

SOUTH AFRICA / JUDGMENT

Omega Landgoed (Pty) Ltd v Fruitman (Pty) Ltd (57560/08) [2010] ZAGPPHC 27 (1 April 2010) [2010] ZAGPPHC 27

COURT

North Gauteng High Court, Pretoria

BEFORE

Legodi

CASE / FILE NUMBER

57560/08

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH COURT - PRETORIA)

CASE

NO. 57560/08

DATE:1/04/2010

In

the matter between:

OMEGA

LANDGOED (PTY) Ltd Plaintiff

and

THE

FRUITMAN (PTY) Ltd Defendant

JUDGMENT

LEGODIJ,

INTRODUCTION

1. In this matter, the plaintiff claims against the defendant for payment of R168 561.40 said to be the balance of the minimum guarantee price for Valencia oranges belonging to the plaintiff.

PLEADINGS

2. The plaintiff cause of action is based on an alleged agreement of agency in terms of which the defendant would periodically provide the plaintiff with minimum guarantee prices per cartoon for the various orange size and that the defendant would pay a guarantee price to the plaintiff per cartoon and that in the event the defendant was to manage to sell such oranges for a price which was higher than the minimum guarantee price, it would pay the higher price to the plaintiff.
3. It is further alleged that the only circumstances in which the defendant would pay a price lower than the minimum guaranteed price to the plaintiff would be in circumstances where the said oranges had "inherent vice" in which event the defendant would then be obliged upon it becoming to its attention that there was inherent vice, to notify the plaintiff thereof.
4. During the period 25 June 2008 to 30 July 2008, the plaintiff is said to have delivered 22 250 cartoons of oranges to the defendant and invoiced the defendant in a total amount of R1 281 100 as a minimum guaranteed price for the oranges so delivered. The defendant however, paid the plaintiff a total amount of R1 112 538.60 and thus allegedly leaving a balance of R168 561.40 still owed to the plaintiff
5. However, the averments made by the plaintiff in its particulars of claim are denied by the defendant, specifically the defendant

in its plea denies that there was a contract of agency. Secondly, with specific reference to paragraph 6 of the plaintiffs particulars of claim, the defendant pleads that, in terms of the agreement, it would fourth nightly provide the plaintiff with the minimum guaranteed price for sound fruit of export quality. In the event the defendant achieving a higher price than the agreed minimum guaranteed price, the plaintiff will receive 50% of the excess achieved. It is further pleaded that it was a material term of the agreement that the minimum guaranteed price would no longer be available to the plaintiff if there were quality claims on the fruit exported. In the event of quality claim, the defendant after having considered all relevant information, would negotiate the lowest possible discount with its buyers. Lastly, that the minimum guaranteed price to the plaintiff would then be reduced according to the discounted amount. The defendant does not agree that the only circumstances in which it would pay a price lower than the minimum guaranteed price would be if the oranges had inherent vice.

OPENING STATEMENT

6. Counsel for the plaintiff during an opening statement identified the issues as per the pleadings to be:
 - 6.1 Whether or not a contract of agency was concluded?
 - 6.2 Secondly, whether quality claims formed part of the agreement between the parties?

7. On the other hand counsel for the defendant suggested that there was a legal question to the plaintiffs alleged contract of agency. I understood the suggestion to be that if contract of agency was to be proved, the next question would be, whether the plaintiff in law is entitled to claim anything from, the defendant other than the nett profit of the sale? Perhaps to put it differently whether what is claimed by the plaintiff can be said to be the nett profit of the sale? It was further suggested during an opening statement that it would be part of the defendant's case that the goods were sold and delivered to the defendant at an agreed or fixed price.

