REPUBLIC OF SOUTH AFRICA

Case No: 271/96 & 272/96

In the matter between:

EXTEL INDUSTRIAL (PTY) LTD First Appellant
QUATREX MARKETING (PTY) LTD Second Appellant

and

CROWN MILLS (PTY) LTD Respondent

CORAM : Nienaber, Schutz, Scott, Streicher, JJA, Ngoepe, AJA

HEARD : 24 August 1998

DELIVERED : 17 September 1998

JUDGMENT

NIENABER JA/

NIENABER,JA :

This appeal is concerned with commercial bribery and its effect on ensuing agreements. The appellants are two companies to which I shall refer as "Quatrex" and "Extel". Together with a string of other companies, in particular Dorco Trading Company ("Dorco"), they were co-owned and co-controlled by two ex-Zimbabweans, Malcolm Pallet and Francois Macray. To paraphrase the court a quo; they operated as partners and paid scant regard to the separate corporate identities of the companies they controlled. Quatrex and Extel were the plaintiffs in the court below. I shall refer collectively to the group to which they belonged as "the plaintiffs' group". The plaintiffs* group were in the business, inter alia, of supplying sausage casings to the trade. Sausage casings are sheep and hog intestines which the plaintiffs' group obtained from various abattoirs and which were ultimately used by butcheries and sausage producers in the manufacture of sausages. The plaintiffs' group cleaned, partially processed and sorted the casings

in their plant for resale to such outlets. The bulk of their supplies went to the

respondent, the defendant in the court below.

The main business of the defendant, a wholly owned subsidiary of Crown Food Holdings Limited, was that of importer and supplier of natural and artificial sausage casings, spices and light-meat processing equipment to the meat, foodstuffs and catering industries. Its casing division operated the factory where casings from the plaintiffs' group were received and further processed to final form. The factory manager at the defendant's casing division during the relevant period was one David John Cooper. He was a director of the defendant and in overall control of the ordering, receipt and dispatch of sausage casings, of stock-taking and stock records, and of the computation of the costs of sales and stock quantities on hand. The managing director of the defendant since 21 March 1991 was one Sunny Pillay. Cooper and Pillay, as will presently appear, were the persons allegedly bribed by Pallet and Macray.

The arrangement in terms of which the defendant purchased from the plaintiffs' group unselected hog and sheep casings was a long-standing one, commencing in about 1983. For the plaintiffs' group it was a profitable line of business, generating considerable revenue. During the period from 1989 to January 1992, for example, there were payments made by the defendant of at least R5,9m. These payments were credited by Pallet and Macray to Quatrex, Dorco and a transmission account, referred to as the CMG account, which the two of them operated in Botswana. The flow of business was, however, interrupted in February 1992 when the defendant, one in a stable of companies, was being taken over by the Bidvest group of companies and a number of irregularities in the defendant's books of account were uncovered. This ultimately resulted in the dismissal of Cooper and Pillay and in the termination by the defendant of its working relationship with the plaintiffs' group - which in turn gave rise to the claims with which this appeal is concerned.

Extel claimed an amount of R48 048 for the supply on order of 24 960 sets of hog casings to the defendant's factory at Fort Jackson, Ciskei during January 1992. Quatrex claimed an amount of R591 215 for the supply on a regular basis in terms of an oral agreement, alternatively an agreement by conduct, of various quantities of casings during the period 9 December 1991 to 14 February 1992. The claims were resisted by the defendant on two broad grounds: first, that each of the plaintiffs failed to prove the deliveries on which the claims were founded and secondly, if such deliveries had been proved, that the claims were unenforceable because Fallet and Macray on behalf of the plaintiffs' group had bribed Cooper and Pillay, the defendant's directors.

The two actions were duly consolidated and as such proceeded to trial before Goldstein J in the Witwatersrand Local Division of the Supreme Court.

It was common cause, even on the pleadings, that payments had regularly been made by the plaintiffs' group to Cooper in an amount totalling R310 207 and

to Pillay in an amount totalling R162 365. These payments, so Pallet explained in evidence, were openly made to remunerate Cooper and Pillay respectively for work they had done after hours for the plaintiffs' group: to Cooper to upgrade and maintain the quality of the casings supplied by the plaintiffs' group to the defendant and to Pillay to assist Extel in blending spices for trade in Africa. The defendant's case on the other hand was that these were secret payments which were made to induce and reward Cooper and Pillay to maintain the contractual relationship between the plaintiffs' group and the defendant and perhaps to enable them to siphon off payments which the four of them shared.

