

SOUTH AFRICA / JUDGMENT

Afrifresh Group (Pty) Limited v Alan Jaques Renard (Pty) Limited (2013/16380) [2015] ZAGPJHC 9 (3 February 2015)

[2015] ZAGPJHC 9

COURT

South Gauteng High Court, Johannesburg

BEFORE

N P G Redman

CASE / FILE NUMBER

2013/16380

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REPUBLIC OF SOUTH

AFRICA

SOUTH GAUTENG LOCAL

DIVISION,

JOHANNESBURG

CASE NO. 2013/16380

DATE: 03 FEBRUARY 2015

In the matter between:

AFRIFRESH GROUP (PTY)

LIMITED.....Plaintiff

And

ALAIN JAQUES RENARD (PTY)

LIMITED.....Defendant

JUDGMENT

REDMAN AJ

- [1] The defendant (excipient) excepts to the plaintiff's particulars of claim on the basis that the particulars of claim are vague and embarrassing, alternatively lack averments which are necessary to sustain a cause of action.
- [2] The plaintiff's claim is one for damages in the amount of R3 628 219,00 arising out of the defendant's alleged breach of an agreement in terms whereof the defendant was appointed as the plaintiff's agent to manage and administer the plaintiff's requirements for hedging transactions on currencies in South Africa.

[3] The thrust of the complaints raised in the exception are aimed at the discrepancies between the pleadings and the contents of the written instruction attached thereto. The relevant paragraphs of the particulars of claim read as follows:

'6. On 24 July 2012, the Plaintiff, represented by Anton Meinesz, expressly instructed the Defendant, represented by Herman Schoeman, to obtain forward foreign currency cover by means of foreign exchange contracts in terms of the model recommended by the defendant up to the following cover amounts for the weeks indicated:

6.1 week 2012 48: €228 679.00 and £38 679.00;

6.2 week 2012 49: €167 522.00 and £103 663.00;

6.3 week 2012 50: €87 972.00, £38 710.00 and US \$6 210.00;

6.4 week 2012 51: €84 935.00 and £116 941.00;

6.5 week 2012 52: €135 100.00, £120 779.00 and US \$20 250.00;

6.6 week 2013 01 €148 589.00 and £22 629.00;

6.7 week 2013 02: €133 758.00, £192 550.00 and US \$19 359.00;

6.8 week 2013 03: €86 480.00, £74 889.00 and US \$20 457.00;

6.9 week 2013 04: €176 586.00, £351 654.00 and US \$33 728.00;

6.10 week 2013 05: €271 573.00, £24 383.00 and US \$31 248.00; and

6.11 week 2013 06: €338 110.00, £178 018.00 and US \$52 872.00.

7. A true copy of the instructions is attached marked "C".

8. Properly construed, the instruction in "C" was to obtain cover for amounts equal to 50% of the amounts referred to in respect of week 48 of 2011 to week 06 of 2012 (being the actual transaction amounts during the preceding year), for the corresponding weeks of the upcoming season from week 48 of 2012 to week 06 of 2013."

[4] Annexure "C" comprises of two documents, namely -

4.1. an e-mail addressed by Anton Meinesz to "Administration",

4.2. a schedule containing (a) a table reflecting a "sum of receipts" in various currencies for the period week 48 of 2011 to week 06 of 2013; and (b) a table reflecting "cover amounts".

[5] In the exception, the defendant raises four grounds of complaint, some of which overlap. Each of the grounds is dealt with hereunder.

