IN THE SUPREME COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.

(3) REVISED.

DATE 11/1/96 SIGNATURE

CASE NO: 92/7106

In the matters between:

EXTEL INDUSTRIAL (PTY) LTD Plaintiff

and

CROWN MILLS (PTY) LTD Defendant

and

CASE NO: 92/7107

QUATREX MARKETING (PTY) LTD Plaintiff

and

CROWN MILLS (PTY) LTD Defendar

JUDGEMENT

GOLDSTEIN J:

The two actions before me have been consolidated. In the first Extel Industrial (Pty) Ltd ("Extel") sues the defendant for R48 048,00 in respect of goods allegedly sold and delivered by Extel to the defendant. In the second Quatrex Marketing (Pty) Ltd ("Quatrex") sues the defendant on a similar cause of action for R591 215,35.

The goods concerned were sheep or hog intestines, intended for eventual use as the skin of sausages, boerewors or similar products. The intestines were referred to in evidence as "casings" and I shall refer to them as such. Casings are removed from slaughtered animals in an abattoir. They are then cleaned and sorted in a factory in preparation for their final intended use.

Extel and Quatrex were at all times controlled by two Zimbabwean immigrants Malcolm Fallet ("Fallet") and Francois Macray ("Macray"). Fallet and Macray also controlled a company called Dorco Trading (Pty) Ltd ("Dorco"). They operated as partners and, it is not contested, paid scant regard to the separate corporate identities of the companies they controlled. One of the bank accounts into which they deposited large sums of money apparently due to Quatrex and Dorco was known as "C M G Botswana", and I shall refer to it as "the C M G account". It was the bank account none of the companies. Fallet and Macray went into the business of buying

selling casings in 1983. Initially they dealt in the finished products, and one of their suppliers was the defendant, which possessed the necessary machinery and plant. Apparently quite soon thereafter the defendant was compelled by the health authorities concerned to close its plant, and this led to such being taken over by Fallet and Macray. They were assisted in setting up the plant in their premises in Sebenza Edenvale by one David John Cooper ("Cooper") an employee of the defendant, and they commenced processing the casings and selling them to the defendant and to others.

The deliveries the plaintiffs sue on allegedly occurred during the period 9 December 1991 to 14 February 1992. During this period, with the exception, perhaps, of the last day or two Cooper was a director of the defendant and in charge of its casings division and one Sunny Pillay ("Pillay") was its managing director.

It is common cause that during the period 2 December 1988 to 28 January 1992 the defendant paid a total of R5 903 056,45 to Fallet and Macray of which sum R4 711 777,30 was deposited in the C M G account, R319 159,50 in Dorco's bank account and R872 119,65 in Quatrex's. During the period 12 July 1988 to 19 November 1991 Cooper received in his First National Bank ("FNB") City Deep account a total of R263 499,49 from Fallet's and Macray's bank accounts, from the C M G account and from a debtor of Fallet. On 17 December 1991 he received into his account at FNB an additional R11 761,00 from Dorco's account. In addition and during the period 20 April 1988 to 14 May 1991 he received into his Nedbank Sandton account an amount of R40 255,00 from the bank accounts of Fallet and Macray, from

the C M G account, from a debtor of Fallet and from Camlet (Pty) Ltd, a company controlled by Fallet and Macray. It is also common cause that during the period 12 July 1988 to 18 December 1991 Pillay received at least R148 488,50. This sum was paid into the account of one P D Jackson acting on behalf of Pillay at Standard Bank Lenasia, and it came from the accounts of Dorco, Macray, Fallet and C M G. I have gleaned these figures from the schedules attached to the summary of expert evidence of Christopher Richard Stephen which schedules were admitted to be correct.

Relying on the payment of these substantial sums by Fallet and Macray and/or entities or accounts controlled by them to Cooper and Pillay, the defendant contends that Cooper and Pillay were being bribed by Fallet and Macray to continue the contractual relationship subsisting between their companies and the defendant and/or to assist in misrepresenting to the defendant that sales and deliveries of casings had occurred whilst they had not. The defendant contends that Cooper and Pillay acted as they did without the knowledge of its other directors. Furthermore, the defendant denies all the sales and deliveries alleged by the plaintiffs and puts the plaintiffs to the proof of such. My understanding of this denial is, however, that it is for the most part in fact limited to a denial of delivery, since the attack on the plaintiffs' case was never directed specifically against the agreement or agreements of sale concerned. The defences of bribery and of denial of delivery are, of course, not unconnected. If there was bribery the alleged deliveries become less probable. And if some of the deliveries are shown to be suspect the probability of bribery becomes stronger.

