REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 52088/2018

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

16 February 2021 .....

In the matter between:

JOHN WRIGHT VENEERS (SA) (PTY) Plaintiff

And

KOMATIELAND FORESTS SOC LIMITED Defendant

JUDGMENT

WANLESS AJ

Introduction

[1] On or about the 26th of September 2014 and at or near Pretoria, JOHN WRIGHT VENEERS (SA) (PTY) LIMITED *("the Plaintiff")* and KOMATIELAND FORESTS SOC (PTY) LIMITED *("the Defendant")* entered into a written agreement *("the custom cut contract").* In terms of the custom cut contract the Plaintiff would process the Defendant's saw logs and be remunerated therfor *("the processing fee")* by the Defendant. The custom cut contract was later amended by two addendums which increased the processing fee.

[2] A dispute arose between the parties in terms of the custom cut contract. On or about the 23rd of November 2016 this dispute was settled between the parties. The Plaintiff instituted the present action on the basis that the Defendant has failed to fully comply with that settlement agreement *("the agreement").*

The Plaintiff's case

[3] It is common cause that the dispute which arose in terms of the custom cut contract was in respect of whether the Defendant had failed to deliver the monthly commitment of logs to the Plaintiff for processing during or about the period August 2014 to July 2016. It was alleged by the Plaintiff that the shortfall in respect thereof was 13 675 cubic meters. When calculated in

terms of the provisions of sub-paragraph 3.3 of the custom cut contract this gave rise to a claim by the Plaintiff in the sum of R8 287 227.79.

[4] This claim was discussed and settled, in principle, at a meeting held between the parties on the 14th of November 2016. The contents of the minutes of that meeting are not in dispute. Following thereon, the very next day (the 15th of November 2016), the Plaintiff received an email from Mr Nonyane *("Nonyane").* It is alleged by the Plaintiff that in this email Nonyane, the Defendant's Custom Cut Manager, authorised by the Defendant to do so, undertook that the Defendant would deliver 7 800 cubic meters of logs to the Plaintiff to process during the months of December 2016 and January 2017.

[5] Premised on the aforegoing, it is the Plaintiff's case that the parties then entered into the agreement. The agreement is as set out in two letters, dated the 18th of November 2016 *("the first letter")* and the 22nd of November 2016 *("the second letter"),* respectively. In terms thereof the Plaintiff avers that the material terms and conditions of the agreement were that the Defendant would pay to the Plaintiff the sum of R2 500 000.00 and would produce and supply additional log volumes in December 2016 and January 2017 to bring the levels of log deliveries to contractually expected volumes. These log volumes were, according to the Plaintiff, those as set out in the email of Nonyane on the 15th of November 2016.

[6] It is common cause that the Defendant complied with the agreement by paying the Plaintiff the sum of R2 500 000.00. However, the Plaintiff avers that the Defendant has failed to comply with its remaining obligations in

terms of the agreement in that the Defendant failed to produce and supply additional log volumes in December 2016 and January 2017 to bring the levels of log deliveries to contractually expected volumes. In this regard the Plaintiff avers (and it is common cause) that the Defendant only delivered 1 574 cubic meters during the relevant period giving rise to a shortfall of 6 226 cubic meters. This shortfall, at the agreed rate of R827,97 per cubic meter recovered, gives rise to the Plaintiff's claim for damages in the sum of R2 809 442.96. This calculation is set out in paragraph 13 of the Plaintiff's Particulars of claim. The Plaintiff claims payment of this amount, together with interest and costs.

The Defendant's case

[7] In terms of the Defendant's Plea (as amended) the Defendant has raised a number of defences (no less than five) to the claim for damages by the Plaintiff. These are: -

7.1 Nonyane was not authorised by the Defendant to agree to deliver the volume of logs to the Plaintiff during December 2016 and January 2017 as alleged by the Plaintiff;

7.2 in the alternative to 7.1 and in the event of it being held that Nonyane was so authorised, that this is in fact inconsequential due to the agreement which was subsequently entered into between the parties on 22 November 2016 which settled all disputes relating to the log delivery shortfalls;

7.3 in terms of the Interim Transport Agreement *("the transport agreement")* entered into between the parties and which came into effect on 16 January 2017 the Defendant's obligations to make log deliveries to the Plaintiff ceased;

7.4 in terms of sub-paragraph 3.1 of the custom cut contract, no log deliveries were expected or due in the period from approximately the middle of December to the middle of January *("the shut down period")*;

7.5 the Plaintiff failed to comply with the provisions of sub-paragraph 3.3 of the custom cut contract. This defence was added to the Defendant's defences when the Defendant, during the course of the trial, after the testimony of Human and during the evidence in chief of Gouws, amended its Plea to introduce same. There was no objection thereto by the Plaintiff.