First ground

- [6] The defendant contends that the allegations contained in paragraph 6 (read with 7) of the particulars of claim are factually incorrect and are not supported by the contents of annexure "C". The defendant contends that the weeks referred to in paragraph 6 of the particulars of claim do not correspond to the weeks recorded in annexure "C".
- [7] It is immediately apparent from a perusal of the first table reflected in the schedule that the dates recorded therein are for the period week 48 of 2011 to week 06 of 2012, and not for the period week 48 of 2012 to week 06 of 2013 (being the dates recorded in paragraph 6 of the particulars of claim).
- [8] Paragraph 6 of the particulars of claim, however, does not purport to recite the contents of the table in annexure "C", but purports to record the instruction given by the plaintiff to the defendant.
- [9] It is the plaintiff's contention that the instruction "properly construed" instructs the defendant to obtain cover for the weeks 48 of 2012 to week 6 of 2013, notwithstanding the fact that the weeks recorded in annexure "C" relate to the same period for the preceding year.
- [10] It is self-evident that an instruction to obtain forward cover would relate to foreign exchange contracts in the future. It would be nonsensical for the plaintiff to instruct the defendant to obtain forward cover for periods which had already passed.
- [11] It is the plaintiff's contention that, on a proper construction of annexure "C", the defendant was instructed to obtain forward cover for the forthcoming season, based on the actual transaction amounts for the preceding year.
- [12] In the e-mail addressed by Anton Meinesz (forming part of annexure "C") he records the following:

"Attached are our expected Grape revenue for the forthcoming season.

The dates are calendar dates and the amounts that we would potentially want covered are shown in the middle of the sheet under the heading "cover amounts".

You guys must apply your model but I am very comfortable fixing quite a lot of these amounts if you think it appropriate. I would try and spread the fixing over the full season rather than just locking in the earlier amounts (although I know that the later fixes will absorb a bit more facility) .." [emphasis added]

- [13] At the foot of the aforesaid e-mail is an e-mail from Basil Karstel to Anton Meinesz which reads as follows:

"This is based on last season's income on Grape and I've taken 50% of this to be covered."

- [14] I am alive to the fact that a Court should exercise caution when deciding questions concerning the interpretation of contracts on exception. The defendant bears the onus of persuading the Court that on every interpretation no cause of action has been revealed. See *Francis v Sharp* 2004 (3) SA 230 (C) at 237D-I.
- [15] Annexure "C" does not form part of the agreement relied upon by the plaintiff. The plaintiff contends that annexure "C" is an instruction which was given by the plaintiff to the defendant pursuant to the underlying agreement. Annexure "C" is a unilateral instruction and accordingly the defendant's suggestion that the plaintiff should have sought rectification of the documents is misplaced.
- [16] When applying the "golden rule" of interpretation, the Court will give effect to the ordinary grammatical meaning of the language contained in a document unless this would result in some absurdity, repugnancy or inconsistency. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para [18], the Court summarised the current legal position relating to the interpretation of documents as follows:

'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against,

the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

- [17] As indicated above, if one were to give effect to the dates recorded in the first table in annexure "C", this would give rise to an absurdity and would probably undermine the purpose of the instruction.
- [18] In order to aid the Court in the interpretation of the document, reference may be had to evidence which may include the circumstances in which the document came into existence. See *Bothma-Batho Transport v S Bothma en Seun Transport* 2014 (2) SA 494 (SCA) at [12].

- [19] Bearing in mind that the author and recipient of the e-mail are businessmen who have had a relationship since at least 2011, I am not persuaded that a court will not find that the interpretation of the instruction contended for by the plaintiff in paragraphs 6 and 8 of its particulars of claim is the correct interpretation thereof.
- [20] In the light of the aforesaid, it would be inappropriate for me to attempt to place an interpretation on the provisions of the instruction on exception. In those circumstances, the first ground of exception cannot succeed.

Second ground

- [21] In paragraph 6 of the particulars of claim, the plaintiff alleges that the foreign exchange contracts were to be obtained 'up to' the amounts indicated in that paragraph.
- [22] In paragraph 8 of the particulars of claim, the plaintiff alleges that, '[p]roperly construed the instruction in annexure "C" was to obtain cover for amounts equal to 50%'.
- [23] The defendant contends that there is nothing in annexure "C" which either expressly or on a proper construction provides for a term that cover was to be obtained for 'amounts equal to 50%'.
- [24] It is immediately apparent that paragraphs 6 and 8 of the particulars of claim are incompatible and contradictory.
- [25] If the defendant was expressly instructed to obtain forward foreign currency cover up to the amounts reflected in the second table in the schedule attached to annexure "C" (which records amounts equal to 50% of the transactions for the preceding year), this is irreconcilable with the allegation in paragraph 8 that the defendant was to obtain cover equal to 50% of the transactions for the preceding year.
- [26] During argument, counsel for the plaintiff conceded that paragraphs 6 and 8 are contradictory and that paragraph 8 did not accord with the contents of annexure "C".
- [27] In annexure "C", it is recorded that the amounts reflected in the second table of the schedule are amounts that the plaintiff "... would potentially want covered ...". It is further recorded that Meinesz was "... very comfortable fixing quite a lot of these amounts".
- [28] Nowhere in annexure "C" is the defendant instructed to obtain cover for amounts equal to 50% of the transaction amounts for the preceding year. The use of the terms "potentially" and "quite a lot" indicate a discretionary instruction to the contrary.
- [29] Where a document contains an express provision, no tacit term can be imported into that document which contradicts the expressed term. See *FJ Hawkes & Co Ltd v Nagel* 1957 (3) SA 126 (W) at 132C and *Robin v Guarantee Life Assurance Co Ltd* [1984] ZASCA 72; 1984 (4) SA 558 (A) at 567A-F.

