REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 236/2004

In the matter between:

PROMAR CC **PLAINTIFF**

and

BLUE SEAL EXPORTERS CC **FIRST DEFENDANT**

GERALD EUGENE ROUX **SECOND DEFENDANT**

Neutral citation: *Promar CC v Blue Seal Exporters CC* (I 236/2004) [2014] NAHCMD 10 (23 January 2014)

Coram: PARKER AJ

Heard: **10 – 14 June 2013; 14 – 16 October 2013; 18 October 2013**

Delivered: **23 January 2014**

Flynote: Contract – Purchase and sale – Plaintiff (seller) relying on an oral agreement to sell and the second defendant (buyer) to purchase horse mackerel – Plaintiff unable to supply total contract consignment – Parties subsequently agreed that plaintiff could supplement consignment with mackerel – Court held that there was only one original agreement and the agreement to supplement mackerel was an amendment of a term of the original agreement – The amendment does not constitute a new and separate agreement which can stand on its own and capable of being severed from the original agreement – The evidence indicates that that was the only substantive term that was amended.

Summary: Contract – Purchase and sale – Plaintiff (seller) relying on an oral agreement to sell and second defendant (buyer) to purchase horse mackerel – Fish

loaded on vessel fell short of the total contract consignment – Subsequently, parties agreed that consignment could be supplemented with mackerel – Court found that the subsequent agreement on supplementation constituted an amendment of the original agreement and did not constitute a separate or second agreement that could stand on its own and be severable from the original agreement.

Flynote: Contract – Purchase and sale – Sale by sample – The sample inspected by the first defendant was used to identify the expected quality of the specific bulk of horse mackerel from which a quantity of the fish would be drawn – Court held that sale by sample was established and accordingly certain implied undertakings by the seller followed as a matter of course.

Summary: Contract – Purchase and sale – Sale by sample – Seller made available to the buyer sample of cartons of fish for the buyer to inspect – On the evidence and as is the practice in the industry sampling is done of selected cartons of fish by the buyer – Court found that this system is used to identify the expected quality of the specific bulk of fish from which a quantity would be drawn – The sale involved is therefore sale by sample.

ORDER

(a) Judgment is granted for the plaintiff and against the defendants jointly and severally, the one paying, the other to be absolved, in the amount of -

(i) N$514 620,45, and

(ii) N$12 276,43,

plus interest on the amount of N$514 620,45 at the rate of 20 per cent per annum, calculated from 10 September 2003 to date of payment.

(b) The defendants are jointly and severally to pay 70 per cent only of the plaintiff's costs of suit, including costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] This matter concerns fish; and summons was caused to be issued in October 2003. Now the court is confronted with a case whose progression has undergone considerable processes during which the plaintiff's claim in the particulars of claim has seen a series of amendments. To use a pedestrian language; the claim has undergone considerable face-lift.

[2] In its original particulars of claim (October 2003), the plaintiff alleges that 'on 13 August 1998 an agreement was reached in respect of the horse mackerel. In response to the defendants' request for further particulars the plaintiff stated that it was represented by Diamantino Ruffino da Silva Correira. However, during the trial the testimony given is that Mr Correira had no part in this agreement because he was in Portugal at the time. In May 2004 amended particulars of claim, it is reiterated the date of the single agreement and it again refers only to horse mackerel. Thereafter, the February 2007 amended particulars of claim reiterates the one agreement for horse mackerel concluded on 13 August 1998. Thereafter, in further particulars of February 2007 the plaintiff reiterates that it was represented by Correira when the agreement was concluded. Furthermore, in further particulars of September 2008 plaintiff repeats its earlier particulars that Correira represented it and that Correira accepted the suretyship (discussed below) on behalf of the plaintiff. In the particulars of claim of November 2008 the one agreement relating to horse mackerel concluded on 13 August 1998 is repeated. Thereafter, in particulars of claim of January 2009 the aforementioned one agreement of 13 August 1998 in respect of horse mackerel is repeated. Additionally, in further particulars of February 2009 the fact that Mr Correira represented plaintiff at the time of the agreement and on acceptance of the surety is reiterated.