For the plaintiffs only Fallet gave evidence directly relevant to the issue of bribery, and he denied it. Macray, who sat in court through much, if not all of the trial, was not called to support this denial and this counts against the plaintiffs. The plaintiffs also failed to call Cooper and Pillay despite Fallet's evidence that he retained amicable contact with them. This too, counts against the plaintiffs: it is clear that Cooper and Pillay were available to them (see **Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 1 SA 621 (A) at 624**) and more so to them than to the defendant (see **Munster Estates at 624 in fin**), which had dismissed Cooper and Pillay on or about 13 February 1992, and with which they were, according to Fallet, now competing in business.

Fallet's explanation for the substantial payments made to Cooper and Pillay was that they worked after normal hours in respectively the casings business and a spice business at the Sebenza premises. Cooper was needed, he said, to keep a constant check on the quality of the casings in the interests of the factory, and in the defendant's interests as well. And Pillay was needed to give "some expert help and assistance" in the spice business which did a great deal of trade in Africa and in respect of which neither Fallet nor Macray had expertise. Under cross-examination Fallet said that Pillay helped blend spices. Cooper and Pillay were paid R250,00 per hour for their services and were also paid for their meals and refreshments whilst on duty. At the end of every month they would present their accounts and be paid when the cash flow of the group allowed of such payments. Willem Cornelius Johannes Kleynhans, factory manager of the plaintiffs' casings factory gave evidence for the plaintiffs confirming that Cooper had worked there.

It seems improbable that Cooper, a director of the defendant and the head of the latter's casings division would work for one of its suppliers in order to check and maintain the quality of the product supplied. I accept Fallet's evidence of Cooper's assistance in 1983 in setting up the plant but have difficulty in understanding why his input would still have been necessary in the period from 1988 to 1991, especially since Kleynhans had by 1988 been running the factory for about 3 years. It seems improbable too that Pillay the managing director of the defendant and the head of its spice factory would have assisted in the spice business of Fallet and Macray especially since the defendant was itself in such a business. Furthermore, the evidence of Pillay's activities in the spice business is so scanty as to fail to convince me that he had anything of substance to do there.

Highly suspicious too, is the fact that payments to Cooper and Pillay occurred by way of cash cheques and that Pillay for some unexplained reason caused his cheques to be paid into the account of P D Jackson. Then there is the surprising evidence of Fallet that the payments would not be reflected as expenses against any of the companies in the group. Related to this is the fact that the accounts allegedly presented monthly by Cooper and Pillay were not produced in court.

Perhaps most damaging of all to Fallet's unlikely tale of the innocent involvement of Cooper and Pillay is to be found in Stephen's analysis of monies deposited to Cooper and Pillay (the latter of course via the P D Jackson account). I do not propose repeating this analysis in full but will suffice with highlighting certain aspects of it. Fallet paid Pillay each R7 111,25 on 7 and 12 July 1988. On 7 July 1988 Fallet and

Macray each paid Cooper R999,37. R3 321,25 was paid to Pillay on 20 October 1988 by Macray and to Cooper by Fallet on 5 November 1988. On 3 December 1988 Macray and Fallet each paid Cooper R1 712,50. On 3 April 1989 Macray paid Pillay R3 537,50 and on 5 April 1989 Cooper received such sum from M W Investments. According to Fallet M W Investments owed him (Fallet) the money and he "gave it straight over to ... Cooper". R3 900,00 was paid to Cooper by Fallet on 12 May 1989 and by Macray to Pillay on 17 May 1989. R2 075,00 was paid by each of Fallet and Macray to Cooper on 12 May 1989. R4 352,50 was paid by Fallet to Cooper and by Macray to Pillay on 14 and 12 June 1989 respectively. R4 175,00 was paid by Macray to Pillay on 24 July 1989 and by Fallet to Cooper on 15 August 1989. R3 975,00 was paid by Fallet to Pillay on 11 September 1989 and by Macray to Cooper on 28 September 1989. Macray paid R4 437,50 to Pillay on 2 October 1989 and to Cooper on 3 October 1989. On 17 October 1989 Fallet paid Pillay R5 075,00 and on 20 October 1989 Macray and Fallet each paid half of this sum (R2 537,50) to Cooper. On the same day Macray paid Cooper R5 075,00. Thereafter and during the period 8 December 1989 to 19 November 1991 Cooper and Pillay each received substantial sums from the C M G account. On at least fourteen of such occasions Cooper received exactly double, or within a few rand double, of that received by Pillay. Fallet deposed that he simply paid the accounts proffered by Cooper and Pillay and that he accepted that they had worked the time necessary, and incurred the expenses involved, in justifying their accounts. I reject this evidence. In my view an analysis of the payments, especially against the backdrop of the other unsatisfactory features of Fallet's version to which I have referred, shows overwhelmingly on the probabilities that they constituted the division of the spoils of the participants.

