IN THE HIGH COURT OF SOUTH AFRICA
SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE No. 2007/1470

DATE: 26/10/2010

Reportable in the electronic law reports only

In the matter between:

FLEET AFRICA (PTY) LTD Plaintiff

and

CARGILL COTTON GINNERS LTD Defendant

JUDGMENT

WILLIS J:

[1] The plaintiff claims some R2, 8 million from the defendant arising from transport and other logistical services allegedly rendered to the defendant in collecting raw cotton from depots in Zambia and delivering it to a ginnery in Chipata, Zambia for processing. The evidence was that, by and large, cotton in Zambia is farmed by smallholders holding between one and ten hectares of land. These farmers take their raw cotton to depots wherefrom it is collected and taken to various ginneries for processing before export. The alleged

agreement between the plaintiff and the defendant was concluded partly in writing and partly orally.

[2] The defendant has raised a special plea as to the lack of jurisdiction of this court to hear the matter. The parties agreed that, as the special plea, if successful, would be dispositive of the matter, the special plea should be considered first and separately from the plea over on the merits. It is the special plea that falls for determination before me.

[3] The lack of jurisdiction was pleaded by the defendant on the following grounds:

(i) the defendant is a company registered in Zambia with its registered office in Zambia;
(ii) the plaintiff's registered office is in Pretoria;
(iii) the plaintiff's principal place of business is in Pinetown, Kwazulu – Natal;
(iv) the alleged agreement, if indeed it was concluded, was concluded in Kwazulu-Natal;
(v) the breach of the agreement, if such indeed occurred, would have been in Zambia;
(vi) "the defendant did not reside in, and was not, in the area of jurisdiction of this Court within the meaning of section 19 (1) of the Supreme Court Act, 1959".

[4] Various witnesses on behalf of both the plaintiff and the defendant testified before me over two days concerning the special plea.

[5] "Cargill Cotton" is one of the "big names" in the cotton industry world-wide. It distinctive logo, bearing this name, is a registered trademark all over the world, including South Africa. Cargill Cotton operates in innumerable countries around the world. In does so in the

manner typical of multinational corporations: it registers as a local company in the different countries in which it operates, with one hundred percent of the shares in that local company being held either directly by the ultimate holding company or through a hierarchy of holding companies, culminating in this ultimate holding company. The ultimate holding company in the case of Cargill Cotton is Cargill Incorporated, a company registered and incorporated in the United States of America. Cargill Cotton collectively is one of the "big three" cotton merchants in the world. There can be no question that the defendant is a Zambian company, if for no other reason than that its registered office is in Zambia and it carries on extensive business in that country. It is therefore a foreign company. Cargill Cotton operates in South Africa under the name Cargill RSA (Pty) Ltd. It has been duly registered and incorporated in this country accordingly. It is common cause that Cargill RSA (Pty) Ltd, at all material times, has operated from an office in Fourways which falls within the area of jurisdiction of this court. Mr Gerhardus Kotze, who acted on behalf of the defendant at the time of concluding the alleged agreement, was, at the time of doing so, employed by Cargill RSA (Pty) Ltd as the "country cotton manager, Zambia". Most of his working hours were, at the time, spent in this office of Cargill Cotton in Fourways.

[6] It is quite clear from the evidence all the witnesses that Cargill Cotton's African operations, including not only Zambia but also Malawi, Zimbabwe, Tanzania and Kenya were, at all material times, including the present time, centrally controlled or "managed" from South Africa, mainly from this office in Fourways. This control extends to giving the defendant logistical support. All the key witnesses for the parties, relating to the alleged transaction, live here in South Africa and within easy commuting distance of this court.

[8] In *Appleby (Pty) Ltd v Dundas Ltd*[1] Hoexter J (as he then was) found

[1] 1948 (2) SA 905 ((E.D.L.D)

that the defendant which was a foreign company, registered in England and with its registered office in England was amenable to the jurisdiction of the Witwatersrand Local Division by reason of the fact that it carried on business at a branch office in Johannesburg. Hoexter J was interpreting section 5 of the Administration of Justice Act, No. 27 of 1912, the predecessor of section 19 of the Supreme Court Act, No 59 of 1959, having particular regard to the meaning of the word "reside". He held that "In my opinion it is so amenable in respect of any cause of action arising out of business carried on at its Johannesburg branch".[2] Hoexter J stressed the importance of commercial convenience in coming to his conclusion and referred, with approval, to what Lord St Leonards said in *Carron Iron Co v Maclaren*[3]:

> The corporation cannot have the benefit of a place of business here without yielding to the persons with whom it deals a corresponding advantage.[4]

