

SOUTH AFRICA / JUDGMENT

Birch t/a LF Birch & Son v Marqwe Produce (Pty) Ltd (17018/09) [2010] ZAGPPHC 304 (16 April 2010)

[2010] ZAGPPHC 304

COURT

North Gauteng High Court, Pretoria

BEFORE

Msimeki

CASE / FILE NUMBER

17018/09

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH COURT, PRETORIA)

CASE

NO 17018/09

DATE:

16 APRIL 2010

In

the matter:

SIDNEY BONNEN

BIRCH t/a LF BIRCH &

SON.....APPLICANT

And

MARQWE PRODUCE

(PTY)

LTD.....RESPONDENT

JUDGMENT

MSIMEKI, J

INTRODUCTION

[1] The Applicant, in this application, seeks an order in the following terms:

“1. Directing and compelling the Respondent to furnish the Applicant with:

1.1 Copies of all documents relating to the exportation of all ostrich meat (“the ostrich meat”) supplied by the Applicant in the period between 1 January 2007 to 30 November 2007.

1.2 Copies of any and all records and photographs of the ostrich meat as inspected in Europe.

2. Directing that the Respondent pay the costs of this application.”

[2] The Respondent opposes the application on the basis that the granting of the order that the Applicant seeks will enable the Applicant to extract the Respondent’s version on oath and that that would amount to demanding full discovery prior to the formulation of any claim or the institution of any action against the Defendant, which procedure, according to the Respondent, is unknown in our law.

BRIEF FACTS

[3] The Applicant, an ostrich farmer sold certain ostrich meat to the Respondent. The meat was processed by Venison Processors (Pty) Ltd (“Venison Processors”) and the Respondent at their facilities. The first export approved ostrich meat deboning facility registration number is “ZA18” while the Respondent export approved meat processing plant’s registration number is “ZA19”. The Applicant would invoice the Respondent which would make payment upon presentation of the shipping documents comprising the Bill of Lading by the Respondent to the Respondent’s customer in Europe. The prices of the meat produced by Venison Processors and the Respondent had been agreed on. The Applicant’s meat from ZA18 and ZA19 was stored at Commercial Cold Storage (Pty) Ltd (“CCS”) under a frozen storage account in the Applicant’s name prior to shipment. The Applicant’s meat from ZA18 and ZA19 and the Respondent’s own meat produced at ZA19 was placed in the same container and shipped to Europe. Only the meat from ZA18 was allegedly rotten and destroyed. Only the Applicant’s meat from ZA19, the plant of the Respondent, was discounted. The Applicant was then to receive €5.00 per kg instead of the agreed €12.00 per kg for his meat produced at the ZA19 plant. According to the Applicant, there was no apparent reduction in the price of the

Respondent’s own meat produced at its own ZA19 plant. This, the Applicant finds inexplicable as their meat had been in the same container. The Applicant clearly does not accept the Respondent’s version and explanation.

THE UNDERTAKING

- [4] Several e-mails and Skype messages were exchanged between the Applicant and the Respondent. The Applicant and the Respondent communicated by e-mail represented by the deponents to the founding affidavit and the answering affidavit Sidney Bonnen Birch and Tanya Claassen respectively. The e-mails dealt with the ZA19 meat and the ZA18 meat. I shall specifically refer to three e-mails which I regard as paramount. Tanya's first e-mail which appears on page 66 of the paginated papers reads:

"Hi Sid,

I need to finalise the matter with regards the meat in Europe. Please confirm that you will accept the price of €5/kg on the ZA19 meat, and that the VP ZA18 meat will be discarded without further claims from your side. "

In response to this e-mail Sidney reacted as follows:

"I accept the €5/kg provided that I can first have copies of the export documents as well as the records and photos of the meat as inspected in Europe. Obviously if the ZA18 meat is off then it has to be discarded. We must both have no claims against each other. Please confirm this. " (My emphasis)

Pursuant to this e-mail Tanya then reacted as follows:

"Hallo Sid,

The money should be paid to us by the end of January -I will follow up this morning. I will also get all documentation that you have asked for. " (My emphasis)

These e-mails appear on pages 65 -66 of the paginated papers. The e-mails were followed by several others exchanged between the parties and their attorneys concerning the third e-mail, (Tanya's e-mail) the subject matter of this application. This is the e-mail upon which the Applicant bases his application. The Applicant alleges that failure to get satisfactory response from the Respondent resulted in this application.

