IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A235/2021

Court a quo Case No: RCATL02/13

In the matter between:

AJ AGENBACH **Appellant**

and

LUTZVILLE 1999 CO-OPERATIVE LIMITED **Respondent**

JUDGMENT DELIVERED ELECTRONICALLY: WEDNESDAY, 23 MARCH 2022

NZIWENI AJ

Introduction

[1] This is an appeal against the judgment of the Regional Court Magistrate. In this judgment for the sake of convenience, the parties will be cited as they were referred to in the court *a quo*, namely the Appellant as the Defendant and the Respondent as the Plaintiff.

[2] The Plaintiff is a Co-Operative duly incorporated in terms of the Co-Operatives Act, 14 of 2005 (the Co-Operative Act). It is common cause in this matter that the Defendant, a farmer, at all material times was a member of the Plaintiff in terms of the constitution of the Plaintiff. The Defendant became a member of the Plaintiff before or, during 1998 until the termination of his membership on or about 30 May 2013. This was admitted by the Defendant in his response to Plaintiff's request for trial particulars. The Defendant further admitted in his response to the Plaintiff's request for trial particulars, that he delivered grapes to the Plaintiff for a number of years in accordance with his rights and obligations as one of the Plaintiff's members.

[3] The amended particulars of claim aver that rights and obligations under the Plaintiff's constitution were conferred to the Defendant, at the relevant time.

[4] Furthermore, the amended particulars of claim quote the relevant express terms of the Plaintiff's constitution. I will however cite only one term, quoted as follows:

" . . . The Plaintiff's board of directors ('The Board") determines annually a commission/fixed costs ("the commission") that is recovered from the members in order to satisfy the Plaintiff's and Lutziville Vineyards Limited's (hereinafter referred to as "the Company ") income and capital requirements. The commission may be recovered from members based on their delivery of grapes during that year or based on their pressing quota (parskwota') at the Plaintiff. The commission shall be limited to the Plaintiff's and the Company's fixed costs, which fixed costs consist of the following items . . ."

[5] It is further common cause that on 2 October 2000, the Plaintiff concluded a processing agreement ('verwerkingsooreenkoms') with Lutzville Vineyards Ltd. On 20 April 2000, the 'verwerkingsooreenkoms' became effective. On 10 December 2004, the Plaintiff and the Defendant concluded a "Leweringsooreenkoms, which came into effect on 1 January 2005".

[6] The Plaintiff instituted an action against the Defendant in the Atlantis Regional Court. The Plaintiff's claims are set out under three headings for payment of monies. According to the particulars of claim, the claim for payment of monies is in respect of 'fixed costs', which are recoverable from the Defendant in terms of the Plaintiff's constitutions. In a nutshell, the Plaintiff sued the Defendant for the non-delivery of grapes in accordance with its constitution.

[7] In the court below, the only party that presented oral evidence was the Plaintiff. The Plaintiff, called two witnesses in its endeavour to prove that it was entitled to the prayers sought. At the close of the Plaintiff's case, the Defendant brought an application for absolution from the instance. On 31 March 2021, the Regional Court Magistrate delivered her judgment on absolution from the instance. She dismissed the application for absolution from the instance with costs.

[8] It is of note that the Defendant, pursuant to the dismissal of the application for absolution from the instance, closed his case without leading oral evidence. After the Defendant closed his case, the Regional Court Magistrate, in her judgment delivered on 20 August 2021, granted judgment in favour of the Plaintiff. The Defendant now

appeals against the cost order granted on 31 March 2021, and the whole judgment of the 20 August 2021, (the main judgment including costs).

[9] At the trial, the Defendant's defence proceeded principally on two distinct components. This is so because in his defence, the Defendant raised two special pleas. Firstly, the Defendant challenged the *locus standi* of the Plaintiff and or failure by the Plaintiff to join a necessary party (non-joinder). Secondly, the Defendant pleaded that the conduct of the Plaintiff's business was contrary to the co-operative principles. It is further contended on behalf of the Defendant that the Plaintiff was not operational as contemplated in the Co-operative Act. Consequently, the Plaintiff cannot recover any monies it claims to be due to it.

[10] The first component of the Defendant's defence can be described in the following way:

(a) The Plaintiff ceded all its rights, title and interests to claim the amounts set out in its particulars of claim to Lutzville Vineyards Ltd. In the premises, the Plaintiff has no claim against the Defendant.

(b) The Plaintiff failed to join the necessary party; Lutzville Vineyards Ltd which should have been joined as a co-plaintiff to claim the monies due to it.

[11] The second component of the Defendant's defence can be outlined as follows:

(a) The Plaintiff did not conduct any business.

[12] The Defendant also advanced further arguments along the following lines:

(a) That the Plaintiff's Constitution/s are in contravention of certain sections of the Competition Act, 89 of 1998 (the Competition Act); and they stand to be declared void and unenforceable by the Competition Tribunal;

(b) Accordingly, the jurisdiction of the court a quo was ousted, in terms of section 65 (2) (b) of the Competition Act, as the matter had to be referred to the Competitions Tribunal for its adjudication.

[13] At the commencement of the trial, it was agreed that the preliminary points were to be determined simultaneously with the merits. It is also worth noting that at commencement of trial, counsel on behalf of the Plaintiff stated the following in the opening remarks:

"Your Worship of some importance there are two special pleas that have been raised by the defendant my learned friend and I discussed the issue, because of the fact that there will be a substantial overlapping dealing with the special pleas and merits. We think it is going to be . . . it will not be an effective use of judicial time to deal with those separate and that it would make sense to deal with all the evidence at once . . ."

[14] Some of the issues between the parties concerned the proper construction of the agreement entered into between the Plaintiff and Lutzville Vineyards Ltd ('verwerkingsooreenkoms'), various others statutes are not points of interpretation.

[15] It is a curious feature of this case that this court is also asked to determine whether the nature of the reasons given by the Regional Magistrate can bear scrutiny.

[16] The central issues for determination in this matter can be summarised as follows:

(a) Whether the nature of the reasons for the findings of the Regional Court Magistrate; is a stand-alone ground for appeal. Rearticulated, this court is also tasked with the duty of determining whether, there are deficiencies in the judgment of the trial court, and if such deficiencies exist; whether if they are taken together with the trial record as a whole, excludes a meaningful appeal.