[3] The trial of the matter was set down for November 2012, and so in terms of the rules, in October 2012 the defendants' witness statements were furnished for the trial, but the trial did not proceed. Thereafter, the plaintiff made further amendments to the plaintiff's particulars of claim. Thus, in the notice of amendment of November 2012 the following was done; the date of 13 August 1998 for the conclusion of the agreement is changed to 'on or about 13 August 1998', the single agreement is now amended to be in respect of 'horse mackerel and mackerel' and it is also now

alleged that the relationship resulted from 'an oral agreement or agreements'. That is not all. The further particulars are also amended to bring in Mr Martins as an alternative to Mr Correira and as the person who represented the plaintiff at the relevant times.

[4] I have for a purpose set out briefly the history of the case since the issuance of summons up to the commencement of the trial, which traverses a period of some 10 years. It is to make this point. A party may apply to amend its pleadings at any stage of the proceeding. But where a multiplicity of amendments to further particulars and particulars of claim amount to putting brakes on the progression of the case towards its conclusion to the prejudice of the other party, as is in the present case, the court should, not may, take into account the conduct of the party involved when it comes to considering the issue of costs. I shall return to this conclusion in due course. In these proceedings Mr Tötemeyer SC represents the plaintiff, and Mr Frank SC represents the defendants.

[5] On the evidence I make the following significant factual findings. The plaintiff, represented at all material times by Mr Martins (a plaintiff witness), a sales manager of the plaintiff, entered into an oral agreement (the original agreement) for the sale of fish to the first defendant. The total tonnage of the fish to be sold was around 529 tons. The fish consisted of horse mackerel. Before risk in the fish passed to the first defendant the first defendant's representatives (inspected some pallets which had been selected randomly by staff members of the Walvis Bay Cold Storage (WBCS). The selected boxes (or cartons) were opened for inspection by the first defendant's representatives. These were 17 kg boxes.

[6] Thus, what is relevant for our present purposes is that for obvious reasons, it was not expected of the buyer (the first defendant) to humanly inspect each and every carton involved in such sale of a bulk of fish weighing some 329 tons and comprising more than 1000 cartons. The sample that the first defendant's representatives inspected was used to identify the expected quality of a specific bulk from which a quantity of fish would be drawn. In my opinion that is what the exercise of inspection at the Walvis Bay Cold Storage (WBCS) was about. I, therefore, find that the sale of fish which was the subject matter of the agreement was sale by sample. (*Parker v Palmer* (1821) 4 B & Ald 387, 106 ER 978; discussed in GRJ Hackwill, *Mackeurtan's Sale of Goods in South Africa*, 5th ed (1984): section 4)

[7] Sale by sample having been established certain implied undertakings follow as a matter of course, eg that the quality and condition of the bulk shall correspond with that of the sample, to the extent that the sample is relevant, or with the sample and description, as the case maybe, and that the bulk shall be free from any defect which would not be apparent upon a reasonable examination of the sample. (GRJ Hackwill, *Mackeurtan's Sale of Goods in South Africa*, ibid. pp 55 – 56)

[8] I find that the subject matter of the original agreement was 17 kg boxes of 20+ fish (that is horse mackerel of the size of more or less 20 cm). After the consignment of 17 kg boxes of fish had been loaded on the vessel Northern Phoenix it was realized that there was not enough consignment to complete the contract consignment. This state of affairs led to an amendment of the original agreement whereby the consignment would be supplemented by 30 kg cartons and mackerel. I do not find that there were two separate agreements to the extent that there was a first agreement and a second agreement to the extent that the first and second are severable as respects several substantive and important terms. Indeed, on the evidence, I hold that the reasonable conclusion that can be made about 30 kg cartons and mackerel is that the parties agreed to amend their original agreement by substituting 17 kg cartons with 30 kg cartons and mackerel. It is not uncommon in commerce for parties to make such amendment when both parties see that a term in their agreement is impossible to implement and that an amendment of the particular term would be for the mutual benefit of the parties.

[9] It was after the exercise of sampling of the selected boxes had been completed that loading of the bulk of fish on the vessel Northern Phoenix, captained by Captain Brown (a defence witness), took place. The destination of the cargo of fish was Luanda, Angola; a journey of three days. The Northern Phoenix set sail from Walvis Bay Habour with its cargo of the fish on 17 August 1998.

