THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 20049/14

In the matter between:

ROOYENDAL (PTY) LTD	**FIRST APPELLANT**
MARK WILLIAM BOSHOFF	**SECOND APPELLANT**
SENTA BOSHOFF	**THIRD APPELLANT**
EDSEL HOHLS	**FOURTH APPELLANT**
I R VOIGTS (PTY) LTD	**FIFTH APPELLANT**
WALTER HERBERT REDINGER	**SIXTH APPELLANT**
HEINZ FRIEDEL REDINGER	**SEVENTH APPELLANT**

and

THE MINISTER OF LAND AFFAIRS	**FIRST RESPONDENT**
TABATHA AGATHA SHANGE	**SECOND RESPONDENT**

Neutral Citation: *Rooyendal (Pty) Ltd v The Minister of Land Affairs* (20049/14) [2015] ZASCA 108 (21 August 2015).

Coram: Mpati P, Lewis and Bosielo JJA and Van der Merwe and Gorven AJJA

Heard: **18 May 2015**

Delivered: **21 August 2015**

Summary: Contract ─ appellants failed to prove oral agreements relied upon ─ oral agreements relied upon by first and seventh appellants in any event unenforceable as result of integration (parol evidence) rule.

ORDER

On appeal from: Land Claims Court, (Sardiwalla AJ sitting as a court of first instance in KwaZulu-Natal): judgment reported *sub nom Rooyendal (Pty) Ltd v Minister of Land Affairs* [2013] 3 All SA 588 (LCC).

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Bosielo JA and Van der Merwe AJA (Mpati P, Lewis JA and Gorven AJA concurring):

[1] The Amakhabela and Ntunjambili/Ngcolosi communities lodged land claims in terms of the Restitution of Land Rights Act 22 of 1994 (the Act), in respect of a number of farms in the Kranskop region of KwaZulu-Natal. The communities claimed inter alia restoration of farms owned and farmed by the first and seventh appellants. They also claimed restoration of farms leased from their owners by a partnership consisting of the second and third appellants and by the fourth, fifth and sixth appellants. These farms were owned by family trusts. The trustees of the respective family trusts included the second, third, fifth and sixth appellants as well as Mr Ivan Voigts, the managing director of the fifth appellant. An attorney, Ms Karen Hepburn, was a trustee of a number of these family trusts. The principal farming operations on these farms were the production of timber and sugar-cane.

[2] At all relevant times the second respondent, Ms Tabatha Shange, was employed by the Department of Land Affairs (the department) as Regional Lands Claims Commissioner for KwaZulu-Natal. She caused notices of the claims to be published in the government gazette during 2003. The owners of the farms referred to in the previous paragraph (the farms) opted to sell and commenced negotiations for that purpose with Ms Shange on behalf of the communities. These negotiations were mainly conducted on behalf of the

appellants by the third appellant, Ms Senta Boshoff, the fourth appellant, Mr Edsel Hohls, Mr Voigts and Ms Hepburn. Ms Shange was assisted by officials of the department in KwaZulu-Natal.

[3] The farms were eventually sold to the department, represented by Ms Shange, on behalf of the communities, in terms of nine written deeds of sale, all entered into on 8 June 2005. The total consideration payable in respect of the deeds of sale amounted to some R90 million. Apart from the description of the farms and the purchase price thereof, the terms of the deeds of sale were identical. Each agreement provided in clauses 2 and 5 that the farm or farms and standing sugar-cane and/or timber were sold as a going concern. In terms of clause 7 of each agreement occupation would be given to the purchaser on the date of registration of transfer. Clause 8 contained the following provisions:

'8.1 This agreement constitutes the entire record of the contract between the PARTIES. No agreement varying, adding to, deleting from or cancelling this agreement, shall be effective unless reduced to writing and signed by or on behalf of the PARTIES.

8.2 The PARTIES agree and warrant that:

8.2.1 there are no conditions precedent suspending the operation of this agreement save as specifically set out in this agreement,

8.2.2 no warranties other than those contained in this agreement shall be of any force and effect, and that no other warranties have been given or representations made to the PURCHASER by the SELLER whereby the PURCHASER has been induced to enter into this agreement.

8.2.3 This agreement replaces the terms and conditions of all preceding negotiations, written or oral communication between the parties with regard to this PROPERTY.'

