CG CASE NUMBER: 677/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

WOOLFSON'S IMPORT & EXPORT

ENTERPRISES CC Appellant

and

UXOLO FARMS t/a SPITZBERG GINGER Respondent

CORAM: HEFER, EKSTEEN et VAN DEN HEEVER JJA

HEARD ON: 18 MAY 1995

DELIVERED ON: 31 MAY 1995

J U D G M E N T

VAN DEN HEEVER JA

The appellant, who was the unsuccessful plaintiff in the court a quo, seeks to reverse orders made in favour of the respondent (the defendant below) in the Transvaal Provincial Division. The appellant is a close corporation which does business as an importer and exporter under the trade name "Remex". The respondent is a partnership producing and selling ginger under the trade name "Spitzberg Ginger". In what follows I refer to the parties as either Remex or the plaintiff, and Spitzberg or the defendant respectively.

It is common cause that in terms of an oral agreement concluded during 1990, in which Remex was represented by Mr Woolfson, Spitzberg sold and delivered ginger intended for export to Remex on a number of occasions. Spitzberg effected delivery by handing over each consignment to a cartage contractor who in turn delivered it at Jan Smuts airport from where it was airfreighted to London. It is also common cause that Remex did not pay the agreed price of R8 200,00 in respect of one of these consignments.

The issues between the parties - as to what the terms of their agreement were, whether Spitzberg breached the contract in material respects; and the basis on which Remex calculated its damages - were set out in the pleadings as follows.

In its particulars of claim, Remex alleged that the oral agreement

contained the following terms:

> "... that the ginger would comply with the relevant governing specifications relating to ginger to be exported from the Republic and in particular that -
>
> 4.1.1 the ginger would be free of mould; and
>
> 4.1.2 the ginger would be clean and practically free from any visible foreign matter; and
>
> 4.1.3 the ginger would not be blemished and misshapen and scarred ginger roots would be excluded from the ginger purchased".

Spitzberg admitted these allegations in its plea.

Remex alleged further that

> "5. At the time of the conclusion of the aforesaid agreement the defendant was aware of the following facts and the agreement was concluded on the basis of the said

facts, namely that:-

5.1 the ginger was purchased by the plaintiff for export from the Republic;

4.1.4 the plaintiff would rely on the defendant to deliver only ginger meeting the specifications as set out hereinabove and not itself inspect same, nor have same inspected prior to freighting the ginger overseas;

4.1.5 should the ginger not meet the specifications as set out hereinabove, same would be of no use and would have no commercial value to the plaintiff who would by virtue of its inability to sell and/or its inability to receive payment for the ginger from its purchaser, suffer damages in an amount totalling the cost of freighting and/or the loss of profits as are set out more fully in paragraph 9 - 9.4 hereunder".

(Those calculations refer to consignments identified by date of shipment and number of air waybill.) The plea admits that the representative of Spitzberg was aware of the facts set out in sub-paragraphs 5.1 and 5.2, but denies the remaining allegations contained in paragraph 5.

The version of the agreement alleged by Spitzberg in its counterclaim, for the unpaid purchase price of a further consignment, is that

"2.1 Verweerder ooreengekom het om gemmer aan Eiser te verkoop;

2.2 Lowering van die gemmer sou geskied het aan mnr Barnard, 'n vervoerkontrakteur te Hazyview;

2.3 Betaling deur Eiser aan Verweerder sou geskied van Verweerder se gebruiklike pryse vir die gemmer, sodra die toepaslike owerhede die gemmer vir uitvoer te Jan Smutslughawe sou goedkeur."

Remex in turn admitted these allegations but added the qualification that

defendant would be paid

"providing that the ginger complied with the relevant governing specifications relating to ginger to be exported from the Republic, which specifications are more fully set out in paragraphs 4.1.1 to 4.1.3 of the plaintiffs particulars of claim, which are herewith repeated".

And in further particulars Spitzberg admitted that their agreement did

contain those terms.

The breach of contract on which Remex relied (and which is

denied by Spitzberg), is that the latter delivered ginger -

"6.1.1 which was not free from mould; and

6.1.2 which was not clean and free from any visible foreign

matter; and

6.1.3 which had blemished and misshapen and scarred roots.

