THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case : 247/2007
UNREPORTABLE

In the appeal between:

AMANITA PREMIER OILS LTD Appellant (Plaintiff)

and

PRAYSA TRADE 1069 CC t/a JUMBO PEANUTS Respondent (Defendant)

Before: Cameron JA, Navsa JA, Cachalia JA, Hurt AJA and Kgomo AJA
Heard: Tuesday 13 May 2008
Judgment: Thursday 29 May 2008

Contract of sale – delivery of groundnuts – terms of contract – court reversing factual findings of trial court – finding in favour of supplier / plaintiff

Neutral citation: Amanita Premier Oils v Praysa Trade (247/07) [2008] ZASCA 59 (29 May 2008)

CAMERON JA:

Introduction

[1] In the High Court in Pretoria Botha J granted the respondent (defendant) absolution from the instance on a claim the appellant (plaintiff) brought for payment of an amount outstanding under a contract for delivery of groundnuts. After concluding an agreement with the defendant on 6 August 2004, the plaintiff delivered a total of 926.54 metric tons of nuts at a price of R4 300 per ton. Of this, the defendant used or on-sold 886.54 tons (mostly processing it for peanut butter). However, against invoices for R3 984 115.08, the defendant paid only R3 078 215.79, and then stopped paying because of a dispute about quality. After allowing for the forty-ton remnant the defendant has not used, and deducting R25 488.72 for bags that were delivered wet, the plaintiff in this appeal – pursued with leave granted by Botha J – seeks an order for payment of R708 417.49.

[2] In the negotiation of the contract, the plaintiff (a Zambian-registered corporation) was represented by a local agent, Mrs Christie Abrahams (operating through Cypro Consulting CC), and defendant by its member, Mr Hein Geyser. Abrahams and Geyser agreed on nuts of Malawian or Zambian origin, and the

written sales contract they signed specified that their 'quality' would be 'hand cleaned farmer's grade groundnuts'.

[3] At the trial, the primary issues were what terms the parties agreed and whether the quality of the nuts delivered conformed with those terms. Abrahams testified for the plaintiff, as well as Mr Diego Jean Maria Casilli, the director of her principal. Geyser testified for the defendant, and called two employees of the Perishable Products Export Control Board (PPECB),[1] Mr Wegner and Mr Bosman, to describe tests they performed on samples of groundnuts to establish their quality and levels of aflatoxin (a dangerous fungus-produced toxin that may cause cancer in humans).

Judgment of the trial court

[4] Botha J found that the plaintiff's contractual performance was deficient in that the nuts delivered were of sub-standard quality. While the contractual specification 'farmer's grade' was to some extent ambiguous, and did not conform to an officially recognised

[1] Perishable Products Export Control Act 9 of 1983, s 2 of which provides that notwithstanding the repeal of the Perishable Products Export Control Act 53 of 1926, the Board, established in terms of that Act, continues to exist and to be a juristic person.

grading in South Africa, 'hand cleaned' denoted some additional processing by hand. He endorsed Wegner's view that this indicated that the nuts would be standard grade or choice grade. He accepted Geyser's evidence that Abrahams had provided a sample that he found acceptable, but that the nuts later supplied fell short of its quality. He found that contemporaneous correspondence undermined Abrahams's evidence to the contrary, while corroborating Geyser's account that during deliveries he had persistently complained, with justification, about quality. In addition, he found that PPECB tests established that the nuts had unacceptable levels of aflatoxin, and that the plaintiff's contractual performance therefore did not conform to the parties' agreement.

[5] Although the defendant had rejected only two loads out of 36 delivered, and used the bulk of the rest (barring 40 tons), the trial court found that Geyser had not accepted the nuts as adequate, but had pressed, as he was entitled to do, for a downward price adjustment, which the plaintiff had refused to grant. Because of the deficient quality, the plaintiff had failed to prove that it was entitled to the stipulated contract price. It had also failed to prove

what it should get instead. On the pleadings and the evidence, it was all or nothing for the plaintiff. That it got nothing, Botha J remarked in conclusion, was not unfair: the plaintiff remained free to tender adequate performance, or to offer the defendant an adjustment of the contract price to take account of the deficiencies.

