REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **A 341/11**

22/3/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

pp. L LUCAS ABA DJP 22/3/2016
SIGNATURE DATE

In the matter between:

DIE ONDERBERG VERWERKINGS Appellant

KOOPERASIE BEPERK (Defendant *a quo)*

Versus

CHAMOTTE HOLDINGS (PTY) LTD Respondent

(Plaintiff *a quo)*

JUDGMENT

MATOJANE J

Introduction

[1] This is an appeal, with leave of the Supreme Court of Appeal, to the full Bench of this court against that portion of the judgment and orders of the Honourable Legodi J in terms whereof he granted judgment on a Claim A in favour of the respondent in the sum of R 753 810.00 plus interest at 15.5% per year from the date of the summons to date of payment. The trial court granted absolution from the instance on Claim B and ordered each party to pay its own costs.

[2] There is no appeal or any cross-appeal against any of the other orders that were made by the trial court.

[3] The respondent instituted an action for damages suffered as a consequence of loss of income resulting from the alleged breach of an agreement for the dumping of wet citrus peel at a waste disposal site of the respondent. The loss was calculated at an agreed dumping fee of R 15.00 per ton on 50,254 tons of wet citrus peel which tonnage the appellant was allegedly obliged to dump at the waste disposal site during 2003-2005 seasons but did not do so.

[4] Before the court *a quo* appellant denied that the verbal agreement relied upon by the respondent was concluded early in 2001 as pleaded. The appellant argued that the agreement was entered into on a different occasion, namely October 2001 under another agreement. Appellant also disputed the terms of the later agreement.

[5] The trial court found that the respondent's version of the terms and conditions of the agreement was more probable than the appellant's version and granted judgment in favour of the respondent.

Factual background

[6] The appellant is a cooperative which conducts a juice processing operation, processing some 60,000.00 tons of citrus per season which generates some 30,000.00 tons of wet peel and pulp per season depending on whether it was a bad or good export season. Since 1997 appellant had an arrangement with another company for the dumping of wet citrus peel on its land. This arrangement was summarily terminated. The appellant needed a waste disposal site but could not obtain the necessary statutory authorisation.

[7] The respondent mines for minerals including magnesite, in the same area where the appellant conducts its agricultural cooperative. The respondent was under an obligation to rehabilitate the mined-out surface in its mining area for the purposes of which it could use the wet citrus peel.

[8] During the 1997 season, the respondent allowed the appellant to dump its peel to a designated site on respondent's property for an agreed sum of R15,00 excluding VAT per ton of orange peel dumped. The respondent composted the surplus orange peel for its own benefit.

[9] The whole venture was about benefiting both parties, with the appellant to get a disposal site and the respondent to get compost for rehabilitation and for some sales.

[10] During the 1997 season appellant dumped 31 788 tons of wet peel on respondent's premises which were duly paid for. At the commencement of the 1998 season the use of the site was prohibited by the department of Water Affairs and Forestry in terms of the Section 20(1) of the Environmental Conservation Act, Act 73

of 1989 as amended. In the 1998 season appellant dumped only 66 tons of orange peel.

[11] The appellant obtained a temporary permit from the Minister for 1999 and 2000 seasons and appointed consultants to apply for a permanent permit and or exemption therefrom. The appellant was unsuccessful in obtaining the required permit and/or exemption.

[12] The appellant requested respondent to take over the process to obtain authorisation for and to construct a waste disposal site.

Pleadings

[13] In its original Particulars of Claim, respondent claimed R810,000.00 from appellant as compensation for damages as a result of an alleged breach of another verbal agreement, the material, express alternatively implied terms which were pleaded as follows: -

"8.1 The plaintiff will proceed with an application on behalf of the defendant for the necessary permit and comply with any of the requirements or conditions imposed by the said minister for the obtaining of a permit or alternatively for being exempted from the need of obtaining such a permit.

8.2 The defendant will deliver all its orange peels not being less than 30 000.00 tons per season of wet peel for three consecutive seasons following the granting of the permit.

8.3 The parties had within their contemplation that the agreement would continue for at least another two years and it is at the specific request of the defendant that the plaintiff applied for an exemption on the site for five years. The parties thus agreed that the price per ton would continue at R15,00 per ton excluding VAT for the first three seasons but that this figure will be adjusted upwards after the three

consecutive seasons for the next two seasons as overhead costs would warrant such adjustment.