6.2 Further details of the defects in the ginger appear from the report of J & B Seymour Consultants"

which was annexed to the particulars of claim. The particulars continue

that, ignorant of the defendant's breach, Remex freighted the ginger

overseas; which

> "... was of no use and/or commercial value to the plaintiff who was unable to sell same, alternatively unable to obtain payment of the purchase price from its purchasers and was accordingly unable to recover the cost of freighting the ginger overseas".

Then follow its calculations in respect of certain consignments, based on what it cost Remex to deliver each such consignment in London, minus the "total nett proceeds from sale". To this loss, Remex added its loss of profit. The total claimed in respect of four consignments - shipped on 21 August, 27 August, 3 September and 10 September 1990 respectively - was R43 807,98.

At the close of the plaintiffs case, counsel for the defendant, Mr Swart, applied for absolution from the instance on two grounds, He argued -

4.1.6 that the plaintiff had failed to lead any evidence that the ginger delivered did not comply with South African export regulations; and, in any event,

4.1.7 that the plaintiff had failed to lead admissible evidence of the value of the performance in fact received by Remex, and so had failed to provide the trial court with the material necessary to enable it to quantify its damages.

During the course of Mr Swart's argument the trial judge inquired whether the continued existence of the counterclaim should not have a bearing on his decision. Mr Swart intimated that his client was not adamant about proceeding with that and, if granted absolution, would ask that the counterclaim be postponed sine die. In the ensuing judgment, the trial court

4.1.8 commented that such a request would make commercial sense. In the course of the plaintiff's testimony Woolfson had admitted that, apart from its interest in the action, Remex's assets were limited;

4.1.9 commented unfavourably as to the suffiency of the evidence tendered by Remex but

4.1.10 refused absolution on the ground that "it is possible that evidence may be forthcoming" - obviously, from witnesses testifying in support of the counterclaim - "supplementing the plaintiff's case which may then lead the court to grant judgment for the plaintiff'. Mr Swart proceeded to close his client's case on the claim and

asked that the counterclaim be postponed sine die. Mr Coetzer, who

appeared for Remex at the trial, i.a. objected to the latter request,

stressing that the claim and counterclaim were inextricably interwoven.

The trial judge dealt first with the request for postponement:

> "This seems to me to be eminently a case where it would be futile for a defendant to carry on with a counter-claim which will be an empty shell in the end. In the circumstances I

> am of the view that I must accede to the request to postpone it sine die and reserve the question of costs, that means that it will always be for the plaintiff, if it so wishes to place that matter on the roll again and to see if it can recover its costs."

Absolution was then granted since the basis of the earlier refusal, that possibly the defendant could augment the plaintiffs case, had fallen away. As regards costs, Remex was ordered to pay Spitzberg's costs of the claim, the costs of the counterclaim being reserved "for hearing by the court hearing the counterclaim". The trial judge ruled, for the benefit of the taxing master, that the time spent on plaintiff's claim was 95%, on the counterclaim 5%, of the hearing.

Leave was subsequently granted to appeal to this Court. The main issues before us are whether the trial judge was correct

1. in finding that Remex had not made out a prima facie case that Spitzberg had breached the agreement between the parties;

2. in finding that Remex had not adduced sufficient evidence to enable the court to calculate the damages Remex had allegedly suffered; and

3. in postponing the counterclaim sine die.

Short shrift can be made of the third of these. The purpose of the defendant's ploy in asking for a postponement of the counterclaim could only have been to avoid the unfavourable costs order that would inevitably have followed should defendant either have withdrawn the counterclaim or have forthwith closed its case on that, resulting in absolution in favour of Remex. The procedure adopted used form to conceal fact. The avenue pointedly left open to the plaintiff (to enrol the matter again should it wish to pursue its claim to the costs of the counterclaim) was an obviously unnecessary burden imposed on Remex since the matter was already before the court and Remex wished it to be dealt with forthwith. The court must have been satisfied that Remex would be unable to follow this avenue and Spitzberg content not to resume this burden in future: pursuit of the counterclaim would destroy the foundation on which the court had based its refusal to grant absolution in the first instance, and threaten the foundation on which

absolution had been granted thereafter.

I return below to what is to happen to the improperly postponed counterclaim.