- [30] The instruction in annexure "C" appears to provide the defendant with a discretion as to the amount of cover it was to obtain and on no possible construction of the written document is there room for the interpretation that the cover was to equal 50% of the transaction amounts during the preceding year.
- [31] The plaintiff's cause of action is clearly based on its interpretation of the instruction as recorded in paragraph 8 of the particulars of claim.
- [32] In paragraph 9 of the particulars of claim, the plaintiff alleges that the defendant, '[i]nstead of only entering into foreign exchange contracts in the amounts instructed by the Plaintiff' in ... annexure "C" ..., the Defendant entered into foreign exchange contracts for the periods instructed in excess of the amounts instructed contrary to the express instructions of the Plaintiff ...'.
- [33] The express instructions referred to in paragraph 9 of the particulars of claim clearly refer to the instructions as construed by the plaintiff in paragraph 8 of the particulars of claim.
- [34] The plaintiff accordingly contends that the defendant breached the agreement by failing to enter into foreign exchange contracts for the relevant periods in amounts equal to 50% of the actual transaction amounts for the preceding year.
- [35] In the light of the inconsistency between paragraph 8 of the particulars of claim and annexure "C", I am satisfied that the plaintiff has not made out a cause of action entitling it to claim damages for breach of contract arising out of the defendant's failure to comply with the instruction as contended for by the plaintiff.
- [36] In addition, the contradiction between paragraphs 6 and 8 of the particulars of claim read with annexure "C", render the particulars of claim as a whole vague and embarrassing. It is impossible to distil from annexure "C" and the allegations contained in paragraph 6 of the particulars of claim the interpretation placed on the agreement by the plaintiff in paragraph 8 of the particulars of claim.
- [37] It has been held that a summons would be vague and embarrassing if there is an inconsistency amounting to a contradiction between the summons and the documents relied upon as the basis of the claim. See *Keeley v Heller* 1904 (TS) 101.
- [38] The defendant would be embarrassed in pleading to the contradictory averments in paragraphs 6 and 8 of the particulars of claim and would be prejudiced if it was compelled to do so.
- [39] In the circumstances, the second ground of the exception is upheld.

Third and fourth grounds

- [40] The defendant contends that the term "properly construed" as recorded in paragraph 8 of the particulars of claim is incompatible with the claim in paragraph 6 that the terms were express.

- [41] Paragraph 6 of the particulars of claim, does not indicate that the terms contained therein were express, but merely indicates that the defendant was "expressly instructed".
- [42] I am not persuaded that by pleading that the instruction should be properly construed in a certain way renders the particulars of claim as a whole vague and embarrassing.
- [43] There is nothing irreconcilable between the use of the word "potentially" contained in annexure "C" and the allegation that the instruction was given expressly.
- [44] The defendant must accordingly fail on the third and fourth grounds.
- [45] I make an order in the following terms:
1. The defendant's exception is upheld;
 2. The plaintiff is afforded ten days within which to amend its particulars of claim;
 3. The plaintiff is ordered to pay the costs.

N P G REDMAN

Acting Judge of the High Court

Heard: 29 August 2014

Judgment delivered: 03 February 2015

Appearances:

For Plaintiff: Adv. L Burger SC

Attorneys: Hayes Incorporated

For Defendant: C Acker

Attorneys: Jordaan & Wolberg

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