Issues

[8] All of the aforegoing defences, as pleaded by the Defendant, amount to a denial that it was a material term of the agreement that the Defendant would produce and supply additional log volumes in December 2016 and January 2017 to bring the levels of log deliveries to contractually expected volumes. It is the Defendant's case that this was agreed in terms of the custom cut contract. In the premises, the main issue for this court to decide is whether the agreement reached by the parties on the 23rd of November 2016 included the term that the Defendant would produce and supply additional log volumes in December 2016 and January 2017 to bring the

levels of log deliveries to contractually expected volumes which had already been determined by the Defendant.

Common cause facts

[9] Whilst some of the facts which were common cause have already been set out above, it is nevertheless expedient, at this stage, to deal specifically therewith. The relevant facts in deciding this matter and which were common cause are the following:-

9.1 the material terms and conditions of the custom cut contract and the two addendums thereto;

9.2 it was a material term of the agreement that the Defendant would pay to the Plaintiff the sum of R2 500 000.00;

9.3 the Defendant complied with the agreement by paying to the Plaintiff the sum of R2 500 000.00;

9.4 the Defendant supplied 1 574 logs to the Plaintiff during the months of December 2016 and January 2017;

9.5 the manner in which the Plaintiff's quantum of damages has been calculated and the amount of damages the Plaintiff has suffered in the event of the Plaintiff proving that the Defendant is liable to compensate the Plaintiff in respect of same.

The law

[10] A compromise or settlement *(transactio)* is a contract the purpose of which is to prevent or avoid or put an end to litigation. Whether embodied in an

order of court or not, it has the effect of *res iudicata (Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd 1978 (1) SA 914 (AD); Georgias v Standard Chartered Finance Zimbabwe Ltd 2000 (1) SA 126 (ZS) at 138-139).*

[11] A compromise is a substantive contract which exists independently of the cause that gave rise to the compromise. Being a contract the general rules of pleading; proving and interpreting the terms of a contract apply *(Natal Joint Municipal Pension Fund Endumeni Municipality 2012 (4) SA 593 (SCA) at paragraph 18).*

[12] In the absence of a reservation of the right to proceed on the original cause of action the compromise agreement bars any proceedings based on the original cause. Not only can the original contract not be relied upon but the parties are also not entitled to go behind the compromise and raise defences to the original cause of action when sued on the compromise *(Van Zyl v Niemann 1964 (4) SA 662 (AD)).*

The evidence

[13] The Plaintiff called three witnesses, namely Messrs Human; Gouws and Murovhi, whilst the Defendant called one witness, namely Nonyane. Various documents were admitted into evidence by consent.

[14] This judgment will not be burdened unnecessarily by setting out, in detail, the evidence that was placed before this court at trial, whether same was

the *viva voce* evidence of the various witnesses or evidence of a documentary nature. Rather, same will be referred to herein where appropriate.

Was it a term of the agreement that the Defendant was obliged to produce and supply 7 800 cubic meters of logs to the Plaintiff during December 2016 and January 2017 ?

[15] Human, Gouws and Nonyane (who all testified at the trial) were present at the meeting held between the Plaintiff and the Defendant on 14 November 2016. The purpose of this meeting was to attempt to settle the Plaintiff's claim in respect of the short supply of logs by the Defendant to the Plaintiff in terms of the custom cut contract. As noted earlier in this judgment the parties agreed that what was contained in the minutes of that meeting *(MEETING MINUTES FOR JOHN WRIGHT VENEERS LOG UNDERSUPPLY CLAIM at pages 74 and 75 of Volume 1 of the Trial Bundle)* was a true recordal of what took place at that meeting.

[16] Mr Theron (a representative of the Defendant) requested that the plantations produce and supply enough volume for the December holidays. Theron also stated that a proposal for settling the claim would be communicated on 18 November. He further requested that Messrs Mokobane and Themba (representatives of the Defendant) draft a proposal for supplying the Plaintiff logs for the next four months and include plans for supplying additional volume in December. Theron did not testify at the trial.

[17] Mokobane (a representative of the Defendant who also did not testify at trial) was of the opinion that the plantations could stagger their holidays to make up for the increased demand. He further stated that Gouws should write up a proposal for settlement of the claim in line with what had been agreed at the meeting.