The evidence relevant to the issues on the merits may be summarized as follows.

Mr R M Sater was to all intents and purposes the United Kingdom client Remex supplied with ginger which Remex bought in the Republic of South Africa from Spitzberg, supplemented later by supplies from a concern called Vaspan. Sater was bom and bred in South Africa, but moved to the United Kingdom in 1986 where he i.a. launched a company, Montpelier Trading, through which he imported fruit and vegetables from South Africa. He met Woolfson in 1990. A sample of ginger Woolfson gave him found favour with one of Sater's up-market clients. Sater ordered a ton of ginger, to be packed in 10-kilogram boxes and air-freighted to London. The first consignment was of such high quality, that Sater's market expanded in the United Kingdom and he

placed orders with Remex for increasing consignments of ginger to be delivered weekly by air, for which he undertook to pay £16 per box. He himself did not see the produce. It was received, cared for and distributed by others on behalf of Montpelier. After a few weeks, Sater received a complaint and offered that customer a discount, accepting that his supplier had merely had a "bad week", which was not unusual in the fresh produce market. Then ginger was returned by a customer of Montpelier's as unacceptable. Sater contacted Woolfson. Woolfson wanted an independent expert opinion. Sater called in Mr Gentle of the South African Embassy, whose task it was "to ensure that all produce from South Africa meets the standards which South Africans are known for", and also approached a firm of experts in the Geld of the assessment and control of the quality of fresh produce, J & B Seymour Consultants. On 18 September 1990 Sater and Gentle met two experts from J & B Seymour, messrs. Allard and Russell, at the premises of a concern called Panfresh near Heathrow Airport. Panfresh takes delivery of imported

fresh produce on behalf of importer customers (including Montpelier), and stores it under optimum conditions before distributing it in accordance with its clients' instructions. There 60 boxes taken at random from four consignments of South African ginger emanating from Spitzberg and airfreighted according to the relevant documentation on 21 and 27 August, and 3 and 10 September from Jan Smuts airport, were inspected. Sater took photographs of what he saw. Allard advised him that by rights a public health inspector should be called in to condemn the consignments. Sater dissuaded him from doing so, contacted Woolfson, informed him that Montpelier's customers would have nothing to do with such inferior ginger, and asked what Woolfson wished him to do with it. It was agreed that he would attempt to get rid of the ginger as best he might, and remit what money he received (less his expenses in doing so) to Remex. Sater detailed the steps he took in accordance with this undertaking. He was challenged in cross-examination by Mr Swart as to the admissibility of his evidence relating to the condition of

the ginger when he saw it, since he did not purport to testify as an expert and no notice had been given in terms of Supreme Court Rule 36(9)(b) that he would do so. His reply was that he was testifying about what he saw, as an observer and not an expert; and that he knew from experience - scil. as an importer of fresh produce, not a horticulturalist - that ginger properly treated and stored has a shelf life of between four and six months. What he saw was ginger that was soiled, infected with mould, misshapen and scarred, and a far cry from the sample on the strength of which he had placed regular orders. He was unable when pressed by Mr Swart to give details as to the going rates for the different steps he took in the process of having the ginger disposed of - in less affluent and less choosey markets than those Montpelier had disappointed as a result of the flaws in the produce - transport, commission charged, and so on. He was however unshaken that he had done all in his power, through reliable and honest agencies, to dispose of the ginger to best advantage. He was fully aware that the condition of the ginger would

deteriorate progressively as time went by because of the mould infecting

it. However,

> "... there were seven tons of ginger which had been stated to be defective. If we had taken all seven tons to the market in one week, we would not have been able to sell it. What we did was, split it up into five different markets and we sent out small portions per week, so that we could clear the goods consistently. If you dump out-of-grade ginger, you really have a major problem".