I digress at this stage to examine the issue of delivery. Kleynhans was directly involved with the despatch of casings from the factory and he gave evidence on this issue. So did Fallet. Save for one occasion, the casings were all delivered by truck, and no driver was called except that Kleynhans deposed, if I understood him correctly, that on rare occasions on which no driver was available he drove. However, he did not say that he had acted as driver in respect of any of the deliveries sued on in this matter.

The casings sued upon can conveniently be divided into two categories. In the first fall the vast majority, and in the second, the claim of Extel and two deliveries of Quatrex. I proceed to deal with the first category.

Kleynhans and Fallet deposed to an unusual pattern of events regarding the delivery of these casings. The casings were tied in bundles consisting of five casings each. In the case of sheep, casings would be placed into buckets, which would be filled completely and then closed. The number of sheep casings involved would be recorded by Kleynhans on what was called production sheets. In respect of each delivery Kleynhans would make out a delivery note in duplicate using carbon paper. The top copy would be removed and sent with the driver. The delivery notes come from books called "Pen Carbon Book", which one witness said, was obtainable from the CNA. The delivery notes did not contain the printed name of either plaintiff. Kleynhans would fill in the date, the name "Crown Mills" and then add a number of "buckets sheep", and thereafter, where applicable, a number of "bundles hog". The words "buckets sheep" serve to indicate that sheep casings were being despatched

in the buckets and the words "bundles hog" that bundles of hog casings were being delivered. Thereafter Kleynhans would sign the delivery note on the last line where provision is made for a signature by the recipient of the goods. The name of the supplier would not be appended to the delivery note. The casings and hog bundles, where applicable, would then be loaded onto a truck and sent off for delivery to the premises of the defendant. No signature for the receipt of the goods would be obtained. At the end of the week on Friday Kleynhans would hand his production sheets to Fallet who would obtain from these the number of sheep casings delivered that week. This number would then be inserted by Fallet in an invoice pre-printed with Quatrex's full name, address and other relevant details. Fallet would write the defendant's name on the invoice, date it and give the number of sheep "sets" (another word for casings), the unit price of each and the total amount claimed with VAT added. If hog bundles had been delivered during the week concerned a separate invoice, but on the same printed form as that used for sheep casings, for such bundles would be made out. By arrangement with Cooper the amounts reflected in the invoices were payable within two weeks. The production sheets were not produced by the plaintiffs' witnesses. Such sheets were, according to Fallet and Kleynhans, removed by the police and never returned.

The unusual facts I have referred to become all the more improbable when viewed against the backdrop of the strong evidence of Cooper and Pillay having been bribed. Furthermore no acceptable reason was given as to why a signature on behalf of the defendant could not have been obtained on the delivery notes; the procedure deposed to is quite unbusinesslike and improbable. The absence of evidence of the

drivers concerned increases my doubts about the genuineness of the deliveries. No explanation was given for failure to call the drivers. Kleynhans was unable under cross-examination to say who the drivers were. Mr Stipp, who very ably presented the plaintiffs' complicated case pointed to the fact that in certain instances the original delivery notes were discovered by the defendant in its discovery affidavit. And so, the argument ran, these found their way to the defendant and could only have done so by the driver concerned having delivered his load of casings. I reject this argument. Fallet could quite easily himself have handed the invoices and delivery notes to Cooper. This scenario is quite likely given the facts I have already recounted and the unusual features of the evidence of Magel Maria van Reenen with which I shall deal later. Failure to produce the production sheets creates an evidential problem for the plaintiffs in that the best evidence rule makes it impermissible to rely on such documents. In **Vulcan Rubber Works (Pty) Ltd v SAR & H 1958 3 SA 285 (A)** Schreiner JA said at 296E:

> "Weaker evidence is not excluded by the availability of uncalled stronger evidence except in the case of documents, when the original must be produced or its absence properly explained."

The only explanation for the absence of the production sheets was that they were found to be missing after a police investigation. This is not a sufficiently full explanation. Nothing is said of any attempt to find the documents in the possession of the police.