PLAINTIFFS CASE

8. The plaintiff led the evidence of one witness, Mr Koekemoer, a director of the plaintiff. I do not intend dealing with the evidence in detail. In a nutshell, Mr Koekemoer's evidence was the following effect:

8.1 Previously before 2008, the plaintiff and the defendant had a contractual relationship. The delivery of Valencia oranges to the defendant during the period June 2008 to July 2008 was as a result of an oral agreement concluded during May 2008. Amongst others, the material terms of the agreement were:

8.1.1. that the agreement was that of agency based on a minimum guaranteed price payable to the plaintiff for its Valencia oranges,

8.1.2 that 30% advance payment was to be made within two weeks upon delivery of the oranges to the defendant in Durban,

8.1.3 that the balance was to be payable within three months of delivery,

8.1.4 that the defendant was exempted from paying less than the minimum guaranteed price only in the event inherent vice or defect was to be found in the fruits and upon due notice thereof having been given to the plaintiff,

8.2 There is a procedure that has to be followed to ensure that the quality of goods that are exported to other countries comply with acceptable standard. In this regard the Statutory Board that oversees such goods is involved

8.3 Before the involvement of statutory board, the procedure in the instant case was that, the plaintiff would on harvest bring the fruits to the pack house. The produce would then be selected and packed according to size and other characteristics of the produce.

8.4 At the pack house, the produce would be placed in cartoons that are kept in the pallets. About eighty cartoons in each pallet. Because the produce is earmarked to be exported, a sample of two cartoons per pallet would be caused to be inspected by a statutory body. Upon being inspected, either approval for export or refusal thereof would be issued.

8.5 The produce would then be transported to the exporter and in the instant case, the defendant. About 11 consignments were delivered to the defendant during the harvest period of June to July 2008. Certain payments were made in respect of the consignments. However, not all the minimum guaranteed price was made. Round about 1 October 2008, the plaintiff was notified that there were quality claims and that the produce were therefore sold at a discounted price. Based on this, the defendant refused to pay the full minimum guaranteed price. This was despite the fact that it has never been a term of the contract that, a lower price would be paid in respect of quality claims. According to the plaintiff, only in respect of inherent vice or defect would the defendant be entitled to pay less than the minimum guaranteed price. It was a further term of the contract that in the event of a profit, the parties would share such a profit margin on 50% basis. This concluded the evidence for the plaintiff.

DEFENDANTS EVIDENCE

9. Three witnesses testified on behalf of the defendant. The witnesses were Mr A Stanbury, a director and one of the three founding

shareholders of the defendant, Mr Combrink, he was a managing director of the defendant during 2008 and was involved in the

conclusion

of the agreement being the subject of the dispute and Mr Julius an official of Perishable Products Export Control Board (hereinafter referred to as the Board). In a nutshell, their evidence was to the following effect:

9.1 The defendant concluded an agreement of sale, which included minimum guaranteed price with the plaintiff. It was not an agency agreement with minimum guaranteed price as alleged by the plaintiff.

9.2 The following were further terms of the agreement:

9.2.1 that minimum guaranteed price as indicated by the defendant from time to time would be paid to the plaintiff for the Valencia oranges delivered by the plaintiff to the defendant in Durban,

9.2.2 that within seven days of delivery of such produce in Durban, the plaintiff would be paid an initial amount of R30 per carton,

9.2.3 that within three months of delivery of such produce the balance outstanding on the minimum guaranteed price would be paid to the plaintiff.

10. The defendant as an exporter registered with the Board its requirements for export regarding perishable goods to Hong Kong. Such requirements are contained in a document marked "official template" for exporter packaging guides. This document was admitted as exhibit A1 during the evidence of the plaintiff. The document also sets out minimum standards required for export to countries referred to in the document as South East Asia. According to the defendant South East Asia, includes Hong Kong.
11. When the inspection is made at the pack house of producer and before delivery of the produce to the defendants, such standards as specified by the defendant in the document marked exhibit A1 would be taken into consideration before giving an approval for such an export.
12. The plaintiff having delivered the produce in Durban, a superficial inspection of the consignment would be done before shipment of the produce. Should there be a delay in the shipment, the approval given by the Board to export a particular consignment would lapse after 28 days.
13. The eleven consignments were targeted for Hong Kong. The defendant had a representative in the targeted market area to sell and deliver the produce to buyers in those foreign countries. The defendant received a notification that there were quality claims on some of the consignments.
14. As a policy of the defendant, where there is a quality claim the defendant would first have to decide whether to investigate such claims or to offer to the buyers a lesser price. In doing so, it would consider cost implications of launching such an investigation.