(b) If this Court finds that the judgment of the court *a quo* is adequate, then the next enquiry is whether the findings of the court below inclusive of the cost orders are correct.

(b1) Whether the preliminary points raised by the defendant during the trial should have been sustained.

(b2) Whether the cost order granted by the Regional Court Magistrate on 31 March 2021 is a competent cost order.

(b3) Condonation by the Defendant for the late noting of the appeal against the cost order of the 31 March 2021, and for the late filing of the Defendant's application for an appeal hearing date.

Condonation

[17] It is my firm view that the Defendant has furnished sufficient grounds for the delay. Consequently, the failure to comply with the Court's Rules is hereby condoned.

[18] I propose to deal with the different aspects of this appeal in the following fashion.

The nature of the judgment of the court below.

[19] Reasons behind the findings of a trial court plays a significant role in court proceedings. The task of giving reasons is inherent in a presiding officer's role. In accordance with the well-established principles set out by the Courts, the function of giving reasons for judgment is always integrally and fundamentally embedded in the concept of judicial accountability.

[20] The duty of giving reasons is an obligation owed to the public at large. The parties and the public in general justifiably expect that judicial officers should account through their reasons for the decisions they make. It is thus expected of every judicial officer to be answerable for his/her decision through the mechanism of giving reasons. In order to enhance the objective that justice should be seen to be done, judicial officers must recognise the need to articulate, justify and explain the reasons for their actions or results.

The consequence of this is that, where inadequate reasons are given for a finding, that can make the entire proceedings to be susceptible to be set aside on appeal.

[21] The Defendant in this matter has assailed the nature of the reasons given by the Regional Magistrate. The reasons have been described as scant, poorly expressed and construed and do not constitute meaningful reasons at all. It is thus asserted *inter alia* on behalf of the Defendant that the reasons given by the trial court are inadequate and scant. Additionally, it is the contention of the Defendant that it is not discernible at all as to how the Regional Court Magistrate reached her decision. Moreover, before this Court, the Defendant raises the nature of the trial court's

judgment as a self-standing ground of appeal, which should justify its reversal by this Court.

[22] If regard is had to the reasons given by the court below for its finding, the Defendant cannot be faulted for his sentiments regarding the nature of the reasons. It is true that a party to proceedings should not be left in doubt about why a finding went against it. It is clear therefor, that a judicial officer should always be mindful of the task of giving reasons and always strive to give well-articulated reasons.

[23] Of course, a judicial officer is not held to an abstract standard of perfection. It is only expected that the judicial officer should provide reasons that adhere to the required standard.

[24] It is true and worth noting that under certain circumstances, absence of sufficient reasons, can lead to a finding that the Court of Appeal could not carry out its appellate function. Thus, at times inadequate reasons can be considered a material defect that warrants the setting aside of a judgment altogether.

[25] However, it is to be noted that where the nature of the reasons for the judgment are concerned, not every failure or deficiency in the reasons provides a ground of appeal.

[26] This Court cannot simply set aside the proceedings because the trial court did a poor job of expressing itself. Partly this is because at times the basis for the finding

may be apparent from the record. Put in another way, when the finding is in any event sustainable on the evidence or where the circumstances of the case manifests the grounds of the conclusion, a matter cannot be set aside because of inadequate reasons.

[27] Consequently, deficient reasons do not automatically mean that an appeal should succeed solely based on that.

[28] I am stating this at the cost of repeating myself that, in order for the party to succeed based on the claim of insufficient, or unclear reasons, it must be shown that the judgment was incorrect and thus be set aside. Thus, whether insufficient or unclear reasons warrant setting aside of the decision of the trial court will differ from case to case.

[29] Turning to the present case, the vital question to be answered here would be; whether this Court sitting as an Appeal Court, is able to discern how the court *a quo* reached its finding and whether the finding is borne out by evidence. In the determination as to whether the findings of the trial court are well based on the evidence, regard has to be given, amongst others, to the nature of the subject matter before the trial court. For instance, it cannot be said in the case in *casu*, that the matter was one which called for, or demanded from the Regional Magistrate, critical examination of evidence. In the instant case, it is worth noting that oral evidence was not tendered by both sides but only by the Plaintiff. Thus, the present case rested chiefly on the evidence tendered by the Plaintiff.

[30] Insofar as the credibility of the Plaintiff's witnesses the magistrate expressed the following sentiments:

> "This court cannot find that the evidence of the Plaintiff's witnesses are either reliable, credible, probable and (sic) logical."

[31] With the benefit of the complete record, I cannot comprehend how the credibility findings made about the Plaintiff's witnesses are justified.

[32] I am mindful to the fact that credibility must be assessed in light of all evidence. On examination of the evidence and the circumstances of this case, the record does not support the trial court's finding that the Plaintiff's witnesses were not credible or reliable.

[33] It is also significant to note that the evidence of the Plaintiff's expert witness was not disputed by producing countervailing expert evidence. In the present case, there were no noteworthy inconsistencies or conflicts in the evidence. There was thus no need to resolve tangled or contradictory evidence on key aspects by the Regional Magistrate. Additionally, the case did not turn on credibility. The credibility of the Plaintiff's witnesses was also not assailed during this appeal. It appears to me, therefore, that, as far as the trial court's assessment of the credibility of the Plaintiff's witness and the expert witness are concerned, they are not borne out, or cannot be supported on any reasonable perspective of the evidence. Consequently, the credibility findings of the court below can be ignored by this Court.

[34] In light of the fact that during the trial, the Defendant closed his case without leading evidence strongly suggest that the appeal in this matter is directed at the findings rather than the reasons for the findings. The Regional Magistrate's finding is obvious from the record, even without being articulated in reasons.

[35] Whilst the trial court's reasons for her findings are not clear, if regard is had to the record, it is not difficult to understand the reasoning behind her finding. The nature of the evidence, which was led during the trial, is easily identifiable from the rest of the record. This in turn allows this Court to determine the correctness of the lower court's decision.

[36] Equally important, albeit the trial court's reasons are lacking, but given the circumstances of this case, this Court, sitting as the Appeal Court is able to explain the results to the parties. It cannot be said that the conclusion of the trial court is unreasonable or unsupported by evidence. Thus, there is no need in this case for the trial to start de novo or for the proceedings to be set aside.