The evidence before the trial court

[6] On appeal, as at the trial, the primary contest was the terms of the parties' agreement and the quality of the groundnuts delivered under it. Since Casilli was out of the country for most of the period, the plaintiff's case on these issues rested in large measure on the evidence of Abrahams. Conversely, since the defendant did not call any of the staff who received or inspected the groundnuts, nor the other authors of correspondence directed to Abrahams and the plaintiff, the defendant's case on these issues rested exclusively on the account Geyser gave. Before relating Abrahams's and Geyser's evidence, it may be useful first to summarise the correspondence, since the judge attributed some significance to it in determining the probabilities.

[7] It was common cause that the defendant took delivery of all loads bar two. While there were specific complaints about musty, mouldy and wet bags (for which allowance was on the whole made in the invoicing), only two loads were reported as wholly unacceptable, namely those rejected on 17 September and 13 October 2004. Before the second rejection, Geyser's staff complained in writing to Abrahams on 11 October in a fax headed 'POOR QUALITY AND MUSTY PEANUTS'. That fax referred to loads delivered on 17 and 20 September. It also itemised 26 wet bags delivered on 7 September, and musty peanuts delivered on 29 September.

[8] After the second load was rejected on Thursday 14 October, Abrahams wrote to Casilli, scolding him about quality:

> 'I am not sure what is going on, but the truckloads we receive lately are of VERY bad quality. … This qualifies as crush grade. The stuff is also mouldy and wet – this is now the 4th truckload we receive of this bad quality. I will send you truck details, we demand a refund or replacement. This does not comply with the specifications … NO mouldy kernels allowed. What are you guys sending us?'

('Crush grade', as emerged at the trial, is the lowest grade of groundnut, used only for oil extraction.)

[9] On 18 October, Abrahams emailed the transporters, copying Casilli, recording that 'in total we received 34 truck loads, you'll

note load 32 … rejected. Also see the increased number of wet bags on the last trucks.'

[10] On 26 October, the defendant again wrote complaining to Abrahams about sixteen musty bags of peanuts delivered the previous day. On 12 January 2005 the defendant faxed Abrahams adding mention of a further eleven musty bags received on 25 October, stating that 'As we are releasing our stock, we discover a lot of musty bags' (making a total of 27).

[11] The defendant made three payments for the nuts delivered: it paid for the first ten loads (delivered according to Abrahams's contemporaneous hand-written notes between 25 August and 13 September) on 14 October; a second payment on 10 November (for loads delivered from 20 to 28 September); and a third on 22 December 2004 (for loads delivered on 28 and 29 September). The payments therefore covered what the defendant received until the end of September. No payments were made for loads delivered thereafter.

[12] On 1 December 2004, before the defendant's third payment, Abrahams wrote to the defendant that Casilli, who was about to visit South Africa, was 'not at all happy with the rate of payments

[that] have been received': 'He wants a written undertaking from [the defendant] as to when final payment can be expected'. Abrahams added: 'We also need to discuss the two "rejected" loads. Please advise where you have off-loaded and stored these two.'

[13] On 24 January 2005, in evident response to increasing pressure from the plaintiff, relayed through Abrahams, to settle the outstanding amount, Geyser directed a significant communication to Casilli:

> 'Up to now we never made any promise to anybody about payment and settlement to you before end of January 2005.
> You have not been prejudiced in this relationship as far as we know.
> What we did was to make payments to Cypro Consulting who then distributed the money.
> It will be a pity if you take this matter to a legal status, as it will delay the settlement of the account, which I presume nobody wants.
> As I have told your Cypro representative I can't make a promise of a settlement date because of unexpected late payments by our customers. I am prepared to make a promise for a final settlement not later than the 21st of March 2005.
> I hope you will find this in order.'

[14] On 2 February 2005, Geyser wrote to the plaintiff's attorneys that there was a 'quality problem' which was being investigated, and that the results would be known shortly: 'Further I wish to draw to your attention that your client is indeed aware of the

quality problem and that it was pointed out to him by Cypro.'[2] On the same day, the plaintiff's attorneys advised Casilli of this communication. Casilli replied indignantly that 'There is now no compromise', and 'We have case of FRAUD by Cypro'.