A further serious difficulty for the plaintiffs' case and the credibility and dependability of their witnesses arises from the evidence of Fallet and Kleynhans as to the

maximum number of sheep casings a bucket could contain. Fallet said 325 with a minimum of 250 and Kleynhans 260 with a minimum of 250. Kleynhans' version seems the more likely one. There are seven invoices concerning the casings presently under consideration. The number of casings reflected on each are respectively: 25 122, 41 618, 27 000, 37 900, 43 219, 35 986 and 38 017. And the number of buckets contained in the delivery notes relevant to each invoice are respectively: 82, 151, 86, 124, 122, 122,5 and 121. Division of the numbers of casings on each invoice by the number of buckets allegedly delivered in respect of each gives the following figures of casings per bucket on each of the invoices respectively: 306,36, 275,61, 313,95, 305,64, 354,2, 293,76 and 314,19. These figures are all in excess - most substantially so - of the maximum of 260 deposed to by Kleynhans and one of them, 354,2, involving 122 buckets is substantially in excess of the maximum deposed to by Fallet. These important facts cast serious doubt on the genuineness of the transactions deposed to.

A further troubling feature arises from the evidence of Van Reenen who gave evidence for the defendant. She deposed that she had worked with Cooper since January 1989, and that she attended to the payment of the creditors of the defendant's casings factory under the control of Cooper. The normal procedure was for the receiving department to receive goods and the relevant delivery note. The goods would be checked and those confirmed as having been received entered in a GRV - a goods received voucher. The delivery note and GRV would then be sent to her. The delivery notes of other firms normally contained the names of the firm and its address pre-printed. In the case of Dorco and Quatrex she did not receive GRV's or delivery

notes from the receiving department. Cooper would bring her an invoice and a GRV handwritten by him and ask her to generate a cheque which would be collected on the same day by Fallet. During "the last few months of the casings" Cooper would give her "little - it was not a real delivery note, it was a pencil carbon book, small delivery notes which would be attached to invoices and the GRV made out for payment ..." Cooper changed the system because he had been "asked by the financial director why (they were) not getting delivery notes".

In regard to two of the invoices for the casings in the first category Fallet received a cheque dated 14 February 1992 in favour of Quatrex in an amount of R64 199,08 drawn by "Crown Mills Ciskei - Division of Crown Foods (Pty) Ltd". The cheque bears two signatures - one of which is that of one Stewart who according to Fallet was the manager of the defendant's casings factory in the Ciskei. Payment of this cheque was stopped. The first of the invoices concerned, dated 31 December 1991 is in respect of 25 122 sheep casings in an amount of R52 484,08 and the other dated 24 January 1992 in respect of 710 hog bundles in an amount of R11 715,00. The two amounts add up to the sum reflected on the cheque. In the light of these facts, Mr Stipp contended that **prima facie** delivery of the goods concerned had occurred. He correctly stressed that the defendant had led no evidence to explain how the cheques came to be drawn. A number of factors relating to this issue cast doubt on the correctness of Mr Stipp's contention. Firstly, there is the fact that Fallet simply deposed that he received the cheque. He says nothing of any accompanying documentation, which one would expect in the normal course. Secondly, Fallet says nothing of having complained to the defendant when the cheque was stopped.

Thirdly, one of the invoices covered by the cheque is in respect of 25 122 sheep casings in respect of which it will be recalled that 82 buckets are reflected in the delivery notes concerned, giving 306,36 casings per bucket - a figure well in excess of Kleynhans's maximum of 260 casings per bucket.

I turn to deal with the second category of casings and commence with Extel's claim.

Kleynhans deposed that he filled 24 barrels with 1 040 hog casings each giving a total of 24 960 casings and that these barrels left Extel's premises in Sebenza Edenvale on 14 January 1992 in two sealed containers loaded on a truck of the South African Transport Services with destination the Crown Casings Factory, Unit 13, Fort Jackson Ciskei. This evidence is supported by the original documentation of the South African Transport Services produced in evidence by Mr Johannes Hendrik Jasper Cloete a claims inspector of the South African Transport Services. The documentation, Exhibits A 10.1, 10.2, 10.3, 10.4, 10.5, and 11.1, 11.2, 11.3, 11.4 and 11.5 indicate that a total of 24 "parcels" of "sausage casings" were despatched on 14 January 1992. The documents bear an account number being 67487. Fallet deposed that this was the defendant's account number with the carrier and that he did not pay the account. It follows that the defendant probably paid for the transport. Exhibits A 10.5 and A 11.5 make provision for the signature of the consignee indicating receipt of the goods mentioned in good outward condition. And such signature appears illegibly with a legible version printed apparently by the author and reading V STEWART. The date 16 January 1992 appears in the immediate vicinity. Stewart was of course one of the signatories of the cheque of R64 199,08 to which I have