Jurisdiction / Competition Act

[37] Turning to the aspect as to whether the Jurisdiction of the Regional Court was ousted by the provisions of the Competition Act. At the outset I wish to point out that during the testimony of the Plaintiff's witness, Mr. Mostert (Mostert); was referred to correspondence written by the Competition Commission. Gleaning from the same document, it is evident that the Competition Commission decided not to refer the

complaint against the Plaintiff regarding commission of a prohibited practice, to the Competition Tribunal.

[38] Section 50 of the Competition Act states the following:

"Outcome of complaint

50. After completing its investigation the Competition Commission must-

(a) refer the matter to the Competition Tribunal, if it determines that a *prohibited practice* has been established; or

(b) in any other case, issue a notice of non-referral to the *complainant* in the *prescribed* form."

[39] Section 51 (1) of the Competition Act states the following:

"(1) If the Competition Commission issues a notice of non-referral in response to a complaint, the *complainant* may refer the complaint directly to the Competition Tribunal, subject to its rules of procedure."

[40] In the present case, of course, the Defendant was at pains to point out, that the jurisdiction of the Regional Court to conduct the trial was ousted in terms of section 65 of the Competition Act. According to the Defendant, this is so because the Plaintiff's Constitution and its implementation constitutes prohibited conduct as contemplated in sections 8 and 9 of the Competition Act. As mentioned previously, this particular challenge was raised during the trial and evidently, it was not successful.

[41] It is significant to note that the evidence of Mostert, reveals that in early February 2013, an investigation by the Competition Commission was already underway. This was pursuant to a complaint which was lodged by a member of the Plaintiff. According to Mostert, during this critical time, a group of farmers were opposed to the registration of the constitution and the Defendant's name appeared on the list of the farmers who were opposed to the registration of the Constitution. The complaint was that the Plaintiff was a monopoly and farmers could not deliver their grapes to other parties. The Competition Commission on 21 March 2013 dismissed the complaint. Furthermore, Mostert read a letter dated 21 February 2013, from Werksmans Attorneys, into the record, purportedly written on behalf of the Defendant.

[42] It is convenient to quote the contents of the letter.

"1. We confirm that we act on behalf of Mr. AJ Agenbag ("our client").

2. . .

3. It is common cause that the Competition Commission is currently investigating a complainant of ant-competitive conduct, in respect of Lutzville 1999 Co-operative Limited and Lutzville Vineyards Limited's ("Lutzville") business practices. A particular aspect of the conduct which is being investigated relates to Lutzville's levying of commission and penalties against producers who have not met their full quota requirements.

4. Further to the above, we are currently defending a claim Lutzville instituted against our client, under case number RCATL02/2013 in the Atlantis Regional Court in respect of money Lutzville claims is owned to it for the no-delivery of grapes by our client in accordance with its Statute. We are of the opinion that any claim in respect of commission and penalties allegedly owing by our client to Lutzville amounts to a prohibited practice in terms of the Competition Act 89 of 1998 ("the Competition Act"). In addition any such claim is premature as the investigation by the Competition Commission is still underway.

5. It is our instruction that our client accepts Lutzville's offer to cancel and retract his shares and "parskwota" in Lutzville subject to Lutzville abandoning all past or future claims of whatsoever nature it may have against our client.

6. We further place on record that Lutzville is not entitled to levy any penalties against our client in terms of Article 44 of the Statute or any claim any other outstanding commission, levels or penalties as provided for in the Lutzville Statute, as same forms subject matter of the current complaint before the Competition Commission and amounts to a prohibited practice in terms of sections 5 and 8 of the Competition Act.

7 . . ."

[43] It is common cause in this matter that on the 28 March 2013, the Competition Commission issued a notice of non-referral of complaint, concerning John Conroy Smuts against the Lutzville 1999 Co-Operative Limited [The Plaintiff] and Lutzville Vineyards Limited. It is also not disputed that the Competition Commission after it concluded its investigation, decided that the Lutzville statutes were not restrictive.

[44] Central to this issue is that, in a letter also dated 28 March 2013, the Competition Commission further informed the complainant that if he disagrees with the Commission's decision, he has 20 business days, after the date of issue of the Notice of Non-Referral, to refer the complaint to the Tribunal.

[45] Section 65 of the Competition Act, which is the key provision in this issue, provides as follows:

65 'Civil actions and jurisdiction

(1) Nothing in *this Act* renders void a provision of an *agreement* that, in terms of *this Act*, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void.

(2) If, in any action in a *civil court*, a party raises an issue concerning conduct that is prohibited in terms of *this Act*, that court must not consider that issue on its merits, and—

(a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or

(b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that—

(i) the issue has not been raised in a frivolous or vexatious manner; and

(ii) the resolution of that issue is required to determine the final outcome of the action.

(3) ...

(4) ...

(5) ..."

[46] In the present case, when regard is to be had to this particular challenge, it is quite noticeable that the party, who raised this challenge, did not adduce any evidence during the trial. I have also borne in mind that the law is well settled that a plaintiff bears the onus to prove that the court has jurisdiction. However, that does not detract from the fact that there are instances where it can be required that; where a defendant raises a defence of jurisdiction, he or she cannot simply close and dispose of a case without placing certain facts before court.

[47] It is to be emphasised that the Plaintiff put facts before the court below and that the Competition Commission has already decided the matter of dominance. Furthermore, it is quite clear from the testimony of Mostert and the letter dated 21 February 2013, by Werksmans Attorneys on behalf of the Defendant, that the Defendant was part of the group of farmers who lodged the complaint with the Competition Commission. The evidence further evinces that the Competition

Commission notified the complainant when it issued the notice of non–referral that if the complainant still desires to refer the complaint to the tribunal, this should be done within 20 business days.

[48] An *ex facie* consideration of the court a quo record, makes it evident that the trial commenced only in 2019, notwithstanding the fact that the summons was issued some years prior to that.