[15] On 4 February 2005, Abrahams, Geyser and Geyser's wife met the plaintiff's attorney at Abrahams's home. The attorney relayed to Casilli the defendant's offer from this meeting:

> 'On Monday 7 February 2005 R100 000 will be paid into my trust account.
> On 3 February 2005 the peanuts were "smoked" and they have to be kept under sails for ten days, which means that on 14 February 2005 the peanuts will be uncovered.
> On 15 February ACE [the inspection arm of the bankers financing the defendant's transaction] will go to the storing facilities and grade the peanuts. Apparently 10%-15% of the peanuts cannot be used. Mr Geyser is meeting with the bank as we speak.
> Total losses of peanuts that cannot be used will be given to us via the grading of ACE and an independent grader and the amount outstanding will then be reduced with the amount of peanuts that cannot be used. I received samples of the batches of peanuts delivered, according to ACE the [toxin] amount is too high.
> I am advised that these losses (initially) of peanuts not used by Jumbo can be recovered by you, according to the contract that you have with your suppliers … is this correct?
> Once the amount is reduced one third of the amount outstanding will be paid to you (includes the R100 000 on trust), on 18 February 2005.
> On 20 March 2005 the rest outstanding will be paid over to us.
> This is what is on the table. Is this acceptable to you?'

[16] This offer the plaintiff rejected. An email he directed on 5 February 2005 jointly to Geyser and Abrahams indicated that he

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[2] 'Ook dat daar 'n kwaliteitsprobleem is wat tans ondersoek word en dat die uitslag daarvan eersdaags bekend sal wees.
Verder wil ek onder u aandag bring dat u klient wel bewus is van die kwaliteitsprobleem en dat dit deur Cypro aan hom uitgewys is.'

blamed them both for the unacceptable offer, and that he planned to institute action against both of them. The next day, Sunday 6 February, Abrahams wrote a reproving letter to Casilli:

> 'You knew the quality of the product was not as per the contract. It was even pointed out to Farmer's World [the plaintiff's supplier]. Please do yourself a favour and read the [joint venture] you have with Farmer's World with emphasis to quality aspects. They NEVER cleaned the groundnuts, it was farmer's grade stuff they supplied and you were made aware of it.'

[17] The next day, the plaintiff's attorneys sent a letter of demand to Cypro, rejecting further negotiations, and demanding payment of the full outstanding amount by the next day. The defendant itself responded to this letter, through a letter from its attorneys dated 8 February 2005. It claimed that the groundnuts were defective because they did not conform to the 'hand picked select' quality; instead, 'the supply delivered to our client was "farmer's stock"'. The latter term was novel to the parties' interactions. In evidence, Geyser explained that it denoted peanuts merely shelled by the farmer, but not cleaned, nor cleared of broken or halved kernels, skins, shells, sticks, stones; so 'any thing' (*'enige ding'*) could be inside the bags. The letter proposed that the disputed stock be sifted and sorted, and that an accounting be done thereafter.

[18] The plaintiff found this unacceptable. Summons was issued and served just over two weeks later. The defendant pleaded that

the parties had agreed that the nuts would be hand-selected and choice grade, that they would conform to specified sizes, and be fit for human consumption. (The defendant initially counter-claimed for a price reduction of 20%, plus labour costs of R894 250 incurred because of the disputed deficiencies, but abandoned this on the first day of trial.)

[19] Against this background of written evidence, I now return to the parties' conflicting accounts of what occurred when the contract was concluded and while the nuts were being delivered. Abrahams testified that 'farmer's grade' groundnuts emanated from small-scale farmers in Malawi or the bordering areas of Zambia who produced cash crops on farms smaller than a hectare. The relevance of this lay in the quality of the nuts, and the state in which they were shipped. The producers hand-shelled the nuts, and separated foreign matter from them. Later, the product was again hand cleaned by women workers at central collecting depots, who removed twigs, shells, leaves, stones. Casilli testified that these were hand-shelled nuts, sorted and cleaned by hand to the minimum specification, 'as low as you can get from the field'; it was not a graded, sorted product. Farmer's

grade, Abrahams emphasised, was to be distinguished from other grades such as crush and choice, and grades that specified different sizes. She was emphatic that it was not equivalent to choice grade.