Mr Richard Allard from the United Kingdom was the expert called on behalf of the plaintiff in support of the report which was an annexure to the pleadings. He himself was the author of that report although another had signed it on behalf of the firm J & B Seymour Consultants. It is unnecessary to detail his qualifications or his experience which stretched over many decades in i.a. the inspection and assessment of fresh produce for purposes of quality control and loss assessment. It was not his expertise which was challenged, but the norm against which he assessed the ginger which he and his colleague inspected that day and

reported on. He detailed the steps taken to select a random but representative sampling from the consignments in question. There was no confusion between Spitzberg and Vaspan ginger. The boxes bore the producers' names, and all claimed to contain Class 1 ginger. None did. His description of what he saw corroborates Sater's interpretation of the photographs he took that day. Had a health inspector been called in, the entire consignment would have been condemned. He knows Panfresh distribution centre well and comes there often enough to state that its reputation of being one of the best such centres in and around London is well deserved. He knows its methods. He had no reason to think that the poor condition of the ginger as he saw it was due to any incorrect handling whether in transit or storage by Panfresh.

The major attack launched against Allard's evidence by Mr Swart was founded on the fact that Allard rated the ginger as second class or "out of grade" (i.e. lower than class 2), "using the OECD Recommended Quality Standards for fresh ginger". Allard explained that the acronym

stands for the Organization of Economic Co-operation and Development, which has its headquarters in Paris. Allard did not pretend to have any expert knowledge of the content of the South African regulations governing the export of ginger from the Republic of South Africa, nor whether the permissible percentages of deviation from the desirable norm which he applied, approximated to norms laid down here. But Allard was unshaken that the flaws he saw in the ginger were due to careless harvesting - leading to tears and cuts; to lack of proper cleaning -leaving roots soiled; and to lack of proper curing and drying, along with failure to treat the roots with fungicide and growth inhibitors before packing the produce - leading to the development of mould and some roots starting to sprout. He had no doubt that the origin of the mould he saw was to be found in insufficient pre-packaging care; and that, once mould started, it was almost impossible to reverse the process of rapid deterioration that would follow.

The last witness called, was Mr Woolfson. He corroborated the

evidence of Sater as to how their business relationship began. Initially he had bought ginger from Spitzberg through an intermediary, a certain Ludi; but after one or two consignments he had contacted Spitzberg direct and spoken to Mr Schreuder of that concern. He confirmed that their agreement included the terms set out in paragraph 4 of Remex's particulars of claim. He himself had seen the original consignment which he had sent to Montpelier. It was magnificent ginger. When he made contact personally with Schreuder, Schreuder said that he was aware of the export regulations and knew how to comply with them. The understanding was that Spitzberg would supply ginger of the same quality as the first consignment; and that if the ginger delivered did not match the quality of that, "the ginger would effectively become worthless to us and the reason for that is that we would then not have a customer for it, a client". Schreuder was aware that Remex would rely on Spitzberg for quality control since Remex would not itself handle the ginger at any stage. He had contacted Schreuder when the first

complaint about the quality of the ginger delivered was voiced. Sater thereafter faxed Allard's report to him immediately after the four consignments had been inspected. He contacted Schreuder and relayed the expert opinion that by rights those four consignments should be condemned, but "we would see what we could do". Schreuder slammed the phone down on him.

Woolfson was cross-examined vigorously for allegedly seeking to have English standards applied to the ginger delivered, instead of the South African norms relevant to the agreement between the parties; and was pressed to explain why he had been and remained unwilling to acknowledge that the ginger had been inspected at Jan Smuts airport, despite conceding that according to the relevant documentation put before court it had been passed for export by the appropriate officials there. Mr Swart obtained the inevitable concession that Woolfson had no personal knowledge whether the costs and charges incurred by Sater which he had deducted from the price he obtained for the flawed ginger had been

reasonable, or that the ginger had been sold for its market value.

It is unnecessary to set out further detail of the testimony. The witnesses did not contradict one another or themselves in any material respect and, of course, their evidence stands uncontradicted.

