IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: A740/2008

DATE: 18 June 2009

In the matter between:

McCAIN FROZEN FOODS (PTY) LIMITED Appellant

and

ARTHUR WILLIAM CREIGHTON Respondent

JUDGMENT

HARTZENBERG J

The appellant appeals against an order, dated 21 September 2006, by Mokgoatlheng AJ. The learned judge dismissed its application for an amendment of its Particulars of Claim and struck some of the paragraphs out of its replication. It is common cause between the parties that the legal arguments underlying the objection to the amendments and the application to strike out the paragraphs in the replication, are identical. The appellant buys potatoes on a large scale from farmers. The respondent is a farmer. This whole matter concerns two revised

agreements in terms of which the respondent undertook to supply certain quantities of potatoes to the appellant, at certain times, at agreed prices; and the respondent's failure to supply the full quantities.

The parties entered in two agreements in terms of which the respondent was to supply potatoes to the appellant during the months of October, November and December of 2002. The original agreements were concluded on 20 and 23 May 2002 respectively. They were both revised on 15 October 2002. The one agreement is known by the parties as the Viljoenskroon agreement and the other one as the Delmas agreement, because the potatoes in respect of the first agreement had to be delivered at Viljoenskroon and those in respect of the second agreement at Delmas. Although the agreements differ as to time of delivery, quantity of potatoes to be delivered and place of delivery, the further terms of the agreements are identical. The fate of the appeal will be the same for both agreements. If the appeal is to be dismissed it has to be dismissed in respect of both claims based on the two agreements and conversely if it is to succeed, the amendments in respect of both agreements are to be allowed and the application to strike out is to be dismissed. It is consequently unnecessary to deal with the provisions of both agreements. It will be sufficient to analyse and discuss the arguments in respect of the Viljoenskroon agreement and apply the result also to the Delmas agreement.

In terms of the Viljoenskroon agreement in its original form the respondent undertook to supply to the appellant, during the season starting on or about 7 October 2002 and ending on or about 22 December 2002, 2850 metric tons of potatoes that comply with the specifications contained in the agreement. In annexure A to the agreement it was specified that the respondent was to deliver 900 tons of potatoes during October 2002 and in particular that 300

tons per week had to be delivered during each of weeks 42, 43 and 44, 1200 tons of potatoes during November 2002 and in particular that 300 tons of potatoes had to be delivered during each of weeks 45, 46, 47 and 48 and that 750 tons of potatoes had to be delivered during December 2002 by way of delivery of 250 tons during each of weeks 49, 50 and 51. The agreement was signed on 23 May 2002. In the revised agreement, dated 15 October 2002, the respondent undertook to supply 3 300 tons of potatoes during the season commencing on or about 14 October 2002 and ending on or about 20 December 2002. According to schedule F to the revised agreement delivery was to be as follows: during each of the weeks of 14, 21 and 28 October 350 tons; during each of the weeks of 4, 11, 18 and 25 November 350 tons; during the weeks of 2 and 9 December 300 tons per week and during the week of 16 December 250 tons. The appellant annexed schedules to the particulars of claim indicating when delivery took place. It appears from them that the respondent's first delivery, accepted by the appellant, occurred about two weeks prior to the first delivery date. It is common cause that the respondent failed to supply the stipulated quantity in each one of the months. It only supplied 1 277,339 tons leaving a shortfall of 2 065,476 tons.

The appellant refused to pay the respondent for the potatoes actually delivered. The respondent instituted an action in which it claimed payment for the potatoes delivered, according to the agreed price. The appellant admitted delivery and failure to pay but asked for payment to be deferred until finalization of its counterclaim for damages which was alleged to be in excess of the respondent's claim. The respondent denied that it is liable to pay an amount in damages to the appellant. When the trial was to commence, the parties agreed to refer the matter to arbitration. It was agreed that the arbitration was to be regulated by the Uniform

Rules of Court. In the arbitration agreement the parties stipulated that there would be a right of appeal.

