

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

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

17/01/2022

SIGNATURE

DATE

CASE NO: 2239/2017

In the matter between:

BOSBOK ONTGENNING CC

Plaintiff

and

YORK TIMBERS (PTY) LTD

Defendant

J U D G M E N T

MASHILE J:

MASHILE J:

INTRODUCTION

- [1] This is an application for absolution from the instance. A terse background from which it emanates is that on 10 February 2011, the parties concluded a written Harvesting and Transport Agreement ("the agreement"). By effluxion of time, the agreement expired on 30 June 2015. One of the salient provisions of the agreement is that Paragraph 8.3 lays down that should the Parties, for whatever reason, continue with the operational implementation of this Agreement or any part thereof beyond the Termination Date without expressly and in writing having renewed it as envisaged above, or having so renewed it beyond the new Termination Date, such continuation shall be subject to 30 (thirty) calendar days' written notice of termination by either Party.
- [2] The agreement also contains a non-variation clause unless reduced to writing and signed by both parties. A further clause is that the agreement constitutes the whole agreement between the parties and supersedes any other discussions, agreements and/or understandings regarding the subject matter thereof.
- [3] Bosbok alleges that following termination of the agreement, York Timber was advised that Bosbok would increase its rates for the services that it would henceforth render to it. Bosbok further argues that with full knowledge of the increased rates, York Timber, by its conduct, tacitly accepted them by placing further orders. Bosbok seeks payment on the new rates, which it maintains it formally communicated to York Timber.
- [4] Resisting the claim, York Timber contends that the non-variation except in writing clause in the agreement cannot reside together in the same document as the oral or tacit agreement coming into existence between the parties. The terms and conditions of the agreement that terminated on 30 June 2015,

contends York Timber, persist to find application after 30 June 2021, the only difference of course being that it is a month to month agreement that can be terminated by either party giving a 30-day notice to the other.

- [5] Apart from the above, maintains York Timber, Bosbok has not pleaded any facts from which any court can find that there exists a basis for the conclusion of a tacit agreement. It is manifest that while there is no controversy regarding the coming to end of the agreement on 30 June 2015, a dispute persists on the continued application of the terms and conditions of the initial agreement and the coming into being of another on slightly different terms and conditions, the main being the increased rates.

PLEADINGS

- [6] This Court is indebted to the parties for their summary of the areas of common cause, disagreements and description of the issues that the court ought to consider for proper determination of their dispute. In short, the statement accentuates pertinent parts of their pleadings making it unnecessary to quote extensively from them. The significance of the statement warrants reproduction below:

"The following are common cause:

1. That, on or about 10 February 2011, a written Harvesting and Transport Agreement was concluded between the Plaintiff and Defendant and that the mentioned written agreement is attached to Defendant's plea as **Annexure "P1"**.
2. That the termination date of **Annexure "P1"** was 30 June 2015.

3. That **Annexure "P1"** includes a term which provides that should the parties for whatsoever reason continue with the operational implementation of the written agreement, or any part thereof, beyond 30 June 2015 without expressly and in writing having renewed it as envisaged in clauses 8.1 and 8.2 of **Annexure "P1"**, such continuation shall be subject to 30 calendar days' written notice of termination by either party.
4. That **Annexure "P1"**, in addition, provides that the agreement constitutes the whole agreement between the parties and supersedes any other discussion, agreements and/or understandings regarding the subject matter thereof (clause 29.1). No amendment or consensual cancellation of the agreement or any provision or term thereof or of any agreement or other document issued or executed pursuant to, or in terms of, the written agreement and no settlement of any disputes arising under the agreement and no extension of time, waiver or relaxation or suspension of, or agreement to enforce or suspend or to postpone enforcement of any of the provisions of the terms of the written agreement or any other agreement or other document issued pursuant to or in terms of the written agreement, shall be binding unless recorded in written document signed by the parties (or in case of an extension of time, waiver or relaxation or suspension signed by the party granting such extension, waiver or relaxation).
5. That both parties, at least up until 30 June 2015, substantially complied with its obligations in terms of the agreement.
6. That subsequent to 30 June 2015 Defendant proceeded to place orders with Plaintiff by following the normal procedures as followed for the preceding four years, for the months of June, July, August and September 2015.