Both the argument advanced by Mr Swart and the judgment of the court a quo burden Remex with an agreement containing terms which conflict with those that were common cause on the pleadings and confirmed by Woolfson in his evidence. He had been quite right to refuse to commit himself as to whether the ginger delivered by Spitzberg had been inspected at Jan Smuts airport. It was irrelevant whether any inspector had or had not approved such roots, whether on the strength of prior inspection or as a formality. The touchstone against which the parties' agreement required the ginger to be tested, was an objective one: it had to comply with "the relevant governing specifications relating to ginger to be exported from the Republic". No evidence was tendered as to what those specifications laid down. Mr Swart put it to Woolfson that

Schreuder would say that he had obtained a memorandum from the Department of Agriculture, allegedly containing specifications relating to ginger to be exported. He asked whether Woolfson wished to comment on this document. Woolfson replied in the negative. Even had the memorandum, dated 7 October 1987, become admissible evidence of the truth of its contents by such a passing reference, it could not assist the defendant. It set out "voorskrifte/standaarde" to be administratively applied pending the promulgation of "nuwe regulasies", and did so incoherently. Phrases like

> "(e) Bederf met 1% afwyking. (f) Verlep met 1% afwyking"

are at least ambiguous. Specifications like

> "(g) Skoon gewas en vry van vreemde stowwe.
> (j) Moet eenvormig per houer wees.
> (k) Moet behandel wees met 'n geskikte swamdoder"

are not. In any event 1 repeat that it was conceded on the pleadings that the applicable specifications included (or, in the plea to the counterclaim,

were limited to) the imperatives that the ginger had to be free of mould, clean, and not blemished, misshapen or scarred. The court a quo was accordingly quite wrong in regarding it as a fatal lacuna in the plaintiffs case that

> "...there is no evidence before the court as to what the condition of the ginger was or would have been in the eyes of an inspector who had to inspect it in terms of the agreement".

The uncontradicted evidence of Allard and Sater makes it clear that the ginger did not match up to the admitted requirements when it was inspected. The failure to match up with the second and third imperatives clearly constituted a defect present already on delivery at Jan Smuts airport, so that the lapse of time between that delivery and the inspection - of which much was sought to be made at the trial - is irrelevant. Allard was adamant, as already pointed out, that the progressive infection

of mould seen at the inspection also originated before that delivery.

In short, there was at the very least prima facie evidence that the common cause terms of the agreement between the parties had been breached by the defendant. That the breach was material can hardly be questioned in the light of Allard's evidence that the ginger should by rights have been destroyed.

On the issue of damage, too, defendant sought to confine plaintiff to a method of computing its quantum in which Remex was not interested. In the preliminary skirmishing before the trial, both on paper and at the pre-trial conference, Spitzberg pressed Remex for advance notification of the expert evidence Remex proposed leading to enable the court to quantify the damages claimed. Remex was constant: it had no intention of calling expert evidence on this issue. Both Mr Swart and the trial court ignored paragraph 5 of the particulars of claim and Woolfson's evidence, from which I have quoted earlier, that the agreement was concluded on the basis that, having an overseas customer for quality

ginger, inferior ginger was of no use to Remex. In the light of that uncontradicted evidence, the trial court erred in holding there to be a second fatal lacuna in plaintiffs case:

> "There is no expert evidence before this court as to what second grade or out of grade ginger could fetch on various markets testified to by Mr Allard in England. One of the items claimed by the plaintiff represents his out of pocket expenses to market the ginger in England and there are various items under this head. He had to pay customs costs, cartage, handling, distribution and market commission.
>
> I have no problem that if those costs had to be incurred in order to realise something, that that is a figure which a court can and must take into account in working out what the damages have been. My difficulty is that there is really no evidence before the court as to how these amounts were paid out, to whom, for what and if they were reasonable in the England situation."

The objective of an award of damages for any breach of contract, is to put the injured party in the position in which he would have been, financially speaking, if the other party to the contract had performed properly in accordance with its terms, without being unfair to the

defendant. The cases are legion - see e.g. NOVICK v BENJAMIN 1972 (2) SA 842 (A) 860 A-B. The method by or date at which to calculate the sum required to achieve this object, is not defined by laws of the Medes and Persians, despite "working rules" accepted as being applicable

and fair in the majority of cases. (Cf for example HOFFMANN AND CARVALHO v MINISTER OF AGRICULTURE 1947 (2) SA 855 (T); NOVICK v BENJAMIN supra at p 859 D-G; CULVERWELL AND ANOTHER v BROWN 1990 (1) SA 7 (A).) In the present matter the object of awarding damages would not be achieved were it to be limited by reference to the market value of the defective ginger, whether at delivery at Jan Smuts airport or when Remex discovered its loss as a result of Allard's report. Insistence on this method of quantification would have placed a prohibitively expensive burden of proof on Remex. The ginger, the markets - if any - and the witnesses to testify to those were thousands of kilometres away. In any event the uncontradicted evidence supports the allegation in par 5.3 of plaintiffs particulars of

claim, that Remex itself had no means of disposing of the ginger Allard thought should be condemned. It could only look to Sater to make the best of a bad job that would worsen progressively as the mould itself progressed. There can be no suggestion on this record that it should have acted in any other fashion; nor indeed that Sater did not act prudently in the steps he took; nor that Woolfson erred in saying, when challenged, that he himself could not say that the price received for the ginger was fair -