[18] As also noted earlier in this judgment the day following that of the meeting (the 15th of November 2016) the Plaintiff received an email from Nonyane *(annexure "POC 4" to the Plaintiff's Particulars of Claim at page 65 of Volume 1 of the Trial Bundle).*It is noted that Nonyane proposed the volumes of logs to be supplied to the Plaintiff and not Mokobane and Themba as requested by Theron at the meeting. This, however, makes sense, since it is common cause that Nonyane was in charge of the custom cut contract on behalf of the Defendant.

[19] On the 18th of November 2016 the Defendant addressed the first letter to the Plaintiff *(annexure "POC 5" to the Plaintiff's Particulars of Claim).* This letter bears the heading "SHORT SUPPLY OF LOGS-KOMATIELAND FORESTS SOC LIMITED SETTLEMENT PROPOSAL" and was signed by Theron.

[20] Paragraph 1 of the first letter reads as follows:-

*"We refer to the John Wright Veneers (SA) (Pty) Ltd.'s ("**JWV**") claim on the log-undersupply as received by Komatiland Forests SOC Limited*

*(**"KLF"/Company**") on Tuesday, 25 October 2016 ("**the claim**") and particularly the subsequent meeting held on Monday, 14 November 2016 wherein, amongst others, the claim was extensively discussed with a view of finding a settlement of all matters in dispute."*

[21] In paragraph 2, it is stated:-

*"As agreed during the abovementioned meeting, KLF hereby makes an offer in full and final settlement of all disputes and the claim ("**Offer**") as follows:*

2.1 KLF shall make payment to JWV on or before 25 November 2016 of the total sum of R2,200,000 (Two Million Two Hundred Thousand Rands only) in full and final settlement (of) the claim as received on Tuesday, 25 October 2016; and

2.2 KLF undertakes to produce and supply additional volumes in December 2016 to JMV in an effort to bring the levels of log delivery to contractually expected volumes."

[22] Paragraph 3 reads:-

"KLF makes the foregoing Offer in order to re-establish its longstanding relationship with JMV and to enable both parties to achieve, within the remaining period, the targets set out in (the) agreement as entered into in August 2014."

[23] In paragraph 6 it is stated:-

"By acceptance of this Offer, this document will serve as evidence of a full and final settlement of both the claim and all other existing disputes between the JMV and the Company."

[24] The offer as set out in the first letter was made open for acceptance until the 22nd of November 2016. It is common cause that this offer was not accepted by the Plaintiff. Instead, on the 20th of November 2016, Human, on behalf of the Plaintiff, addressed a letter to Theron of the Defendant. This letter bears the heading "SHORT SUPPLY OF LOGS-KOMATILAND FORESZTS (PTY) LTD SETTLEMENT COUNTER PROPOSAL". The significance of this letter is that it deals only with a monetary settlement. No mention is made therein of the supply by the Defendant to the Plaintiff of additional volumes of logs during the months of December 2016 and January 2017.

[25] On the 22nd of November 2016 the Defendant addressed the second letter to the Plaintiff *(annexure "POC 6" to the Plaintiff's Particulars of Claim)*. This letter bears the heading "SHORT SUPPLY OF LOGS-FULL AND FINAL SETTLEMENT OFFER BY KOMATILAND FORESTS SOC LIMITED" and was once again drafted by Gouws and signed by Theron.

[26] The relevant paragraphs in the second letter are 3, 4 and 7, which read as follows:-

*" 3. As a measure of goodwill and in an endeavour to amicably settle all existing disputes, particularly the claim as received by KLF on Tuesday, 25 October 2016, the Company hereby makes an improved full and final offer of settlement ("**Improved Final Offer**") of payment to JWV of the total sum of **R2,5000,00 (Two Million Five Hundred Thousand Rands only)** on or before **Friday, 25 November 2016.***

*4. Please take note that the foregoing Improved Final Offer is open for your acceptance within the same terms and conditions stated in KLF's offer of settlement made on Friday, 18 November 2016 to JWV ("**Initial Offer**").*

7. Further take note that unless specifically mentioned and/or amended herein, all the terms and conditions of the Initial Offer as pertaining to the acceptance and the binding nature of such, shall apply mutatis mutandis to this Improved Final Offer that is made herein."

[27] The offer, as encapsulated in the second letter, was accepted by the Plaintiff. In this regard, Human signed same on the 23rd of November 2016.

