THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 232/2018

In the matter between:

STARWAYS TRADING 21 CC (in liquidation)	**FIRST APPELLANT**
SIMON MATLESHE SEIMA NO	**SECOND APPELLANT**
NURJEHAN ABDOOL GAFAAR OMAR NO	**THIRD APPELLANT**
NANO ABRAHAM MATLALA NO	**FOURTH APPELLANT**
and	
PEARL ISLAND TRADING 714 (PTY) LIMITED	**FIRST RESPONDENT**
SHOPRITE CHECKERS (PTY) LIMITED	**SECOND RESPONDENT**

Neutral citation: *Starways Trading v Pearl Island Trading* (232/2018) [2018] ZASCA 177 (3 December 2018)

Coram: Lewis, Wallis, Zondi and Van der Merwe JJA and Matojane AJA

Heard: 19 November 2018

Delivered: 3 December 2018

Summary: Sale – in the absence of agreement to the contrary, provisions of s 59 of the Customs and Excise Act 91 of 1964 are terms of a sale agreement implied by law – meaning of term *ex warehouse* – not agreement to the contrary – insistence by seller on incorrect interpretation of contract constituted repudiation thereof.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Davis J sitting as court of first instance):

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

JUDGMENT

Van der Merwe JA (Lewis, Wallis and Zondi JJA and Matojane AJA concurring)

[1] The first appellant, Starways Trading 21 CC (in liquidation) (Starways), is an importer of, *inter alia*, sugar. Starways was placed in provisional liquidation shortly before the hearing of the appeal. Its provisional liquidators have been authorised to continue the prosecution of the appeal and they elected to do so. They have since been added as the second, third and fourth appellants in the appeal. The first respondent, Pearl Island Trading 714 (Pty) Ltd (Pearl), is a wholesale supplier and the second respondent, Shoprite Checkers (Pty) Ltd (Shoprite), is a retailer.

Background

[2] On 14 July 2016, Starways and Pearl entered into a written agreement in terms of which Starways sold 25 000 metric tonnes of white refined sugar to Pearl (the sugar contract). The sugar was destined for Shoprite. When a dispute arose between Starways and Pearl in respect of payment in terms of the sugar contract, Starways contended that Shoprite was contractually obliged to it to pay the purchase prices in terms of the sugar contract to Pearl. Starways approached the Western Cape Division of the High Court, Cape Town on motion for final orders enforcing the sugar contract against Pearl and the alleged contractual obligation of Shoprite to make payment to Pearl. That court (Davis J) dismissed the application and refused leave to appeal. The appeal is with the leave of this court.

[3] In terms of the sugar contract the sugar would be delivered to Pearl in 50kg bags. Clauses 7 to 10 of the sugar contract read:

'7. **DELIVERY PERIOD:** Between 1st October 2016 and 31st May 2017, as follows:

a) October 2016 – 8,000MT delivered directly from Port to the BUYER

b) November 2016 – 2,000MT Ex Warehouse

c) December 2016 – 2,500MT Ex Warehouse

d) January 2017 – 2,500MT Ex Warehouse

e) February 2017 – 4,000MT Ex Warehouse

f) March 2017 – 2,500MT Ex Warehouse

g) April 2017 – 2,500MT Ex Warehouse

h) May 2017 – 1,000MT Ex Warehouse

The above draws are subject to variation of about 500MT per month depending on space availability at BUYER'S warehouse and storage will be free of charge until end of May 2017.

8. **PRICE:** For 10,000MT is ZAR10,350 per MT (Excluding VAT) Ex Warehouse Cape Town.
For 15,000MT is ZAR10,650 per MT (Excluding VAT) Ex Warehouse Cape Town.

9. **INSURANCE:** To be arranged by BUYER on transfer of ownership.

10. **PAYMENT:** Payment against invoice as follows, but not exceeding:

a) 8000MT@ ZAR10,350 (Excl VAT) in October 2016

b) 2000MT@ ZAR10,350 (Excl VAT) in November 2016

c) 2500MT@ ZAR10,650 (Excl VAT) in December 2016

d) 2500MT@ ZAR10,650 (Excl VAT) in January 2017

e) 5000MT@ ZAR10,650 (Excl VAT) in February 2017

f) 5000MT@ ZAR10,650 (Excl VAT) in March 2017'

Clause 12 provided that the sugar contract '. . . shall be governed and construed under and in accordance with the laws of the Republic of South Africa.'