[20] She explained that she negotiated price, grade, quality and delivery with Geyser for a first, near-identical, supply contract that she concluded with him in Cypro's own name. When Geyser said he needed more nuts, she concluded a second contract with him – the one in issue – on behalf of the plaintiff. She was adamant that though she knew that the defendant wanted the nuts to process into peanut butter, there was no agreement that they would be choice grade, or 'hand picked select'. The nuts had been hand cleaned, but not sorted – that remained to be done after delivery. 'Farmer's grade' was all that the plaintiff undertook to deliver, and that was what it did indeed deliver.

[21] Abrahams insisted that to Geyser's knowledge it was impossible to determine or control aflatoxin levels in groundnuts imported from Africa: it was for this reason that the written agreement made no reference to it.

[22] Geyser testified that he needed groundnuts during mid-2004, which was a time of great shortage (*'… 'n baie groot skaarste aan grondbone. Die oes daardie jaar was nie na wense nie'*). He expressly ordered edible grade (*'eetgraad'*) nuts. This entailed that they would be choice grade. He also specified that aflatoxin levels had to be acceptable: Abrahams assured him this would not be a problem. He showed her exactly what 'choice grade' was, and she brought him samples that were excellent, top-grade. He was prepared to pay R4 300 per ton because no cent would be required for further cleaning.

[23] Yet, Geyser recounted, he realised at the time of the very first deliveries ('*van meet af*', that is from 25 August 2004) that the nuts delivered were quite different from those previously supplied under the contract with Cypro: they were much smaller, with many shrunken kernels and a tremendous level of impurities such as sticks, stones, insects and other objects. He telephoned Abrahams to object. On various occasions he told her that he was extremely unhappy with the quality – the nuts were at face value (*'op sigwaarde'*) not what had been agreed. He told her that the product delivered must be removed (*'die goed moet weg'*); he

declined her request to store them for her, but she responded that she had no place to do so, and the delivery trucks were now being used elsewhere.

[24] Geyser recounted that Abrahams visited his plant to inspect samples of the unsatisfactory nuts (he mentioned 11 September as the date of the first such visit, which, as the cross-examiner pointed out to him, was early, after the first nine deliveries; though the samples are first mentioned in defendant's fax of 11 October). Abrahams repeatedly assured him that she would sort out the quality issue and that he could trust her. He should first process the previous contract's nuts; they would then negotiate when he needed to process the unsatisfactory nuts and put the matter right (*'en dit regstel'*). However, he made no payments after the December payment because of the quality objections.

[25] He refused to accept the two expressly rejected loads because their standard was of an 'extremely clear, obvious, terribly bad quality' (*'uiters duidelik, ooglopende, verskriklike swak kwaliteit'*). Their rejection was designed to make a 'statement' because Abrahams had disregarded his previous complaints.

[26] Geyser testified that apart from the 40 tons still extant, he processed about half of the nuts delivered, mixing them with 'clean' nuts sourced elsewhere to bring down aflatoxin levels. The remainder (420 tons) he sold to a farmer for R200 000 (barely one-tenth of the purchase price). His financing bankers, to whom Abrahams (acting for Casilli) had introduced him, had advanced the (discounted) financing for all 36 loads received, bar the two expressly rejected.

Assessment of the evidence

[27] The onus rested on the plaintiff to establish the terms of the contract it sought to enforce – that is, the written contract Geyser and Abrahams signed. The first question is thus whether, as the defendant sought to establish, the parties' agreement in fact provided that the nuts would be hand-selected and choice grade. Geyser testified that his express stipulation with Abrahams was for first-grade, top-grade, choice nuts of 'hand-picked select' quality. The major obstacle to this version lies in the express written terms: 'hand cleaned farmer's grade groundnuts'. Geyser stated in cross-examination that he was a careful businessman:

'Normally we would have set out every jot and tittle, because that is how I normally do my business'.[3] On this occasion, however, he did not: 'The conditions from my side, these are not written here, like many things are not written here'.[4] The reason, he testified, was that 'I said to her, shouldn't we rather set out everything, and she said to me, but then you make it very complicated and later that will cause problems … she assured me that I did not need to worry because after all we would not have problems'.[5]