already referred. Stewart's position in the defendant's factory and his signatures on the documents were not disputed in cross-examination. A privity or identity of interest was established between Stewart and the defendant making Stewart's admissions on the documents admissible in evidence against the defendant. **Botes v Van Deventer 1966 3 SA 182 (A)**. The delivery to the defendant's factory in the Ciskei was made pursuant to and in accordance with a request by Cooper who acted on behalf of the defendant and Fallet acting for "us". Exhibits A 10 and 11 being the documentation of the Transport Services contain the name "Dorco Trading" as the sender of the goods. Exhibit A 7, which Fallet described as the invoice in respect of the goods does not contain the name of the seller of the goods, and appears to be a carbon copy of such invoice. Fallet and Macray traded through a number of companies and I accept on the probabilities that it was understood between Fallet and Cooper that Fallet was entitled to nominate any one of such companies as the seller of the goods. Furthermore and in any event Fallet deposes that the invoice book from which the invoice was taken "would have been an Extel invoice book". This evidence was not attacked in cross-examination and I understand it to mean that exhibit A 7 is a carbon copy of an original invoice bearing Extel's name as the seller of the goods. The price was Extel's usual one and including VAT it amounts to R48 048,00 which remains unpaid by the defendant. Fallet said in evidence that Stewart confirmed to him that the goods had been received. The defendant did not call Stewart.

I turn now to deal with the two Quatrex deliveries I have mentioned. The first occurred on 9 December 1991. Here the delivery note is a pre-printed one of Quatrex. There is a "tax invoice" which appears to be identical to the delivery note, one (I am not sure

which) appearing to be a carbon copy of the other. The number of the casings concerned is obliterated on my copy by a hole made to file the document but simple arithmetic (dividing the total purchase price by the price per casing), which I did not understand to be contested, reveals 850. The invoice/delivery note refers to "Hks Halaal wide" which, according to the evidence, meant bundles of sheep casings complying with Muslim dietary rules. A price per unit of 17,50 is reflected and a total purchase price, including VAT, of R16 362,50 is reflected. No buckets are involved in this transaction and there is a signature of Cooper acknowledging receipt of the goods.

The second Quatrex delivery I am now concerned with occurred on 16 January 1992. Here too no buckets were involved. Similar documentation to that involved in the delivery of 9 December 1991 supports the transaction including the numbers of bundles of casings, and their prices together with a total price, including VAT, of R22 825,00. Here too there is a signature of a recipient but an illegible one.

Kleynhans deposed that he personally prepared and sent to the defendant the goods of 9 December 1991 and 16 January 1992. He was requested to do so by Cooper who required the goods for onward transmission to Cape Town as Cooper had some space available in a container at defendant's premises destined for Cape Town. All of the documentation bears the word "Cape Town".

It is convenient at this stage to return to the issue of bribery.

In **Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk 1986 1 SA 819 (A)** Rabie CJ discusses bribery in civil law at 845-848. In my view the following can be distilled from the discussion of the learned Chief Justice: Bribery occurs when someone gives or promises to the agent of another a gift or remuneration without the knowledge of that other with a view to influencing the agent in order to gain an advantage for the briber from the principal of the agent.

In my view, on a conspectus of the evidence as a whole the elements of bribery I have referred to were established by the defendant. This is so for a number of reasons. Firstly, 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 Fallet. Fourthly, Cooper was instrumental in effecting payment to Fallet from time to time in unusual circumstances. All of the aforegoing factors justify the inference on the probabilities that Cooper and Pillay must have received the money they did from Fallet and Macray in order to influence them to gain an advantage for Fallet 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. The issue on which no direct evidence was called by the defendant is whether all of this occurred without the knowledge of the other directors

of the defendant. Fallet deposed that Cooper and Pillay had informed him that the other directors of the defendant were aware of the involvement of Cooper and Pillay with the activities of Fallet and Macray and I accept, without deciding, that this evidence of Fallet is admissible against the defendant. (In the court **a quo** in **Plaaslike Boeredienste** McEwan J decided that it was "not sufficient for the alleged briber to take the agent's word that the employer (was) aware of the alleged bribe," and that the alleged briber had "a positive duty himself to disclose to the employer the giving to the agent of the payment or other benefit concerned". - See p 1501 of the Appellate Division record.) In my view, however, the ignorance of the other directors of the defendant was established on the probabilities for the following reasons. Firstly, of course, it is highly unlikely that Cooper and Pillay would have informed their co-directors of what they were receiving. Secondly, the defendant laid documentary evidence before me of statements made by Cooper and Pillay in accordance with internal control measures of the defendant and/or its holding company, indicating that neither Pillay or Cooper had the interests Fallet deposed to. Thirdly, if Pillay and Cooper had acted openly and honestly I would have expected them to be called to tell me so.