Clause 22 thereof provided:

'22.1 From the DATE OF SALE to the DATE OF TRANSFER, the SELLER shall continue to farm the PROPERTY in accordance with recognised farming practices.

22.2 All proceeds during this period shall be for the SELLER'S account.'

Registration of transfer of the farms took place during September and October 2005.

[4] During the negotiations a series of meetings took place between the parties, notably on 8 July 2004, 19 August 2004, 30 March 2005 and 6 September 2005. Minutes of these meetings were prepared by Ms Hepburn. Although these minutes were forwarded to Ms Shange or her officials, they never responded to them, not even acknowledging receipt. The minutes were also not formally adopted at the respective subsequent meetings. It is notable, too, that Ms Hepburn accepted that the minutes may have omitted various matters discussed, and agreed that they were not verbatim recordings of what was discussed.

[5] Relying to a large extent on these minutes, the appellants averred that during the period from 8 July 2004 to 6 September 2005 each of them entered into an oral agreement with the department, represented by Ms Shange, in terms of which the department agreed to reimburse them for input costs incurred in respect of their respective sugar-cane and/or timber plantations during the period from September 2004 to January 2005. The input costs consisted of the costs of fertilisers, weed-killers, insecticides and the like. The appellants consequently instituted action in the Land Claims Court, claiming a total amount of approximately R4,8 million in respect of these input costs.

[6] The second and third appellants, Mr and Mrs Boshoff, also claimed payment of what was referred to as development costs. They alleged that during the same period they entered into an oral agreement in terms of which the department agreed to reimburse the costs of capital development of the farm Spekfontein. According to the evidence these development costs related to the construction of a shed, the propagation of seedlings and the establishment of 60 hectares of timber and 30 hectares of sugar-cane.

[7] In evidence on behalf of the respondents it was acknowledged that mention of reimbursement of input costs had been made at the meetings. Ms Shange and other witnesses testified that reimbursement was mentioned solely within the context of the possibility of post-transfer involvement of the appellants in the farming operations of the communities. They denied that any agreement was actually reached in respect of reimbursement of input costs

and denied that reimbursement of development costs was even the subject of discussion. On behalf of the respondents it was also contended that these claims were in any event excluded by the terms of the sale agreements.

[8] The Land Claims Court (Sardiwalla AJ) found that the appellants did not prove the oral agreements relied upon on a balance of probabilities and dismissed all their claims. Leave to appeal was granted by this court. The issues in this appeal are therefore whether reliance on the alleged oral agreements was excluded by the terms of the deeds of sale and, if not, whether the finding of the court a quo that none of the alleged oral agreements were proved, could be faulted. It is convenient to deal with the first question at the outset since in our view it conveniently disposes of the claims of the first and seventh appellants.

[9] The second to sixth appellants were not parties to any of the deeds of sale in respect of the farms, even though some of them signed the respective deeds of sale on behalf of the owner trusts. The terms of the deeds of sale are not binding on the second to sixth appellants. They do, however, bind the first and seventh appellants. The question, therefore, is whether the oral agreements in respect of reimbursement of input costs relied upon by the first and seventh appellants would in any event have been unenforceable because of the application of the integration rule.

[10] As we will show, the evidence on behalf of the appellants was that the oral agreements in respect of input costs had been entered into prior to the conclusion of the deeds of sale. The question is thus whether the sale agreements entered into by the first and seventh appellants were intended to constitute the exclusive memorials of the agreements reached during the negotiations between the respective parties.

[11] In our view, the terms of the deeds of sale made clear that that was the case. In terms of clause 8.1 of the deeds of sale they constituted the entire record of the contracts between the parties. These contracts related to the sale of the farms and standing sugar-cane and/or timber as going concerns,

which were to be farmed for the account of the sellers until the date of transfer of the farms. There can be no doubt that an agreement pertaining to reimbursement of input costs incurred by the seller in respect of a farm prior to its transfer, would constitute an addition to or variation of the deed of sale. Any oral addition to, or variation of, the deed of sale was, in each case, expressly rendered unenforceable by the second sentence of clause 8.1. This is also clear from the provisions of clause 8.2.3. This clause provided that the written agreement replaced the terms and conditions of all preceding negotiations and communication between the parties with regard to the immovable property sold. A preceding oral agreement for the reimbursement of costs of the inputs made in respect of a farm, by the seller during the period before transfer, would, in context, constitute a term of preceding negotiations or communication and was thus replaced by the deed of sale.

