CIV/APN/237/02

IN THE HIGH COURT OF LESOTHO

In the matter between:

G.D.D. FINE FOODS (PROPRIETARY) LIMITED t/a GOOD FOODS	Applicant

and

PETER R N KHOMONNGOÈ N.O	1st Respondent
DISASTER MANAGEMENT AUTHORITY (DMA)	2nd Respondent
PRIME MINISTER OF LESOTHO	3rd Respondent
THE ATTORNEY-GENERAL	4th Respondent
MINISTRY OF FINANCE	5th Respondent

For the Applicant : Mr. Wessels

For the Respondents : Mr. Putsoane

Judgment

Delivered by the Honourable Mr. Justice T. Monapathi
on the 22nd day of November 2002

It was common cause that on or about the 9th day of October 1998 and the 9th day of November 1998, Applicant entered into a written agreement with the

the Second Respondent (the DMA) (the real and non-nominal Respondent) in terms of which the DMA purchased from Applicant 100 tons of Nutrimel Food Formulation and approximately 2,100 tons of fortified foods. The dispute is over whether the DMA ought to have taken more delivery of the products in terms of the agreements which are disputed as will be clearer herein.

The decision in this application fell to be decided the following point taken by Respondents. Whether on the facts of the case the Court could competently, in its discretion, order for specific performance by Second Respondent (DMA) by way of :

> "Directing the 1st Respondent in his official capacity, to comply in all respects with the terms of conditions of the renewed Agreement of Sale entered into between 2nd Respondent and Applicant and to take delivery of product purchased in terms thereof." (See prayer 2 of the notice of motion)

- And where there had been no particular order for specific goods at all. I noted by way of emphasis as was contended by Respondents where ther ewas no proof of any order made by the DMA.

Other prayers (although complementary) which ran into no less than seven in number were not as equally important and would revolve around the above prayer. It may not however be very wasteful to reproduce the other prayers as follows:

1. Directing that the normal Rules regulating Service of Process be dispensed with and that this Application be heard as an urgent Application;

2. Directing the 1st Respondent, in his official capacity, to comply in all respects with the terms and conditions of the renewed Agreement of Sale entered into between 2nd Respondent and Applicant and to take delivery of product purchased in terms thereof.

3. Directing the 1st Respondent to immediately cause letters of credit acceptable to Applicant to be issued by 2nd Respondent's bankers in terms of the Deed of Sale, securing payment of product sold by the Applicant to the 2nd Respondent.

4. Directing the 1st Respondent to immediately issue orders to the Applicant with detailed information in respect of the quantities of Fortified Food and Nutrimel to sufficiently and effectively prevent shortages of food, hunger, malnutrition, starvation and famine throughout all districts in Lesotho with details and directives of the time and place where products are needed;

5. Directing the 1st Respondent to do all things and give effective instructions throughout the 2nd Respondent's staff and structures to comply with the contract and with the provisions of the Disaster Management Act No.2 of 1997;

6. Directing the 1st Respondent to consider, analyse, compile and record all relevant information already in the possession of the 2nd Respondent and all other related authorities to accurately determine the extend of starvation, drought disaster, food shortages and malnutrition, especially amongst women and children throughout the Districts of Lesotho and especially those patients presently being treated at Government Hospitals and to order foodstuffs to satisfy such needs;

7. Directing 1st & 2nd Respondents to fully and in detail comply with the provisions of the Disaster Management Act no 2 of 1997 and to execute all duties in regard to compliance with the terms and conditions of the contract with Applicant.

8. Granting such further and alternative relief as this Honourable

Court may be necessary.

The point taken as shown above would effectively decide the case.

