



Reportable:	YES /NO
Circulate to Judges:	YES /NO
Circulate to Magistrates:	YES /NO

HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

Case No: **449 / 11**

Heard: **20-06-2016**

Delivered: **16-09-2016**

In the matter between:

ELSIESDRIFT PLASE (PTY) LTD

Appellant

v

AWENDGLOED BOEDERY (PTY) LTD

Respondent

Coram: Kgomo JP; Mamosebo J et Lever AJ

FULL BENCH APPEAL - JUDGMENT

Kgomo JP

1. At the end of a lengthy trial before Phatshoane J, the Learned judge made the following order:
 - 1.1 Elsiesdrift Plase (Edms) Bpk, the defendant, is directed to pay to Awendgloed Boerdery Bpk, the plaintiff, such amount of damages as the plaintiff may succeed to prove with effect from May 2008, with costs.
 - 1.2 The plaintiff's enrichment claim is dismissed with costs.

2. The appellant (Elsiesdrift) was the defendant *a quo* and the respondent (Awendgloed) the plaintiff. Awendgloed claimed payment in the amount of R18. 133-odd million from Elsiesdrift as damages allegedly suffered in consequence of a breach of contract committed by Elsiesdrift. Awendgloed also claimed R53, 240 based on undue enrichment, which claim was unsuccessful. There is no counter-appeal in this regard by Awendgloed. As shown in the order the quantum issue stands over for later determination.

AWENDGLOED'S CASE (THE PLAINTIFF).

3. Awendgloed pleaded that it, represented by Mr JJ du Preez (known as Oom Jan), concluded an oral lease agreement during October 2007 with Elsiesdrift, represented by Thomas Lubbe, in terms whereof:
 - 3.1 Elsiesdrift leased Lubbeshoop, an agricultural farm, to Awendgloed for a period of five years commencing from 01 July 2008. Lubbeshoop had to be utilized for the initial six months to cultivate wheat ('koring') and subsequently for Lucerne production;
 - 3.2 The quid pro quo for the initial six months ('the Wheat Tenure') would be 240 tons of the highest grade wheat harvested and for the remainder of the lease ('the Lucerne Tenure') the compensation would be 40% of the Lucerne harvested.
 - 3.3 Awendgloed maintains that it took occupation of Lubbeshoop, cultivated wheat thereon and complied with all its obligations relative to the Wheat Tenure.
4. Awendgloed pleads that on 05 December 2008, at Douglas, Elsiesdrift's attorney, Mr Herman Van Heerden, suggested that the said oral lease agreement be replaced by two separate lease agreements. The first for the period 01 July 2008 to 31 December 2008 (the Wheat Contract), and the second from 01 January 2009

to 31 December 2014 (the Lucerne Contract). The written Wheat Contract was appended to the summons and marked Annexure "A", whereas the written Lucerne Contract was Annexure "B". That this constituted an offer to amend the original oral agreement.

5. Awendgloed further pleads that it accepted Elsiesdrift's offer on 05 December 2008 when its representative, Du Preez, signed the contracts, the said Annexures "A" and "B". At that stage, Awendgloed claims, Elsiesdrift had not signed these contracts. Awendgloed states that pursuant to this signature it cultivated Lucerne with the full knowledge of Elsiesdrift.
6. Notwithstanding the foregoing, Awendgloed pleads further, Elsiesdrift represented by (and/or in the presence of) Thomas Lubbe, his brother Hanrè Lubbe and their father Ardu Lubbe repudiated the Lucerne Contract on 12 January 2009, Annexure "B". Cognizance must be taken here that the Wheat Contract would already have expired on 31 December 2008.
7. Awendgloed maintains that in the circumstances it expressly accepted the repudiation on or about 27 January 2009, alternatively it did so by means of the letter addressed to Elsiesdrift on 27 January 2009 in terms of which it cancelled the Lucerne Contract, Annexure "B".
8. Awendgloed appended to its Particulars of Claim as Annexure "C1", a minute prepared by Dr W J Nel, which sets out how the amount of R18.133 million is calculated and arrived at. The detail thereof will only require attention if and when the quantum stage is reached. Broadly, the above figure is divided under two heads:
 - 8.1 The first head speaks to the direct expenses and costs incurred in implementing the Lucerne Contract, Annexure "B": R1 142 456, 95.

8.2 The second relates to Awendgloed's loss of income for the contracted period of the Lucerne Contract, Annexure "B".

9. It is, however, essential to particularise the assets, which were required for the execution of the Lucerne Contract and led to the loss specified in para 8.1 above:

9.1 Losses suffered as a result of the purchase of two Massey-Ferguson tractors;

9.2 Losses resulting from the sale of 2 (two) Claas Disco Lucerne Harvesters which were rendered extra to requirements;

9.3 Losses resulting from the purchase of a bakkie (a van) for the use of its farm manager, Mr Abrie Serfontein, who commenced his employment on 01 July 2008;

9.4 Losses incurred resulting from the maintenance costs pertaining to the tractors and harvesters referred to;

9.5 Losses incurred as a result of the employment and payment of Mr Serfontein and the farmworkers for purposes of implementing the aforesaid agreements; and

9.6 Loss suffered as a result of the registration of a mortgage bond in order to finance the production costs of Lucerne.