- [5] The Applicant contends that the application through the answering affidavit, has produced fifteen required documents namely annexures "TC4", "TC4bis", "TCter", "TC5", "TC6", "TC7 - 12", "TC12bis", "TCI3 -TCI5" which despite the undertaking and numerous attempts to obtain them, had never previously been provided by the Respondent.

THE ISSUES

- [6] The issues to be determined are:

1. Whether, in deed, the relief sought will amount to an order for discovery which the Applicant should obtain only after the institution of an action against the Respondent under Rule 35 of the Uniform Rules of Court.

2. Whether there are disputes of fact relating to the terms of the undertaking and the merits of the action to be instituted in respect of the quality of the meat.

COMMON CAUSE

FACTS

[7] The following facts are common cause:

1. That the parties concluded an agreement in terms of which the Applicant sold certain ostrich meat to the Respondent.
2. That the ostrich meat was exported to Europe.
3. That the meat came from two facilities, namely ZA18 and ZA19.
4. That ZA19 was operated by the Respondent itself.
5. That the Applicants' meat from ZA18 and ZA19 was stored at CCS prior to shipment.
6. That the Applicant's meat from ZA18 and ZA19 and the Respondent's own meat produced at ZA19 was placed in one container which was sent to Europe.

[8] The Applicant finds the following surprising and strange:

1. That only the ZA18 meat was allegedly found rotten and destroyed.
2. That only the Applicant's meat from ZA19 plant of the Respondent for which the Applicant was to receive €5.00 per kg and not €12.00 per kg was discounted.
3. That according to him, there was no apparent reduction in the price of the Respondent's own meat produced at its own ZA19 plant. He finds it inexplicable that the Respondent is apparently paid in full for its own meat produced at its own plant which was placed in the same container.

If, indeed, this happens to be the position, questions pertaining thereto should be inevitable.

[9] The Respondent's version, according to the Applicant, is riddled with inconsistencies which have led to a number of inevitable questions.

THE FIRST INCONSISTENCIES

1. Tanya Claassen ("Tanya") in the answering affidavit stated that veterinarians check the meat when it gets to Europe. According to her 'ostrich meat exports to European Union were placed under extreme scrutiny as a result of health scares..'. She however, also states that no such inspection took place in respect of the meat in question. This is clearly an inconsistency. The Applicant, on the contrary, avers that Tanya could never have personal knowledge relating to whether such an inspection did or did not take place as she was not in Europe at the time.

2. The Applicant contends that Tanya's statement to the effect that upon the arrival of the container in Europe, and after defrosting the meat, various problems were identified is unreliable. The Applicant contends that Tanya makes assumptions of facts about which she could never have had personal knowledge and that that places the veracity of her version in doubt.
3. Annexure "TC6" to the answering affidavit shows that the meat was defrosted. This, according to the Applicant, leads to a host of other questions relating to the defrosting of the ZA18 meat and that the answers can only be produced by the required documents.
4. Tanya claims that the allegedly rotten meat was disposed of by the Respondent's client. The Respondent's customer Van Leendert, in annexure "TC6", according to the Applicant, says nothing about the meat having been destroyed. The customer, instead, states that he agreed "to adjust the purchase price of all the meat (My emphasis). What to the Applicant remains inexplicable is how the customer separated the ZA18 meat from the ZA19 meat and how the customer decided which portion of ZA18 meat had to be condemned leaving the ZA19 meat uncondemned while the meat came from the same container.
5. It, according to the Applicant, remains a puzzle why the Applicant's meat destined to arrive at Rotterdam on 24 September 2007 could only, as claimed in annexure "TC6", arrive on 18 October 2007. This, it is argued on behalf of the Applicant, seems to suggest that there could have been another consignment of meat which had nothing to do with the Applicant's meat. In the absence of the necessary documents, who cannot excuse the advancement of such a submission? If the meat was rotten on arrival, it is further submitted on behalf of the Applicant, there could never have been any discussion about selling the meat a month later.

There is, indeed, merit in this submission. This seems to go against the contents of annexure "TC6."