[28] This highly damaging detail – which, as counsel rightly conceded, essentially entailed that Abrahams lied to Geyser and cheated him – was never put to Abrahams during an extensive cross-examination. That is the first obstacle to its acceptance. The second is that it is inherently improbable. The basis on which Geyser claimed Abrahams persuaded him not to record his express stipulation for 'choice' nuts – that it would 'complicate' matters – is hard to credit. Geyser was a sound and self-reliant

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[3] *'Normaalweg sou ons beskryf het elke jota en tittel want dit is hoe ek normaalweg my besigheid doen'.*

[4] *'Die voorwaardes van my kant af, dit is nou nie hier geskryf soos baie dinge nie hier geskryf is nie'.*

[5] *'Die voorwaardes van my kant af, dit is nou nie hier geskryf nie, soos baie dinge nie hier geskryf is nie, want ek het vir haar gesê moet ons nie maar alles beskryf nie toe se sy dan maak jy dit nou baie ingewikkeld en later gaan dit probleme veroorsaak … maar sy het my verseker ek hoef*

businessman. That he would defer to Abrahams on such an important issue, for such a flimsy reason, is difficult to accept.

[29] In short, if securing choice grade nuts was as vital to Geyser as he claimed, and he told Abrahams this, the likelihood is that the written agreement would have reflected it. Instead, it contained something very different. It is therefore probable that the parties agreed only, as the contract recorded, that the nuts were to be 'hand cleaned, farmer's grade' quality.

[30] What did this demand of the supplier? As Botha J rightly observed, the description contains some ambiguity, predictably reflected in the parties' differing accounts at the trial. Abrahams insisted that it meant something different from, and inferior to, choice grade, or 'hand-picked select' (the category familiar to the PPECB): they would be something less than the best.

[31] Wegner's evidence in this regard was that 'hand cleaned farmer's grade' was not a known term within the grading regulations the PPECB applies. The weight his evidence can carry in relation to the parties' own characterisation of their contractual specification is thus limited. However, he regarded

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nie bekommerd te wees nie want ons gaan mos nou nie probleme hê nie'.

the specification as ‘a little misleading’ (*‘’n bietjie misleidend’*) since ‘farmer’s grade’ would refer to a product that was not necessarily selected into classes or grades. He added however that ‘hand cleaned’ would suggest to him (*‘sou weer vir my vat na’*) a product that was not merely machine cleaned, but hand cleaned, thus suggesting choice or standard grade (*‘wat dus op die keur of standaard graad spesifikasies ‘n aanduiding sou gee’*).

[32] A factor bearing considerably on the probabilities here is Geyser’s own account that there was a severe shortage of groundnuts in mid-2004 because of crop shortages. This explains why the nuts were sourced from central Africa (and not from Geyser’s previous suppliers, all of whom seem to have been South African), and it points to his being willing to accept a contract embodying what Abrahams was able to supply, on the terms she offered, and at the price Casilli quoted. It also points away from Geyser’s insistence that the agreed price (R4 300 per ton) necessarily denoted top-grade nuts.

[33] Also significant is Geyser’s own conversance with what he termed ‘farmer’s stock’, a grade he explained included impurities along with shelled nuts. The terminological resonance between

‘farmer’s grade’ and ‘farmer’s stock’ does not appear incidental. It seems likely that Geyser must have known when terms were agreed that ‘farmer’s grade’ entailed less than choice grade. ‘Hand cleaned’ suggests an additional process of manual cleansing, as Abrahams described in her evidence. But it does not mean ‘hand selected’, which necessarily connotes a measure of sorting, since it was common cause at the trial that the nuts were not expected to be sorted.

[34] The crucial question is to what extent the nuts delivered conformed with what the plaintiff undertook to supply. Two things are beyond contest. First, at least two loads did not conform: those Geyser rejected on 17 September and 13 October. Second, Geyser’s staff expressly complained in writing, on more than one occasion, about wet bags and mouldy peanuts: but each time they did so they specified precisely the details of the loads and numbers of affected bags.