[49] I have no hesitation in saying that, as far as the objection to the jurisdiction of the Regional Court is concerned, the Plaintiff's version has been consistent throughout. For instance, when the Plaintiff was responding to the Defendant's amended plea, it stated that the alleged contravention to which the Defendant refers, has already been referred to the Competition Commission and the Competition Commission has concluded that the Plaintiff's constitution is not restrictive and does not contravene the Competition Act.

[50] Therefore, all along the Defendant knew what the Plaintiff was going to say during the trial regarding this particular objection. While I do not think that it is always necessary that a legal argument should always have an accompaniment of evidence, in certain circumstances, absence of evidence from one party entails the acceptance of the evidence given by another party. Under such circumstances, the trier of facts can certainly give regard to the only evidence presented by one party with some degree of assurance than might otherwise have been the case, if there was evidence to gainsay the version.

[51] In the context of this case, it is significant to note the sentiments as expressed in the case of *Malherbe v Britstown Municipality 1949 (1) SA 281(C),* on page *287* when the Court opined as follows:

"Under the procedure now prescribed by Act 32 of 1944 any question of onus which arises in connection with any challenge of the Court's jurisdiction must, in my judgment, be determined on a consideration of the particular form in which that challenge is raised on the pleadings in the particular case (my own underlining). It is the province of the plaintiff to establish the jurisdiction of the Court into which he, as *dominus litis*, has brought the defendant. In this sense the onus of establishing jurisdiction is, in my view, always on the plaintiff. But the form of defendant's plea may be such as to burden him with an onus to prove certain facts (my own underlining). As shown by VAN DEN HEEVER, J.P. (as he then was) in *Lubbe v Bosman*, there is weighty Roman-Dutch authority for the proposition that once a defendant raises the *exceptio fori declinatoria* as a substantive plea 'the onus rests upon him of proving the facts upon which his plea to the jurisdiction is based'. In such a case the defendant in his plea avers the existence of certain facts which, if proved, will defeat the jurisdiction. The onus of proof of such facts rests upon the defendant (my own underlining)."

[52] In the matter of Munsamy v Govender 1950 (2) SA 622 (N) at 624, Broome J, echoed the sentiments expressed in *Britstown Municipality supra*, when he opined as follows:

"Mr. Hathorn's submission is far-reaching and uncompromising. It is that the plaintiff, who as dominus litis choses the forum, carries on his shoulders at all times the burden of showing that the Court in which he has elected to sue has jurisdiction to try the case. The question, it is true, may never be raise, in which case his burden will not trouble him. But once the question is raised, in whatever form it is raised, he must discharge his onus or give up the fight. I cannot accept that argument... In the

present case the defendant has alleged a fact . . . The onus is clearly upon him to establish this fact. . . in the circumstances of the present case, the onus was on the defendant to establish the fact which he alleged , proof of which would determine the question of jurisdiction. As he failed to discharge this burden, the question . . . must be decided in plaintiff's favour". See also *Botha v Andrade* (578/2007) [2008] ZASCA 120 (26 September 2008) at paragraph 18.

[53] The Plaintiff's case in this regard is that the Competition Commission has already found in its favour. In the instant case, notwithstanding the evidence tendered on behalf of the Plaintiff regarding the jurisdiction issue, the Defendant chose not to gainsay or to respond to what was stated on behalf of the Plaintiff. In this matter, there is no evidence to show that there is a pending complaint currently before the Competition Tribunal or Commission.

[54] It was thus significant during the trial for the Defendant to produce facts that would counter the evidence of the Plaintiff and that would give an indication that the Regional Court's jurisdiction was ousted.

[55] It is clear therefore in this case that, no evidence was tendered in the trial court, to attest that pursuant to the non-referral finding of the Competition Commission; the complaint is currently pending before the Competition Tribunal, or there is a new complaint lodged for investigation with the Competition Commission.

[56] With the risk of repeating myself, and as described extensively above, the facts which were presented before the Regional Magistrate plainly demonstrate that the

Competition Commission issued a notice after a complaint was lodged with it against the Plaintiff, to the effect that if the complainant wishes to refer the complaint to the Tribunal that should be done within 20 business days. In these circumstances, it follows that there are good grounds for believing that there was no referral of the complaint to the Competition Tribunal, after the 28 March 2013.

[57] Consequently, in the context of this case, it is incomprehensible that the counsel on behalf of the Defendant contends that the findings of the Competition Commission are not binding. There is no scintilla of evidence in support of the contention.

[58] As such, by virtue of the letter written by the Competition Commission on the 28 March 2013, it does not follow that the Defendant can infinitely rely on the same issue. Hence, under the circumstances of this matter, the assertion that the Plaintiff practices a prohibited conduct as envisaged in the Competition Act; is not sufficient to oust the Regional Court jurisdiction.

[59] In his heads of argument, counsel for the Plaintiff correctly states that there are no basis for the Defendant now to seek to air a complaint that has been determined, effectively against him, without the issue having been taken any further at the appropriate time.

[60] Because the surrounding facts involved in establishing the jurisdiction of the Competition Tribunal were critical in the determination of the jurisdictional aspect; it was not sufficient for the Defendant to simply close his case without leading evidence. Accordingly, in the context of this case, after the evidence of the Plaintiff was heard regarding jurisdictional fact; it was incumbent upon the Defendant to tender facts, which would show that the Regional Court has no jurisdiction. It is critical to emphasise that it is evident that this particular issue was primarily decided on the evidence presented by the Plaintiff. The Regional Magistrate in dismissing the challenge cannot be faulted on that point.

Locus Standi

[61] It is argued that the Plaintiff does not have has *locus standi in iudcio* to make the claims against the Defendant. The high watermark of this submission is because the following is asserted against the Plaintiff:

(a) did not conduct any business;

(b) was at all material times, a mere 'shell'; and

(c) did not and could not have, incurred any fixed costs.

(d) When the 'verwerkingsooreenkoms' was concluded, it was the intention of the Plaintiff and Lutzville Ltd to divest the Plaintiff of all rights and duties vis-à-vis the members of the Plaintiff and to vest them in Lutzville Ltd. The Plaintiff ceded all its rights and interests to Lutzville Ltd.

(e) The Plaintiff as a single Plaintiff, has nothing to claim.

(f) The Plaintiff is not suing in the capacity of cessionary.

(g) Lutziville Ltd has not been joined as co-plaintiff.