In the instant case, it decided not to investigate the veracity of such claims. The amount which is now claimed by the plaintiff, is the discounted amount that was offered in the market for the goods in question. In short, this is the evidence that was tendered on behalf of the defendant.

15. At the conclusion of the evidence and at the start of the submissions, I requested the parties to set out what they regard as

issues raised by the pleadings and the evidence thereto.

16. The followings were identified as issues to be determined in these proceedings:

16.1 Whether the relationship between the parties, is a contractual relationship of agency or contractual relationship of independent

contractor or a purchaser and a seller?

16.2 Whether a number of terms were indeed terms of the agreement? For example,

16.2.1 whether the minimum guaranteed price would no longer be available to the plaintiff if there were quality claims on the fruits exported?

16.2.3 whether as a term of a contract, the only circumstances where a lower price would be payable, would be in case of inherent vice?

16.2.4 Whether a lower price would also be payable in the case of quality claims? And if so,

16.2.5 Whether such quality claims have been proved? And if so,

Who bears the risk for such quality claims?

16.2.6 Whether the defendant was under paid or not? Or to put it differently, whether the defendant had proved that it had been under paid?

DISCUSSIONS, SUBMISSIONS AND FINDINGS

17. I find it necessary to deal with the first issue that was raised in paragraph 16.1 of this judgment

Whether the relationship between the parties is a contractual relationship of agency or sale?

18. This issue was prompted by the defendant's stance during the opening statement. This was persisted in the course of the evidence and also during final submissions. In his written heads of argument, counsel for the defendant states the issue as follows:

"15.1 It had not been the business of the defendant to conclude agreements on an agency basis. It always purchased fruit from the producer, the majority of agreements being minimum guaranteed profit share, the rest being fixed price contracts".

Further in paragraph 16 of the defendant's written heads of argument a submission is made as follows:

"Mr Crombrink who concluded the agreement on behalf of the defendant also confidence that the defendant never did business as an agent but only as a purchaser and that the agreement with the plaintiff was concluded on that basis".

The nature of the submission raises another issue:

Whether an agreement of purchaser and seller relationship was pleaded by the defendant?

19. When I posed this question to counsel for the defendant he referred me to paragraph 3 of the defendant's plea which paragraph reads as follows:

"3.1 The defendant denies that it was the plaintiffs agent and pleads that the parties were at all times acting as independent contractors,

3.2 The defendant pleads that it is a fruit exporter which produces fruit at a minimum guaranteed price, subject to fruit quality in order to sell same to buyers in different global markets".

19.1 Firstly, a relationship of independent contractor cannot be that of a purchaser and seller. Why would the defendant refer to itself as an independent contractor, if it really saw itself as a purchaser of the plaintiffs produce? The plaintiff having alleged a relationship of agency, it was incumbent on the defendant to be clearer on its alleged relationship with the plaintiff.

19.2 Secondly, "procure fruit at a minimum guaranteed price" cannot, in itself be equivalent to an allegation of buying fruit from the defendant at a minimum guaranteed price as contended by counsel on behalf of the defendant. I therefore find that a relationship of a seller and purchaser was not properly pleaded by the defendant and solely based on this finding, the defence should be found not to have been properly placed before the court.

20. Even if I have to be wrong in finding that an agreement of sale was not properly pleaded, another issue would still be raised.

Whether the defendant's "allegation of seller and purchaser" relationship is more probable?

