REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 27845/2018

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

7 SEPTEMBER 2021 **MODIBA J**

In the matter between:

RENIER VAN RENSBURG Plaintiff

and

ELECTROGRID (PTY) LIMITED Defendant

JUDGMENT

MODIBA J

[1] The Plaintiff's claim is based on an agreement concluded between the

Plaintiff and the Defendant, on or about 8 September 2015, for the supply and installation of a solar power system at the Plaintiff's residence (the agreement). The Defendant was duly represented by Norman Cherry.

[2] The issue in dispute between the parties is crisp. It is whether, in terms of the agreement, the Plaintiff contracted the Defendant to supply and install an off grid solar power system or a start-up battery system. The Plaintiff contends that he contracted the Defendant to supply and install an off grid system. The Defendant denies this. He contends that the parties' agreement was that the Defendant would supply and install a start-up system, which would be upgraded as required.

[3] Three witnesses testified on behalf of the Plaintiff, namely the Plaintiff Renier van Rensburg, Charles van Zyl and Jaco Botha. Botha testified as an expert witness. Cherry is the only witness who testified on behalf of the Defendant.

[4] Van Zyl testified that he introduced Cherry to the Plaintiff when he was contracted to undertake renovations at the Plaintiff's residence. He had known Cherry for 15 years. On that day, they walked through the house where Cherry assessed the Plaintiff's electrical needs. They also went up to the roof to see where the solar panels would fit. Van Zyl's father would later install the steelwork for resting the solar panels on the roof at the Defendant's instruction.

[5] Van Zyl confirmed the Plaintiff's version of the terms of the agreement as discussed on that day.

[6] Van Rensburg testified that the Defendant, represented by Cherry, undertook to supply a system in terms of which solar panels would charge the batteries during the day and supply sufficient solar power to the residence as long as the sun was shining. The batteries would be sufficiently charged during the course of the day in order to supply the household with solar power through the night, until the next morning, when the batteries would recharge again, ensuring constant solar power supply to the residence. The power system would revert back to the grid on the days there was no sufficient sunshine to fully supply the house and charge the batteries.

[7] The Defendant's quotation, which the Plaintiff accepted, reference an "Electrogrid Off Grid quotation". The Defendant had also furnished the Plaintiff with a quotation for a battery backup system when there is load shedding, which he did not accept.

[8] Installation commenced in February 2016. At the time, van Rensburg was renovating his house. Cherry required additional equipment installed to increase the capacity for the solar power supply due to the alterations and extra air-conditioners which had been installed during the renovations. The additional cost was R64 809.00. The Plaintiff made full payment to the Defendant in the amount of R431 009.00.

[9] Shortly thereafter, the Plaintiff started experiencing various problems with the solar power system as installed by the Defendant. The system was faulty. It could never operate as an off grid system in that the solar power supply to

the residence was always insufficient. The system could never function for a period of more than 2 to 5 hours even under the most favourable circumstances.

[10] The Plaintiff provided the Defendant with various opportunities to rectify the solar power system, to no avail. On 20 July 2018, the Plaintiff served the Defendant with a final letter to rectify the solar power system. Cherry responded in an e-mail dated 21 July 2018 with no tender to do so. Instead for the first time, he stated that the Defendant never sold to the Plaintiff an off grid system and that the Plaintiff should connect back the timers on the geysers, which would assist in reducing the load for the inverters to carry out their normal operation without the system being overloaded. This led to the cancellation of the agreement by the Plaintiff and the commencement of legal proceedings against the Defendant.

[11] In the joint minutes of experts, the parties' experts are agreed that the system was off, in bypass mode and not operational when they inspected it. A fault was present on one of the inverters. The 3 phase needed further balancing as one of the phases, overshoots the load capacity of the inverters. If phase balancing is done and inverters are operational then they should be able to handle the load indefinitely. However, the solar panels and battery capacity is insufficient to run the system off the grid. The solar panels are installed in shaded positions, thus rendering the system inefficient. Panels were mounted by pop riveting. This could interfere with their warranty.

[12] The parties' experts further agreed that the hybrid inverters were of a lower quality type.

[13] Botha also testified that the batteries were lead acid batteries and were insufficient to support the power demand of the premises. The batteries only carried a 2-year warranty and would have to be replaced typically every 3 years. Even if the system was installed optimally, it would on average produce 45 kWh per day in circumstances where the premises required a daily consumption of between 84 kWh to 148 kWh. Therefore, the system would only provide 60% of the energy needs of the Plaintiff's residential premises. This is why the system was not running off grid.

[14] According to Cherry, the Defendant would never have provided the Plaintiff with an off grid system because that would be illegal. The Plaintiff required solar energy for some lights and television in the event of a power outage. He offered him two options. The first was batteries with inverters. He could later increase the solar energy capacity by installing more inverters and add solar panels resulting in the Plaintiff saving some money and not using all of the power straight from the grid. The Defendant subcontracted the solar power system installation at the Plaintiff's residence to a person Cherry referred to as Lovemore.

[15] Cherry further testified that, later, the Plaintiff required the whole residence to be running through the inverters and that required additional equipment. He attended the Plaintiff's residence on two occasions due to

difficulties with the solar power system. The inverters had gone into bypass mode. Two of the inverters had blown in this period. He could not explain what caused the explosion. He suspected that they had been overloaded. He got the inverters replaced without extra charge to the Plaintiff. Lovemore attended the Plaintiff's residence on behalf of the Defendant on various other occasions to attend to the persistent problems.