The arbitration was done before a retired judge of the Supreme Court of Appeal, the Honourable Mr. Justice F H Grosskopf. The arbitration was done over a period of ten days. It appears from the award of the arbitrator that a number of witnesses testified. The respondent testified about his farming ventures and his expected yield and he and other witnesses on both sides testified about the negotiations leading to the agreements and the revised agreements and the prevailing circumstances. There were witnesses who testified about the alleged damages and the computation thereof.

The arbitrator refused a claim for rectification by the respondent to the effect that there was an oral agreement that he would be released from delivering a shortfall should it transpire that it has become impossible for him to deliver. The arbitrator, invited to do so by the respondent, also refused to find that there was a tacit or implied term in the agreement that the respondent would be released from his obligation to deliver in case of impossibility to perform. The arbitrator found that there was an implied term in the revised agreement, that should the respondent be unwilling or unable to deliver from his own fields, he would be obliged to make good the shortfall from other sources, at his own expense. He stated that the overall agreement between the parties was a simple contract of purchase and sale in terms whereof the respondent was obliged to deliver a certain quantity of potatoes of a particular size during specific weeks to the appellant and that the respondent was obliged to make good any shortfall from other available sources. He found that the respondent was in breach of his obligations in terms of the contract when he failed to deliver the required tonnage on time. He went on to state that

damages are usually assessed as the adverse difference between the contract price and the market price of the goods at the proper time and place of performance and found that in this case the damages are to be assessed at the time and place of performance. He then discussed the question whether the appellant succeeded in putting sufficient evidence before him so that he could make a proper assessment of the damages, having found that the respondent was *in mora* right from the outset, and concluded that it failed to prove the *quantum* of its damages, in that it had failed to produce available evidence. In the result the arbitrator made an award in favour of the respondent in respect of its claim and ordered absolution from the instance in respect of the appellant's counterclaim. The appellant was ordered to pay the respondent's costs of the arbitration.

The appellant did not avail itself of its right of appeal, provided for in the arbitration agreement, but failed to pay the amount awarded against it and the costs to the respondent. Such conduct caused the respondent to apply to the court to have the award made an order of court. The appellant brought a counter-application for the matter to be remitted to the arbitrator to hear further evidence on the question of the *quantum* of the appellant's damages and for a stay of its obligation to pay the respondent the amount and costs that was awarded to it by the arbitrator, pending the further hearing by the arbitrator. The application and counter-application were heard by Bertelsmann J. He made the award in favour of the respondent an order of court and refused to remit the matter to the arbitrator, being of the view that that there was no legal basis either in the Arbitration Act or elsewhere which authorizes a court to make such an order, and that even if there were such a basis that he would have exercised his discretion against remitting the matter to the arbitrator.

Within days of his order the appellant instituted the present action. The respondent pleaded and raised a number of defences by way of special pleas and in the plea. The respondent contended that in terms of section 28 of the Arbitration Act, No. 42 of 1965, the appellant is bound by the award and has to submit to it. The respondent further referred to the provisions of the arbitration agreement itself and pleaded that they preclude the institution of the action. It also pleaded that the time of delivery had been finally determined by the arbitrator and that that aspect is accordingly now *res judicata*. The respondent pertinently referred to the non-variation clause in the Viljoenskroon agreement. Another point pleaded by the respondent was a denial that the arbitrator had found that the appellant had suffered damages and, in any event, a denial of the *quantum* of any possible damages that it may have suffered.

In its replication the appellant denied:

1. that the counterclaims had been dismissed by the arbitrator;
2. that the award is final in terms of section 28 of the Arbitration Act; and
3. that the appellant is obliged to abide by and comply with the terms of the award.

