Judgment No S.C. 118\2001
Civil Appeal No 5\2000

HORTICO PRODUCE (PRIVATE) LIMITED v TAFULA PROPERTIES (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
McNALLY JA, EBRAHIM JA & SANDURA JA
HARARE NOVEMBER 20 & DECEMBER 21, 2001

F. Girach, for the appellant

G.E. Mandizha, for the respondent

McNALLY JA: The appellant (Hortico) exports vegetables. The respondent (Tafula) grows them. They entered into an agreement whereby Tafula would sell mange tout peas to Hortico. During the period 23 October 1998 to 12 November 1998 Tafula sold a quantity of these peas to Hortico. By special arrangement Hortico collected the peas, whereas other suppliers delivered their produce to Hortico's premises. At the end of the period Hortico paid Tafula what it contended was owing. Tafula claimed this was short of the correct amount by the sum of $233,029,00. It sued Hortico in the High Court and won. Hortico now appeals.

Tafula did not file a declaration. However, it supplied further particulars to the summons, and Hortico pleaded to the summons as particularised. It is apparent that the reason for the dispute is that the two parties rely on entirely different versions of the contract between them. It is necessary to set out the two versions.

Tafula claims the contract was partly oral, partly written. The written part consists of a letter of 13 October 1998 from Mr Perlman of Hortico to Mr Musikavanhu of Tafula. It reads as follows:-

> "Further to our discussions this instant. Hortico may have a need for 3 tonnes of Mange Tout per week for the period 14 October 1998 – 1 December 1998. These volumes are indication only and may be increased or decreased according to our requirements at the time.
>
> The indicated prices for the above production are as follows:
>
> - ZWD 30-00 per kilogram A grade for period 14 October 1998 – 3 November 1998;
> - ZWD 45-00 per kilogram A grade for period 4 November 1998 – 1 December 1998
> - ZWD 60-00 per kilogram A grade for period 2 December 1998 – 31 December 1998
> - ZWD 20-00 per kilogram B grade for period 14 October 1998 – 31 December 1998
>
> The above prices are based on an exchange rate of ZWD60.00 : GBP 1.00 and will be adjusted should there be a significant change in the exchange rate.
>
> Should the above be acceptable please sign the attached copy and retain this letter for your records."

The copy was not signed and returned to Hortico, but it was not in dispute that the letter formed part of the contract.

The oral part, as alleged by Mr Musikavanhu, was as follows:-

1. Tafula would deliver grade A mange tout peas only, suitable for export.
2. If Tafula failed to deliver peas of that quality they would be returned, and the contract cancelled.
3. Overgrown or undergrown peas would not be acceptable to Hortico.
4. Upon delivery, Hortico would test the peas for maturity, size, colour, moisture etc.
5. Hortico would collect the peas from Tafula's farm.

Hortico's version was vastly different. It relied on the letter set out above. But it claimed that the relevant grading of the peas was entirely to be done by Hortico. In fact, of the peas delivered, approximately 11,63% were A grade, and 20,66% were B grade. The balance were not acceptable and were disposed of. That is the reason why they paid $81,963,50 and not the $314 992,50 which was claimed.

The learned judge in the court *a quo* set out the evidence of both sides in some detail. The witnesses for Tafula "impressed the court as being truthful". The witnesses for Hortico "did not impress me as being truthful". The conclusion was that the defence had been fabricated to frustrate the plaintiff in his claim.

I am conscious of the fact that appeal courts are very reluctant to disturb findings which are based on credibility, where the trial court was in a position to observe the demeanour of the witnesses. Nonetheless demeanour, as DIEMONT

JA observed in *S v Kelly* 1980 (3) SA 301 (A) at 308B-G, "is , at best, a tricky horse to ride.".

I have to say that a reading of the record does not indicate any significant difference in the quality of the evidence for the two parties. In the circumstances it is far better to approach the evidence by considering the probabilities, and then assessing whether, on a balance of probabilities, the plaintiff has proved its case, or, in this case, its contract.