[35] The written details bear on whose testimony is more probable. Geyser testified that from the outset he complained repeatedly about the quality of the nuts that were delivered. A difficulty is that this account did not square with what defendant’s counsel put

to Abrahams. She was told in cross-examination that Geyser would testify that he had complained continually from about the end of September (*'van ongeveer einde September af deurlopend'*). This suggests not only that the complaints started later, but that they were more isolated, than Geyser's evidence sought to portray, and thus that he coloured his account with some measure of overstatement.

[36] Abrahams confirmed that she visited Geyser's plant north of Pretoria to inspect samples of deficient nuts, though she was not present when they were drawn. She linked her recollection of this visit to receipt of the defendant's letter of 11 October, where the samples are first mentioned, and which complained about 'poor quality and musty peanuts'. Abrahams testified that she accepted that the complaints and samples were related to the specific loads itemised in that letter, namely the expressly rejected load of 17 September, and the load delivered three days later on 20 November. As she bluntly stated, 'There was no reason not to accept this.'[6] As against this, it is difficult to accept Geyser's

[6] *'Daar was geen rede om dit nie te aanvaar nie.'*

evidence, lacking entirely in documentary back-up, that his complaints were insistent from the first delivery.

[37] A further difficulty with Geyser's evidence is that, while he insisted that there were pronounced differences between the loads previously supplied under Cypro's direct contract, and those supplied on behalf of the plaintiff, he had difficulty in articulating what his problem was:

> 'I can only tell you that samples were in fact drawn [from every load] and that I saw … here is a problem with the quality and I could not say how big the problem was and I could not tell you what the problem was. I showed them to Mrs Abrahams, each sample. My people were there, we looked at them, we talked about it and then she promised to get something done and that it all I can say to you, but I do not know what is in the loads before I have put them through the [processing] machines.'[7]

[38] Geyser's inability to specify the problems with the loads other than those he rejected outright (and the specific complaints about wet and mouldy bags) suggests that quality problems, as Abrahams indeed inferred, related only to those.

[39] The evidence thus established that at least two of the loads and some bags in addition did not conform with the parties' contractual

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[7] *'Ja, ek kan net vir u se dat daar wel monsters getrek was [van al die vragte] en dat ek gesien het dat die kwaliteit, hier is fout met die kwaliteit en ek kon nie se hoe groot die fout is nie en ek kon nie vir u se wat die probleem is nie. Ek het dit vir Mev Abrahams gewys, die monsters apart. My mense was by, ons het daarna gekyk, ons het daaroor gepraat en toe het sy belowe om werk te maak daarvan en dit is al wat ek vir u kan se maar ek weet nie wat is in die vragte voor ek dit nie deur die masjiene gegooi het nie.'*

specification; but Geyser's evidence that virtually all the nuts, from the outset, so deviated, cannot in my view be accepted.

[40] Botha J rightly considered that two of Abrahams's written communications to Casilli – both of which she supplied to the defendant when she thought the plaintiff planned to sue her – lent support to Geyser's complaint about the general standard of the nuts. These were her scolding message of 14 October 2004, in which she claimed that Casilli had sent 'crush grade' nuts; and her message of 6 February 2005 in which she stated 'They NEVER cleaned the groundnuts, it was farmer's grade stuff they supplied and you were made aware of it'.

[41] Of the first, Abrahams said that she was referring to the rejected loads (given substance by the reference to 'the truckloads we receive lately'), and was in any event intended to exhort the plaintiff's suppliers do their best amidst possible quality variances. She pointed out moreover that she could speak with authority only about the samples she herself had inspected (which she believed came from the rejected loads) – she had not been present when all the deliveries were off-loaded, and could therefore not pronounce on them.

[42] Regarding the January message. Abrahams reiterated that it referred only to the rejected consignments, and that she had no personal experience of the loads delivered, adding that she wished to get Casilli off her back (given substance by the fact that the previous day Casilli threatened her with legal action).