21. Mr Combrink who testified on behalf of the defendant is the one who concluded the agreement with the plaintiff. It was not the first harvest that was delivered to the defendant on the basis of a minimum guaranteed price; plus profit sharing after the defendant's costs which have included commission, shall have been deducted. These would be costs relating to the shipment, storage and other related costs in addition to the commission. The nature of the relationship when the agreement was concluded was never discussed nor was there any such discussion thereafter.
22. Now, in the normal agreement of sale, commission does not become an issue. Secondly, profit sharing does not become an issue in sale agreements. The seller having determined a fixed price, would have taken into account also his profit margin. In the instant case, it was the defendant who determined the minimum guaranteed price, after having considered all costs applicable to it including its commission.
23. Through out the documentation forming part of the consignments, there has never been any reference to the plaintiff as the seller and the defendant as the purchaser.
24. All of these should be marched against the plaintiffs version. It was an agreement of agency coupled with a minimum guaranteed price. It would also have been entitled to profit sharing. In the consignment note or "vragbrief" the defendant is referred to as an agent. No explanation by the defendant could be offered for this and why it was never queried. On probability this was a relationship of agency. However, I also raised another issue during the discussion.

Whether it matters if the relationship was that arising from agency or sale agreement?

25. The following factors are common cause:

25.1 that the plaintiff would be paid minimum guaranteed price as determined by the defendant for his produce,

25.2 that the plaintiff would deliver Valencia oranges in consignments to the defendant in Durban,

25.3 that upon delivery of each consignment R30 per each carton will be paid to the plaintiff as an advance,

25.4 that the costs relating to the consignments were to be borne by the defendant upon delivery thereof to the defendant,

25.5 that in addition to such costs, commission to the defendant would also be considered by the defendant when the minimum guaranteed

prices are furnished to the plaintiff,

25.6 that in the event of the produce been sold at a higher price with a profit margin, such a profit would be shared on an equal basis between the parties.

26. All of these common cause factors should in themselves justify a cause of action irrespective of whether or not the agreement was that of sale or agency. In the course of the evidence and also during the discussions, a suggestion was made on behalf of the defendant that the essence of the agreement concluded was that of a minimum guaranteed price and sale. Similarly, it was suggested on behalf of the plaintiff that the agreement was that of an agency with a minimum guarantee price. I have already found that the agreement was that of agency. This finding however, raised two issues that were contended by counsel on behalf of the defendant. Before I deal with the two issues, counsel for the defendant sought to suggest that one cannot couple an agency agreement with a minimum guaranteed price. In holding this view, he sought to rely on what was stated in paragraph 30 of the judgment in *Dolce South Africa (PTY) Ltd v Pieter Beukes Ltd* 2007 (4) SA 577 (C). In this matter, the defendant sought to rely on an oral agreement in the face of a clear written agreement of agency between the parties. In the written agreement it was specifically stated in a clear and unambiguous manner that the money advanced by the plaintiff to the defendant would be a loan repayable to the plaintiff should the nett proceeds of the sale of the produce be less than the amount advanced. The defendant had not read the agreement before signing it and stated that he would not have entered into the agreement if he had been aware of this clause about advances. On the facts, the defendant was accordingly bound by the written agreement.

27. Now, in paragraph 17 of the defendant's written heads of argument, and referring to Dole's case of relevance, the following are stated:

"The court considered the evidence relating to the consignment deals and minimum guarantee agreements (par 30) (My own emphasis)

28. Based on what is understood to be the essence of the judgment in Dole's case in paragraph 18 of the written heads of argument it is then concluded as follows:

"18

Upon application of the aforesaid principles to the evidence above, it is submitted that the minimum guaranteed price agreement, concluded between the parties was a sale and not an agency"

29. This submission seems to have been founded on what is alleged was said in paragraph 30 of the judgment in Dole's case. The principle being as I understand the submission, that a minimum guaranteed price does not apply in agency agreements. I can find no such principle been stated in paragraph 30 of the aforesaid judgment, nor is it apparent from paragraphs 14 to 20 of the judgment. Even if it was, I would not agree with such a principle as the parties to an agreement, whether it being agency or sale, should be entitled to regulate their conduct, unless specifically prevented by the operation or existence of the law.
30. I now come to deal with the other two issues prompted by the submissions made on behalf of the defendant.