[4] On 20 March 2013, Shoprite and Pearl had entered into a written agreement (the supply agreement). In terms of the supply agreement Shoprite would from time to time place orders for the supply of products by Pearl, which would then warehouse, package and distribute the goods so ordered. Although for reasons of practicality and convenience Shoprite acted as intermediary for Pearl when the sugar contract was negotiated with Starways, it is common cause that Shoprite was not a party to the sugar contract and that Pearl onsold the sugar to Shoprite in terms of a separate agreement. In terms of this agreement, Pearl would package the sugar and deliver it to Shoprite at a higher price than the bulk prices specified in the sugar contract.

[5] As an importer, Starways was obliged to pay the import duty imposed on sugar in terms of the Customs and Excise Act 91 of 1964 (the Act). Starways no doubt calculated the purchase prices specified in the sugar contract taking into account the import duty that it expected to pay. In this sense, these prices were inclusive of the import duty. During the period 5 August 2016 to 16 September 2016, however, the import duty on sugar was reduced drastically. It is common cause that during this period the import duty decreased from the amount of R2 395 per metric tonne to R318,90 per metric tonne.

[6] Section 59 of the Act provides:

59 Contract prices may be varied to extent of alteration in duty

'(1) Whenever any duty is imposed or increased, directly or indirectly, by amendment in any manner of any Schedule to this Act, on any goods and such goods, in pursuance of a contract made before such duty or increased duty became payable, are thereafter delivered to and accepted by the purchaser, the seller of the goods may, in the absence of agreement to the contrary, recover as an addition to the contract price a sum equal to any amount paid by him by reason of the said duty or increase.

(2) Whenever any duty is withdrawn or decreased, directly or indirectly, by amendment in any manner of any Schedule to this Act, on any goods, and such goods in pursuance of a contract made before the withdrawal or decrease became effective are thereafter delivered to the purchaser, the purchaser of the goods may, in the absence of agreement to the contrary, if the seller has in respect of those goods had the benefit of the withdrawal or decrease, deduct from the contract price a sum equal to the said duty or decrease.'

[7] The application of s 59 to the sugar contract would have resulted in the reduction of the purchase price for the first consignment of sugar by some R18 million and of the total purchase price by some R51 million. It is no wonder that this lay at the heart of the dispute between the parties. Pearl took the stance that the sugar contract did not include an agreement to the contrary as contemplated by s 59 and that it was therefore entitled to pay reduced purchase prices. Starways, on the other hand, contended that the term *ex warehouse* constituted an agreement to the contrary that entitled it to the benefit of the decrease in import duty. Pearl regarded Starways' insistence on this interpretation of the sugar contract as a repudiation thereof. It maintained that its acceptance of the repudiation put an end to the sugar contract.

[8] In the light of what I have said, there are three issues before us. They are: the interpretation of the sugar contract, particularly whether the term *ex warehouse* excluded the operation of s 59; whether Starways repudiated the sugar contract and whether there was contractual privity between Shoprite and Starways as alleged. The court a quo found against Starways on all three issues. I consider these issues in turn.

Agreement to the contrary?

[9] It is trite that at common law the risk and benefit in respect of a thing sold passes to the purchaser when the contract of sale becomes *perfecta*, even though delivery may take place thereafter. A contract of sale becomes *perfecta* when agreement is reached on the two essential elements of the thing sold and the price, and the contract is not subject to a suspensive condition. See G Glover *Kerr's Law of Sale and Lease* 4 ed (2014) pp 306 and 310; G R J Hackwill *Mackeurtan's Sale of Goods in South Africa* 5 ed (1984) p 180.

[10] This position may, of course, be altered by agreement. In line herewith, Starways argued that an *ex warehouse* agreement postpones the passing of risk and benefit until delivery takes place. Because s 59 concerns risk and benefit in respect of sale agreements, so counsel for Starways contended, the term *ex warehouse* constituted an agreement to the contrary as contemplated.