THE SWIFT LABORATORIES' MICROBIOLOGICAL REPORT

- [10] According to annexure "TC6" to the answering affidavit the meat was smelling badly. This, it is submitted on behalf of the Applicant, should be appearing in the compulsory CVED document which the veterinarians complete in Europe. This document the Respondent has not provided the Applicant with. This document, it is further submitted, should have been the first document to be relied upon by the Respondent if, indeed, the meat had been rotten on arrival as alleged given the fact that the inspection of meat on arrival in Europe is peremptory. Annexure "TC9" to the answering affidavit shows low bacterial readings while annexure "F" which is also a report of Swift Laboratories denotes high bacterial readings. This is obviously a contradiction. The Respondent's version on this aspect, according to the Applicant's counsel, is unreliable. There seems to be merit in the submission. The availability of the required documents, according to the Applicant, would assist in determining the reliability of the Swift reports. Only the required documents, it is

submitted, will help solve the problems between the parties. This appears to be the case for the reasons I shall give later.

RESPONDENTS VERSION REGARDING THE VIDEO

- [11] The undertaking shows that the Respondent was to provide "... photos of the meat as inspected in Europe." The submission on behalf of the Applicant is that the Respondent only provided the video on 15 September 2008 which is a year later when it also transpired that:
1. The video was taken in South Africa and not Europe.
 2. The date of the video is 12 November 2007 almost two months after the meat was shipped from South Africa on 24 August 2007.
 3. The date of production of the meat in the video was 18 March 2007, while the date of the production of the meat exported according to the Respondents commercial invoice was 25 May 2007.
 4. The telephone conversation between Tanya and the Applicant was recorded on 12 November 2007 which is the same date as the video recording yet Tanya fails to say that she advised the Applicant during the said conversation about the video of the meat either then done or about to be done at her instance.
 5. No permission was sought by the Respondent prior to removing the Applicant's meat from CCS for purposes of examination or otherwise. It is submitted on behalf of the Applicant that this was done 'surreptitiously behind the Applicant's back. '
- [12] The outstanding documents that the Applicant still needs and which it is submitted the Respondent should provide are the following:
1. Documents relating to the shipping and arrival of the meat in Rotterdam;
 2. Documents relating to the storage of the meat in Rotterdam between 24 September 2007 and 18 October 2007, or at any other time;
 3. Documents showing the core temperature and container temperature readings prior to the departure of the ship, as referred to by Claasen in paragraph 28.3 of the answering affidavit;
 4. The documents produced by the veterinarians in Europe that the Respondent refers to in paragraph 28.2 of the answering affidavit which show the temperature changes that occurred during the ship's voyage to Europe;
 5. Documents that connect the container MWCU 564.717-1 referred to in annexure "TC6" to the answering affidavit, to the shipment in question and the allegedly rotten meat;
 6. Documents relating to the storage, and particularly the freezing of the meat from the moment it was removed from CCS in South Africa, until the moment it was opened in Holland;

7. Documents relating to the disposal of the allegedly rotten meat;
8. Any photographic evidence relating to the above;
9. Proof of what the Respondent was paid by its customer.

[13] The three e-mails I have referred to above clearly show that Tanya and Sidney wanted the matter sorted out amicably. This appears clearly from Sidney's e-mail which clearly indicates that if the meat was rotten on arrival then that would conclude the matter. However, he needed the required documents which he has listed in his e-mail to be sure that the meat was rotten on arrival. Because Tanya also needed the matter amicably solved, she then gave Sidney the undertaking that:

"I will also get all documentation that you have asked for."

The e-mails are straightforward and readily understandable. They need no complex interpretation as they are also easy to follow because they mean what they say. No dispute can arise from the reading of the e-mails. This matter could have long been resolved had the Respondent complied with the undertaking. The Applicant was even prepared to accept the reduced price of his meat only if the Respondent produced the documents that were promised by Tanya.

The meat was either rotten on arrival or it was not. This was the easiest thing to prove had the meat been rotten on arrival and had the Respondent wanted to resolve the matter. The Applicant's conclusion arise from the conduct of the Respondent coupled with the inconsistencies that have been pointed out by and on behalf of the Applicant.