Whether if the agreement is that of agency the plaintiff 1 law is entitled to the amount claimed.

31. Counsel for the defendant suggested that in law, where damages are claimed based on agency agreement, the principal would only be entitled to the nett proceeds of the sale facilitated by the agent. Specifically suggesting that, the plaintiffs action should fail, because the plaintiff had failed to prove its damages, and in particular the nett proceeds of sale of the Valencia oranges in the targeted market, that is, sale of the oranges in Hong Kong. I find this to be on fishing expedition.
32. The plaintiff plays no role in this identification of the buyers in the outside market. It plays no role in the fixing of prices that must be offered to those buyers. It bears no knowledge of the identities of the buyers to whom the oranges were offered. The

defendant having sold the oranges at whatever price, kept the rest after having paid what it says was obliged to pay to the plaintiff.

Everything since delivery of the produce to the defendant and until sale of such produce in the outside market, was within the knowledge of the defendant. Assuming therefore that the plaintiff was entitled to the nett proceeds as contended by the defendant, the defendant would have been obliged to disclose more facts than just mere denying liability.

33. However, the relationship between the parties should be seen in context. The common cause factors stated earlier in paragraph 25 of this judgment should serve as an overall in determining the intention of the parties and the extent of their respective obligations to sustain liability. For example, in the instant case the defendant was obliged to pay to the plaintiff a minimum guaranteed price offered to plaintiff by the defendant and accepted by the plaintiff as displayed by delivery of the produce to the defendant. The terms of such payment were agreed upon as indicated earlier in this judgment. To insist on another form

of liability and mode of payment in the light of this, would in my view, offend against the intention of the parties. I therefore find that the contention of nett proceeds cannot be sustained. I now turn to deal with the second issue.

Whether the plaintiff as a principal, continued to bear the risk up to the end?

34. This question has a bearing to the other issues already identified in paragraph 16 of this judgment. For example, the issues raised in paragraphs 16.2.5, 16.2.4, 16.2.3, 16.2.2 and 16.2.1
35. The keeping and transportation of the produce until up to the delivery thereof in Durban, appears to be common cause that it was the responsibility of the plaintiff. However, it was contended on behalf of the defendant, that if the court was to find that the nature of the relationship is that of agency, then the plaintiff should be found to have carried the risk. In fact, the issue of risk was raised on two grounds. Firstly, that the plaintiff bears the risk of quality claims and secondly, that such a risk operate against the plaintiff in the light of principal and agent relationship. That is, if the produce were found to be of poor quality, the plaintiff as the principal was responsible thereto.
36. Starting with the risk created by virtue of the relationship, I think this again should not be considered in isolation. It was the defendant who was to incur storage costs. It was the defendant who had to identify the buyers. It was the defendant who had to decide when to ship the consignments. It was the defendant who was to be paid by the buyers. Having paid the plaintiff the minimum guaranteed price, it was the defendant who was to determine whether there was amount remaining for the profit sharing or not. If a lower price had to be offered to the buyers in those countries, it was the defendant who had to make a decision without consulting the plaintiff. All of these should be seen to do away with a general rule that the principal is liable or responsible for everything. The parties agreed and it was their understanding that this would be the case. I therefore find that the plaintiff is not liable or did not bear the risk by virtue of agency relationship.
37. I now turn to deal with the other ground of risk raised by the defendant. Before I do that, I find it necessary to deal with the other issues identified earlier in paragraphs 16.2.3 and 16.2.4 of this judgment.

Whether a lower price would also be payable in case of quality claims?

38. Remember, the amount that is claimed by the plaintiff is the discounted amount which the defendant says it was entitled to do due to the alleged quality claims that were made by the buyers in Hong Kong, in respect of the Valencia oranges. These claims are said to have revolved around the blemish on the oranges, the quality of the colour of the oranges and the skin is apparently said to have not been smooth. It was common cause that these are the things that could be observed with one's naked eyes. That is, one did not need scientific observation to detect these signs on the oranges.

