latched onto by defendant when the last of the recordings became available two days before the trial. In that conversation between plaintiff and Vorster, plaintiff mentioned that he had a specific principal, namely a Mr Jarlet from Cargill (a company). In earlier conversations, plaintiff obviously also mentioned that he had a client with whom he had to confirm the deal. His evidence was however, that as a commodities trader, and specifically in relation to Jarlet, the latter was only a backup to the deal and he had no obligation to sell to Jarlet. He had the option to sell it to anyone. He further testified that he used Jarlet in the discussions with the defendant's people only to bolster his case and try to compel defendant to keep to the deal. Defendant also referred to plaintiff's own evidence to the effect that during this period he acted mainly as an agent, but not always. Within the context of this case and the evidence of plaintiff and Jarlet, I have no problem in accepting plaintiff's evidence that he was acting as a principal. Except for suggestions to the contrary, there is in any event no evidence to contradict plaintiff on this score, and as indicated, this defence only came as an afterthought and only raised for the first time during cross-examination of plaintiff. Defendant also did not seek an amendment of its pleadings. This point is therefore without merit.

20.

The next question turns on plaintiff's quantum of damages. The quantification of his damages is based on the Safex prices of the next day, which was, as predicted much higher than on 28th February. He says normally he would sell at the Safex price (in this case of the 1st of March) plus a R15 per ton premium. There was no objection from

defendant regarding that principle of pricing by plaintiff. Defendant's objection related to the manner of proof that plaintiff used to prove his damages.

21.

Plaintiff's evidence in this respect was as follows. He testified that on the 1st of March 2002 (i.e. the next day) he entered the Safex website and downloaded the day's fixes of the market. This showed that the price jumped to R1930, at the lowest, and to R2070 at its peak. Plaintiff put in as Ex A 5, a copy of the page of that day's trading as printedby him from the website. That means that whenever plaintiff might have decided to sell the next day, he would have made a profit. It must immediately be pointed out that defendant never disputed the correctness of this evidence. It only disputed the admissibility thereof into evidence, since this exhibit related to computer generated evidence.

22.

To get around that problem, plaintiff filed an affidavit from one Mr Sturgess, a Senior Manager: Agricultural Products of the JSE Ltd. (Ex. E) He states as follows:

> *I certify the attached printouts as data messages with regard to transactions pertaining to the March 2002 white maize 1 contract on SAFEX for the dates 28 February 2002 and 1 March 2002, as being data messages made by persons in the employ of SAFEX in the ordinary course of business to be correct.*

He then attaches printouts relating to those two days' prices, confirming what plaintiff has already testified to.

23.

This evidence was presented by plaintiff allegedly in terms of sec 15(4) of the Electronic Communications and Transactions Act 25 of 2002. It reads as follows:

> *A data message made by a person in the ordinary course of business, or a copy of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceeding under any law, the rules of a self regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout, or extract.*

24.

As stated defendant objected not only to Ex A 5, but also Ex E, on the basis that it did not comply with the abovementioned act. To my mind, even if there are shortcomings as regards the particular printouts, plaintiff's personal evidence regarding the prices as seen on his computer the next day, which was available and accessible to all and sundry, stands uncontradicted. Defendant never even suggested that those prices might be wrong. For those reasons that evidence is sufficient in the circumstances to prove those prices.

The next question is the computation of plaintiff's quantum. Defendant never disputed that plaintiff could have sold the maize at a profit the next day. It was common cause that

the surge in prices did take place and it was not disputed that plaintiff was expecting it and that that was the reason why he bought the maize. In fact, plaintiff's probable loss due to the loss of the maize was not in issue. Plaintiff himself provided four different scenarios for computing his damages. He took the difference between his purchase price, i.e. the R1 834 per ton, plus the R15 premium (totalling R1 849), and four different prices of the next day: i.e. the highest, the lowest, the average and the Safex price. That was R 2 070, R1 930, R1 940 and R2000 and respectively. Working on the total tonnage of 4623, (i.e. excluding the 56 tons of the Nooitgedacht silo), his loss of profits amounted to R 1 021683, R374 463, R420 693 or R698 073 respectively, depending on which method is adopted. He further testified that it was practise for a seller in his position to add another R15 per ton as a premium to his price. This was not disputed either. However he disallowed it to himself in this case to take care of any contingencies. On this basis it was argued that he is entitled to the highest price of the next day.

The defendant opposed any entitlement to damages in this respect on the basis that plaintiff did not prove his damages exactly, whereas in a situation like this he could and should have. Therefore he should be non-suited. I do not agree. There is a host of authorities that say that it is not necessary for a plaintiff to prove his damages to the last cent. It is sufficient if he puts before court enough evidential material from which the court can reasonably calculate or compute his damages. This is a case in point. Plaintiff has provided the court with the four scenarios. Each one provides an exact formula. It is for the court to decide which one is the most reasonable in the circumstances.

In the circumstances of this case I do not think that either the highest or the lowest price is reasonable. Plaintiff is a businessman who is in the business to make a profit. He has been in it long enough to read the signs to the extent that it is at all possible. This is shown simply by the fact that he wanted this deal so badly: he had heard of or read the signs in time. It is therefore reasonable to accept that he would not have sold willy-nilly. Nor would he necessarily have known when the highest point of trading the next day would be. Therefore those two can be excluded. He would also not have known what the MTM (fixed Safex price) would have been beforehand. However, the median price is considerably higher than the MTM price, compared to the other price differences. I think it is reasonable to accept that he would have sold at a higher price than the MTM price, simply because he is a businessman. In the circumstances I think that the median price of R2000 per ton is not unreasonable.

In the result the plaintiff has proven his contract, its breach, and his damages on a balance of probabilities, entitling him to judgment in his favour.

The last question relates to costs. The matter stood down from Thursday the 22nd of May until the next day, because plaintiff's witness was not available and plaintiff was waiting for Ex E to come to hand. On Friday the matter then stood down further, by agreement, until Wednesday the 30th of May, in order to suit everybody, including the court. Because of that, the whole of Friday was wasted. The better half of Thursday's court time

was also lost for the same reason. It is common cause that it was done in order to accommodate plaintiff. It would therefore not be improper if plaintiff had to stand in for those wasted costs.

In the result I make the following order:

1. Judgment in favour of plaintiff in an amount of R698 073,00 as damages.

2. Interest on the said amount at the legal rate from date of judgment.

3. Defendant to pay the costs, except for the wasted costs of 50% of Thursday the 22nd, and all of Friday the 23rd of May 2002, which plaintiff must pay.

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R D CLAASSEN
JUDGE OF THE HIGH COURT