[43] The insufficiencies in these explanations must be weighed against the documents that undermine Geyser's own account. That evidence is in my view even weightier. First, it is notable that on 8 October, in finalising the financing deal with the bank, the defendant described the nuts that were then being delivered as 'choice' (the warehouse documentation records: '"Said to be" Ground Nuts (choice grade)'). Though he blamed Abrahams for this description, the fact is that at a time when he later claimed there were wholesale quality deficiencies he was happy to nail down a substantial (R4.3 million) credit deal on the basis that the overall quality being delivered was good.

[44] Particularly destructive of Geyser's account of long-standing and severe quality problems is his willingness on 24 January to offer the plaintiff 'final settlement' of the amounts owed by 21 March (with no word of complaint about quality). Eleven days

later, on 4 February, the stakes having been raised, Geyser put less on the table: but he was still offering an immediate R100 000 plus the rest after a price adjustment based on quality testing; this letter recorded that ’10-15% of the peanuts cannot be used’ – with no suggestion that from the outset the shipment had been deficient in its totality. In the midst of this, it must be remembered, the defendant on 2 February alluded only to a ‘quality problem that is currently being investigated’ (*‘’n kwaliteitsprobleem … wat tans ondersoek word’*). It was only on 8 February, after open hostilities had commenced, that the defendant recorded for the first time that the nuts were defective because they did not conform to the ‘hand picked select’ grade. This was also at a time when Geyser’s own correspondence indicated that he was experiencing cash flow problems.

[45] Geyser’s explanation of his 24 January message – that he was merely coming to the aid of Abrahams because she begged him (*‘my kom soebat’*) to make a (necessarily false) promise in order to get Casilli off her back – reeks of improvisation. His explanation of the R100 000 offer – that he was amenable to settlement – is plainly true; and perhaps the matter might have

reached a juster resolution had the plaintiff also been amenable; but the fact that he was willing to make this offer at all is a further indication against his account of general and pronounced deficiencies.

[46] It is in my view not possible to accept Geyser's account that he was on the verge of rejecting all the loads all along, and wanted to do so, but was diverted from this intention by the repeated blandishments of Abrahams. The likelihood is that as a strong-minded businessman he would, on the contrary, have rejected product unacceptable to his needs, and that he in fact did so when the product fell short – though only on the occasions recorded in the written exchanges with Abrahams. His inability to explain under cross-examination why, in the light of his detailed descriptions of poor quality, he had not rejected subsequent loads, bears this out.

[47] Geyser testified that for practical reasons relating to his store-room layout he used the Cypro-supplied nuts first, and started using those supplied on behalf of the plaintiff after they had been depleted: it was only then that he realised the extent of the problem. This, as already indicated, is difficult to square with his

evidence that he was aware of the problem, and complained insistently, from the outset. It is also difficult to square with the fact that some loads and bags were at an earlier stage expressly rejected. This, again, points away from the conclusion that there was a general and acute quality deficiency.

[48] These considerations lead to the conclusion that it is not possible to accept Botha J's findings on the probabilities. These were based on the trial judge's view of the inherent probabilities in the contesting versions, with strong reliance on the written evidence. In my respectful view, this court is in as good a position as the trial judge to assess these.

[49] It follows in my view that the trial court should have found that:

(i) the plaintiff established that the sole terms relating to the product to be delivered were those contained in the parties' written agreement of 6 August 2004;

(ii) those terms entailed that the plaintiff would deliver farmer's grade nuts that were hand cleaned, but which were less than choice grade or hand picked select;

(iii) there was no specification regarding aflatoxin levels;

(iv) barring the rejected loads and the expressly specified wet and mouldy bags, the plaintiff in fact delivered according to specification.

[50] These findings make it unnecessary to consider the parties' submissions on the difficult questions that may have arisen regarding the exceptio non adimpleti contractus and the attendant possibility of price-reduction.

[51] There is an order in the following terms:

1. The appeal succeeds with costs.
2. The order of absolution from the instance is set aside and in its place there is substituted:
   '(a) The claim succeeds with costs.
   (b) There is judgment for the plaintiff in the amount of R708 417.49 plus interest at the rate of 15.5% on this amount from the date of judgment to date of payment.'

E CAMERON
JUDGE OF APPEAL

CONCUR:
NAVSA JA
CACHALIA JA
HURT AJA
KGOMO AJA