39. Just to recap, what the defendant did was, having allegedly received the alleged quality claims, it decided not to launch an investigation into the claims. Instead, it decided to offer a discount without having told the plaintiff. Only late in September-October 2008, was the plaintiff informed of the quality claims as the basis why it would not be paid the minimum guaranteed price. This kind of an arrangement as alleged to have been agreed upon, is disputed by the plaintiff.
40. According to the plaintiff, it was obliged to provide or deliver to the defendant in Durban "sound export quality fruit, in mutually agreed quality and on initially agreed times and dates". This sentence was added to paragraph 3 of the plaintiffs particulars of claim late during the hearing of this matter and was not objected to by the defendant.
41. As I understood the plaintiff, it was never part of the agreement that quality claims made when the goods are in the market on foreign countries, would be the responsibility of the plaintiff. In making the submission to this effect, I understood the plaintiff to be relying on the following set of facts:
- 41.1 Just before the agreement was concluded in 2008, Mr Combrick from the defendant investigated the orchards and in his own words expressed satisfaction. He expressed no concerns about blemishes, colour or skin problem,
- 41.2 After the oranges were taken to the plaintiffs pack house, an official from the Board inspected them. Having done the inspection an approval to export the produce was given. It was common cause that in doing the inspection, the official concerned would have utilised Exhibit A1, which document was registered with the Board. It contains the minimum standards for specific items or factors and also those of the defendant in respect of the targeted market. According to the official from the Board and called as witness on behalf of the defendant, when inspection made and there is document like Exhibit A1, registered with the Board, such investigation would take into account the standard set out by the exporter.
- 41.3 When a consignment does not comply with the registered standard, no approval would be given for export. For example, on the 28 July 2008, the Board refused to give an approval of a consignment under pallet 537 345 049 306. This appears on page 62 of Exhibit A and it was referred to during the evidence of the witness for the plaintiff. Once there is a rejection such a consignment would not even be delivered to the defendant.
- 41.4 The approval of the produce for export is seen by the plaintiff as a proof of sound export quality fruit envisaged by the parties. In doing the investigation, the board would require a sample of about two cartons from each consignment. Remember, each consignment is a pallet consisting of 80 cartons. This is said to be an acceptable standard of investigation as it is not practical to check each and every orange or to check each and every7 pallet or carton.

41.5 Upon delivery and before shipment of the consignment by the defendant, the defendant will do superficial investigation. Again, it is accepted that it would not be practical to investigate everything. In this regard, one must accept that the defendant would not ship a consignment if something wrong is observed. Once the consignment leaves the port without any complaint by the defendant, the plaintiff cannot be held liable for the quality problems that are discovered thereafter.

42. All of these factors and submissions made, in my view, make sense. Remember, one is dealing here with perishable goods. Secondly, one is dealing with quality problems that do not need a scientific observation. Time is of essence in the disposal of these kind of produce. The condition under which they are kept, is also important. Right climate and temperature is important. The keeping of the produce is also important. For example, were they kept in an open area where they could easily be damaged by external factors? Or were they exposed to any unfavourable condition? Of necessity, all of these would be the responsibility of the one who keeps them. In this case, the defendant as from the date on which each consignment was delivered.
43. Now, eleven consignments were delivered to the defendant. Not particularly in one and the same date. These consignments were kept in Durban under the care of the defendant before shipment. The conditions and exact places where they were kept before shipment was not properly explained by the defendant. When each of the consignment was dispatched and delivered to the targeted market and under what conditions could only have been within the defendant's knowledge. The defendant failed to lead evidence around these aspects. When the quality problems were discovered and in respect of which consignment, is also not known and no reason has been given as to why evidence in this regard was not adduced. The nature of the relationship and the manner in which the parties conducted themselves, make it evidently clear where and when the respective risks lie. The plaintiff could not have carried the risk beyond delivery of the consignments in Durban. More so that the quality claims alleged to have been lodged by the buyers in Hong Kong with the defendant via its agent, or representative, were not problems observed by Mr Combrick when he inspected the orchards. The problems were not observed by the plaintiff when preparing the consignments and where not observed and noted by an official of the board before approval for export. Lastly, such quality problems not observed or noted by the defendant when doing superficial inspection. I am therefore unable to find that the defendant was entitled to pay the plaintiff less than the minimum guaranteed price, based on the alleged quality problems that were allegedly discovered after delivery and after shipment of the consignments.