DISPUTED ISSUES:

7. Defendant alleges that, on or about 2 July 2015, and at Sabie, Mpumalanga, Plaintiff represented by Jacobus Johannes Scheepers, and Defendant, duly represented by Mr. Pieter van der Merwe, the general manager: Forestry, alternatively another employee representing the Defendant, entered into a verbal agreement, alternatively a tacit agreement came into being.
8. That the express, alternatively implied, further alternatively tacit terms of the verbal, alternatively tacit, agreement are:
 - 8.1 That Plaintiff agreed and undertook to supply the Defendant with harvesting and extraction services at different locations as pointed out by Defendant;
 - 8.2 That charges to be paid by Defendant to Plaintiff for the harvesting and extraction services were to be standard prices as set out in the contractual agreement entered into and between the parties during 10 February 2011, which agreement terminated during June 2015;
 - 8.3 That a higher rate, as communicated on 1 July 2015, would be applicable/payable to/for harvesting and extraction services.
9. Defendant, in addition to the contentions below, disputes the conclusion of the alleged verbal or tacit agreement.

PARTIES CONTENTIONS:

- 9.1 Defendant pleads that the conclusion of a verbal or tacit agreement is, in fact and in law, excluded by the provisions of the written agreement attached to Defendant's plea as **Annexure "P1"**, in general, and in particular clause 8.3, which provides that should the parties (the Plaintiff and Defendant), for whatsoever reason, continue with the operational

implementation of the agreement, or any part thereof, beyond the termination date without expressly and in writing having renewed it, as envisaged in clause 8.2 of the agreement, such continuation shall be subject to 30 calendar days' written notice of termination by either party. The plaintiff submits that the clause referred to does not prevent the conclusion of an oral, tacit or implied contract and pertains to a termination notice period of any further agreement entered between the parties which is not expressly and in writing confirmed between the parties.

CONSEQUENCES OF FINDINGS:

10. The parties are *ad idem* that:

10.1 should this Honourable Court find that:

10.1.1 the Plaintiff satisfied the *onus* of proving that the verbal or tacit agreement was concluded as alleged by Plaintiff on the terms as alleged by Plaintiff, and

10.1.2 that such verbal or tacit agreement is not excluded by the provisions of **Annexure "P1"** – for which the defendant has the onus of proving, then:

the Plaintiff must be successful in its claim against Defendant, for the amount as claimed;

10.2 Should this Honourable Court find that the Plaintiff has not satisfied its *onus* of proving the verbal or tacit agreement as alleged or the court finds that the verbal or tacit agreement, if proven, is excluded by the provisions of **Annexure "P1"**, then the Defendant is successful in its defence and Plaintiff's claim must be dismissed.

11. The parties remain *ad idem* that the costs of the action will be addressed at the hearing of this action.”

ISSUES

- [7] From the pleadings and evidence levied before court, this Court is required to make a decision on the following matters:

- 7.1 Has Bosbok made a case both on the pleadings and evidence adduced by Mr Scheepers at this juncture that can be consistent with a decision that a tacit agreement was reached between the parties?
- 7.2 If it has not, has Bosbok nonetheless established a case that cannot vindicate the granting of absolution from the instance?
- 7.3 Given the context in which the agreement was entered into, the purpose and background negotiations leading to the agreement between the parties, what can the proper interpretation of Clause 8.3 be?

ASSERTIONS OF THE PARTIES

- [8] The plaintiff contends that Clause 8.3, which I will closely scrutinise as the judgment unfolds, ‘does not prevent the conclusion of an oral, tacit or implied contract and pertains to a termination notice period of any further agreement entered between the parties which is not expressly and in writing confirmed between the parties’. For purposes of avoiding absolution, Bosbok believes that the pleadings as are and the evidence adduced until now is sufficient.

- 8.1 Conversely, York Timbers argues that Clause 8.3 of the agreement, both in fact and law, excludes the conclusion of a verbal or tacit agreement. Furthermore, Bosbok has not laid a foundation from which this Court can justifiably find that a verbal or tacit agreement was concluded between the parties. As such, there exists no possibility that a court might find in favour of Bosbok were the matter to proceed beyond this stage. Accordingly, granting absolution would be appropriate.