[28] Human, Gouws and Nonyane were all credible witnesses. The evidence of the only other witness who testified before this court, namely Murovhi (like Gouws, an employee of the Defendant who was subpoenaed by the Plaintiff to give evidence on the Plaintiff's behalf), took the matter no further. He was called in relation to the alleged failure of the Defendant to discover certain documentation allegedly in the Defendant's possession.

Whilst Human testified that it was a material term of the agreement that the Defendant would produce and supply additional log volumes in December 2016 and January 2017 to bring the levels of log deliveries to contractually expected volumes which had already been determined by the Defendant, Gouws and Nonyane testified that this was not the case. In the premises, faced with two irreconcilable versions, it falls upon this court to decide this matter on the probabilities in order to determine whether the Plaintiff has discharged the onus incumbent upon it to prove that the aforesaid term was a material term of the agreement *(Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others 2003 (1) SA 11 (SCA)).*

[29] The minutes of the meeting held on the 14th of November 2021, insofar as those minutes may have provided objective evidence as to what was discussed, shed little light on what was (or was not) agreed at the meeting in order to settle the Plaintiff's claim. Rather, the two letters, together with certain correspondence entered into during negotiations and subsequent to the agreement being accepted by the Plaintiff, are of assistance in determining whether, on a balance of probabilities, the agreement included a term in relation to the production and supply of logs.

[30] No discussion about payment of a sum of money in settlement of the Plaintiff's claim, is recorded in the minutes of the meeting. Nevertheless, it is common cause that in terms of paragraph 3 of the second letter the initial offer by the Defendant to the Plaintiff was increased from R2 200 000,00 to R2 500 000,00. The wording of this paragraph, as set out earlier in this judgment, is important. It is stated therein that payment of that sum is to "….settle ***all*** existing disputes, ***particularly*** the claim as

received by KLF on Tuesday, 25 October 2016". The conclusion that can be made therefrom is that the said payment settled all disputes, particularly the claim of the Plaintiff arising from a short supply of logs in terms of the custom cut contract. In other words, simply put, once that payment was made, this brought finality in respect of the dispute. There was nothing more the Defendant had to do. It was not incumbent upon the Defendant to produce and supply additional log volumes. Moreover, it is probable that had the Defendant been obliged to pay the sum of R2 500 000,00 *and* also supply an additional volume of logs during December 2016 and January 2017, then this paragraph would have said so and/or the Plaintiff would have insisted that this be clearly recorded in the second letter. The fact that the second letter, which constitutes the revised offer of the Defendant, is silent in respect of the production and supply of logs, supports the probability that same was not a term of the agreement.

[31] Further in this regard, it is correct (as pointed out by the Plaintiff) that paragraph 4 of the second letter (as set out above) states that the improved and final offer of the Defendant is open for the Plaintiff's acceptance *"....within the same terms and conditions"* as stated in the first letter *(the Initial Offer)*. In that regard, it is the finding of this court that this incorporation of terms and conditions as contained in the first letter into the second letter did not include sub-paragraph 2.2 thereof (the production and supply of additional volumes of logs). This finding is based on the fact that, once again, it is far more probable that such an important clause would have either been included in the second letter, alternatively, would have been specifically referred to in the second letter.

[32] It is, however, paragraph 3 of the first letter (also set out above) which illustrates above all else, that on a balance of probabilities the agreement that the Defendant would produce and supply additional log volumes to the Plaintiff was not a material term of the agreement but was related to the custom cut contract. To understand why this is so and the true import of paragraph 3 of the first letter, it is necessary to deal with the provisions of sub-paragraph 3.3 of the custom cut contract. This sub-paragraph reads as follows:

"Should the volume delivered by KLF fall short of the monthly commitment in any consecutive three months for reasons other than force majeure, KLF shall be obliged to place the Contractor in the same financial position it would have been had KLF supplied the monthly commitment".

[33] It is common cause that the Defendant *("KLF")* had fallen short of the monthly commitment in terms of the custom cut contract in respect of its obligation to produce and supply to the Plaintiff *("the Contractor")* monthly volumes that would equate to 50 000 cubic meters of logs in a calendar year *(sub-paragraph 3.1 of the custom cut contract*). Further, it is common cause that the custom cut contract would be coming to an end on the 31st of July 2017. In light thereof, the Defendant had at least eight (8) months to ensure that, by increasing the monthly volumes of production and supply of logs to the Plaintiff, it would, by the time the custom cut contract came to an end, have fully complied with the obligation to have produced and supplied the required volume of logs to the Plaintiff as more fully set out in sub-paragraph 3.1 thereof. Should the Defendant fail to do so the Plaintiff would then be entitled (as it had done in terms of its claim against the Defendant which was settled) to claim damages in terms of, *inter alia*, sub-paragraph 3.3 of the custom cut agreement.