The court below found that Extel had succeeded in proving the sale and supply of sausage casings to the defendant in an amount of R48 048 and that Quatrex had likewise proved the sale and supply of casings in amounts of R16 362 and R22 825 respectively. In respect of the balance of Quatrex's claim (R552 027) the court found that delivery had not been established. In those instances where

delivery had been established the court nevertheless non-suited the plaintiffs

concerned on the ground that Cooper and Pillay had been bribed by Pallet and

Macray and that such bribery rendered the plaintiffs' claim for payment in terms

of the ensuing agreement legally unenforceable. The judgment of the court a quo

has been reported (Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd - Quatrex

Marketing (Pty) Ltd v Crown Mills (Pty) Ltd 1996 (2) SA 80 (W)).

With the leave of the court a quo the plaintiffs now appeal:

1. against the factual finding that Quatrex failed to prove delivery in respect of goods to the tune of R552 027;

2. against the factual finding of bribery;

3. against the legal finding that the bribery, if established, nonsuited the plaintiffs.

. There are accordingly two broad areas of dispute, each propagating a number of subsidiary disputes, one,

whether Quatrex proved the deliveries on

which the balance of its claims is founded; and two, whether the defendant

established the bribery on which its defence is founded.

I propose to deal with these issues, and with some of the subsidiary disputes they generated, in reverse order. I commence with the

question of bribery.

Bribery is described in Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk

1986 (1) SA 819 (A) ("Chemfos"), the leading case on the subject in our law, in

these terms at 845A-B:

> "Omkopery in die siviele reg bestaan in die praktyk meesal daarin dat iemand 'n geskenk of vergoeding aan die agent van 'n ander persoon gee, of beloof, sonder dat daardie ander persoon (dit wil sê die agent se prinsipaal) daarvan weet, met die doel om die agent te beïnvloed om met betrekking tot die sake van sy prinsipaal 'n voordeel vir die skenker te verkry."

See, too, the judgment of the court a quo, supra, at 90A-B.

Elements of commercial bribery that can be identified are: (i) a reward (ii)

paid or promised (iii) by one party, the briber; (iv) to another, the agent (who may

be an agent in the true sense or merely a go-between or facilitator), (v) who is able to exert influence over (vi) a third party, the principal (vii) with the intention that the agent (viii) should induce the principal (ix) without the latter's knowledge and (x) for the direct or indirect benefit of the briber (xi) to enter into or maintain or alter a contractual relationship (xii) with the briber, his principal, associate or subordinate.

The allegation in this case is that, at the very least, Pallet and Macray (the bribers) enticed Cooper and Pillay (the agents) by regular payments made to them (the reward) to place the business of the defendant (the principal) with the plaintiffs' group (the briber's principal) of which Pallet and Macray were the sole shareholders (the benefit).

Pallet, denying the allegation of bribery, testified. Macray, Cooper and Pillay, although all available to the plaintiffs to do so, did not.

The court a quo at 90B-E held that the inference of bribery in the above

sense was inescapable:

> "This is so for a number of reasons. First, Cooper and Pillay received substantial payments over a long period for which the plaintiffs failed to give a satisfactory explanation. Secondly, most of the deliveries sued upon allegedly occurred in such unusual and suspicious circumstances as to cast serious doubt on their genuineness. Thirdly, in many cases Quatrex sues for more than can have been delivered on Kleynhans's version, and in one case for more than can have been delivered on the version of Pallet. Fourthly, Cooper was instrumental in effecting payment to Pallet from time to time in unusual circumstances. All of the aforegoing factors justify the inference on the probabilities that Copper and Pillay must have received the money they did from Pallet and Macray in order to influence them to gain an advantage for Pallet and Macray and/or the entities controlled by them from the defendant. And that advantage must have been the continuing purchase by the defendant of the products of entities controlled by Fallet and Macray and/or the payment by the defendant to such entities of sums of money not owing to them."

(Kleynhans was the factory manager at the plaintiffs' group's plant at Sebenza,

Edenvale.)

It was argued on behalf of the plaintiffs that the court below erred in so

finding but in my view the reasons advanced by the court in its judgment cannot

be faulted. The payments received by Cooper and Pillay over a passage of time were substantial, (R310 207 to Pallet and R162 365 to Pillay, according to the admissions on the pleadings), and in his evidence Pallet conceded that it might even have been more. Pallet's explanation, that the payments, reputedly calculated at R250 per hour, were intended for specialised after-hours consultative work and quality control on the part of Cooper and for the blending of spices on the part of Pillay, also done during his spare time, was highly implausible. I say this for the reasons which follow.