[12] We therefore conclude that, even if the first and seventh appellants were able to prove the alleged oral agreements, their claims were bad in law. Whether these oral agreements were in fact proved, in so far as the other appellants are concerned, is the question to which we now turn.

[13] It is trite that generally a contract is concluded when the acceptance of an offer is communicated by the offeree to the offeror. It follows that a party, wishing to rely on an agreement reached during oral negotiations, should show when, where and how the acceptance of the terms of the agreement was expressed by each of the parties to the agreement. The content of the terms must also be clearly established.

[14] No viva voce evidence of a director or employee of the first appellant was presented. The sixth and seventh appellants did not testify. We accept that these appellants were represented during the relevant negotiations by Ms Boshoff, Mr Hohls and Ms Hepburn. They gave evidence as to the conclusion of the oral agreements in respect of reimbursement of input costs, as did Mr Voigts. It is important to note that according to each of these witnesses the oral agreements between the department and the appellants were concluded on a single occasion.

[15] Mr Voigts said that binding agreements were concluded at the meeting held on 8 July 2004. But this evidence cannot be accepted. One of the issues raised during the negotiations between the parties was the possibility of involvement of the appellants in arrangements in respect of utilization of the farms for the benefit of the communities after the transfer thereof. These possibilities were either lease agreements in terms of which the appellants would hire the farms from their new owners (lease-back), or the establishment of partnerships between the appellants and the communities in respect of the farming operations on the farms. It is common cause that such post-transfer involvement of the appellants was contemplated at the meeting of 8 July 2004. It was recorded in the minutes of the meeting that a precedent of a memorandum of understanding in this regard would be forwarded to the appellants and that a full day would be set aside for a future meeting to address these matters. Thus, it was at least clear that the post-transfer arrangements would be embodied in written agreements and that, in such event, the appellants would not be reimbursed for input costs in terms of a separate oral agreement. In addition, it is common cause that by 8 July 2004 it was expected that takeover of the farms would take place on 1 September 2004, that is, before the inputs in question would be made. For these reasons binding agreements in respect of reimbursement of input costs for the period September 2004 to January 2005 could hardly have been concluded at the meeting of 8 July 2004. Both Ms Boshoff and Ms Hepburn expressly conceded that binding agreements in respect of input costs were not reached at this meeting. Both also conceded that no agreement was concluded at the meeting of 19 August 2004.

[16] In his evidence, the fourth appellant, Mr Edsel Hohls, said that it had been agreed with Ms Shange that the farms would be taken over on 1 September 2004. According to his initial evidence, reimbursement of the costs of inputs actually made were not on the table for discussion before 1 September 2004. He said that as the fertilisers and other substances had to be ordered in May and June of that year, the concern was about the costs of these materials that had been ordered but would not have been used on takeover. According to Mr Hohls, the response of Ms Shange was that these

would be taken over and paid for. He stated that when takeover of the farms did not take place on 1 September 2004, Ms Shange telephoned him during the beginning of September 2004. She requested him to ensure that all the relevant farmers make the inputs and said that their costs would be paid. Mr Hohls repeatedly testified that the agreements for reimbursement of input costs were concluded during this telephone conversation. This was not put to Ms Shange in cross-examination. In his later evidence, Mr Hohls said that on 8 July 2004, or perhaps even prior thereto, agreement had been reached that the department would reimburse input costs if the farms were not taken over by 1 September 2004. This version, of a conditional agreement reached before 1 September 2004, not only constituted a material adjustment of his evidence but was contradicted by the witnesses of the appellants that we have mentioned.

[17] Ms Boshoff testified that she was unable to provide the date on which the oral agreements were concluded. She did say, however, that they must have been concluded prior to October 2004. Ms Hepburn, in turn, said that the agreements were concluded at the meeting of 30 March 2005.

[18] Two advocates, Mr A J Rall SC and Mr A E Potgieter SC, testified for the appellants. Both attended the meeting of 6 September 2005. Mr Rall testified that his independent recollection was that at this meeting the appellants received the undertaking or the confirmation of previous undertakings from Ms Shange that the input costs would be paid on production of invoices. Mr Potgieter had a similar recollection. But both formed the impression that the undertaking to reimburse input costs also related to the period after January 2005. Mr Rall said that the undertaking related to input costs incurred up to 30 January 2005 and subsequently, and Mr Potgieter said that he presumed that it related to input costs that were incurred until at least 6 September 2005. As we have said, according to the appellants the agreements were not reached on 6 September 2005, nor did they relate to any period after January 2005.