The *Appleby* decision was referred to with approval in the case of *Bisonboard Ltd v Braun Woodworking Machinery (Pty) Ltd.*[5] I share the view of Kuny AJ in *Tschilas and Another v Touch Line Media (Pty) Ltd*[6] that, when it comes to jurisdiction, the test is really whether the defendant (or respondent, as the case may be) has a sufficient "presence" to justify the court having jurisdiction. Similar views are apparent from *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party).*[7] Indeed, it seems to me that it is clear that the Supreme Court of Appeal has, since at least the *Bid Industrial Holdings* case, adopted a more relaxed view as to jurisdiction and that considerations of appropriateness and convenience must prevail. I am satisfied that,

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[2] At p910
[3] 5 H.L.C. 416 at p450
[4] At 911
[5] 1991 (1) SA 482 (A) at 497C-D
[6] 2004 (2) SA 112 (W) at 119H
[7] 2008 (3) SA 355 (SCA) at paragraphs [55] to [57]

against the background of the facts in this case, there is a sufficiently close linkage between the defendant's Zambian operations and the business conducted from Cargill Cotton's offices in Fourways to justify this court having jurisdiction to determine the dispute between the parties. The defendant has a not insubstantial place of business at Fourways and therefore "resides" within the area of jurisdiction of this court.

[9] The defendant complains that the plaintiff, in its particulars of claim, merely alleged that the defendant had "its principal place of business" at Fourways and did not allege that is "residing" there. Nevertheless, as I have mentioned in paragraph [3] above, the defendant itself pertinently raised the issue of residence (within the meaning of the word "residing" in section 19 (1) (a) of the Supreme Court Act) in its special plea objecting to the jurisdiction of this court. Counsel for the defendant submitted that, having failed to allege that the defendant resides within the jurisdiction of this court (within the meaning of section 19 (1) (a) of the Act), the defendant could not rely on this fact. The plaintiff has, in the meantime, since the hearing of the matter, served a notice of intention to amend its particulars of claim to make the allegation which the defendant claims is fatally missing. The question of whether or not the intended amendment is to succeed has not yet been determined. I shall therefore decide the matter on the basis that there is no such notice of intention to amend before me.

[10] I share the view of Stegmann J in *Sibeko v Minister of Police and Others*[8] that a convenient discussion of the common law position with regard to special pleas is set out in the judgment of Murray CJ in *Reuben v Meyers.*[9] In *Reuben's* case Murray CJ, in turn, refers to the most helpful analysis given by Innes CJ in *Western Assurance Co v*

[8] 1985 (1) SA 149 (W) at 158C
[9] 1957 (4) SA (SR)

Caldwell's Trustee[10] In this case Innes CJ refers to the old authorities, in particular *Merula*, *Vroman*, *Voet*, *Groenewegen* and *Carpzovius*.[11] The following seems clear:

(i) An objection to jurisdiction, known as a declinatory exception, must be raised before *litis contestatio*;

(ii) An exception in the practice of the Courts of Holland was not used in the narrow sense which this term is now normally understood in South Africa but would cover "a number of what we call special pleas";

(iii) An exception (including one in the broader sense of this term) of must be pleaded and proved.

[11] In *Masuku and Another v Mdlalose and Others*[12] the Supreme Court of Appeal made it clear that a special plea is in the nature of a special defence which it is incumbent upon a defendant to prove. In *Durbach v Fairway Hotel Ltd*[13] Tredgold J (as he then was) said that a "special defence must be specifically and unambiguously pleaded". Shortly before that Tredgold J said that "the whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed".

[12] The defendant has declined to submit or consent to the jurisdiction of this court on the basis that it does not reside within the area of this court's jurisdiction within the meaning of section 19 (1) (a) of the Supreme Court Act. Accordingly, the defendant having raised the issue itself in its special plea, must stand or fall by it for this very reason. It cannot complain that it faced "trial by ambush". The contention advanced by the defendant that the plaintiff's case is fatally defective because it failed to allege that the defendant "resides" within the area of this court's jurisdiction is without merit. On the

[10] 1918 AD 262. In *Reuben's* case Murray CJ refers to the judgment of Innes CJ at 58-60.
[11] At 270-1.
[12] 1998 (1) SA 1 (SCA) at 11B-C
[13] 1949 (3) SA 1081 (SR) at 1082

evidence before me, the defendant has fallen. The special plea cannot succeed.

[13] Judgment is given in favour of the plaintiff against the defendant as follows:

The defendant's special plea is dismissed with costs.

DATED AT JOHANNESBURG THIS 26th DAY OF OCTOBER, 2010.

N.P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: *A.B.D. Choudree.*
Counsel for the Defendant: *A.P. Rubens SC* (with him, *G. Kairinos*)

Attorneys for the Plaintiff: Vash Choudree & Associates
Attorneys for the Defendant: Werksmans

Date of hearing: 11th, 12th and 13th October, 2010.
Date of judgment: 26th October, 2010