The court a quo was prepared to accept in the plaintiffs' favour that Cooper had assisted Pallet and Macray during 1983 to establish their plant at Sebenza. So too Kleynhans testified that Cooper groomed him for his new and unaccustomed position when he was first appointed to it 1985. Kleynhans's evidence can also be accepted that he saw Cooper and Pillay at the plaintiffs' plant from time to time; this would hardly be surprising considering the close working relationship which,

on their own showing, existed between Pallet and Macray on the one hand and

Cooper and Pillay on the other. But that cannot account for the sustained flow of payments diverted to Cooper and Pillay over a lengthy period. Cooper was supposed to work for Dorco and Pillay for Extel yet none of the payments to them were made by those instances and although termed expenses by Pallet none of these payments were reflected as such in the books of account of any of the companies in the plaintiffs' group. The analysis by Stephen, a forensic accountant who examined the books of account of the plaintiffs' group on behalf of the defendant, demonstrated that the payments were made by various other instances: Cooper was sometimes paid from the CMG transmission account, sometimes by Pallet and Macray in equal amounts, sometimes by Camlet (another company in the plaintiffs' group) and once even by Pillay; whereas the payments to Pillay came from the CMG account, from Pallet and Macray personally and equally, from Camlet and from one Richter. The payments to Pillay were invariably deposited

into the account of a relative of his, one P D Jackson. Although the payments were supposed to be regular payments for regular extra-curricular work independently done by Cooper and Pillay against the rendering by them of monthly accounts, none of the accounts were ever produced, and the payments were made irregularly - depending, so Pallet explained, on the state of the cash flow at the time. Curiously enough, the amounts paid to Cooper were frequently exactly double of that paid to Pillay, and all the payments were by way of cash cheques. Pallet conceded under cross-examination that the modus operandi was such that no auditor would be able, on examining the accounts, to form a clear picture of the workings of the companies concerned. The overall impression is one of secrecy and subterfuge on the part of the plaintiffs' group which Cooper and Pillay could readily have dispelled by testifying. But neither Cooper nor Pillay was called to give evidence. The court a quo concluded, and I agree, that the payments made to Cooper and Pillay were explicable on no other rational basis

than that they constituted bribes.

Turning next to the payments made by the defendant to the plaintiffs' group, the analysis of Stephen, of which the details remained unchallenged, revealed that sums in excess of R5,9m were diverted to Pallet's and Macray's personal accounts and that a significant portion thereof some R2m, was split between Pallet, Macray, Cooper and Pillay. The amounts were: R879 150 to Pallet, R803 263 to Macray, R199 157 to Cooper and R91 911 to Pillay. In respect of the payments diverted to Cooper and Pillay the sum allocated to Cooper happened to be close to 10% of the total split and that to Pillay close to 5% thereof, while on some fifteen occasions on which such payments were made Pillay received, to the final cent, exactly one half of what was paid to Cooper. Pallet was unable, when challenged, to offer an innocent explanation.

It is of course true, as emphasised by counsel for the plaintiffs, that the cheques issued by the defendant to the plaintiffs' group required two signatories;

but the obvious retort is that Cooper was in effective control of the affairs of the defendant and of the flow of its funds. Mrs van Reenen, a clerk in the defendant's office, testified that different procedures were followed from those normally employed when payments were made to the defendant by other suppliers and that this happened on Cooper's direct instructions.

And finally there are the many highly unsatisfactory features relating to the delivery to the defendant of what the court below termed "the first category of casings", which it detailed at 86A-88F of its judgment. These unsatisfactory features fit a pattern of underhand dealings between the plaintiffs' group and Cooper and Pillay; they are not so readily explicable if those dealings were indeed open and orthodox.

All things considered the conclusion is in my view fully justified that Pallet and Macray by means of bribery conspired with Cooper and Pillay to exploit their high station in the defendant not only for the good of the plaintiffs' group but also

for their own personal and mutual profit.

The first response, in argument, was that Cooper and Pillay's superiors at the time were fully aware of their involvement in the plaintiffs' enterprise and condoned it; and they did so because they appreciated that there was nothing sinister or objectionable in Cooper and Pillay assisting the plaintiffs' group in their spare time to improve the quality of the product which would eventually be supplied to the defendant.

The evidence in support of that assertion was essentially that of Pallet who testified that Cooper and Pillay assured him that they had made a full disclosure of their association with the plaintiffs' group to their board of directors.