[19] Ms Shange, as we have said, testified at the trial. The respondents also called four witnesses who were employed by the department in KwaZulu-Natal. They were Mr Brendan Boyce, Mr M P Zuma, Ms Khethiwe Mlotshwe and Ms Yolisa Ndia. Mr Boyce was deputy director of the post-settlement unit. Ms Mlotshwe was also a deputy director and was the project manager of the claims in question. Mr Zuma was a project officer that reported to Ms Mlotshwe. Ms Ndia was the head of finance and administration. Ms Shange was a poor and evasive witness. No criticism can, however, be levelled at the other witnesses on behalf of the respondents.

[20] The high-water mark of the minutes of the meeting of 8 July 2004 in respect of the case of the appellants is the recordal that Ms Hepburn '. . . summarised the position as follows: If there is no leaseback or partnership, RLCC will reimburse the farmers for inputs'. But this does not appear to be an accurate summary of the minuted preceding discussion on the subject. Mr Boyce was the spokesman of the department on the subject. According to the minutes he, at best for the appellants, said that after submission of a detailed plan in respect of making of inputs and the verification thereof, agreement might be reached for payment of input costs. The minutes do not gainsay the evidence of Mr Boyce that he told the meeting that the department would pay for input costs only in terms of a written agreement in respect of a post-settlement dispensation. The minutes must of course be viewed in the light of what we have said before, especially that, according to Ms Hepburn's own evidence, no binding agreement was concluded at this meeting.

[21] It was recorded in the minutes of the meeting of 30 March 2005 that the appellants handed documentation to the officials of the department at the meeting. This documentation included the claims of the appellants in respect of input costs for the period September 2004 to January 2005, with supporting invoices. However, the minutes did not by any stretch of imagination record that agreement had been reached at this meeting that these claims would be paid.

[22] According to the minutes of the meeting of 6 September 2005, Ms Shange said the following in respect of input costs:

'Confirmed that these are reimbursable ─ payment will be done after transfer and on proof of invoice. TS [Ms Shange] needs to know the amount of the inputs, the area and they need the empty bags in respect of the fertilisers etc applied. TS needs schedule with how many bags bought, how many used and these must be backed up with invoices eg. If you bought 200 bags of fertiliser and 100lt of weed killer, how much was used on the land and how much is remaining and the amount remaining must be left on the farm. RLCC needs guarantees that people have these chemicals on the land. These documents must be submitted and they will be paid after transfer.'

As we have said, these claims and invoices had already been provided to the department on 30 March 2005. The documents had been audited by Crystal Holdings (Pty) Ltd (Crystal Holdings) and the results were presented to Ms Shange on 11 August 2005. In these circumstances these minutes are compatible with the evidence of Ms Shange that she referred to submission of documentation in respect of payment for fertilisers, weed-killers, etc that remained on the farms on the dates of transfer.

[23] Counsel for the appellants relied heavily on the preamble to a questionnaire that had been directed to the owners of the farms. He argued that this document provided strong support for the case of the appellants. As we see it, however, the contents of the document pointed the other way. Although this was not provided for in the deeds of sale, the parties were ad idem that the audits would take place to determine whether recognised farming practices were followed on the farms and that only in case of a positive audit result would the balance of the purchase price be released in order for transfer of a farm to proceed. Crystal Holdings was appointed to conduct the audits. Mr Pierre Redinger acted for Crystal Holdings in this regard. The questionnaire was drafted by Mr Redinger. There was some dispute as to the extent to which Mr Boyce contributed to the contents of the preamble to the questionnaire, but in our view that is of no moment. The questionnaire was finalised towards the end of April 2005. Both Mr Boyce and Mr Redinger testified that the questionnaire reflected the understanding gained by Mr Redinger from his interactions with the appellants and the

department. It is not disputed that Mr Boyce informed Mr Redinger at the time that no agreement had been reached in respect of reimbursement of input costs. The questionnaire reflected the purpose of the audits but also referred to a second purpose in the following terms:

'Secondly the audit shall be used as an objective tool to assess and quantify the various inputs the reasonable and diligent landowner would have incurred on the property and will assess whether or not he/she should be compensated for reasonable input costs incurred by him/her in terms of a further agreement.'