(h) cession.

[62] It is relevant to quote some of the relevant parts (Clauses 3.1; 3.2; 3.3; 5; 6; 7 and 8) of the 'Verwerkingsooreenkoms'. The clauses read as follows:

"3.1 Die Koöperasie stel hiermee vir die Maatskappy aan on namens die Koöperasie diens te lewer aan verskaffers, en sedeer verder sy volle reg in en tot lewering van produksie deaur verskaffers aan die Maatskappy aanvaar hiermee die stelling en sessie op die terme en voorwaardes hierin uiteengesit. Sonder om die algemeenheid van voorgenoemded te beperk, sluit voormelded sessie die reg in om produkte van verskaffers te verpoel soos hieronder uiteengesit.

3.2 Die Koöperasie onderneem om mee te werk om alle nodige ondersteuning aan die Maatskappy te gee om die Maatskappy in staat te stel om die leweringsreg uit te oefen ten opsigte van al die produkte van die verskaffers, so volmaak en doeltreffend asof die Maatskapyal die magte, bevoeghede en verpligtinge het van die Koöperasie in gevolge die statute.

3.3 Indien 'n verskaffer in gebreke is van die leweringsreg van Koöperasie hierkragtens sedeer aan die Mmaatskapy na te kom, dan in so 'n geval onderneem die Koöperasie en sal dit verplig wees indien die Maatskapy aldus versoek, om al die nodige stappe te doen kragtens die statute toelaatbaar om verskaffer te verplig om die produkte aan die maatskappy te lewer.

5. REGTE EN VERPLIGTINGE VAN DIE MAATKAPPY

Die Maatskappy sal, sonder om afbreuk te doe naan diens in die breë strekking daarvan, vir die volgende verantwoordelik wees:-

5.1 . . .

5.2 . . .

5.3 . . .

5.4 Die Maatskappy sal verplig wees om, indien daartoe versoek deur die Koöperasie, ten volle alle rekords openbaar te maak aan die Raad van die Koöperasieten opsigte van die verkoopspryse behaal deur die Maatskappy met die verkoop van wyn uit die produkte.

5.4 . . .

6. VERPLIGTE VAN DIE KOöPERASIE

Die Koöperasie sal verplig wees om:-

6.1 te verseker dat die verskaffers volhou om hul produkte betyds en direk aan die Maatskappy lewer om die Maatskappy in staat te stel om sy verpligtingeefektie na te kom;

6.2 jaarliks, op die effektiewe datum of enige verjaring daarvan, vir die Maatskappy in kennis te stel van die beraamde volume per produk variteit wat die Maatskappy verplig is om te verwerk;

6.3 . . .

6.4 jaarliks wanneer deur die Maatskappy daartoe versoek, 'n wingerdsstoksensusonder sy ledeto hou en die resultate daarvan tot beskikking van die Maatskkapy te stel;

6.5 te bewerkstelling dat verteenwoordigers van die Maatskappy van tyd to ty den te alle redelike tye die re gen bevoegheid het om:-

6.5.1 die wingerdboorde, die dryf van die wingerdstok en nuwe aanplantings te inspekteur;

6.5.2 te adviseur ten opsigte van korrekte en behoorlike boerdery-praktyke en gehalte beheer;

6.5.3die verskaffers te adviseer en in te lig ten opsigte van cultivar en kwaliteit vereis; en

6.5.4 indien die Maatskkapy die nodig vind, 'n wingerdstoksensus te hou.

7. VERPOELING EN VERGOEDING

7.1 Die Maatskkapy onderneem hiermee ten gunste van die Koöperasie en die verskaffers om as agent van die verskaffers:-

7.1.1 Die produkte te verpoel;

7.1.2 Betaling te maak aan die verskaffers ten opsigte van die produkte Aldus verpoel,

. . .

7.2 . . .

8. RISIKO

Die Koöperasie sal toesien dat die risiko ten opsigte van die produkte deur die verskaffers direk aan die Maatskappy gelewer in gevolge van hierdie ooreenkoms steeds in die betrokke verskaffer vestige en vrywaar hiermee die Maatskaapy teen enige eise deur verskaffers ten opsigte van verlies te wyte aan opste growwe nalatigheid aan die kant van die Maatskappy."

Was the Plaintiff at all material times, a mere 'shell'?

[63] Mostert testified that the Plaintiff is an agricultural Co-Operative, with members. The Plaintiff's witnesses never testified that the Plaintiff was a mere shell. It is settled law that a registered Co-operative is a legal entity. The Defendant admitted this in his response to Plaintiff's request for trial particulars, asserting that the Plaintiff is currently incorporated.

[64] Mostert further testified that on 17 December 1999, the Co-Operative [Plaintiff] was registered with the intention of conducting the business of wine cellars on behalf of its members. According to Mostert, the members of the Plaintiff share in the liability of the fixed costs of the Plaintiff. He also testified that the Plaintiff still exists with the two constitutions and has not disappeared from the scene.

[65] On the other hand it was the testimony of the auditor of the Plaintiff, Mr Voss (Voss) that; because the Plaintiff had a constitution and the 'verwerkingsooreenkoms' agreement in place, it cannot be said that the Plaintiff was a shelf co-operative. Furthermore, it was Voss's testimony that the Plaintiff cannot be a shelf co-operative, as it had meetings, annual directors' meetings, annual general meetings and had an agreement with Lutzville Vineyards Ltd. He testified that a shelf company does not have such agreements and does not hold directors meetings. According to Voss, a company in a shelf merely lays on the racks and nothing goes on.

[66] Additionally, if one has regard to Clause 8 of the 'verwerkingsooreenkoms' under the heading 'RISKO'; it becomes evident that notwithstanding the cession

contained in clause 3 of the 'verwerkingsooreenkoms', that the Plaintiff still remained as an active co-operative. As set out above in clause 8 of the 'verwerkingsooreenkoms,' the Plaintiff categorically makes an undertaking to do certain things and even indemnifies Lutzville Vinyards Ltd, against any claims from the suppliers with regards to loss of produce whilst in possession of Lutzville Vinyards Ltd, excluding loss due to gross negligence on the part of Lutzville Vinyards Ltd.