[34] This reasoning finds support in the clear and unambiguous wording of paragraph 3 of the first letter. This paragraph has been set out above. Nevertheless, it deserves further attention at this stage. Once again, it reads as follows:-

"KLF makes the foregoing Offer in order to re-establish its longstanding relationship with JMV ***and to enable both parties to achieve, within the remaining period, the targets set out in (the) agreement as entered into in August 2014."***

[35] As testified to by Gouws and Nonyane, the aforegoing lends considerable support for the probability that it was not a term of the agreement that the Defendant would produce cand supply additional log volumes to the Plaintiff for the months of December 2016 and January 2017 as determined by Nonyane on behalf of the Defendant. It is improbable that the Defendant would agree, as part of the agreement to settle a dispute pertaining to the short supply of logs, to supply additional logs over a period of two months when a dispute may never arise as to whether or not the Defendant was in breach of sub-paragraph 3.3 of the custom cut contract during the existence of that contract or upon the termination thereof. Undertaking to attempt to begin to produce and supply additional volumes of logs, in principle and in order to give some assurance to the Plaintiff that the Defendant wanted to try to fulfil its commitments in terms of the custom cut contract, is quite different to settling a dispute on that basis. This is particularly so when viewed in the context of the other facts as dealt with above and, in particular, the fact that compensation in the sum of R2 500 000.00 had been agreed upon.

[36] The events which took place pursuant to the parties entering into the agreement also support the fact that it is more probable that it was not a material term of the agreement that the Defendant would produce and supply additional log volumes to the Plaintiff for the months of December 2016 and January 2017. In this regard, during the period 22 November 2016 (when the Plaintiff accepted the settlement proposal of the Defendant) to the 6th of February 2017 (the date of the Plaintiff's letter of demand), no correspondence was entered into evidence where it is indicated, by either party, that the aforesaid term was part of the agreement. In fact, in the Plaintiff's letter of demand the following is stated by Human:-

"The absence of logs during the month of December 2016 to the latter part of January 2017 resulted in losses incurred by JMV ***which was not provided for in the settlement reached on 22 November 2016".***

This paragraph clearly shows that the agreement did not provide for logs to be supplied by the Defendant to the Plaintiff during December 2016.

[37] Another fact which supports the probability that the agreement did not include a term involving the production and supply of logs as averred by the Plaintiff is that the schedule prepared by Nonyane on the 15th of November 2016 sets out log deliveries for the months of December 2016; January 2017; February 2017 and March 2017. Had the agreement incorporated the term that additional log volumes were to be produced and supplied for two months (December 2016 and January 2017) it is improbable that Nonyane would have gone to the effort

of working out additional log volumes for a total of four months. The fact that he did, supports the Defendant's version (and the probabilities) as set out above.

[38] Finally, the fact that the first letter refers to an undertaking by the Defendant to produce and supply an additional volume of logs in December 2016 only (in an effort to bring the levels of log delivery to *contractually expected volumes)* and does not include January 2017, whilst the Plaintiff claims for a shortfall of logs over two months (December 2016 and January 2017) is indicative of the fact that the Plaintiff's claim, if any, is a claim in terms of sub-paragraph 3.3 of the custom cut contract and not in terms of the agreement.

[39] In the premises, taking all of the aforegoing into account, it is held that the Plaintiff has failed to prove, on a balance of probabilities, that it was a material term of the agreement that the Defendant would produce and supply to the Plaintiff 7 800 cubic meters of logs during December 2016 and January 2017. Following thereon, it is unnecessary for this court to consider whether the Defendant breached the agreement and, if so, the amount of damages payable to the Plaintiff in respect thereof. Moreover, it is unnecessary for this court to consider the defences raised by the Defendant and as set out, *inter alia*, in sub-paragraphs 7.1; 7.3 and 7.4 of this judgment.

Order

[40] This court makes the following order:

"The Plaintiff's claim is dismissed with costs".

BC WANLESS

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on: 13 November 2020
For the Plaintiff : Adv AJ Schoeman
Instructed by: Kruse Attorneys Inc
For the Defendant : Adv Madima SC
Instructed by: Fasken (incorporated in South Africa as Bell Dewar Inc)
Date of Judgment: 16 February 2021