8.4 It was at all material times the understanding that plaintiff would compost the peel for its own benefit and that the composting business would contribute to the creation of jobs for the local community in terms of the plaintiff's BEE policy."

[14] The appellant denies that the verbal agreement relied upon by the respondent was entered into in early 2001.The appellant pleaded that the terms of the aforesaid October agreement were as follows:

"11.1 The respondent would at his own costs and responsibility, prepare and construct a waste disposal site for wet citrus peel;

11.2 That from the date of completion of the waste disposal site the defendant would be entitled to dump wet citrus peel at the site at a dumping fee of R15.00 (VAT excluded)

11.3 That the aforesaid dumping fee would be reviewed at the end of 3 seasons from the date of completion of the waste disposal site: and

11.4 That the defendant would, from the date of completion of the waste disposal site and for the following 3 seasons consecutively, be obliged to dump such a volume of wet peel at the waste disposal site as would enable the plaintiff to recover its capital costs for the construction of the waste disposal site".

[15] In its amended particulars of claim, plaintiff now claims a total amount of R4 850,376.00 as compensation for damages as a result of the alleged breaches of the same alleged verbal agreement of early 2001. The respondent still relied on the terms mention in 8.1 and 8.2 above. The respondent now pleaded for the first time additional terms of the aforesaid agreement as follows: -

"8.3 The parties had within their contemplation that the agreement would continue for at least another two years and it is at the the specific request of the defendant that the plaintiff applied for an exemption on the site for five years. The parties thus agreed that the price per ton would continue at R15.00 per ton excluding VAT for the first three seasons but that this figure would be adjusted upwards after the three consecutive seasons for the next two seasons as overhead costs would warrant such adjustment."

8.4 It was at all material times the understanding that the Plaintiff would compost the peel for its own benefit and that the composting business would contribute to the creation of jobs for the local community in terms of the plaintiff's BEE policy.

8.5 Plaintiff has at his own cost and for his own benefit developed an organic compost called 'Biomix' the surplus of which to the knowledge of defendant was sold to farmers for R89.00 per ton.

[16] In claim A respondent claimed payment of the sum of R710 000.00 for loss of income of the dumping fee of R15.00 per ton for 47 376 tons. The respondent introduced a further claim (as Claim B) claiming payment of the value to the plaintiff of 47 376 tons of peel from which 23 688 tons of compost could have been manufactured at the profit of R49.00 per ton of compost.

[17] In Claim C(a) respondent claimed of an amount of R1 140 000.00 as the increased amount at R19 per ton for 60 000 tons for the 2006 and 2007 seasons. In Claim C(b) respondent claimed an amount of R1 470 000.00 as payment for the loss of 30 000.00 tons of compost which could have been manufactured from the aforesaid 60 000 tons of orange peel. In the new claim D respondent claims payment of R370 000.00 being the cost of rehabilitation of the dumping site.

[18] In the course of his judgment Legodi J stated:

"Secondly, the defendant's version should be matched against that of the plaintiff. The latter developed the dumping site at a huge cost. It could not have been expected of it that it could develop such a site only to recover its costs and the end, so it was contended by the plaintiff. The plaintiff is a business entity, doing business in mining. When the idea of a relationship with the defendant was mooted, especially for the period starting in 2003, its financial manager, who is an accountant by profession, was asked to do a feasibility study on the project. It was felt it would make business sense to conclude such an agreement with the defendant. For example, there would be a payment of R15.00 per ton of peels. There would also be a compost project derived from wet peels and sold at a profit to the public and farmers in the surrounding areas."

[19] Despite explanation that Fourie could not be called to testify as he had received cancer treatment and did not want to go through the rigours of a trial, the trial court stated:

"The defendant with regard to what was agreed upon, failed to lead evidence of the person who had dealings with the plaintiff. Mr Greaves, the plaintiff's Managing Director, was the person who negotiated for the establishment of the dumping site. Effectively therefore, the defendant for its term of the agreement, relies on documentation and or circumstantial evidence. This evidence must be measured against the viva voce evidence of Mr Greaves and other factors".

[20] The learned judge concluded:

"...it would not have made any business sense for the respondent to conduct its affairs in this matter. For example, to erect the dumping site for the defendant, incur huge costs and only thereafter content itself in recovering the costs."