The Applicant, a manufacturer and distributor of health giving foodstuffs sought specific performance based on two contracts (strictly the last or an extension thereof) which it had concluded with the DMA in October 1998 (the first) and in November 2000 (the last). The latter contract (which was common cause) having been extended to the 31st March 2002. It immediately proves useful to reflect the terms and conditions of amended contract of the 18th April 2001 and the original clause 2 as follows:

> "This letter serves to confirm that G.D.G. Fine Foods (Pty) Ltd Lesotho hereby accepts and confirm that the Contract for the supply of Fortified Food and Nutrrimel dated 8th October 1998 and the 9th November 1998 be extended on the same terms and conditions save as set out below.
>
> a) The price will be set as per the last deliveries, namely M58.80 per kg for Nutrimel and M5719.85 per ton for Fortified Food.
>
> b) Increases will only be allowed at a maximum of 10% per annum, calculated from the date of resumption of the Contracts. The date is as per the M.D.A. letter dated 11th April 2001.
>
> c) Quantities will be determined by the D.M.A. and passed on to G.D.D. "

(See clause 2 Amended clause 2 of both Contracts). And clause 2:

> "2. **SUBJECT MATTER OF THE SALE**

> The SELLER shall sell, and the PURCHASER shall purchase, quantities that will be determined by needs and communicated to GDD Fine foods by DMA." (My emphasis)

Obviously what is underlined above is the issue of liberty of DMA to decide to requisition according to its needs. The salient question will be whether it has purchased any stuff from the Applicant.

In terms of the mentioned contracts the parties agreed that the Applicant would supply certain goods to the DMA for distribution to disaster stricken areas within the Kingdom of Lesotho. The Chief Executive of the DMA who is the First Respondent has constantly stated there was clear need for Applicant's products due to dire conditions country-wide. There had even been a communication made by the Ministry of Health to the DMA which spelt out specific products which the said Ministry urged the DMA to order for the Ministry.

Allied to the point that I have alluded is another ground for the Respondents' opposition to the application. It is, in essence, as Respondents submitted, that the Applicant could no longer claim relief in terms of the agreements as such agreements had expired by effluxion of time.

In addition purchases which were normally or previously made from the

Applicant had this time not been budgeted for by Government. This suggested that purchases were not made nor were any orders intended in the circumstances where there would be no funds to be availed for purchase of goods. And consequently the DMA could not perform as envisaged by the Applicant because in terms of clause 2 as amended and as submitted correctly in my view, by Mr. Putsoane:

> "The contracts were extended subject to clear condition that quantities needed would be determined by 2nd respondent. There were no specific quantities that had to be supplied by the applicant to the second respondent over a specific period, as such, the Court cannot just order the 2nd Respondent to order products from applicant. Such an order would be impossible of performance as respondent would not have been ordered to purchase any specific quantity of products from applicant." (My emphasis)

There were other submissions made which I will come to later that made for enlargement of argument without derogating from the decisive point to which I have just alluded.

The said original contracts ran their course and were fully implemented.

Applicant had this time not been budgeted for by Government. This suggested that purchases were not made nor were any orders intended in the circumstances where there would be no funds to be availed for purchase of goods. And consequently the DMA could not perform as envisaged by the Applicant because in terms of clause 2 as amended and as submitted correctly in my view, by Mr. Putsoane:

> "The contracts were extended subject to clear condition that quantities needed would be determined by 2nd respondent. There were no specific quantities that had to be supplied by the applicant to the second respondent over a specific period, as such, the Court cannot just order the 2nd Respondent to order products from applicant. <u>Such an order would be impossible of performance as respondent would not have been ordered to purchase any specific quantity of products from applicant."</u> (My emphasis)

There were other submissions made which I will come to later that made for enlargement of argument without derogating from the decisive point to which I have just alluded.

The said original contracts ran their course and were fully implemented.

The said agreements were valid from a period of twelve (12) months. On or about April 2001 the contracts were extended and expired on the 31st March 2002. The DMA also accordingly contended as submitted that it has been absolved from the obligation to perform further because the contract has expired. That therefore it could not consequently be asked to perform in terms of a contract that was not in existence. See **Farmers Cooperative Society v Berry** 1912 AD 343, **Principles of the Law of Contract,** 5th Edition AJ Kerr, page 598, **Benson v SA Mutual Life Assurance Society** 1986(1) SA 776 (AD).

It was not denied that the said contracts were extended on the same terms and conditions save for the following. First, the purchase price of the products was increased.

Secondly, further increase in price in case of inflation would only be allowed at fixed percentage of the per cent (10%).

Lastly and most importantly quantities to be supplied were to be determined by the DMA. In this regard refer to condition "C" of the 10th April 2001 and the said clause 2 of the parties contract of the 12th April 2001.