This evidence is in my view unconvincing. It presupposes an innocent relationship between Cooper and Pillay and the plaintiffs' group. But once it is found, as in this case it must be, that the relationship was not an innocent one it becomes most unlikely that Cooper and Pillay would have confessed it to their

superiors and that their superiors would have condoned it. In the circumstances both Pallet's own evidence of what they were supposed to have told him and the hearsay evidence itself if at all admissible, become highly suspect. (Compare the remarks of the court below at 90E-I.)

Moreover, on his own showing Pallet had had several meetings with the defendant's board of directors at which the issue of Cooper and Pillay's participation in the plaintiffs' group's activities, if innocent, could and probably would have been ventilated. It never was. I agree with the court a quo that it is most unlikely that such a semi-permanent arrangement would have been countenanced whereby the defendant's managing director and the head of its casing division were allowed to work after hours for one of its suppliers (and in the case of Pillay, one of its potential competitors) for a payment and at a rate well in excess of what the defendant paid them. There would have been an obvious conflict of interest between the two positions Cooper and Pillay occupied: on the

one hand as the top echelon of the defendant's management team doing business

with the plaintiffs' group and, on the other, as the latter's part-time employees. It was put to Pallet during cross-examination that Smart, the defendant's group managing director during 1983, would deny that he knew of any such arrangement between the plaintiffs' group and Cooper and Pillay, to which Pallet responded that the denial would surprise him. Smart was never called to substantiate the point made in his name. The failure to do so is a matter of legitimate criticism. But in the end the inference to be drawn from the failure to call Smart is simply not strong enough to displace the inference the other way that the defendant's board of directors did not have knowledge of the extent to which Cooper and Pillay were implicated in the plaintiffs' affairs. The seriousness with which the defendant viewed Cooper and Pillay's involvement in the activities of the plaintiffs' group is evidenced by their dismissals once that involvement was discovered; and the importance which Pallet and Macray attributed to their cooperation, and the vital

role they played in the plaintiffs' business, are evidenced by the immediate closure

of the plaintiffs' business once Cooper and Pillay's relationship with the defendant and the defendant's relationship with the plaintiffs' group were severed. The companies in the plaintiffs' group were thereupon either sold or they were allowed to become dormant.

In the alternative it was argued on behalf of the plaintiffs that Cooper and Pillay's guilty knowledge could be ascribed or imputed to the defendant, with the consequence that, as far as the defendant was concerned, their participation in the plaintiffs' business was not, for the purpose of the definition of the term bribery, secret. I disagree. The common law rule as to the imputation of knowledge by an agent to his principal can never be stretched to cover the situation where the agent is engaged in an activity to the detriment of his principal which he would of necessity have kept secret from him. The evidence was that, prior to the discovery of their association with Pallet and Macray, both Cooper and Pillay were asked,

in line with the normal practice of the defendant's holding company, to disclose

in writing any interest they may have had in any other company. Neither of them disclosed their connection with the plaintiffs' group. (See the judgment of the court a quo, supra, at 90H-J.) In my view the court a quo was accordingly right in concluding (at 90G) that the other directors of the defendant were unaware of Cooper and Pillay's association with the plaintiff group.

It follows that all the elements of bribery, including that of secrecy and corrupt intent, were established.

The legal consequence of that finding was vigorously debated in this court. That bribery is a form of corrupt conduct that will not be countenanced by any court of law is undeniably so. It follows that the agreement whereby the bribery was established (in the current context, the understanding between Pallet and Macray, on the one hand, and Cooper and Pillay, on the other), is to be regarded as immoral and thus void. No claim to enforce performance by either of the

parties would be entertained.

The agreements under consideration were not, however, the agreement between the briber (Pallet and Macray operating on behalf of the plaintiffs' group) and the party bribed (Cooper and Pillay). They were the subsequent agreements of sale between the plaintiffs' group and the defendant. The sales which the briber (the plaintiffs' group) sought to enforce were thus one step removed from the source of pollution. And unlike the bribery agreement itself where both parties were guilty, in this instance one of the parties to the ensuing sales, the defendant, was both ignorant and innocent.

The Chemfos decision, supra, is direct authority for the proposition that a

briber cannot, against the will of the innocent party, enforce the agreement which

was concluded with him as a result of the bribery.