> "I would go so far ... as to say that it is an incredible price in the light of the fact that it could have been destroyed and we could have received nothing for it... or sent back to Jan Smuts and your client would today be looking at a claim far, far greater than this".

Cf HOLMDENE BRICKWORKS (PTY) LTD v ROBERTS CONSTRUCTION CO LTD 1977 (3) SA 670 (A) 689 D-F.

Before us respondent did not dispute the other components of Woolfson's sums when explaining the composition of Remex's loss: the purchase price it had paid for the ginger, the necessary expenses involved

in getting that to London, and the profit Remex would have made on its contract of sale to Montpelier at £16 per box. It follows that once the figures of Sater and Woolfson are accepted as to what was salvaged and remitted, the total amount claimed in the particulars of claim is correct.

Reversal of the order of the court a quo on the main claim leaves the postponed counterclaim suspended in mid-air along with the directive made by the trial judge to the taxing master that only 5% of the trial costs incurred should be allocated to the counterclaim. That ruling ignored the pre-history, that Spitzberg obtained default judgment in the magistrate's court for R8 200,00 against Remex, which was rescinded. Remex had been unaware of the issue of summons. According to Woolfson it had been pinned to the door of vacant premises. By agreement between the parties this claim re-appeared as the counterclaim in the action instituted in the Supreme Court by Remex.

Mr Swart conceded that should the appeal succeed, the counterclaim should be dismissed with costs. (It being a matter pending

in the Transvaal Provincial Division, it is however not for this Court to make such an order.) Mr Swart agreed that it should be noted that in such event defendant would withdraw its counterclaim and tender costs on the basis of the agreement alleged in the counterclaim, that each party would pay its own magistrate's court costs.

No argument was advanced as to the propriety of the second prayer contained in plaintiffs particulars of claim, which was for interest on the damages claimed at 18,5% p.a. from date of service of summons. Since the amount claimed was originally greater than the final figure and the quantum was in dispute, I can think of no reason why interest should run from summons instead of from the date of the judgment of the trial court, namely 8 August 1993. Cf RUSSELL NO AND LOVEDAY NO v COLLINS SUBMARINE PIPELINES AFRICA (PTY) LTD 1975 (1) SA 110 (A) 154-8.

However, for the very reason that no argument was addressed on the question of either the date from which interest should run or the rate

claimed, paragraph 3(b) of the order of this Court will be provisional for 14 days from date of this judgment; with leave to both parties to file written argument on the matter within that period. Should none be forthcoming, that paragraph of the order will become final.

Finally: at the commencement of the hearing before us, plaintiff required condonation, since the appeal had been lodged out of time. Defendant did not oppose and condonation was granted but plaintiff ordered to pay the costs.

The following orders are made:

4.1.11 The appeal succeeds, with costs.

4.1.12 The order of the trial court granting absolution from the instance with costs is set aside and replaced with the following: "Judgment is granted against the defendant for -

4.1.13 Payment of the sum of R43 807,98.

4.1.14 Interest on the said sum at the rate prescribed from time to time, from 8 August 1993 to date of payment.

(c) Costs of suit."

4.1.15 Paragraph 3(b) above shall be provisional for 14 days from date hereof and become final only should the parties not file written argument as to the rate at and date from which interest is to run.

4.1.16 It is noted that respondent has undertaken to withdraw its counterclaim in this matter still pending in the Transvaal Provincial Division and to tender appellant the costs thereof but so that each party will pay its own costs of the prior magistrate's court proceedings relating to the same issue.

L VAN DEN HEEVER JA

CONCUR:

HEFER JA)
EKSTEEN JA)