LEGAL FRAME WORK

- [9] The law that governs the granting or refusal of absolution is trite and that much is common cause between the parties. The test to be applied for absolution, usually at the end of the plaintiff's case, is not whether or not the evidence levied before court by the plaintiff demonstrates what would customarily be necessary to be proved at the conclusion of the case of both parties. Instead, a court should ask itself whether or not there is evidence upon which a Court, applying its mind reasonably to such evidence, 'could or might' and not should, nor ought to' find for the plaintiff were the matter to proceed to finality. See, *Claude Neon Lights (SA) Ltd v Daniel* **1976 (4) SA 403 (A)**
- [10] It has been said that the test entails that a plaintiff has to make out a prima facie case such that there is evidence relating to all the elements of the claim to survive absolution because without such evidence no court could find for the plaintiff. See, *Marine & Trade Insurance Co Ltd v Van der Schyff* **1972 (1) SA 26 (A) at 37G - 38A**. insofar as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one. See, Schmidt at 93). That said, a court should not be too eager to grant absolution at the end of the plaintiff's case unless doing so, after a careful consideration of the circumstances, will be in the interest of justice. See, *Gordon Lloyd Page & Associates v Rivera* **2001 (1) SA 88 (SCA)**.

- [11] Turning to tacit agreements. It is trite that a party intending to rely on a tacit agreement must plead and prove the facts from which a court can infer that actual and true consensus happened. See, *Sewpersadh v Dookie* 2009 (6) SA 611 (SCA). It is often helpful when considering the existence of consensus between two parties to look at their external manifestations to determine whether or not they were actually in agreement. Needless to state that if they were, there was an agreement. If not, was one party reasonably entitled to assume, from the words or actions of the other, that they were truly in agreement? If yes, agreement will be deemed to have been present. If not, there was no agreement. See, *Christies Law of Contract in South Africa*, GB Bradfield, 7th Edition, paragraph 2.4.2 (c) and *Garden Cities Incorporated v Northpine Islamic Society* 1999 (2) SA 268 (C).

ANALYSIS

EXISTENCE OF VERBAL OR TACIT AGREEMENT

- [12] The starting point here is the letter of 1 June 2015 addressed to York Timbers by Bosbok. The letter notifies York Timbers that Bosbok would, with effect from 1 July 2015, increase the rate at which it harvests and transports wood. York Timbers did not until 28 July 2015 reply to that letter. That said, it is common cause that the parties held meetings in particular, on the last Friday of June 2015 during which Bosbok was expressly advised that the proposed rates were not acceptable. Scheepers agreed during his testimony in court that Van Zyl concluded the meeting by stating that they would engage each other once again on the matter.
- [13] Bosbok argues that subsequent to that meeting York Timbers through its representative, Mr Potgieter ("Potgieter"), proceeded to place orders as it did previously. The conduct of York Timbers placing orders following the meeting the parties had, constitutes outward manifestations of the existence of an agreement reached at the meeting. This assertion, however, comes head to head with the

admission by Scheepers that Van Zyl concluded the meeting of the last Friday of June 2015 by stating that they would talk further on the subject subsequently.

- [14] Besides and as pointed out by York Timber, no case of quasi mutual assent is made in the papers of Bosbok. The orders were placed by York Timbers' employee, Potgieters. Scheepers admitted in his evidence that Potgieter would not have had the authority to bind York Timbers in any agreement that might have ensued between the parties. It is therefore safe to surmise that Potgieter's placement of the orders could not have been understood to confirm the presence of a tacit agreement between the parties in circumstances where he lacked authority to bind York Timbers.
- [15] In fact, the letter of 28 July 2015 addressed to Bosbok by York Timbers puts the matter to rest as it clarifies York Timbers' position on the matter. Firstly, it confirms that the parties held numerous meetings between 1 June and 28 July 2015. Secondly, that the parties' agreement of 10 February 2011 had come to an end on 30 June 2015. Thirdly, that since it was not renewed, it was operating as a month-to-month contract terminable on a 30-day notice by either party as set out in Clause 8.3 of the agreement. During his testimony, Scheepers admitted that, until the letter of 28 July 2015, he had been under the impression that his proposed rates of 1 June 2015 had been accepted.
- [16] Scheepers' admission is devastating to his case of a verbal or tacit agreement having been reached between the parties because it validates the contention that there was no consensus. The letter of 30 July 2015 from Bosbok to York Timbers, insisting on the 1 June 2015 rates, leaves one staggered because it constitutes a unilateral implementation of the rates. That this was indeed a unilateral execution of the rates was confirmed during Scheepers' testimony in court and in the letter of Bosbok to York Timbers dated 1 September 2015.