> '"n Ontleding van die Engelse beslissings oor die onderhawige onderwerp toon myns insiens dat die werklike grondslag van die reg wat 'n party het om die ooreenkoms te repudieer indien daar aan sy

agent 'n omkoopgeskenk deur die ander party gegee is, daarin bestaan dat die reg omkopery as 'n immorele en ongeoorloofde handeling beskou en derhalwe nie toelaat dat die omkoper die ooreenkoms kan afdwing, of dat die ander party daaraan gebonde gehou moet word nie. In die lig van wat hierbo gesê is, meen ek dat, wat ons reg betref, dit nie juis is om, soos in Davies v Donald (supra) en Mangold Bros Ltd v Minnaar and Minnaar (supra) in navolging van Engelse sake gedoen is, die reg van 'n prinsipaal om 'n ooreenkoms wat deur die omkoop van sy agent verkry is, te repudieer op bedrog ("fraud") te grond nie. 'n Mens moet sê, meen ek, altans wat 'n geval soos die onderhawige betref, dat die prinsipaal se reg om die ooreenkoms te verwerp, gegrond is op die ongeoorloofdheid van die metode, naamlik omkopery, waarvan die ander party gebruik gemaak het om hom te beïnvloed om die ooreenkoms aan te gaan. Wat betref die partye wat die omkoopgeskenk aan die agent van die ander party gegee het, moet 'n mens myns insiens sê dat die reg hom nie toelaat om teen die wil van die ander party 'n ooreenkoms af te dwing wat hy deur middel van ongeoorloofde gedrag, naamlik omkopery, verkry het nie." (at 848A-E).

The converse of the proposition in Chemfos (that an agreement resulting from bribery is unenforceable at the instance of the briber and against the will of the innocent party) is that the agreement is enforceable against the briber at the instance of the innocent party - or to put it into legalese, the agreement is not void

but voidable. The agreement between the briber and the person bribed, as stated

earlier, is void; the follow-up agreement between the briber and the innocent party is voidable. There are sound practical and dogmatic reasons for the distinction. Whereas both parties to the bribery agreement are guilty, in the follow-up agreement the one party ex hypothesi is innocent. To treat the latter agreement as void and to visit it with all the consequences of nullity, because the briber's conduct is scandalous, is to punish the innocent for the sins of the guilty. It would mean that the innocent party is deprived of the opportunity of enforcing the agreement, even when it may be to his advantage to do so, for example if he has forward commitments; and that he is confined to his remedies against the briber and the person bribed, which may prove to be worthless. Dogmatically an agreement induced by bribery may be classified, in common with agreements induced by misrepresentation, duress or undue influence, as one which an innocent party can avoid because his consensus, though real, was improperly procured. (Cf

Van der Merwe, et al, Contract General Principles, 73, 99.) The similarities arising from that one common feature must not, however, disguise the differences that do exist, in particular the abhorrence with which the law views the conduct of a briber, which in turn may have repercussions elsewhere.

Counsel for the plaintiffs sought to extract from dicta in Chemfos three separate reasons for resisting the conclusion that if bribery was proved against the plaintiffs' group, neither plaintiff could succeed in its claim. I deal with each of the grounds advanced in turn.

The first is that it had not been shown that the bribery, accepting it to have been established, gave rise to the sales on which the claims were founded; hence, following certain dicta in Chemfos, the finding of bribery became immaterial.

This court in Chemsfos (at 844E-I) did not accept that it is part of our law, as it appears to be part of the English law, that "once the bribe is established, there is an irrebuttable presumption that it was given with an intention to induce the

agent to act favourably to the payer..." (Chemfos at 846B). Although the court a quo sought to resuscitate such a rule for our law by pointing out that the remarks in Chemsfos were obiter (at 92A-E), counsel for the defendant in this case did not argue that the Chemfos approach should be reconsidered. Some allowance in favour of the innocent party was made in Chemfos (at 844I) to the effect that once a plaintiffs bribery is proved against him he may bear the evidential burden of showing that his bribery was causally unrelated to the conclusion of the agreement on which he sues. (It was on that ground that the court below found in the alternative (at 92J-93C) that causation in this case had been proved since Pallet, having denied the existence of the bribe, adduced no countervailing proof on the issue of causation.)

It may be helpful to distinguish in this regard between the following three situations:

i) the agreement of bribery itself which, as stated earlier, is void

ii) the particular transaction contemplated by the bribery agreement and which is concluded as a direct and immediate result thereof; and iii) the contractual relationship which is established as a direct result of the bribery and which engenders further agreements, one or more of which becomes the subject matter of the suit. Chemsfos is an example of the second category, this case is an example of the third.

Causation will rarely be a problem in the second class of cases; it may be a real one in the third. Where it does arise it seems to me that it must be resolved with reference to recognised principles of factual and legal causation (cf International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) 700E-701F; Smit v Abrahams 1994 (4) SA 1 (A) 14F-15G), bearing in mind, in addition, the

gloss in respect of the evidential burden referred to in Chemsfos (at 844I).