It furthermore pleaded that as the award was one of absolution from the instance the respondent is precluded and/or estopped from pleading *lis finita* and/or *res judicata*. In particular the appellant pleaded that the award was not a judgment for the respondent and accordingly did not preclude the institution of fresh proceedings. It also pleaded that the arbitrator had found that the appellant had suffered damages and that the only outstanding issue is the quantification thereof. It then alleged that the interpretation of the agreement was to the effect that the respondent undertook to deliver 3 300 tons of potatoes during the period 14

October 2002 until 20 December 2002 and alternatively averred tacit or implied terms as follows: [i] that the respondent did not regard himself as being bound by the time schedule; [ii] that the dates in the schedule were estimated dates which could be extended for a reasonable period and that three weeks would be a reasonable period; [iii] that the dates in the schedule were approximate dates and that the respondent would be entitled to deliver shortages within a reasonable time after each specified date; [iv] that it is a custom or a trade usage in the farming industry that the dates could only be approximate dates and finally denied that the appellant's claims could have prescribed before November or December 2005.

The appellant then gave notice of an intention to amend its Particulars of Claim in the following respects: [i] that there was an oral agreement that the respondent would not be bound by the schedule (the appellant did not and does not persist with this portion of the proposed amendment and it is of no further relevance.); [ii] that there were implied or tacit terms in the agreement with the import as set out in the previous paragraph; [iii] that the revised agreements were concluded, both parties being aware of and influenced by the past and prevailing weather conditions; and [iv] referring to certain methods of quantification of damages based on a publication known as "Aartappels Suid Afrika".

The issues are clear. The respondent's main contention is that the arbitrator gave his award, that it is final and that the parties are bound by it, if not by section 28 of the Arbitration Act then by the provisions of the very agreement in terms of which they submitted it to the arbitrator. In any event, says the respondent, the arbitrator has adjudicated on the dates upon which the respondent breached the agreement, and has also found that they are the relevant dates upon which the assessment of the damages is to be made. The summons only interrupted

prescription in respect of instances of breach that occurred after it was issued. By introducing the tacit or implied terms or the alleged trade usage the appellant tries to circumvent the fact that most of its alleged claims, had already prescribed by the time that the summons was issued. That, according to the respondent, cannot be done due to the non-variation clause. The appellant does not deny the relevant arbitration agreement or the award but argues that an order of absolution from the instances allows for an opportunity to institute fresh proceedings and that the dates when the respondent fell into breach of contract and whereon the damages are to be assessed have not been finally decided by the arbitrator.

Mogoathleng AJ (as he then was) stated the following about the legal principles governing amendments:

> *"[1] The Court has a discretion to allow a party to amend a pleading or, in the case of an application, to file further affidavits at any time before judgment.*
>
> *[2] Amendments bona fide sought are generally granted unless the application to amend will cause prejudice in the sense of an injustice to the other side in circumstances where the prejudice cannot be eliminated (**if not totally then at least materially**) by a suitable postponement and or an order for costs.*
>
> *[3] The factors which have shaped the Court's policy regarding amendments are a positive endeavour to encourage a full and proper ventilation of the real issues between the parties.*
>
> *[4] Whilst an amendment remains an indulgence which has always to be justified by the seeker, it is the prejudice to the opponent that is the touch stone to the grant or refusal of the application."*

The appellant argued that the legal position was correctly. The argument was that if those principles had been applied the amendments should have been granted. The respondent did not argue that that there was anything wrong in any of the quoted statements by the learned judge. That is accordingly the basis on which this matter is to be decided.

The court *a quo* found: [i] that the only issue not decided by the arbitrator is the question of the quantum of the damages (para.14); [ii] that the delivery dates are critical to determine the damages (para.15); [iii] that the arbitrator finally adjudicated upon the delivery dates (para.18) and [iv] that this court cannot deal with matters finally decided by the arbitrator but only with issues that the arbitrator was unable to decide. The court *a quo's* judgment was to the effect that the appellant cannot revisit an issue already decided by the arbitrator i.e. the determination of the dates of delivery.

The fact of the matter is that there was a claim and a counterclaim. There were pleadings and evidence was led. The interpretation of the agreements was the very issue before the arbitrator. In the process both parties urged the arbitrator to imply terms into the agreement which would be for their own benefit. The appellant's whole defence against the respondent's claim was that it had a counterclaim in excess of the claim. The claim itself and the amount thereof were never in issue. The whole purpose of the arbitration was to determine whether the appellant had suffered damages, and if so, what the amount thereof was. The date of delivery of the potatoes was of vital importance. That had to be determined by interpreting the agreement. It is evident that both parties addressed the issue. Both parties maintained that there were implied terms in the agreement that regulated the dates of delivery. The arbitrator adjudicated that very issue with reference to the agreements, the evidence and the arguments.