Once the alleged bribery is established on a balance of probabilities, the plaintiffs' claims become more suspect than would otherwise have been the case. Given the bribery and the unsatisfactory features I have referred to relating to the first category of casings I cannot find their delivery proved on a balance of probabilities.

Despite the bribery, and because of the cogent evidence relating to the second category of casings I find their delivery to have been proved on a balance of probabilities. In arriving at this finding I do not overlook the evidence of Brent Michael Varcoe, called on behalf of the defendant, to the effect that in about February 1992 he contacted Fallet telephonically and was informed by the latter "that as at December 1991 no monies were owing by Crown Mills to either Dorco or Quatrex". Of course if this were so the claim in respect of the delivery of 9 December 1991 would be suspect. Fallet denied that he had ever made such a statement. Varcoe's version of the discussion which led to the statement was that it related to goods invoiced as having been delivered in November and December 1991, and in respect of which a goods received voucher for January 1992 had been issued. He said that Fallet had said that the invoice dates were irrelevant, since they were the dates on which Fallet had allocated the goods to defendant and that the correct date of delivery was 16 January 1992. None of this important evidence was put in cross-examination to Fallet, making it impossible for me to give any weight to Varcoe's version. I am influenced in regard to the second category too, by the defendant's failure to call any further evidence to rebut the plaintiffs' case. There is also no suggestion that the goods delivered were not in order.

The question which now arises is whether the plaintiffs must be non-suited in respect of the second category of casings because of the bribery defence, and in the absence of any evidence that such bribery influenced Cooper to conclude the three contracts of sale involved on behalf of the defendant. In answering this question it is important, I think, to bear in mind that the law regards bribery as immoral and therefore that our

courts do not allow a briber to enforce against the will of the other party, the agreement which results from it. See **Plaaslike Boeredienste at 848A-E.** It is also perhaps noteworthy that I am not concerned with the problem (which arises in many of the bribery cases) of whether Cooper influenced his principal, the defendant, to conclude the three contracts of sale, since Cooper concluded them himself on behalf of the defendant.

In **Plaaslike Boeredienste** Rabie CJ said the following at 844F-I:

> "Soos reeds hierbo ... aangedui is, is die posisie in die Engelse reg dat, wanneer daar bewys word dat die een party by 'n ooreenkoms 'n omkoopgeskenk aan die agent van die ander party gegee het, daar ten gunste van die agent se prinsipaal, en teen die omkoper en die agent, onweerlegbaar vermoed word dat die agent deur die geskenk beïnvloed is. Hierdie vermoede berus, volgens wat in sekere beslissings gesê word, op praktiese oorwegings rakende bewyslewering en op oorwegings van openbare belang. 'A contrary doctrine', het Chitty LJ in **Shipway v. Broadwood** [1899] 1 QB 369 (CA) gesê, 'would be most dangerous, for it would be almost impossible to ascertain what had been the effect of the bribe', en in **Hovenden and Sons v Millhof** ([1900] 83 LT 41 (CA)) het Romer LJ gesê die vermoede word 'in the interests of morality with the view of discouraging the practice of bribery' deur die Howe aanvaar. Ons reg ken nie 'n vermoede soos die bogemelde nie, maar oorwegings van dié aard wat tot die aanvaarding daarvan in die Engelse reg gelei het, sou myns insiens moontlik in ons reg regverdiging kon bied vir die beskouing dat, waar dit blyk dat een party by 'n ooreenkoms 'n omkoopgeskenk

> aan die agent van die ander party gegee het, hy die las behoort te dra om te bewys dat sy omkopery nie die beoogde beïnvloeding van die agent en sy prinsipaal bewerkstellig het nie. Dit is egter nie nodig om in hierdie saak 'n beslissing oor hierdie vraag te gee nie."

If English law irrebuttably assumes that the agent was influenced by the bribe this amounts to saying that such influence is irrelevant and that the bribe **per se** non-suits the briber. This view of the English law is borne out by the following **dictum** of Rabie CJ at 846F:

> "Volgens die Engelse reg ... sou respondent skynbaar die ooreenkoms kon verwerp sonder dat bewys hoef te word dat Moodie (the agent) deur die omkoopgeld beïnvloed is, of dat respondent (the agent's principal) deur Moodie beïnvloed is om die ooreenkoms aan te gaan."