Whether the quality claims have been proved?

44. Assuming that I was to be wrong in finding that, the defendant was not entitled to pay less amounts than the minimum guaranteed price there is another problem the defendant is confronted with. The issue of quality claims is based on hear-say evidence. Firstly, the defendant got a report from its agent. The agent did not testify. Secondly, the defendant decided not to investigate the claims, and the people who made the claims did not testify.

Therefore even the report that was made to the defendant's agent about the quality claims is based on an unreliable evidence.

45. It is the defendant who is making allegations of quality claims. He must therefore prove the allegations. It has dismally failed to do so. Just on this alone, the defendant should be found not to have been entitled to pay the lower amounts. I find it necessary to deal with another issue which is somewhat related to the defendant's failure to be open and to lead necessary evidence. The issue was raised earlier in paragraph 16.2.6 as follows:

Whether the defendant was underpaid or not? Or to put it differently, whether the defendant had proved that it had been underpaid?

46. The defendant alleges that he had to make some adjustments to the price that he had put on the produce in respect of which quality

claims were made. He however, decided not to give more information. For example, what price he had previously contemplated? What costs were involved including its commission? What loss was made as against what was initially projected?

47. All of these are not immaterial aspects of the case. For example, did the defendant get paid less than the costs and commission? If not, on what basis did the defendant then decide to pay less than the guaranteed minimum price? Lack of evidence around all of these should be found to weaken the defendant's defence. I turn to deal with another issue raised earlier in paragraph 16.2.2 of this judgment.

Whether as a term of a contract, the only circumstance was where a lower price would be payable, would be in a case of inherent vice?

48. This issue was first raised in the pleadings. Secondly, it was raised during evidence and when counsels made submissions. It was the plaintiff's contention that, the only circumstances under which the defendant was entitled to pay less than the minimum guaranteed price, was in the case of "inherent vice". That is, defects or poor quality in the fruits that cannot be easily observed with one's naked eye. This could be poor quality that existed even whilst the oranges were still on the trees, but something which could not easily be observed. For example, the fruit could be of poor quality depending on how the crop was treated before taken off the trees.
49. It makes sense to me, to make such a condition to exist through out. For example, such poor quality could be discovered when the fruits are used or eaten. The level of sugar or water could be found at a very late stage to be wanting. For this reason, it is important that the producer should bear the risk up to the end insofar as it relates to the "inherent vice".
50. I did not understand counsel for the defendant to argue vigorously that the poor quality allegedly complained of, were inherent vice. In the plea it was suggested that in addition to inherent vice, the plaintiff was said to be also bearing the risk in respect of quality claims. In this case, the blemish, colour and skin allegedly complained of, are things that can be

observed from the outside look. I have already made a finding that in the circumstances of the case, the plaintiff was not responsible upon delivery of the produce to the defendant in Durban and upon shipment thereto.

51. The interpretation or what is meant by inherent vice, in my view, is not particularly essential in this case. More so that it is common cause that claims made on the quality were alleged to have been based on factors that could be detected from the outlook of the produce. Although attempts were made to suggest that blemish is part of inherent vice. I do not think this is material if it is something that could have been observed with one's naked eyes. It did not appear that the amount as discounted and now been claimed by the plaintiff is in dispute.

CONCLUSION

52. In conclusion, the following order is made:

52.1 Judgment is hereby granted against the defendant in the sum of R168 561.45

52.2 Interest of the aforesaid amount at 15,5% per annum a tempore morae to date of final payment

52.3 Costs of the suit.

M F LEGODI

JUDGE OF THE HIGH COURT

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