In this case it was argued that the understanding between Pallet, Macray, Cooper and Pillay dated back to the middle eighties and that it had not been shown that each sale sued on was related to a specific act of bribery; only one payment, for example, was made to Cooper and Pillay during the period December 1991 to February 1992 when the disputed deliveries took place; there was no correlation between that payment and those deliveries.

What is to be excluded from the net of causation would be agreements between the briber and the innocent party which the bribery was not designed to bring about or foster. But where, as here, the agreements sued on are of the very kind contemplated when the bribery was conceived, a sufficient causal link has in my view been established.

Bribery casts its dark shadow on all agreements which naturally flow from the contractual relationship inspired or tainted by it. Consequently it is no answer

to the bribery defence that no one was called to testify on behalf of the defendant

that had the defendant been aware of the irregular payments to Cooper and Pillay it would not have ordered any casings from the plaintiffs' group during the period December 1991 to February 1992. The very fact that the defendant refused to make payment when the truth was revealed is proof enough of that fact. In my view the court a quo was right in finding (at 93F) that "the necessary relationship between the bribe and the contract sued upon in the present case does exist".

The first ground relied on by the plaintiffs in their attempt to defeat the defendant's defence of bribery can accordingly not succeed.

The second ground on which the plaintiffs sought to meet the defendant's bribery defence is also founded on certain dicta in Chemsfos. In Chemsfos the innocent principal is recognised to have a right to resile from the contract (at 848 A; 848C) and the briber is denied the right to enforce it against the will of the innocent principal (at 848D; 849A). A right to resile implies a right to abide. The

innocent principal is thus given an election. Notwithstanding the approach of this

court in Chemsfos that the agreement can be impugned because bribery is regarded "as 'n immorele en ongeoorloofde handeling" (at 848A-B), the contract as stated earlier is not void for being illegal but at most is voidable at the behest of the innocent party. In line with the learning on rescission in the case of voidable contracts, an innocent party who elects to rescind may do so, so the argument ran, only if he tenders to restore what he has received under the contract or, if he is unable to do so through no fault of his own, if he tenders compensation in lieu thereof. As the defendant in this case, with regard to at least the three sales in respect of which delivery had been proved, has done neither, the defendant, so it was submitted, is pre-empted from rescinding and accordingly remains committed to perform in terms of the contract in question.

Chemsfos held that a claim by a briber founded on a contract induced by his bribery, was unenforceable against the will of the aggrieved party. The judgment

was not concerned with the ancillary question of restitution of performance

rendered in terms of such a contract where the aggrieved party repudiates the contract. That question does arise in this case and became the spearhead - on the assumption that bribery was established - of the plaintiffs' counter-attack.

In this case the defendant as the aggrieved party did manifest its intention to resile from the sales resulting from the bribery. It did so by countermanding cheques given for payment but not yet cashed and by refusing payment for invoices not yet paid. What is now in issue is whether the defendant was entitled to do so without formally tendering restitution of what had been supplied to it or, failing such restitution, its monetary value.

The rule that a rescinding party must tender restitution is not an inflexible one; it applies only where such restitution remains physically possible. When, through no fault of the party rescinding restoration is no longer physically possible, he is not precluded by that fact alone from resiling from the contract (cf

Feinstein v Niggli and Another 1981 (2) SA 684 (A)700F-701F).

In the instant case the subject matter of the sales, sheep and hog casings, were perishables which were supplied to the defendant from time to time during the period December 1991 to February 1992. The evidence was that these casings were processed to final form in the defendant's factory and then resold. The overwhelming probabilities are that the goods were dealt with in the normal course and for their contemplated purpose; and as such were no longer available for return by the defendant. Consequently the failure to restore or tender restoration could as such not bar the defendant from resiling from the sales.

But it was argued on behalf of the plaintiffs that the defendant should have tendered, in lieu of restitution, the market value of the goods supplied, and that its failure to do so meant that the three sales in respect of which delivery was proved stood and that the plaintiff accordingly remained liable for payment of the purchase price owing in terms thereof. The end result of that argument is that the

defendant's only means of avoiding the sales would have been to perform in terms thereof.