[11] I am unable to agree. The essence of the common law is that the purchaser is obliged to pay the agreed purchase price, despite fortuitous damage to or the destruction of the *merx.* Voet *Commentary on the Pandects* (Gane's translation) 18.6.1 said:

'Under the name of "risk" falls here every disadvantage which overtakes a thing sold, such as death, running away and wounding in the case of a human being or animal sold; an opening of the ground in the case of a field; conflagration and collapse in the case of a house; shipwreck in the case of a ship; mustiness, souring and leakage in the case of wine; and finally spoiling, going bad, perishing or purloining in the case of all things.'

I accept that, in modern times, risk in this context includes the attachment of a legal burden to the *merx* after the sale becomes *perfecta*, such as the imposition of excise duty payable on the thing or the expropriation of the thing. See Hackwill p 179. In respect of benefit Glover says the following:

'Note, however, that the rule on benefit does not include fortuitous gains. The benefit must be directly connected with and actually produced by the property which has been sold.'

See also *Van Deventer v Erasmus* 1960 (4) SA 100 (T) at 104.

[12] Even accepting that the expression *ex warehouse* altered the incidence of the risk to some degree, it needs to be borne in mind that Starways and Pearl expressly subjected the sugar contract to South African Law. In terms of the sugar contract the obligation to pay the import duty therefore rested only on Starways and would under no circumstances be transferred to Pearl. The advantage and disadvantage caused by fluctuation in the import duty, however, would be passed on to Pearl in the manner provided for in s 59 unless the parties agreed to the contrary.

[13] The legal effect of s 59 on a contract of sale is to impose implied terms in relation to the purchase price. Unless they are excluded by agreement, the provisions of s 59 provide the seller, in the specified circumstances, with the right to add to the purchase price or the purchaser with the right to pay a reduced purchase price. This has a direct impact on their bargain in respect of price. In these circumstances, their agreement is subject to the provisions of s 59, whether the parties are aware thereof or not. This, to my mind, means that their contract is subject to terms implied by law. See *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531E-H; *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA

323 (SCA) para 28; G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) p 187-190.

[14] The onus was on Starways to prove that the ordinary meaning of *ex warehouse* excluded the application of s 59 or that that term had to be ascribed a special or technical meaning to that effect. See *Krige v Wallace* 1990 (3) SA 724 (C) at 737A-C; *Wides v Davidson* 1959 (4) SA 678 (W) at 682B. (Starways rightly did not rely on terms implied by trade usage or custom.)

[15] The ordinary meaning of *ex warehouse* is 'out of or in front of the warehouse'. Extensive research on behalf of Starways has not unearthed any authority to the contrary in South African law. The attempt by Starways to prove that *ex warehouse* has a special or technical meaning in the industry, failed dismally. None of the witnesses said that *ex warehouse* means that the operation of s 59 is excluded and the evidence was, in any event, vague and contradictory.

[16] It follows that Starways did not prove that the term *ex warehouse* in the sugar contract had any other meaning than 'out of or in front of the warehouse'. The term was used simply to indicate where delivery would take place. It served to distinguish between delivery in terms of subclause 7(a) (directly from the port to Pearl) and delivery in terms of subclauses 7(b)-(h) (at Starways' warehouse in Cape Town). There is no reason to find that *ex warehouse* had a different meaning in clause 8 of the sugar contract.

[17] In the result, Pearl was entitled to a reduction of price in terms of s 59(2). Starways' interpretation to the contrary was wrong. The next question is whether Starways' conduct amounted to a repudiation of the sugar contract.

Repudiation

[18] It is well established that repudiation of an agreement takes place by unequivocal intimation, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed *according to their true tenor*. The test is objective and the matter is approached from the vantage point of the innocent party. See *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001

(2) SA 284 (SCA) para 16-19. *Bona fide* insistence on an incorrect interpretation of a material term of a contract may amount to the repudiation of the contract. See *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (SCA) at 684J-685G.

[19] In terms of the sugar contract payment would be made 'against invoice'. It is common cause that an invoice would be rendered upon delivery of each consignment. Payment would therefore become due upon delivery.

[20] During August and September 2016, Starways was informed on more than one occasion that Pearl had acquired imported sugar at a cheaper price and would not honour the sugar contract. It is clear that Pearl was able to obtain cheaper imported sugar because of the reduction in the import duty on sugar. On 30 September 2016 Starways wrote to Pearl as follows:

'We are pleased to advise that we will shortly be in position to execute our contractual obligation to supply 8,000MT of White Refined Sugar during the month of October 2016, as provided for in sub-clause 7(a) of the aforementioned agreement.