[24] In context, this paragraph conveyed that the results of the audit would be used to assess whether or not a landowner should be compensated for reasonable input costs incurred by him or her and that, if so, the compensation would be regulated by a further agreement; that is, an agreement to be entered into after the assessment. The implication is that no agreement for reimbursement of input costs had been reached by the end of April 2005. We know that on no version of the appellants was such agreement reached thereafter.

[25] Upon a consideration of the probabilities, it is unlikely that the appellants would take the trouble to compile the claim documents handed over on 30 March 2005, had they not thought that an undertaking had been given to reimburse input costs. The appellants also pointed out that in the Kranskop region sugar-cane was harvested every second year, with the result that they would not reap the benefit of inputs made during the period of September 2004 to January 2005. They said that this was the reason for the agreements to reimburse these input costs. Despite these factors, however, in our view the probabilities arising from the policies and procedures of the department and the structure of the transactions in question, as well as the evidence of the respondents, militate against a finding that it was agreed that the costs of the inputs be reimbursed.

[26] The undisputed evidence of Ms Ndia was that under no circumstances would payment in terms of an oral agreement be authorised by the department. Ms Mlotshwe and Mr Zuma confirmed that input costs could only

possibly be reimbursed in terms of written agreements in respect of post-transfer dispensations for the benefit of the communities. The undisputed evidence was further that the department would make payments only pertaining to these land claims in accordance with submissions in terms of s 42D of the Act, approved by the Minister. In respect of each of the claims of the communities, only the total agreed purchase price in terms of the respective deeds of sale, a settlement planning grant and a restitution discretion grant were approved. These two grants were calculated per household of the communities and were to be utilized for the benefit of the communities. This was accepted by the appellants, who said that Ms Shange undertook to reimburse the pre-transfer input costs from funds that would be obtained from other sources, especially the Department of Agriculture. But according to the evidence, Ms Shange and the department had no control over whether such funds would be made available. If such funds would be made available, it would accrue to the communities. Thus, it is highly improbable that Ms Shange would contractually bind the department in terms of an oral agreement or for payment to the appellants from funds to be obtained from another department or source. Finally, the absence of a contemporaneous letter confirming the conclusion of the agreements and its terms, must be placed in the scale against the appellants.

[27] To sum up, the viva voce evidence presented on behalf of the appellants in respect of the conclusion of the alleged agreements relating to input costs is vague and contradictory; the appellants could not state when precisely any of the oral agreements had been reached or for which of them Ms Boshoff and Mr Hohls was acting; the documentary evidence tendered in support of the appellants' claims is inconclusive and the probabilities favour the respondents. Despite the poor quality of the evidence of Ms Shange, we are not persuaded that the court a quo erred in finding that the appellants did not succeed in proving the oral agreements sought to be relied upon.

[28] It remains to deal with the claim of the Boshoffs for reimbursement of development costs. It can be disposed of briefly. The only evidence in this regard was that the subject was discussed at a meeting on 19 August 2004,

attended by Ms Boshoff, Ms Hepburn and Ms Shange. Although the evidence of Ms Shange, that no such meeting took place, is probably false, it is clear from the minutes of this meeting that no binding agreement was concluded. A note made of a conversation between Ms Boshoff and Ms Hepburn on 2 December 2004, stated that this issue still had to be addressed in discussion with Ms Shange and that a commitment in writing by her was needed. This is in accordance with the evidence of Ms Boshoff that she contemplated that the development costs had to form part of the purchase price of the particular farm. Therefore, even she accepted that the notion that costs of capital development of a farm would be paid to a tenant in terms of an oral agreement distinct from the deed of sale in respect of the farm, was untenable.

[29] It follows that the appeal cannot succeed. There is no reason to deprive the respondents of any costs of appeal.

[30] The appeal is dismissed with costs, including the costs of two counsel.

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L O Bosielo
Judge of Appeal

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C H G van der Merwe
Acting Judge of Appeal

APPEARANCES:

For Appellants:	M G Roberts SC (with him C G Van der Walt) Instructed by: Marshall Attorneys, Johannesburg McIntyre & Van der Post, Bloemfontein
For Respondents:	A A Gabriel SC (with her J Thobela-Mkhulisi) Instructed by: State Attorney, Durban State Attorney, Bloemfontein