[17] It is noteworthy that Scheepers testified that previously the rates were negotiated and confirmed in writing. For some strange reason, Bosbok would have this Court believe that the unilateral implementation of the rates, which is clearly not the result of a negotiated process and is a departure from an established practice between the parties ought to be accepted as verbal or tacit agreement. The position must be that lack of the external manifestations of the parties exhibiting consensus represents proof that there was no such agreement. As such, no verbal or tacit agreement came into existence.

[18] What is the significance of the finding that Bosbok has failed to show the existence of a verbal or tacit agreement between the parties? The answer must be that the parties are forced to revert to the agreement of 10 February 2011 for guidance on what governed their relationship post termination of that agreement on 30 June 2015. The finding of this Court though means that I cannot visit the agreement of 10 February 2011 and in any event neither party has asked that I do.

DOES THE CASE MADE BY BOSBOK WEIGH AGAINST THE GRANTING OF ABSOLUTION

[19] What is required to be examined here is whether or not on the evidence adduced by Bosbok at this juncture there is evidence upon which a Court, applying its mind reasonably to such evidence, 'could or might' and not should, nor ought to' find for the plaintiff were the matter to proceed to finality. A court must not be tempted to assess the matter on the basis of what would usually be expected at the conclusion of the cases of both parties. See, the Claude Nion Lights (SA) case above. This means that at the closure of its case, as is the case in this instance, evidence concerning all the elements of the claim ought to have been established. It is in this sense that a party will be said to have established a prima facie case.

[20] Bosbok has alleged a verbal or a tacit agreement having been entered into between it and York Timbers. However, the evidence presented before court is

hostile to that allegation because firstly, Scheepers conceded that there was no verbal agreement and as a matter of fact, there is no support of such an approach from the documentary evidence before court. Secondly, there is no evidence to sustain the allegation of a tacit agreement once Scheepers has acknowledged that Potgieters would not have had the authority to bind York Timber in such agreement by the orders he placed.

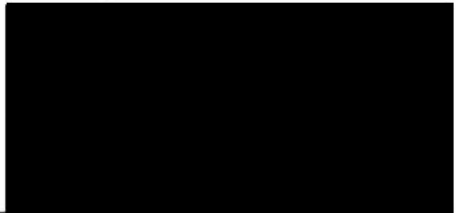
[21] I am mindful that courts ought to be circumspect and tight-fisted in granting absolution. I am also acutely conscious that absolution should not be refused especially in those instances where the interests of justice so warrant. Bosbok has not proved what it has alleged in its papers. The question is why should York Timbers continue to incur further legal costs which it might not recover in whole should it be successful? Bosbok has clearly made a mistake by thinking that there was agreement where there was none. Why should the case be protracted when it could be ended here.

[22] The evidence that Scheepers has levied will not change even if the case were to be allowed to proceed to the end. I am aware that a version of certain witnesses has been put to Scheepers and that perhaps it is appropriate that those witnesses be called to take the stand so that their version can be tested. That would be proper if the evidence established all the elements that pertain to the claim. It is evident that no consensus was reached and that should be the end of the road.

INTERPRETATION OF CLAUSE 8.3

[23] In consequence of the finding above, it will be superfluous to proceed to interpret Clause 8.3. This is for two reasons, which are firstly, the case of Bosbok has collapsed of attempting to prove the verbal or tacit agreement. Secondly, I cannot proceed to interpretation when the first hurdle has not been overcome. In the circumstances the application must succeed and I make the following order:

1. Absolution from the instance is granted with costs.



B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 17 January 2022 at 10:00.

APPEARANCES:

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Instructed by:**

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Date of Judgment:

17 January 2022