[16] To reconcile the mutually conflicting versions of the parties, this court is guided by the test set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others*[1] where the court held that to resolve a dispute of fact between the parties, the court makes a probability finding based on the mutually destructive factual evidence of the parties, having regard to the credibility and reliability of the parties' witnesses.

[17] The evidence of the Plaintiff's witnesses was consistent in material respects. It was also consistent with the Plaintiff's version. The witnesses were reliable and credible.

[18] Cherry's evidence was replete with inconsistencies and improbabilities.

[19] Cherry testified that he always had a lady named Desire van Tonder prepare quotations on his behalf. Van Tonder would not attend client's premises with him where he assessed the needs of a client. Hence, Cherry

[1] (427/01) [2002] ZASCA 98 (6 September 2002).

would always tell van Tonder what to put on the quotation. He never told van Tonder to quote the Plaintiff for an off-grid solar power system.

[20] It was established in cross-examination that the Defendant never discovered relevant e-mails leading up to the final accepted quotation. It is improbable that it is by coincidence that these documents support the Plaintiff's version and contradict the Defendant's. It is also improbable that it is by coincidence that Cherry never saw these documents, that the documents were not discovered and that van Tonder who created them, did not testify at the trial. Yet, the amount quoted, which the Plaintiff paid in full, was never an issue. It begs the question how Cherry knew the amount quoted, if he never saw the quotation.

[21] These factors justify the drawing of a negative inference from the Defendant's failure to secure van Tonder's testimony during the trial.

[22] The Defendant adduced no evidence to contradict the evidence of the Plaintiff that the Defendant offered him an off-grid system or a battery backup system. The two quotations that van Tonder sent the Plaintiff, as well as van Zyl's evidence, corroborate van Rensburg's evidence in this regard. At no point, when the Plaintiff complained to Cherry that the system that the Defendant installed does not meet the needs of his residence, did Cherry point out to him that he ordered and was provided with only a start-up system which would not meet the Plaintiff's expectations. It is absurd that at no point did Cherry correct van Tonder's purported error on the quotation.

[23] At no point either, did Cherry call on the Plaintiff to install recorders to assess the required capacity, or to increase the capacity of the system, yet he was aware that the inverters would go into by-pass mode or blow up due to overloading.

[24] It is apparent from the correspondence and the evidence that even on Defendant's own version, the system never functioned properly. The expert evidence confirms this. Cherry testified that some 8 months after installation, he even tried to contact the supplier to establish why the system was not working properly.

[25] It became apparent from Cherry's evidence that the Defendant's website created a false impression as to the Defendant's experience in installing solar power systems. He used pictures on his website of solar power system installations not done by the Defendant.

[26] When Cherry was confronted with the website where the Defendant advertises the installation of off grid solar power system, and it was pointed out that on his own evidence, off grid solar power systems where illegal, he changed his version to say, off grid solar power systems are legal in Cape Town. Yet, van Tonder had quoted van Rensburg for an off grid system. In addition, in two letters dated 19 April 2018 and 21 July 2018 respectively, Cherry states that the ultimate goal was for the system to become fully off grid.

[27] It is clear that the Defendant lied to potential customers when it created its website and put false information therein as it was a company that was still in its infancy and did not have much experience. This misconception was furthermore pursued in this Court during the evidence. This evidence reflects a serious lack of credibility on Cherry's part.

[28] From the evidence presented during the trial, it is evident that the Defendant lacked the knowledge, skill and experience to install the solar power system of the type the Plaintiff contracted it to install at his residence.

[29] These factors render the improbabilities in the Defendant's version astounding.

[30] Even more problematic for the Defendant is that aspects of the evidence of the Plaintiff's witnesses, which was consistent with the Plaintiff's version, were not disputed. This includes:

30.1 Van Zyl's evidence that when he introduced Cherry to van Rensburg at the latter's residence, they walked about the house for Cherry to assess his electrical needs and went up the roof to see where the solar panels would be installed;

30.2 Van Zyl's evidence confirming the Plaintiff's version of the agreement;

30.3 that Lovemore informed van Rensburg that:

30.3.1 placing the timers on the geysers would merely give an extra hour's power;

30.3.2 this was the first time they ever did such a big job and they did not know how to resolve the problems;

30.3.3 Botha's evidence that the solar power system which the Defendant installed at the Plaintiff's residence could have been an off-grid system for a smaller residence and it was certainly not a start-up system having regard to the equipment and the price thereof;

30.3.4 Botha's evidence that the system could only generate 45 kWh per day when the residence required at least 84 kWh per day;

[31] Further, it was never put to Van Zyl that he was asked to bypass the inverters when he did grinding work;

[32] When asked whether he implemented the recommendations of the Defendant's expert, Cherry replied that the timers were installed to do the load balancing. The Defendant clearly did not implement the recommendation of its own expert to fix the defects in the solar power system the Defendant installed at the Plaintiff's residence.

[33] In the premises, the Plaintiff's version that he contracted the Defendant to install an off grid solar power system at his residence is more probable. It is therefore accepted. The Defendant's version is found to be

improbable. It is therefore rejected.

[34] The Plaintiff has made out a case, on a balance of probabilities, for an order as prayed for in his particulars of claim.

[35] In the premises, the following order is made:

ORDER

1. The Defendant shall pay the Plaintiff an amount of R431,009 including interest on the said amount, from date of service of the summons to date of payment.

2. The Defendant is liable for the Plaintiff's costs of suit.

MS LT MODIBA
JUDGE OF THE HIGH COURT

Counsel for the Plaintiff:	Mr A. P. Den Hartog instructed by Lizl Smith, Lizl Smith Attorneys
Date of hearing:	26-29 November 2019, 24 March 2021, 21 April 2021
Date of judgment:	7 September 2021