As already indicated some of the contentions were rejected. What is important is that evidence was placed before the arbitrator on which he was asked to determine the damages suffered by the appellant. He considered that and concluded in respect of the Viljoenskroon agreement:

> *"The Plaintiff delivered 891.917 tons short in October2002, 391.42 tons short in November 2002 and 782.148 tons short in December 2002 (a total shortfall of 2065.485 tons). It appears that the plaintiff was in mora right from the outset."*
>
> A little later he said:
>
> *"It is common cause that the Defendant bought in only 1017.05 tons of the total shortfall of 2065.485 tons, leaving a balance of 1048.43 tons. There is no evidence that the Defendant bought in any potatoes against the Plaintiff during October or November 2002. It is not in dispute that the 1017.05 tons actually bought in against the Plaintiff were only bought in as from 2 December 2002. The prices which the Defendant paid for the 1017.05 tons in December 2002 were certainly higher than the prices at which he could have bought those potatoes in October and November 2002,* ***at the proper time of performance.*** *And there is in any event no evidence that the prices actually paid by the Defendant in December 2002 were in fact the true market prices at that stage.* ***In my judgment the Defendant has therefore failed to prove the true market price of the 1017.05 tons of potatoes as at the proper time of performance."***
>
> (Own emphasis)

> In respect of the Delmas agreement the arbitrator stated:
>
> *"The Defendant claims a much higher price of R2 715.12 per ton for the shortfall of 953.86 tons bought in against the Plaintiff during the period 2 to 14 December 2002, when the price of potatoes was much higher than in November 2002. Those December*

2002 prices clearly do not represent the market price ***at the proper time of performance*** *and is therefore of no use in assessing the Defendant's damage."*

(Own emphasis)

It is evident from the remarks of the arbitrator that both the time of performance and the actual price of potatoes at those times were in issue and addressed by both parties. The arbitrator had to determine whether there were implied terms that varied the dates stipulated in the agreement. It was for the appellant to raise the issue. It is also clear that the arbitrator had no problem in determining the time of performance. He found that the proper time was the times agreed upon in the schedule. If he was wrong not to find that the time of performance was different from the times agreed upon because of the implied terms in the agreement the appellant had a right of appeal. The arbitrator was unable to determine the damage because there was no evidence before him of the market value of potatoes at the time when the respondent had to deliver. That caused him to absolve the respondent from the instance.

The appellant had a right of appeal against that award. It was specifically stipulated for in the arbitration agreement. The appellant deliberately chose not to avail itself of that right. The result is that, as between the parties there is now, after a lengthy hearing and argument, a final finding as to the time of performance. The only outstanding issue before the arbitrator was the market value of potatoes at the relevant times. By trying to introduce the issues in the notice of amendment the appellant clearly wants to nullify the decision about the time of performance. Section 28 of Act 40 of 1965, the Arbitration Act is applicable. It reads:

"Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms."

In the circumstances the approach of the court *a quo* was correct. The appeal can accordingly not succeed.

The appeal is dismissed with costs, which costs include the costs occasioned by the employment of two counsel.

W J HARTZENBERG
JUDGE OF THE HIGH COURT

I agree

C P RABIE
JUDGE OF THE HIGH COURT

I agree

L N M POSWA
JUDGE OF THE HIGH COURT

HEARD ON : 3 June 2009

ON BEHALF OF THE APPELLANT

Counsel : H Z SLOMOWITZ (SC)
R COHEN

Instructed by : MERVYN JOEL SMITH
C/o JACOBSON & LEVY INCORPORATED

ON BEHALF OF THE RESPONDENT

Counsel : P P DELPORT (SC)
S D WAGENER (SC)

Instructed by : SNYMAN DE JAGER INCORPORATED