The learned Chief Justice then goes on to say at 846F-G:

> "Wat die posisie in ons reg sou wees in 'n geval waar dit nie blyk dat die agent deur die omkoopgeld beïnvloed is nie, of nie blyk dat die prinsipaal deur die agent beïnvloed is nie, is vrae wat nie in die onderhawige saak ontstaan nie en wat gevolglik nie beantwoord hoef te word nie."

The English rule commends itself to me, and seems moreover to be in accordance with the principles of our law - insofar as Rabie CJ may be said to have taken a different view, his remarks were, of course, **obiter**. It seems to me that where an agent in receipt of a bribe contracts with the briber (or the latter's principal) on behalf of his (the agent's) principal who is unaware of the bribe, the contract arises **ex turpi causa** — this follows from Rabie CJ's characterisation of bribery as immoral and

impermissible at 848A-B — and is therefore unenforceable against the will of the agent's principal. Cf **Plaaslike Boeredienste at 848D-E**. In **Davies v Donald 1923 CPD 295** Watermeyer J, delivering the judgement of the Full Court, said at 300 that the reason why bribery entitled the agent's principal to set the contract aside was that bribery had the effect of placing the agent in a situation where his own interests conflicted with his duty to his principal, who was unaware of the arrangement. It seems also that public policy requires our courts to condemn bribery and corruption strongly and thus to non-suit those who would sully their hands with such immoral and disgraceful practices. Cf **Plaaslike Boeredienste at 849A-B**. Bribery is more insidious and serious than misrepresentation, including even many manifestations of fraudulent misrepresentation by one contracting party of another, because in the latter case contracting parties, alive to the imperfect morals of the market place and the propensity of others to exaggeration and misstatement, can be expected to be on their guard against the danger of all kinds of misrepresentation whilst in the case of bribery the relationship of good faith between an agent and his principal, which the latter may be expected to rely on with confidence, is breached in circumstances which would shock even robust dealers in the market place. Moreover bribery has a most destructive effect on the morality of the market-place and is calculated seriously to impede its proper functioning. It is significant too that the legislature has seen fit to criminalise the kind of bribery I am concerned with in this matter. Cf **Plaaslike Boeredienste 848E-G**; the **Corruption Act** No 94 of 1992.

In case I am wrong about the English rule being in accordance with our law I reach the same result by another route. Rabie CJ suggests in an **obiter dictum** in one of

the passages I have quoted, at 844 I, that there may be justification in our law for the view that the briber ought to bear the onus of proving that the bribe failed to influence the agent who received it or the latter's principal. In the present case in bribing Cooper and Pillay, Fallet and Macray obviously acted on behalf of both plaintiffs and indeed on behalf of all separate corporate entities controlled by them which may have dealt with the defendant. Accepting the suggestion of the learned Chief Justice, as I respectfully do, it follows that the plaintiffs bore the onus he refers to. They have failed to discharge it, and can hardly have done so, Fallet having falsely denied the bribe.

My view that the English law in effect accords with our own and that bribery leads without further ado to the briber's being non-suited appears to coincide with those of the Full Courts of the Cape and the Transvaal in respectively **Davies v Donald supra** and **Mangold Bros Ltd v Minnaar & Minnaar 1936 TPD 48. Cf Plaaslike Boeredienste at 836G-H**. It accords also with the view of McEwan J in the court **a quo** in **Plaaslike Boeredienste** - see Appellate Division record at 1532. After expressing such view McEwan J, with respect wisely added the following at 1532-3 of the Appellate Division record (see too 1983 3 SA 616 **sub voce** "Digest of Cases on Appeal"):

> "The conclusion to which I have come must not be taken to mean that it would be immaterial that the giving of the alleged bribe was unrelated to transactions between the donor and the principal. In his definition of a bribe in **Hovenden's** case [(1900) 83 LT 41 (CA)], quoted in **Mangold's** case at 55, Romer LJ speaks of 'a gift ... made ... to a confidential agent with a view to inducing him

to act in favour of the donor in relation to transactions between the donor and the agent's principal ...' (my underlining). In other words there must be a relationship between the gift and transactions either already completed or negotiations in progress. That relationship, however, is something very different from a causal connection between the bribe and the making of the contract."

It seems clear to me that the necessary relationship between the bribe and the contracts sued upon in the present case does exist.