[67] The question, which immediately begs is, if the Plaintiff is a 'shell co-operative', how is it possible for it to have active members, conclude agreements, make undertakings to indemnify Lutzville Vineyard Ltd against law suits. Equally, clause 9 of the verwerkingsooreenkoms,' under the heading 'OORMAG EN OES MISLUKKING' reads as follows:

"9.1.3.2. Indien die Maatskappy die party in versuim is, sal die Koöperasie geregtig wees om alternatiewe reëlings te tref met 'n derde party vir daardie bepaalde parsseisoen om die produktevan die verskaffers te ontvang vir daardie parsseisoen, tot die mate dat die Maatskappy nie sy verpligtinge kragten die ooreenkoms kan na kom nie."

[68] If Clauses 8 and 9 of the 'verwerkingsooreenkoms' prove anything, it is that the Plaintiff at the critical time was active.

[69] There is a close correlation between clause 8 and 9, of the 'verwerkingsooreenkoms,' and the testimony of the Plaintiff's witnesses; that the Plaintiff still exists, is active and has members. The two provisions cited of

the'verwerkingsooreenkoms' supports the testimony that the Plaintiff was not a shell. By contrast, Defendant tendered no evidence to contradict Plaintiff's evidence.

[70] Clause 3.2 of the Plaintiff's constitution of 2004 and 2012 state the following:

"Die Koöperasie is opgerig om saam met die maatskappy [Lutzville Vineyards Ltd] te dien as kollektiewe bedryfsvoertuie vir die lede van Koöperasie."

[71] On the other hand, the terms and conditions of the Leweringsooreenkoms state the following:

"VOORWAARDES VAN OOREENKOMS

AANGESIEN die koöperasie en die maatskappy as kolletiewe bedryfsvoertuie op gronde van sy verbintenis met die maatskappy oor die infrastruktuur beskik om druiwe te verwerk tot wyn en verwante produkte end it te bemark:

EN AANGESIENdie lid oor aandele en parskwota in die koöperasie beskik en die lid kragtens die statuut van die koöperasie 'n leweringsreg het om, onderhewig aan die bepalings van die koöperasiese statuut, druiwe wat op die ingeskrewe plaas verbou word by die koöperasie te lewer vir die verwerking tot wyn en verwante produkte en die bemarking daarvan; . . . "

EN AANGESIEN die koöperasie bereid is om sodanige ooreenkoms met die lid aan te gaan:"

[72] The 'leweringsooreenkoms' entered between the Defendant and Plaintiff after the conclusion of the 'verwerkingsooreenkoms, clearly illustrates that the Plaintiff was very active. The Plaintiff even concluded another agreements after the cession.

[73] Although it is argued that the Plaintiff is a shell, there is no version to adequately provide substance to this argument. In the absence of any evidence to gainsay the Plaintiff's version, there is nothing to contradict the evidence that the Plaintiff was active.

Did Plaintiff conduct any business?

[74] It is contended on behalf of the Defendant that the Plaintiff did not and could not have incurred any fixed costs.

The evidence in this matter, particularly the evidence of Voss, reveals that the directors of the Plaintiff perform the duties of compiling financial statements annually for the Plaintiff and putting in place the 'verswerkingsooreenkoms' and the 'leweringsooreenkoms'.

[75] Voss testified that there was no operational activity as a winery in the Plaintiff, but also elaborated that it cannot be said that there was no business conducted by the Plaintiff. According to Voss, it is typical in co-operatives and companies with co-operative to have a pooling system, where all monies go into one banking account.

[76] Voss further testified that he is a chartered accountant, and for the period of 2011 to 2014, he was personally involved in the auditing of the Plaintiff. For each year, there was a financial statement for the Plaintiff and he was present in the general meetings and he presented financial statements. There is nothing sinister about the fact that the Plaintiff did not have income statements and cash flow statement. He further testified that generally a financial statement contains a balance sheet and an income statement. Where there is no income statement, it has to be indicated in the financial statements that there is no income or expenses for the year.

[77] Clearly, there is no other version to dispute the claim of the Plaintiff's expert witnesses. There was no evidence produced to contradict or rebut Voss's testimony.

[78] I simply cannot fathom why it is contended in the heads of argument of the Defendant that it is apparent, beyond doubt from the evidence both oral and documentary that the Plaintiff did not conduct any business. Once again, this assertion is not supported by evidence.

The cession

[79] The issue here is whether the Plaintiff as a cessionary ceded all the rights and interests to Lutzville Ltd. According to Voss the Plaintiff only ceded 'lewerings reg' in terms of the 'verwerkingsooreenkoms' agreement and the Plaintiff through the 'verwerkingooreenkoms' asked Lutzville Vineyards Ltd to do the functions mentioned there, for instance recovery of fixed costs. He does not agree that Lutzville Vineyards Ltd took over the duties of the Plaintiff. He is not aware of any document that states

that Lutzville Vineyards Ltd, will take over the duties of the directors of the Plaintiff regarding the constitution.

[80] Voss, testified that the Plaintiff has an obligation to take in produce and make wine. However, the Plaintiff does not have assets. Because the Plaintiff does not have a winery, it concluded a 'verwerkingsooreenkoms' with Lutzville Vineyards Ltd. Lutzville Vineyards Ltd did the function through 'verwerkingsooreenkoms'. Lutzville Vineyards Ltd then gets paid through commissions, for its incurred expenses and winery. According to Voss, in terms of the 'verwerkingsooreenkoms', Lutzville Vineyards Ltd has no ownership right in respect of the wine manufactured.

[81] The cession is created in the 'verwerkingsooreenkoms'. It is however, significant that nowhere in the 'verwerkingsooreenkoms' is there mention made of the Plaintiff ceding his right of action to the Lutziville.

[82] The most relevant part of this issue is under the heading 'Aanstelling en sessie' in the 'verwerkingsooreenkoms'. Clause 3.1, categorically states that the purpose of the cession is to do with delivery of products by suppliers and the right to pool the products of the suppliers. Gleaning from the terms of the 'verwerkingsooreenkoms', under the cession heading, it is quite clear that the ownership in the rights pertaining to delivery of product by suppliers remains vested with the Plaintiff despite the cession. Therefore, the right of action by the Plaintiff was not transferred with the cession.