It is true that the learned judge did advert to a number of facts in coming to the conclusion that the probabilities favoured the plaintiff's version of events. But it seems to me that the overwhelming probability must be against the version of the contract put forward by Tafula.

That is not necessarily to say that Tafula's witnesses were untruthful. It is possible that there was never a meeting of minds, and that Tafula's managing director, Mr Musikavanhu, was under the impression that his version was correct.

The point which seems to me to be decisive of the appeal is the point that it must have been the right and prerogative of Hortico to decide on the grade into which the mange tout peas fell. Hortico was an exporter to some of the major supermarket chains in Britain. Their standards are exacting in the extreme. Hortico could not possibly have agreed to accept grading done by its supplier, Tafula.

It may be that Tafula did not realise how exacting those standards were. It may be that Tafula does not believe that so low a percentage of its peas would make the grade. But that is another matter. This case is not about whether Hortico fraudulently undergraded the peas. It is about whether the contract asserted by Tafula was, on a balance of probabilities, the correct one.

It was very unfortunate that Tafula was not earlier made aware of the grading of its peas. This situation arose because the practice of Hortico was to put the result of the grading in the growers pigeon hole at the premises of Hortico. The driver, when effecting a delivery, would collect the record of the grading of the previous delivery. But, exceptionally in the case of Tafula, the driver who delivered was employed not by Tafula but by Hortico. So the grades were not picked up. As soon as Tafula became aware of the low grades it was receiving it ceased to deliver. No doubt had it picked up the grades earlier it would have ceased to deliver earlier. But I see no reason to attribute this failure of communication to malice on the part of Hortico. And it is noteworthy that a number of other growers received lower grades than Tafula.

I cannot accept therefore that Hortico could possibly have agreed to accept Tafula's grading of the peas as the criterion for payment. Nor can I see any reason why Hortico should have told Tafula not to bother about Grade B, but to deliver Grade A only. Grade B is specifically mentioned in the letter.

Tafula's explanation as to why it assumed that all its deliveries were A grade involves interpreting the contract in a way which Hortico could never have

agreed to. Mr Musikavanhu said that he was told two things. First, that he should deliver Grade A peas only, and not to concern himself with Grade B. Second that if "even a single pea" was below Grade A the whole lot would be returned and the contract would be cancelled. Thus, since nothing was returned, it followed that all the peas were accepted as A grade.

This, quite frankly, seems to me to be a wildly improbable arrangement. Therefore I find Hortico's explanation to be eminently reasonable. They say that is how they deal with all the growers, and it is impracticable to return ungraded peas (*a fortiori*, of course, when they would have to use their own transport). Finally the alleged provisions that if even a single pea was substandard the whole lot would be returned and the contract cancelled, seems to me to be fanciful. No reasonable businessman would contract on that basis, in the absence of special circumstances, and there were none here. Therefore one is disposed to believe Hortico when they say that they did not contract in those terms.

Indeed, overall, it would be very odd if Hortico wrote a letter as they did, and then contracted on a different basis.

The only point which might appear to be in Tafula's favour is the fact that Hortico offered an *ex gratia* payment of $70 000 to settle the matter. But Hortico explained that it was prepared to make that payment because it was embarrassed by its failure to convey the grade reports to Tafula, and because it wanted to maintain good customer relations. I see no reason to assume *mala fides* or a guilty conscience because of that offer.

While I consider that the contract letter was very badly drafted, and its wording left a great deal to be desired, I am satisfied that the contract could not have been as Tafula claimed. Accordingly it failed to prove the contract it alleged, and absolution from the instance should have been granted. However because of Hortico's shortcomings a special order as to costs below will be made.

In the premises the appeal succeeds with costs and the order in the court *a quo* is altered to read "Absolution from the instance, with no order as to costs."

EBRAHIM JA: I agree

SANDURA JA: I agree

Atherstone & Cook, appellant's legal practitioners

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