In the cases of **Davies** and **Mangold Bros Ltd** the courts allowed the purchasers of goods to resile from the sales concerned and it ordered the sellers to repay the purchase prices to the purchasers against return of goods sold in each case. In the **Plaaslike Boeredienste** case the plaintiff, which was the beneficiary of the bribe, sued for damages flowing from the defendant's repudiation of the agreement between them, the plaintiff having accepted such repudiation. In non-suiting the plaintiff, the Appellate Division was thus simply disallowing a claim for damages and not concerned with the question of restitution. No restitution is tendered in the present case. Relying on general principles it seems to me that my approach ought to be along the following lines. In the cases of **Davies** and **Mangold Bros** the courts were undoing, and in the case of **Plaaslike Boeredienste** the court was refusing, to give effect to contracts which arose **ex turpi causa**. The courts were not enforcing such contracts - something forbidden by the rule expressed in the maxim **ex turpi causa non oritur actio**. See **Visser en 'n ander v Rousseau en Andere NNO 1990 1 SA 139 (A) 148F-G**. It follows that the simple application of the **ex turpi causa** rule forces me to non-suit the plaintiff. Cf **Plaaslike Boeredienste at 848D-E, 849A-B**. The order for

return of the purchased goods in **Davies** and **Mangold Bros** does not appear to have been debated before the courts concerned, and no reasons are given in the judgments for such orders. Whilst finding it unnecessary to express a final view on the correctness of such orders for return I would point out that the cases were concerned with contracts in which there had been full performance on both sides and one side was attempting to undo its performance, whereas I am faced with an attempt simply to enforce a contract which arises **ex turpi causa**, and that I must refuse. My approach in this regard accords, I think, in principle with that of the Court of Appeal in **Price and Others v The Metropolitan House Investment and Agency Company (Limited) 23 TLR 630** where an estate agent, who had effected a sale, was not permitted to recover commission from his principal, the seller, because he had received a secret profit by means of a transaction involving the purchaser. Mr Stipp relied on **Feinstein v Niggli and Another 1981 2 SA 684 (A) at 700G** for the proposition that the defendant may only avoid the contracts of sale sued upon if it is able and willing to restore what it has received in terms of those contracts. **Feinstein** was concerned with a fraudulent misrepresentation which induced a contract. The answer to Mr Stipp's submission is simply that such a contract is not regarded as arising **ex turpi causa**, and as I have attempted to show above in contrasting bribery with misrepresentation, bribery is regarded as the more serious wrong, and for good reason. It seems to me also that the principles enunciated in **Jajbhay v Cassim 1939 AD 537** in regard to the relaxation of the **par delictum** rule can have no application in the present matter for at least one reason: I am dealing with the attempted enforcement of a contract which arises **ex turpi causa** and not an attempt to undo

performance pursuant to an immoral contract. It follows that the plaintiff must be entirely non-suited.

Two further matters remain and I proceed to deal with these.

On 3 February 1995 and before the trial commenced the defendant applied for an order that Quatrex and Extel furnish security for the defendant's costs of the action. I heard argument on the application and was of the view that it had been brought too late. However, I did not dismiss it but postponed it **sine die** reserving costs and indicating that the defendant could renew the application during the trial before me. It has failed to do so and the application must therefore be dismissed with costs.

The defendant has asked for costs on the attorney and own client scale against the plaintiffs. I am not disposed to grant such a special order. A great deal of time and trouble was taken during the trial by the plaintiffs' attempts to prove delivery. The defendant could I believe, have limited this evidence by making admissions based on records and/or evidence which it ought to have at its disposal. Certainly no explanation was proffered as to why it did not do so. Then there was much debate on whether Pillay and Cooper informed their co-directors of the money received by them. This issue could have been resolved by simply calling the directors concerned. Here too, no explanation was given for failing to do so. My impression is that the defendant conducted this case guardedly and less than frankly and I can only hope that I have not, as a result, done any injustice.

I make the following order:

1. The plaintiffs' claims are dismissed.

2. The plaintiffs are ordered jointly and severally to pay the defendant's costs including the costs of two counsel and the qualifying fees of Mr Stephen.

3. The defendant's application for security is dismissed with costs.

E L GOLDSTEIN
JUDGE OF THE SUPREME COURT

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INSTRUCTED BY	BEDER-FRIEDLAND INC
COUNSEL FOR DEFENDANT	M D KUPER SC, N A CASSIM
INSTRUCTED BY	WERKSMANS
DATES OF HEARING	7, 8, 9, 10, 11, 13, 14, 15 FEBRUARY 1995 20, 21, 22 MARCH 1995
DATE OF JUDGMENT	12 JANUARY 1996