[10] A substantial term of the agreement is that it was agreed that the first defendant shall not discharge the fish in Luanda unless the fish was paid for in cash and that the amount of money was put on board the Northern Phoenix on its return journey to Walvis Bay so that the amount would be placed in the hands of the plaintiff when the vessel arrived in Walvis Bay. That did not happen.

[11] The issue as to whether rotten fish weighing 16,2 tons was sold to the defendant by the plaintiff in Walvis Bay can be disposed of simply thus. I accept Captain Brown's evidence that when he noticed that some fish was rotten he ordered that fish offloaded from his vessel. He was categorical and emphatic that under no circumstances would he have allowed any rotten fish aboard his vessel for shipment. The conclusion therefore is that no rotten fish found its way on the Northern Phoenix for shipment to Luanda, Angola. Accordingly, I find that no rotten fish formed the bulk of the fish that the plaintiff sold to the first defendant and carried on board Captain Brown's Northern Phoenix. In any case, the evidence did not establish the origin of the fish or that it came from the plaintiff. Little wonder then that the defendants abandoned any reliance on 'rotten fish'. I shall return to the defendants' abandonment of its reliance on 'rotten fish' in due course.

[12] This leads me to a consideration of the first defendant's reliance on the fact that payment had not been made to the plaintiff upon the justification that the fish sold by the plaintiff was of 'inferior quality'. The epithet 'inferior' (or is antonym 'superior') used to describe goods that are the subject matter of a contract of sale does not express a legal concept that can lend itself to legal interpretation and application. Accordingly, it has no relevance in this proceeding. I, therefore, accept Mr Tötemeyer's submission that the enquiry should be confined, as a matter of law, to whether or not the fish sold and delivered was reasonably fit for human consumption.

[13] Thus, what the plaintiff would have undertaken was that the fish was reasonably fit for human consumption. I do not think the plaintiff would have made an undertaken for the resale of the fish in Luanda, Angola. That is not how business is done in Namibia. The plaintiff could not have undertaken that the fish would be resold in Angola – no matter the prevailing market conditions and economic dynamics in Angola when the fish arrived in Angola or how weak, unproductive and unimpressive the marketing strategy of Mr Bastos is.

[14] Mr Bastos (a defence witness) was the buyer of the fish. It was the allegation of the defendant that Bastos failed or refused to pay for the fish because the fish was of 'inferior quality'. I have already rejected reliance on the 'inferior quality' 'defence' as untenable in law.

[15] Furthermore, I find that Martins had discussions with the second defendant after the Northern Phoenix had departed for Luanda, Angola, and at no time did the second defendant mention that the fish the plaintiff delivered to the first defendant was of 'inferior quality' and therefore unresaleable in Angola. I accept Martins uncontradicted evidence that the second defendant promised to make payment for the fish. Indeed, in this regard, I accept that the second defendant wrote numerous letters to Correira praying that he be given more time to make payment via a series of to-and-fro communication (directly or indirectly through their respective legal representatives), covering a period of some five years; thus, admitting liability to make payment, and not raising as much as a single complaint about any defective fish, (that is, fish that is not fit for human consumption) or any defect at all. As Mr Tötemeyer submitted, this factual finding is 'singularly telling'.

[16] The evidence is overwhelming and irrefragable that Bastos undertook to pay the entire amount of the invoice issued by the second defendant to Mr Bastos's company including payment for the 17 kg boxes which, if Bastos was to be believed, was defective. Bastos never told the defendants that he would not make payment: he was just unable to make payment. It follows that any defence based on Bastos's failure to make payment to the defendants for the fish the defendants sold to Bastos's company is also unsustainable.

