



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 3 December 2018

STATUS Immediate

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

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

The first appellant, Starways Trading 21 CC (Pty) Limited (in liquidation) (Starways), entered into a written contract with the first respondent, Pearl Island Trading 714 (Pty) Limited (Pearl), in terms of which Starways sold 25 000 metric tonnes of imported sugar to Pearl (the sugar contract). The sugar contract provided that the first consignment of sugar would be delivered directly from the port to Pearl. Subsequent consignments would be delivered *ex warehouse*, Cape Town. The sugar contract also specified purchase prices *ex warehouse*. The sugar contract expressly provided that it was subject to South African law. Pearl is a wholesale supplier and onsold the sugar in packaged form and at an increased price to the second respondent, Shoprite Checkers (Pty) Limited (Shoprite), which is a retailer.

The purchase prices in the sugar contract were inclusive of the import duty on sugar in terms of the Customs and Excise Act 91 of 1964 (the Act). The import duty was payable by Starways. After the sugar contract had been entered into but before the delivery of the first consignment of sugar became due, the import

duty on sugar was reduced drastically. Unless the benefit thereof was passed on to Pearl, this would have resulted in a windfall to Starways of some R51 million.

Section 59 of the Act provides that contract prices may be varied to the extent of alterations in duty payable under the Act. Section 59(1) deals with the situation where a new duty is imposed or a duty is increased. Section 59(2) provides, *inter alia*, that whenever a duty is decreased on goods that are delivered in terms of a contract that was entered into before the decrease in duty became effective, the purchase may, in the absence of agreement to the contrary, deduct from the purchase price a sum equal to the benefit of the decrease to the seller. Pearl took a stance that the sugar contract did not contain 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 repudiation thereof. It maintained that its acceptance of the repudiation put an end to the sugar contract. Starways denied that it repudiated the sugar contract. In addition, it contended that a separate tripartite agreement had been entered into in terms of which Shoprite was obliged to it to make payment of the purchase prices specified in the sugar contract to Pearl.

Starways applied to the Western Cape Division of the High Court, Cape Town, for final orders enforcing the sugar contract against Pearl and the alleged tripartite agreement against Shoprite. The matter raised three issues, namely: 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. The court a quo found against Starways on all three issues and dismissed its application. On appeal to the Supreme Court of Appeal (SCA) Starways challenged the findings of the court a quo in respect of each of these issues.

Today the SCA dismissed the appeal with costs. It held that unless they are excluded by agreement, the provisions of s 59 of the Act in the specified circumstances constitute terms of a contract of sale implied by law. In the circumstances Starways had to prove that the ordinary meaning or a special or technical meaning of the terms *ex warehouse* excluded the application of s 59 of the Act. The SCA held that the ordinary meaning of the term *ex warehouse* is 'out of or in front of the warehouse' and that no special or technical meaning to the contrary had been shown. The SCA therefore held that Pearl was entitled to a reduction of price in terms of s 59(2) and that Starways' interpretation to the contrary was wrong. It further held that a reasonable person in the position of Pearl was, in the 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. Finally the SCA concluded that there was in any event no contractual privity between Starways and Shoprite. It held that neither an express nor tacit tripartite agreement had been entered into and that the alternative reliance by Starways on the doctrine of the undisclosed principal was unfounded.