The said clause 2 was obviously the bedrock of the Respondents defence. What

follows could only be by way of further comment and necessary conclusion.

A clause of minor contention was "clause 4" of the agreement about mode of payment of purchase price "letter of credit". This aspect become irrelevant, in my view, once no agreement was substantially reached by the parties. It is sufficient to immediately observe that except for previous purchases of M800,000.00 and M2 Million no letter of credit was made available in favour of Applicant, (Seller) as a fact. Nor would any bank be authorized in the circumstances to make any payment to the Seller, where the DMA would not have been obliged to "immediately process payment." See Clause 4.2.4.

Put the other way Applicant did not successfully challenge the Respondents averment that at this time around no such letter of credit had been issued by Government through its bank or at all. Respondents spoke of there having been no need for provision of that letter by the bank because no order was made and therefore no payment was contemplated nor would be forthcoming. I respectfully agreed.

I would agree with Mr. Wessels that a Court will in some cases order for specific performance where a defendant was *in mora* during the contract terms which has expired (see **Shamahomed v Cane & Sons** 1927 CDD) 472. The

question had been whether the fact that the contract had expired is relevant or not. I thought it was not even necessary to determine this issue.

The other issue whose importance was unduly inflated was whether the DMA was *in mora* during any of the contract periods more particularly during April 2001 to March 2002. That is whether on the facts circumstances were present, during the currency of the contract, that made the term agreed upon (condition "C") operational and binding.

I would however agree with Mr. Wessels that a Court will in some cases order for specific performance where a defendant was *in mora* during the contract terms which has expired (see **Shamahomed v Cane & Sons** 1927 CDD) 472. The question had been whether the fact that the contract had expired is relevant or not. In my opinion the main thing remains to be whether on the facts of this case there had been "an actual order for purchase of goods."

The other question which could not have been very crucial had been whether the DMA defaulted during or beyond the period of contract as a result of the facts thus giving rise to a binding obligation that arose before the expiry of the contracts? I thought the answer to whether the fact that the contract has expired is relevant or not is provided by the further inquiry as to whether the

DMA was *in mora* or had defaulted. It was consequently not only the simple question whether a contract cannot be performed beyond the period prescribed in the contract itself. For this issue to enjoy any support the real question would still be whether the DMA in effect made any order for purchase of the goods.

Except to say that Mr. Putsoane did not challenge that application procedure as against action procedure (see **The Civil Practice of the Supreme Court of South Africa** - Herbstein & Van Winsen, 4th edition page 233) and that Mr. Wessels wisely withdrew his submission that *actio popularis* was recognized or ought to be recognized lately in Lesotho, the only serious submissions revolved around whether or not specific performance was competent on the facts of the case. And whether Applicant would not fare better if it opted for a claim for damages in that specific performance remained a discretionary remedy.

Mr. Putsoane submitted that the following factors militated against the Court ordering for specific performance. I did not find that Applicant was able to deny most of those on the factual plane.

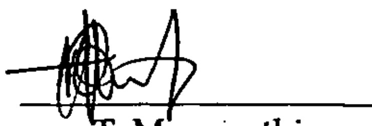
Firstly, no specification or general order for any specific quantity of foods had been made for Applicant to supply at a price or at all. I would reject any

suggestion that reference to past supplies, extension of contract up to 31st March 2002 evidenced a purchase or sale or acknowledgement of that.

I would similarly reject that a communication between the Ministry of Health and the DMA spelling out the specific products which the said Ministry needed would support the contention that any specific arrangement between Applicant and the DMA had been brought into being. So is the savingram dated 20th March 2001 which was a communication between the said Ministry and the DMA.

In no way could the Applicant be said to be privy to the said communication between DMA and the said ministry. It was certainly not an arrangement or undertaking by the DMA even if it was appreciating wrong wording of "the offer to purchase" in the absence of a specific order made by the DMA to the Applicant company. The correct wording by the ministry, once it had estimated it needs, would have been to "encourage or invite" the DMA to make those purchases from the Applicant company.

In all the circumstances this application ought to fail with costs and it is so ordered.



T. Monapathi
(Judge)

22nd November 2002