One asks oneself a simple question, namely if the meat was indeed rotten on arrival what causes the Respondent to refuse with the required documents

which Tanya promised and undertook to provide to the Applicant? The answer to the question seems to confirm the view that the Applicant holds regarding the matter, namely that the meat might not have been rotten after all.

[14] It is submitted on behalf of the Respondent that the Applicant had contemplated a full blown action against the Respondent as evidenced by the correspondence between the parties' attorneys. That may well be so but the question is whether the Respondent undertook to provide the Applicant with the required documents or not. If the Respondent, in fact, gave such an undertaking then the Respondent is bound by the undertaking. There is no evidence to show that Tanya was coerced or threatened to give the undertaking or that she was not in her sound and sober senses when she gave the undertaking. The undertaking is, in deed, the basis of this application. The position would have been different had the undertaking not been made.

It is indeed so that "a person is not entitled to obtain the production for inspection of the books and documents of another, and in which he has no proprietary

interest, in circumstances where litigation is neither pending between such persons nor even certain to eventuate. ” (See *Friday v Thos Cook & Son (S.A.) Ltd* 1952 (4) SA 761 (CPD), *Walsh v Botha* 1960

(2) SA 323 (O) at 325 F - G, *Herbstein & Van Winsen* at pages 779 - 780.)

It is also true that the Rules of Court do not make provision for discovery before the commencement of an action. The position is,

however, different in this application in that the Respondent undertook to provide the Applicant with the documents, obviously,

with a view to settling the problem between them. The Applicant was ready to accept the Respondent's explanation relating to the rotten meat if it was rotten. He was also prepared to accept the reduced price in respect of the other meat but the Respondent, for whatever unexplained reason, and despite the promises, simply failed to have the matter amicably solved. The difference I have alluded to removes this matter from the ambit of the sources and the cases I was referred to by the Respondent's counsel. The Respondent attached fifteen documents to the answering affidavit and failed to provide the Applicant with the remaining documents.

The three e-mails I referred to above clearly demonstrate the absence of any dispute regarding the undertaking and the merits of any action to be instituted in respect of the quality of the meat. Indeed, the e-mails reveal the Applicant's conduct as one that shows readiness by the Applicant to accept the Respondent's version should it be supported by the required documents that the Applicant needs. The production of the remaining documents, according to the Applicant, will either show that the Respondent's version is correct or not correct. The inconsistencies, in my view, serve to show that the meat, indeed, might not have been rotten after all.

I am unable to find that there is any dispute as contended on behalf of the Respondent. Having said that, it becomes clear that the application should succeed as the Applicant has made out a case for the relief that he seeks.

[15] In the result, the order that I make is as follows:

1. The Respondent is directed and compelled to furnish the Applicant with copies of all documents relating to the exportation of all ostrich meat (“the ostrich meat”) supplied by the Applicant to the Respondent in the period between 1 July 2007 to 30 November 2007; and
2. Copies of any and all records and photographs of the ostrich meat as inspected in Europe.
3. The documentation to be provided shall include but not limited to:
 - 3.1 Documents relating to the shipping and arrival of any meat in Rotterdam;
 - 3.2 Documents relating to the storage of the meat in Rotterdam between 24 September 2007 and 18 October 2007 or at any other time;

3.3 Documents evidencing the core temperature and container temperature readings prior to the departure of the ship referred to by the Respondent's representative in paragraph 28.2 of the Respondent's answering affidavit;

3.4 Veterinary inspection documents produced in Europe;

3.5 Documents that connect the container MWCU 564.717-1 referred to in annexure "TC6" to the shipment in question and the allegedly rotten meat;

3.6 Documents relating to the storage and freezing of meat from the time when it was removed from commercial cold storage until the moment it was opened in Holland;

3.7 Documents relating to the disposal of any allegedly rotten meat;

3.8 Documents relating to the amount that the Respondent was paid by any customer of the Respondent in relation to any meat supplied by the Applicant to the Respondent.

4. The Respondent is ordered to pay the Applicant's costs.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT

Heard on: 04 November 2009

Judgment delivered on:

For the Applicant: Adv. K. J. van Huyssteen

Instructed by: Van Huyssteen Inc. C/O Gerber Attorneys (SGA)

For the Respondent: Adv. A. Politis Instructed by: Stegmans Inc.

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