The dispute

[21] Before these arguments are considered, it is necessary to place the dispute in its proper context. Essentially the respondent alleges that the appellant was obliged to dump at the waste disposal site it constructed at least 30 000 tons on peel for a minimum of three seasons commencing 2003 in terms of the verbal agreement.

[22] The appellant on the other hand avers that an oral agreement was entered into or or about October 2001 between appellant represented by its then manager, Johan Fourie and the respondent represented by its then manager, Jan Maritz. Appellant alleges that in terms of the said agreement, it only had to dump enough peel to enable the respondent to recover its capital costs for the construction of the dump site and that by dumping at least 39.100 tons the respondent received R586,500.00 which was sufficient to cover the respondent's capital outlay of R525,000.00.

[23] These two versions are mutually destructive in the sense that the acceptance of the one must necessarily lead to the rejection of the other. Eksteen AJP in **National Employers 'General Insurance v Jagers**[1] set out the approach to be followed where there are mutually destructive versions. He stated at 440 D-G

> "It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two

[1] 1984 (4) 437 (E) at

mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false"

[24] As my judgment will show, the trial court erred in not making proper factual findings in the manner set out by Eksteen AJP in **Jagers** (supra). The court *a quo* found that the versions of the appellant and the respondent are mutually destructive and decided the matter on the version of the respondent. The court gave no reasons why it preferred this version and did not have regard to the probabilities or the credibility of main witness for the respondent. Its failure to test respondent's allegations against the general probabilities is a misdirection entitling this court to reassess the evidence and determine the probabilities. I will hereafter show how the trial judge erred in his approach.

[25] Mr Greaves, respondent's Managing Director, testified on behalf of the respondent that he requested Fourie, who was acting on behalf of the appellant, in October 2001 that the parties enter into a formal written agreement that appellant agree to make exclusive use of the waste disposal site of the respondent. Fourie refused to sign the agreement saying he will not be able to get approval from the board of the appellant. Greaves testified that by early 2003

there was still a need to "formalise our agreement and what it entailed".

[26] On this evidence, respondent knew beforehand that Fourie lacked the necessary authority to bind the appellant to this specific agreement in terms of which appellant would be bound to exclusively dump all its orange peels not being less than 30 000 tons per season at the waste site of the respondent.

[27] The trial court did not consider this evidence at all despite the fact that the respondent relied on it for its cause of action. In my view, the trial court should have found that the said agreement was invalid and unenforceable and should have dismissed all the claims on this ground alone.

[28] Counsel for the respondent submitted in his heads of argument that appellant's argument on appeal that Fourie lacked authority was never pleaded and to raise this issue on appeal is unfair to the respondent. I disagree, the unfairness will not arise in the present matter as the issue was fully canvassed at the trial. In any event, the court has a duty to determine the real issues between the parties, and provided no possible prejudice can be caused, to decide the case on those real issues[2].

[29] Greaves gave vague and contradictory versions as to when and how the alleged agreement came into existence. He testified that early in 2001 Fourie approached him with a request that the plaintiff proceed to take over the application for the necessary permit for a waste disposal site. He does not mention any terms agreed upon by the parties at that stage. In his letter of 19 March 2003, Greaves

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[2] Spearhead Property Holdings Ltd v First Rand bank Ltd 2010 (2) SA 1 (SCA) para [42}

recorded the request to proceed with the obtaining of the site permit as being in October 2001. The date of October 2001 is also confirmed in the letter of demand addressed to the appellant on the 13 August 2004.

[30] When asked by the court when was the agreement concluded, Greaves testified that it was in the early part, just before the season of 2003 (between January and March). When asked to explain why in the pleadings he said the agreement took place early in 2001, he was driven to assert that the contract developed or evolved over time from early 2001 up to and including the first quarter of 2003. Under cross examination he testified that respondent does not rely on an agreement concluded in 2001 but on an agreement with evolved over time between 2001 and 2003. The difficulty with the latter version is that the pleadings as amended expressly states that *"During the early part of 2001 the parties represented as aforesaid entered into another verbal agreement".*

[31] The trial court did not deal with the issue as to whether the respondent has proven the existence of the specific agreement upon which it relied as pleaded in its amended particulars of claim for its cause of action. In my view, the trial court should have found that the respondent has failed to discharge the onus of proving the existence of the specific agreement upon which it relied for its cause of action.