[83] Clause 3.3 of the 'verwerkingsooreenkoms' clearly illustrates the point when it states that the Plaintiff undertakes to work together and give the necessary support to Lutzville Ltd, so that Lutzville Ltd can be in a position to perform the delivery right perfectly and effectively; as if Lutzville has all the powers, authority and responsibilities the Plaintiff has in terms of the statute. This quite clearly indicates that no powers, authorities and responsibilities were ceded to Lutzville Vineyards Ltd.

[84] Importantly, clause 3.3 of the 'verwerkingsooreenkoms' states pertinently that, if the supplier breaches the delivery right which is ceded to by the Plaintiff to Lutzville Vineyards Ltd; the Plaintiff under such circumstances undertakes and will be obliged if Lutzville so requests, to take all the necessary permissible steps under the statute, to compel the supplier to deliver the products to Lutzville.

[85] Clause 3.3 of the 'verwerkingsooreenkoms' plainly differentiates between the ceded right and the right of enforcement. Noticeably clause 3.3 explicitly stipulates that when there is breach from the supplier, the Plaintiff derives the right to enforce directly from the statute.

[86] Along with that, or perhaps, more importantly is that clause 8 of the 'leweringsooreenkoms', which interestingly was entered into between the Defendant and the Plaintiff, after the 'verwerkingsooreenkoms' became effective; states the following:

"8. KONTRAKBREUK:

Indien die lid sou versuim om sy verpligtinge teenoor die koöperasie ingevolge hierdie ooreenkoms na te kom, sal die koöperasie geregtig wees om:

8.1 Onmiddelike spesifieke nakoming van hierdie ooreenkoms van die lid te eis en onmiddelik regstappe teen die lid te stel . . .

8.2 . . .

8.3 . . ."

[87] Manifestly, in terms of clauses 3.3 of the 'verwerkingsooreenkoms' and 8 of the leweringsooreenkoms, the Plaintiff has exclusive right of action. If these clauses do not categorically evince that the Plaintiff retains the right to enforce the terms of the constitution of the Co-operation, despite the cession of the delivery rights; nothing will.

[88] Equally, if the conclusion of the 'verwerkingsooreenkoms' was intended to strip the Plaintiff's of all its rights and duties as far as the members are concerned, and vest them to Lutzville Vineyards Ltd; then it does not make sense that clause 9.1.3.2 of the 'verwerkingsooreenkoms' would still allow the very same Plaintiff to make alternative arrangements with third parties to receive products from the suppliers for the specific press season; if Lutzville Vineyards Ltd is in default.

[89] Likewise, if regard is had to clause 6 of the 'verwerkingsooreenkoms' under the heading 'VERPLIGTINGE VAN DIE KOöPERASIE', it is evident that the Plaintiff still retained obligations towards its members. For instance, clause 6.1 states the following:

"Die Koöperasie sal verplig wees om:-

6.1 te verseker dat die verskaffers volhou om hul produkte betyds en direk aan die Maatskappy lewer om die Maatskappy in staat te stel om sy verpligte effektief na te kom;"

6.2 jaarliks , op die effektiewe datum of enige verjaring daarvan, vir die Maatskkapy In kennis te stel van die beraamde volume per produk variteit wat die Maatskappy verplig is om te verwerk;

6.3 Indien die Maatskappy aldus versoek, om te bewerkstelling dat nie later as 15 Desember van elke jaar, die verskaffers 'n skriftelike staat indien by die gereggistreerde kantoor van die Maatskappy van die hoeveelheid en elke sort druif, vir die maak van wyn bestem, wat hy verwag om in die eersvolgende oes te produseer waarop die lewringsreg betrekking het. Nieteenstaande die voorafgaande sal die Maatskappy ook geregtig maar nie verplig wees om sodanige oesskatting van die produkte self te doen sonder die tussen koms van die Koöperasie;

6.4 jaarliks wanneer deur die Maatskappy daartoe versoek, 'n wingerdstoksensus onder sy lede te hou en die resultate daarvan to beskikking van die Maatskappy te stel;

6.5 . . .

[90] Similarly, in clause 5 under the heading 'REGTE EN VERPLIGTINGE VAN DIE MAATSKAPPY', the following is stated in clause 5.4:

"5.4 Die Maatskappy sal verplig wees om, indien daartoe versoek deur die Koöperasie, ten volle alle rekords openbaar te maak aan die Raad van die Koöperasie ten opsigte van die verkoopspryse behaal deur die Maatskappy met die verkoop van wyn uit die produkte."

[91] Remarkably, merely from the provisions of clause 5.4, Lutzville Vineyards Ltd is financially accountable to the Plaintiff. In my mind it is palpable that Lutzville Vineyards Ltd was dealing with the monies in terms of the 'verwerkingsooreenkoms' on behalf of the Plaintiff. Hence Lutzville Vineyards Ltd is obligated to account.

[92] From the aforegoing, it is thus incorrect to contend that when the 'verwerkingsooreenkoms' was concluded, it was the intention of the Plaintiff and Lutzville Ltd to divest the Plaintiff of all rights and duties vis-à-vis the members of the Plaintiff and to vest them in Lutzville Vineyards Ltd. The 'leweringsooreenkoms', eloquently articulates this point.

[93] In the context of this matter, it is correct to contend that the conclusion of the agreement did not lead to the Plaintiff losing its identity or becoming a shell. Instead, the Plaintiff created its own operational agreements to enforce its constitutions. It is also significant to note that the constitutions of the Plaintiff are the primary statutes that maintain the relationship between the members and the Plaintiff. The Plaintiff's constitutions are also the documents that retain the Co-operative in existence. This action owes its genesis to the Plaintiff's constitutions and not the 'verwerkingsooreenkoms'.

[94] Under the circumstances of this matter it was not necessary to join Lutzville Vineyards Ltd as a party to the proceedings. It is well established that the term "direct and substantive interest' means an interest in the right which is the subject matter of the litigation and not merely an indirect financial interest in the litigation. See,

Verbatim Ex parte Body Corporate of Caroline Court 2001(4) SA 1230 SCA on page 1239 A.