[17] I shall now look at the defendant's unproven assertion that the fish that the plaintiff sold to the first defendant was sourced from Karibib Fisheries and the fish was written off, and so the plaintiff did not pay Karibib Fisheries for the fish. For these assertions the first defendant felt justified in refusing to pay the plaintiff. This allegation was unproven, as aforesaid, and so it cannot assist the first defendant in this proceeding. In any case, I have already found that the first defendant has never refused to pay the plaintiff: it was a matter of its inability to pay. I have considered this aspect only to make a point. It is to conclude that like its reliance on 'inferior quality fish', 'rotten fish', the first defendant's reliance on 'written-off fish' is yet another unconvincing attempt by the first defendant to offer some semblance of a defence for its liability towards the plaintiff. I should say that the first defendant's failed attempts amount to the first defendant clutching at straws for a good defence. Of course, a drowning man will clutch at a straw. On the probabilities I find that the plaintiff has proved its claim respecting the sale of fish to the first defendant and the first defendant's failure or refusal to pay for the fish in terms of the parties'

agreement. It is not disputed that the purchase price of the fish sold and delivered was N$991 118,00 (excluding transport costs). I find further that the first defendant has really no good defence to the plaintiff's claim. The evidence accounts for these conclusions, and the conclusions are unaffected by my finding previously that the sale of fish under the agreement (as amended) was sale by sample.

[18] I now proceed to consider whether the second defendant is liable for the suretyship he stood. Mr Tötemeyer says that the second defendant is liable because he bound himself as surety and co-principal debtor for all the first defendant's obligations arising from the sale of the fish.

[19] Mr Frank's says the second defendant is not liable, and what is counsel's argument. Only this, that in terms of the initial agreement a full freight of 17 kg cartons was envisaged. Loading of the cargo on the Northern Phoenix was carried out until Friday, 14 August 1998 when loading stopped. Loading was to resume on the following Monday, 18th August but loading of more 17 kg cartons was rejected by Captain Brown. Subsequently the 30 kg cartons were loaded. For all this, Mr Frank submits, the plaintiff could not honour its obligations in terms of the original agreement, 'ie a boat load of 17 kg cartons' and so a new agreement was then reached to the effect that the partial performance would be accepted and supplemented by 30 kg cartons and mackerel. Thus, for Mr Frank; 'The suretyship, obviously did not apply to this agreement and furtheremore came to an end on the conclusion of this agreement as all first defendant's obligations in respect thereof fell by the roadside'. Accordingly, counsel concludes that 'the suretyship does not relate to the liabilities of the first defendant in this matter but was entered into in respect of the original agreement'.

[20] I have found previously that in this case there is only one agreement, that is, the original agreement, which was subsequently amended in terms mentioned previously. And, significantly, the suretyship done on 2 September 1998, after the Northern Phoenix had sailed for, and arrived in, Luanda with its cargo of the fish. These conclusions, with respect, debunk the second defendant's averment so ably articulated by Mr Frank in his aforementioned submission. Consequently, I find that the second defendant is liable to the plaintiff for the suretyship he stood.

[21] It remains to consider the issue of interest. I find that the probabilities are that the first defendant received the invoices in which interest was claimed. Mr Roux (the second defendant, who represented the first defendant at all material times) may not have received the invoices himself. But that is not uncommon in modern commerce and industry; and that does not establish that the first defendant did not receive the invoices in question. Furthermore, I find that the due date for payment for the fish sold and delivered to the first defendant was the date on which the cargo of fish arrived in Luanda, Angola (as mentioned in para 9), that is, on or about 21 August 1998. There has been non-payment and so interest *a tempore morae* runs from around that date by operation of law. (See A J Kerr, *The Law of Sale and Lease*, 3rd ed (2004): pp 224 – 226; and the cases there cited.)

[22] As to costs; I think costs should follow the event. However, in virtue of the conduct of the plaintiff which contributed greatly to the matter not been concluded expeditiously, as I have mentioned in paras 1–4, I think the plaintiff should be awarded only part of its costs.

[23] For these reasons I make the following order:

(a) Judgment is granted for the plaintiff and against the defendants jointly and severally, the one paying, the other to be absolved, in the amount of -

(i) N$514 620,45, and

(ii) N$12 276,43,

plus interest on the amount of N$514 620,45 at the rate of 20 per cent per annum, calculated from 10 September 2003 to date of payment.

(b) The defendants are jointly and severally to pay 70 per cent only of the plaintiff's costs of suit, including costs of one instructing counsel and one instructed counsel.

C Parker

Acting Judge

APPEARANCES

PLAINTIFF :	R Tötemeyer SC Instructed by Diekmann Associates, Windhoek
DEFENDANTS:	T J Frank SC Instructed by Du Pisani Legal Practitioners, Windhoek