Please be reminded that the BUYER is required to insure the product upon delivery. Furthermore that payment in full at delivery of invoice and copy of Bill of Lading is expected; such payment amounting to R82 800 000 plus VAT.'

Starways thus elected to enforce the sugar contract and quoted the price for the first consignment without any reduction.

[21] Starways' attorneys wrote to Pearl on 13 October 2016. In the letter they made clear that Starways expected payment from Pearl of the purchase prices stipulated in the sugar contract, without reduction. Pearl's attorneys responded by letter dated 2 November 2016. They asserted, *inter alia*, that it was a tacit, alternatively implied term of the sugar contract that should the import duty on sugar be reduced, the purchase price would be reduced accordingly. As I have said, the contention that the sugar contract contained such term implied by law, was correct. The letter further stated that Starways' letter of 13 October 2016 amounted to a repudiation of the sugar contract and that Pearl accepted the repudiation and cancelled the sugar contract.

[22] Starways responded by launching the application in the court a quo. By that time delivery of the first consignment was already overdue. Delivery of the first

consignment was not tendered, but in fact withheld. In the founding affidavit Starways expressly denied the existence of a price adjustment term. Starways sought an order directing Pearl to accept delivery in terms of the sugar contract and, upon such delivery, to make payment of the prices stipulated in the sugar contract. In this manner Starways unequivocally conveyed that it would deliver the sugar only against payment of the full purchase prices reflected in the sugar contract, without any reduction.

[23] In my judgment, a reasonable person in the position of Pearl was, in all these circumstances, entitled to accept that Starways would not perform its duties in terms of the objective and correct interpretation of the sugar contract but would insist on its interpretation thereof. Pearl was therefore entitled to cancel the sugar contract by acceptance of the repudiation, as it also did in its answering affidavit. Compare *Highveld 7 Properties (Pty) Ltd and others v Bailes* 1999 (4) SA 1307 (SCA) paras 29-31.

Contractual privity with Shoprite

[24] In the light of this conclusion, it is not necessary to deal with the third issue in any great detail. After some prevarication, Starways indicated that it relied on an express or tacit tripartite agreement, separate from the sugar contract, in terms of which Shoprite was obliged to make payment of the purchase prices reflected in the sugar contract to Pearl.

[25] The founding affidavit contains no evidence at all on which a finding could be made that an express tripartite agreement was entered into. The admitted dual transaction in question is unexceptional. Shoprite ordered imported sugar from Pearl. Pearl purchased bulk sugar from Starways and onsold it in packaged form to Shoprite at a higher price. Pearl would make payment to Starways on invoice delivered to it by Starways and Shoprite would make payment to Pearl on invoice delivered to it by Pearl. The transaction was complete and efficacious. This leaves no room for an additional tacit contract between all three parties in terms of which Shoprite is obliged to make payment to Pearl of the amounts that the latter is obliged to pay to Starways.

[26] In this court Starways also relied, for the first time, on the doctrine of the undisclosed principal, presumably in the alternative to the alleged tripartite agreement.

According to the argument, Shoprite played the role of the undisclosed principal of Pearl as far as Starways was concerned. The argument has no merit, for a variety of reasons other than that it was not raised in time for Shoprite and Pearl to properly respond thereto. It suffices to say the following. Starways elected to enforce the sugar contract against Pearl only. In law this precluded a claim against Shoprite as the principal in terms of the sugar contract. In order to claim from Shoprite in terms of the doctrine of the undisclosed principal, Starways had to allege and prove that Pearl had been mandated by Shoprite to conclude the sugar contract as agent for Shoprite. No such allegation was made and no such evidence was adduced. On the contrary, Starways accepted that the converse applied, namely that Shoprite acted as intermediary for Pearl when the sugar contract was negotiated. And at all times the identity and involvement of all three parties were known.

[27] It follows that the appeal cannot succeed. In the result the following order is issued:

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

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C H G van der Merwe

Judge of Appeal

APPEARANCES

For Appellants:	J G Dickerson SC (with him A Heunis) Instructed by: Park & Khan Inc, Landsdowne EG Cooper Majiedt Inc, Bloemfontein
For First Respondent:	L M Olivier SC Instructed by: De Klerk & Van Gend Inc, Cape Town McIntyre & Van der Post, Bloemfontein
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