In support of that proposition the plaintiffs sought to rely on certain dicta and on a particular passage in Uni-Erections v Continental Engineering Company Ltd 1981 (1) SA 240 (W). The dicta are to be found at 247G: "There is abundant authority for the trite principle that restitution is a condition precedent to cancellation" and at 248A: "... I think, that restitution, being an integral part of cancellation, it is for the party relying on the cancellation of a contract to allege and prove that restitution whether actual or (partly) substitutionary has been made or tendered or excused." (my underlining). If the first dictum and the underlined words in the second are intended to convey that an act whereby an election to rescind is manifested (such as the refusal by the innocent party to render counter-performance) is legally ineffective unless it is accompanied by a formal tender of restitution, it firstly confuses, with respect, the act of cancellation with the action

of claiming restitution; secondly, it is impractical; and thirdly it is contrary to

authority in this court.

That a tender of restitution, or the explanation and excuse for its failure, is

a requirement in proceedings for restitution is indeed trite. A contracting party

who demands restitution consequent upon a purported rescission of the contract,

must tender the return of what he himself has received under the contract, or its

equivalent in money (Feinstein v Niggli and Another, supra, 700F-H), and his

failure or inability to do so may effectively preclude or nullify his election to resile

from the contract. But, as Christie, The Law Contract in South Africa, 3rd ed

324, has pointed out:

> "The restitution or tender does not have to be an integral part of the act of rescission, rather it is a consequence that must necessarily follow from it..."

To nullify an act of cancellation because it was not accompanied by a

comprehensive and precise tender of restitution might well be to place an

impossible burden on the party seeking to rescind. The facts of this case demonstrate the impracticality of such a requirement: the defendant, having been taken over by a new concern and having discovered the bribery, refused to pay for the goods allegedly supplied to it. It was suspicious of both the alleged sales and the alleged deliveries. By then restoration of whatever may have been supplied would in any event no longer have been physically possible. What, one may well ask, should the defendant have tendered in those circumstances? There will be many instances where the nature and the extent of any restitution and its possible quantification would be matters of considerable factual and legal complexity, which it may well require the intervention of a court of law to resolve but on which it is unnecessary to dwell in this judgment. To demand of the party wishing to rescind that he should, as a sine qua non for resiling from the agreement, anticipate their resolution in order to make an adequate offer of restitution, may well be to require the unattainable.

The law, sensibly, does not require it. In Van Schalkwyk v Griessel 1948 (1) SA 460 (A) which, like the Uni-Erections case, supra, involved the legality of a rescission by the innocent party to a fraudulent misrepresentation, it was held that the innocent party was not debarred from relying on his earlier recission merely because he had not tendered restitution before the issue of summons. In his summons he had asked for an order declaring the agreement to be properly cancelled. In addition he claimed damages. This court said at 470-1:

> "The argument was that a tender of restitution is a necessary part of the act of repudiation and that without such tender the repudiation does not give rise to a cause of action. Now there is no doubt that, generally speaking, a plaintiff defrauded by misrepresentation must be willing and able to make restitution. See Voet (4.1.21, 22; 4.3.3, 4); Grotius, Introduction (3.48.5); Wessels, Contract (s. 1152); Halsbury's Laws of England (2nd ed., Vol. 23, pars. 157, 167); Cheshire and Fifoot, Contract (p. 192); Spence v Crawford (1939 (3) A.E.R. 271). But I know of no statement - and none was quoted to us - in any authority in our law, in English or in Scots law, to the effect that the person deceived has no right of action until he has tendered restitution.
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> In the Bwlch-Y-Plwm Lead Mining Co v Baynes (L.R. 2 Ex.

324, at p. 326), Bramwell, B., stated:

> 'Now, it is a rule that a contract is voidable at the option of the person who has entered into it, if he has entered into it through the fraud of the other party, and has repudiated it on the discovery of the fraud. This includes giving up all benefit from it, and restoring the other party to the same condition as before, as far as possible.'

The sentences quoted do not seem to me to convey clearly that a repudiation is ineffectual unless it is accompanied by an offer of restitution."

The further passage in the Uni-Erection case, supra, on which the plaintiffs sought to rely is at 248B of the report. It reads:

> "In my opinion where, as here, there has been complete and proper performance by the locator of its obligations under the contract and where there is no question of any defective workmanship, the conductor who has accepted the benefits of the services but who alleges that the contracts were induced by the fraud of the other party, is not entitled to cancel the contracts. His only remedy is to claim what damages he has suffered as a result of the fraud. Once the benefit to be returned has perforce to take the form of being an entirely pecuniary substitute, calculated by assessing its value to the defendant or the lesser amount that it would have paid another contractor, one is no longer dealing with restitution but with damages and it is damages that must be claimed and proved."