[32] Greaves testified that appellant was obliged to use respondent's waste disposal site exclusively to dump all its wet peels. In a letter of the 12 September 2002 that Greaves wrote when he found out that appellant had applied for approval of its own wasted disposal site he never reminded appellant of the exclusivity of the

arrangement, all that he was concerned with was that the parallel application will detract from the urgency of the permit that respondent was trying to get. The conduct of the appellant in pursuing a parallel application for its own disposal site without any demur from respondent is not consistent with the version of the respondent that appellant was obliged to dump all of its wet peels at the respondent's site.

[33] Greaves in his evidence contradicted the respondent's plea that the compost would be produced for respondent's own benefit and only the surplus was to be sold to farmers. He testified that the great majority had to be sold and that only "*a little bit*" of the compost was used, this is despite the permit prescribing that the compost must primarily be used for rehabilitation.

[34] A letter written on 19 March 2003 by Greaves, with the express purpose to record the previous discussions and agreement is a clear admission of the appellant's version of the content of the agreement between the parties. Greaves wrote:

> "Johan – Citrus peel compost site: Thank you for seeing us today, and I write this letter to record our previous discussions and agreement. For your internal reasons you do not want a formal signed agreement and this letter records the understanding between us.
>
> In October 2001 you requested us to proceed with obtaining the necessary site permit, as you had been unsuccessful, due possibly to a clash with personalities with the Department of Water affairs personnel. We have proceeded and have reached the final stages of obtaining the site permit. The costs to date, attached to our letter 22 January 2003 is R526 500.00. It is agreed that Onderberg will deliver wet peel to the mine site for three years and pay R15.00 per ton. This price will remain fixed for this period in order to recover the costs above, the price can then be renegotiated. Onderberg will no longer add magnesium oxide or

lime to correct the ph of the peel, this will be done by the mine. I trust that this records everything and that this long and painful process has been put behind us"

[35] From the respondent's own correspondence it is clear that:

(a) the specific agreement was to endure for a period of three years contrary to the evidence of Greaves that the duration of the agreement between the parties was for five (5) years.

(b) during the said 3 years the appellant was entitled to dump peels at the respondent's site;

(c) the price of R 15.00 per ton will remain fixed for 3 years in order to recover the costs of building the waste disposal site where after it can be renegotiated. Respondent understood that costs were to be recovered from the dumping fee, in its letter of demand on 13 August 2004 respondent demanded payment of the outstanding balance of the costs of building the site not yet recouped. The letter mentioned the total site costs to be R 526,500,00 in respect of which payment of a proportionate amount, calculated as a portion of the site costs not yet recovered, was demanded.

(d) during the said 3 years the appellant was entitled to dump a minimum volume of peels at the respondent's site such as would allow for the recovery of the respondents costs of building the dumping site.

(d) both parties contemplated that after those 3 years the business relationship between the parties will continue, albeit on future terms and conditions to be negotiated for a further or separate agreement;

[36] Respondent first pleaded that defendant would deliver all of its orange peels not being less that 30 000 tons per season of wet peel for three consecutive seasons following the grant of the permit and then amended its case to a contract with a duration of five years. Greaves testified that Fourie wanted a 5-year term from the outset and changed his evidence to say that the request for five-year term came later. When confronted with his pleading that says appellant will deliver peels for three consecutive seasons, he agreed that it was for three years and he changed his evidence back to a request from Fourie for a 5-year term, blaming the contradiction with the original Particulars of Claim on him not providing his lawyers with sufficient information.

[37] In my view, the trial court should have found that the appellant's version of the terms and conditions of the agreement are on a preponderance of probabilities true and accurate and therefore acceptable, and that the version advanced by the respondent is therefore false or mistaken and falls to be rejected.

[38] The respondent's version is, on the objective facts and probabilities, false and not sustainable. The respondent accordingly failed to discharge the *onus* of proof. In these circumstances, the court below erred in its conclusion when it found that the respondent's version of the terms and conditions of the agreement was more probable than the appellant's version. It follows that the respondent's claim A should have been dismissed. The appeal has to succeed.

[39] In the result the following order is made:

1. The appeal is upheld

2. The order of the court below is set aside and in its stead is substituted the following order:

Claim A is dismissed with costs.

KE Matojane J

PP [LEDWABA DJP J]

G Webster J

I agree, it is so ordered

S Naidoo AJ