[95] There is no basis to assert that the Plaintiff's claim is for monies which (if any were due and owing) accrued, or were owed to another legal entity, the Company, or at best for Plaintiff, the 'group'. Surely, if the monies belonged to a group it was not necessary to set up accountability mechanism, which would oblige Lutziville Vineyards Ltd to lay all records to the 'Raad' of the Plaintiff.

[96] Mostert testified that the 'verswerkingsooreenkoms' was put into place to make sure that the grapes delivered by members or producers would be pressed and the commercial part would be done through Lutzville Vineyards Ltd on behalf of the Plaintiff. It was his testimony that the Company acted on behalf of the Plaintiff regarding the pressing and marketing of the product. Invoices were issued in the name of the Plaintiff. When the 'verswerkingooreenkoms' came into effect it did not affect the obligations of the members of the Plaintiff. He testified that the 'verswerkingooreenkoms', is an agreement between Lutzville Vineyards Ltd and the Plaintiff to do functions which the Plaintiff should have done.

[97] Vos testified that he would understand if Mr Mostert testified that it was a group that conducted business, if he said that in layman's terms. But it was not a group in terms of the Companies Act perspective. There is no evidence to contradict this.

[98] The above takes care of the non-joinder plea. Therefore, it is not necessary to deal with the non-joinder issue separately.

The provisions of the Co-operative Act

[99] It should, however, be borne in mind that, it was the testimony of Mostert that they decided to make a change in their business. In 1999, they then put the new Co-Operative next to the Company to control the membership of farmers. The payment obligation of the members stems from clause 101 of the Constitution. In terms of clause 101 of 2011 constitution, the board determines the commission on annual basis that is payable by members of the Plaintiff. It is also averred in the particulars of claim that the Plaintiff was duly incorporated in terms of the Co-Operative Act.

[100] This Court has already found that the evidence in this matter does reveal that the Plaintiff conducted business. In any event, this Court cannot see how non-compliance with the Co-operative Act is linked to the claim of the Plaintiff. This Court tends to align itself with the sentiments as expressed in the heads of argument on behalf of the Plaintiff that the Co-Operative Act provides for its own remedies for violation or noncompliance with the Co-Operative Act.

[101] Surely, it would be illogical to expect that a party that has issued summonses should in addition to proving the cause of action, also prove general compliance with a statute that created it, particularly, if they are not related to the cause of action. There is no prerequisite in the Co-Operative Act that states that; before a party can be able to claim what it believes it is owed, it should prove general compliance with the

provisions Co-Operative Act. It is unfathomable in the context of this case that non-compliance with the statute can be raised as a defence to the claim of the Plaintiff. The cause of action in this matter is not the Co-Operative Act. It is my firm view that in the context of this case, the non-compliance, or compliance with the Co-Operative is irrelevant to the inquiry of failure to comply with the constitution of the Co-Operative. I do not accept that argument of the Defendant when it comes to this aspect.

[102] No evidence was put forward to defeat the evidence of the Plaintiff, that it is entitled to the prayers it sought.

Cost orders issue

[103] It is well settled, that, a court of appeal does not normally interfere with a cost order of the court of first instance. Costs is a matter for the exercise of the trial court discretion. A court of appeal can only interfere with the discretion of the lower court if it has not exercised its discretion judicially or has misdirected itself.

[104] The costs orders granted by the Regional Court Magistrate are not typical costs orders. I am acutely alive to the fact that in terms of rule 33 (1) of the Magistrates' Court Act, 32 of 1944, (the Magistrates' Court Act) the magistrate can award such costs as he /she deems fit. In the Magistrate's Court, there is a rising scale A, B, C and D, which sets out the scale upon which the costs are to be computed. The rising scale is premised on the amount in dispute or the nature of the cause of action.

[105] It is not entirely correct to state that there is no Regional Court scale. Particularly if regard is had to the provisions of Annexure 2 of the Magistrate' Courts Rules. Part 1 to Annexure 2 reads as follows:

". . . [W]hen the amount in dispute exceeds the maximum jurisdictional amount so determined but the Minister in respect of magistrates' courts for districts and *the process issued out of a magistrate's court for a regional division or when the matter is in respect of a cause of action in terms of section 29 (1B)(A) of the Act, costs shall be taxed on scale D.*" (My emphasis) Thus, scale D is a regional court scale. All the amounts claimed by the Plaintiff in this matter, fall under scale D.

[106] However, in the instant case, the trial court's failure to furnish reasons to elucidate the basis upon which she awarded the two cost orders, is problematic. Moreover, it is not clear why the second cost order was made to be paid on a higher scale and which higher scale she is referring to as the Plaintiff did not make mention of any 'higher scale' in its amended particulars of claim. Furthermore, considering the issues raised by the Defendant, this matter was not a simple matter; as such, services of a counsel was warranted.

[107] Under the circumstances, it is difficult to determine whether the Regional Court Magistrate exercised her discretion judicially, when she phrased the cost orders in the fashion which she did. The issues raised by the Defendant pertaining to the costs were not going to create insurmountable hurdles for the taxing master. Moreso, if regard is had to the fact that there is no such thing as a cost for senior counsel, and

that it was not really necessary for the Regional Court Magistrate to itemise the costs to be billed.

[108] In order to avoid confusion in future for the parties. I am going to substitute the cost orders issued by the Regional court magistrate as follows:

Costs pertaining to absolution application

"1. Defendant is ordered to pay the costs of the application for absolution from the instance, on a party and party scale;

2. The costs include the costs of counsel."

[109] Costs pertaining to the action

"The Defendant shall pay Plaintiff's costs of suit on party and party scale including services of a counsel and fees for the expert witness."

In the results, the following order is made:

1. The Regional Court Magistrate cost order dated 31 March 2021, is hereby set aside and substituted as follows:

1.1 Defendant is ordered to pay the costs of the application for absolution from the instance, on a party and party scale;

1.2 Such costs to include cost of counsel.

2. The Regional Court Magistrate costs order dated 20 August 2021, is hereby set aside and substituted as follows:

2.1 The Defendant shall pay Plaintiff's costs of suit on party and party scale including services of a counsel and fees for the expert witness.

3. The appeal is dismissed with costs

[redacted]

CN NZIWENI
Acting Judge of the High Court

I agree and it is so ordered

[redacted]

MI SAMELA
Judge of the High Court