The passage, I must confess, is not altogether clear to me. If it means that acceptance of the work with knowledge of the fraud precludes rescission I would agree with it for in that sense the contractor would then have made an election not to resile; but if it is intended to mean that the conductor is precluded from resiling simply because the locator has performed in full I have difficulty in accepting it as being an accurate statement of the law. (Cf Kerr (1989) 106 SALJ 97, 107.) What the passage does mean, I think, is this: once the conductor opens has accepted the benefit of the locator's services, restoration in specie will often no longer be possible; hence the conductor must perforce make restitution by way of a pecuniary substitute. Since the value of that substitute may well have to be determined with reference to the contractual standard the rescission of the contract followed by such restitution would leave the parties in exactly the same position as if the contract had been performed on both sides. The rescission would

therefore have no practical effect, except to the extent that it may initiate a claim for damages. If that is indeed what the passage means, it describes a result and does not enunciate a principle. The Uni-Erection case, supra, accordingly does not assist the plaintiffs.

The third of the grounds relied on by the plaintiffs in response to the defendant's defence of bribery is that they were entitled to be compensated on the basis that the defendant, by accepting performance without payment, was unjustifiably enriched at their expense.

The difficulty which faces the plaintiffs in this regard is that they had not pursued their claims on that footing. The issue of enrichment was only raised in their so-called consequential replications in two respects, first, in the context of the defendant's competence to resile from the sales, a matter discussed above, and secondly, in the alternative as a claim for compensation.

To the extent that the allegations in paragraphs 12.7 and 8 of the two

plaintiffs' respective consequential replications are capable of being interpreted as

alternative causes of action they should have been incorporated as such in the plaintiffs' declarations (see, by way of example, Henry v Branfield 1996 (1) SA 244 (D) 251D-G). The plaintiffs' failure to follow that procedure meant that the defendant was entitled, as it did, to ignore it as a cause of action. Had it been properly raised the defendant would have been obliged to plead to the case and to meet it in evidence. The result of that failure is that various issues which would and should have been ventilated in the pleadings and traversed in the evidence were not touched upon.

One such issue would have been the extent of the defendant's possible enrichment and the quantification thereof. Where both the sales and the deliveries were in dispute and the prices on invoice may themselves have been distorted by the bribery, a claim on enrichment may well have been difficult to maintain.

The rule (that the parties ought to be restored to the respective positions they were in at the time they contracted) is founded, moreover, on equitable considerations (Feinstein v Niggli and Another, supra, 700F-G). The plaintiffs, having regard to the conduct of their owners, may well have been hard pressed to show that as a matter of "equity and justice" (ibid, at 700 last line) they were entitled to any compensation. The defendant may well have responded to such a case with the plea that the conduct of Pallet and Macray in bribing Cooper and Pillay, the top management structure of the defendant, and in conspiring with them to exploit the defendant in order to share in the spoils, was so scandalous, so morally reprehensible, that no court should come to their assistance. Bribery of this kind was described in Chemsfos as " 'n immorele en ongeoorloofde handeling" (at 848A-B). There was reference to "die ongeoorloofdheid van die metode" (at 848C-D) and to "ongeoorloofde gedrag" (at 848D-E). The court in Chemsfos was at pains to distinguish between fraud and bribery (846J-848C) and deliberately

declined to view and treat the latter as a species of the former, - not because bribery is invariably more heinous than fraud but because as a legal phenomenon it is different. If the briber is disqualified from claiming either performance (because of the maxim ex turpi causa non oritur actio) or restitution (because of the par delictum rule) from the party he bribed, there is no apparent reason why he should be treated more leniently when he seeks restitution from the party he duped. It is true that in the one case the agreement is void and in the other it is voidable, but that in itself is no reason for refusing him relief in the one case but granting it to him in the other, since his conduct in both instances is equally culpable. In both instances there may of course be circumstances justifying a relaxation of the rule which would otherwise disqualify him from claiming restitution. Those are points and considerations that may have arisen if the issue had been properly raised by the plaintiffs. Since it was not so raised it is unnecessary to express any firm views on them and I refrain from doing so.

None of the grounds relied on by the plaintiffs in answer to the defendant's defence can therefore be sustained.

That being so it follows that the plaintiffs must be non-suited even in respect of those sales where delivery had properly been proved. No purpose would therefore be served in examining, in all its ramifications, the question whether the court a quo was right in holding that Quatrex had failed to prove delivery of what it referred to (at 90J) as "the first category".

The appeal is dismissed with costs, including the costs of two counsel.

P M NIENABER
JUDGE OF APPEAL

Concur:
Schutz JA Scott JA
Streicher JA
Ngoepe AJA