ELSIESDRIFT'S CASE (THE DEFENDANT).

10. Elsie'sdrift contends that the oral agreement was in fact concluded in May 2008, a contention that Phatshoane J went along with and now not contested by Awendgloed. Paras 3.1 and 3.2 (above) relating to the period of the lease and the rate of compensation are common cause. Also common cause is the existence of the written contracts Annexures "A" and "B", to the Particulars of Claim, already alluded to. According to Elsie'sdrift during about November/December 2008 the parties hereto agreed orally to extend the Initial Agreement for a period of five years. That this oral agreement then gave rise to Annexures "A" and "B".

11. Elsiesdrift on its part contends that Awendgloed, represented by Mr Du Preez, repudiated the Lucerne Contract, Annexure "B":

11.1 Firstly, by demanding a rental payment of 38% of the Lucerne Harvest as opposed to 40% agreed upon in Clause 3.1 of the agreement. It is convenient to reflect what this clause (translated) stipulates:

"The rental payable by the Lessee to the Lessor, is calculated in the following manner:

3.1 40% (Forty Per centum) of each Lucerne crop which is harvested from time to time from the property, which crop shall be delivered to the barn of the Lessor at Lubbeshoop."

11.2 Secondly, by demanding that Elsiesdrift carry out maintenance repairs in respect of the pivots on Lubbeshoop contrary to the provisions of Clause 5. Clause 5 (translated) stipulates that:

"It is recorded that the Lessor has overhauled all pumps and machines. The understanding is that the Lessee shall overhaul all pumps and machines when the lease expires.

The Lessee shall be obliged, during the currency (remainder) of the lease to maintain the property described herein in a proper condition to the satisfaction of the Lessor, at its own costs and without regress in its condition: All improvements, including pump-equipment (uittrekkingsstoestelle), of any kind, suction-pumps; pivot-pumps; pipeconduits (permanent or portable); all cultivation equipment (whether specified or not) as well as existing thoroughfares and fences on the property.

The Lessor shall immediately repair or replace any damage to or of improvements and equipment on the farm as they occur and restore same to the Lessor in the condition in which it was received. The only exception to the foregoing is that it

is the responsibility of the lessor to replace the pivots which have been rusted away."

11.3 Thirdly, by demanding that Elsiesdrift bears all the costs pertaining to the preparation (including the levelling) of the land for purposes of planting the Lucerne, contrary to Clause 4.6 which provides (translated):

"The Lessee shall provide all tractors and harvesters (skroppe) in order to level the ground, whereas the Lessor shall provide the diesel for the preparation (levelling) of the ground for the planting of Lucerne."

12. Elsiesdrift maintains that it chose to accept Awendgloed's repudiation on 08 January 2009 and cancelled the Lucerne Contract (that it calls the Extention Agreement); in the alternative Elsiesdrift pleads that this contract was terminated by agreement on the very day (08/01/2009).
13. Before us counsel were ad idem, correctly so, that the dichotomous versions proffered by the parties strongly militate against and are in truth incompatible with a congenial termination of the Lucerne Contract. In fact if Awendgloed's version, articulated by Mr Du Preez, holds sway in the end then the meeting of the parties on or about 27 January 2009 must have been characterised by acrimony. Therefore, the segment of the judgment of the trial Judge at para 86 that records that: *"I am therefore satisfied that the contract was not cancelled by mutual consent"* would be unassailable.
14. It is common cause that the Lucerne Contract that was scheduled to run for five years from 01 January 2009 to 31 December 2014, as stipulated in Clause 2 of Annexure "B", was not consummated. The question is who frustrated its consummation and why, or put differently who cancelled the agreement and upon which expressed

justification or even, who was the innocent party here. **In Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd** 2001 (2) SA 284 (SCA) at 293H-295A (paras 16-18) the SCA, supporting on a collection of its own jurisprudence, remarked instructively that:

"[16]'Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract. . . . Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated . . . '

(per Corbett JA in Nash v Golden Dumps (Pty) Ltd 1985 (3) SA 1 (A) at 22D - F). This is the conventional exposition of the operation of the doctrine of repudiation leading to rescission, with its emphasis on the guilty party's intention and the innocent party's acceptance. At the same time this Court has repeatedly stated that the test for repudiation is not subjective but objective (Ponisammy and Another v Versailles Estates (Pty) B Ltd 1973 (1) SA 372 (A) at 387A - C; Stewart Wrightson (Pty) Ltd v Thorpe (supra at 953E - H); Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou (supra at 845A - 846G); Tuckers Land and Development Corporation (Pty) Ltd v Hovis (supra at 653B - G); OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd and Another 1993 (3) SA 471 (A) at 480I - 481H; Highveld 7 Properties (Pty) Ltd and Others v Bailes 1999 (4) SA 1307 (SCA) at 1315F - G, 1318A - E, 1318H - J). Thus it has recently been said in Metalmil (Pty) Ltd v AECL Explosives and Chemicals Ltd 1994 (3) SA 673 (A) at 684I - 685B:

'It is probably correct to say that respondent was bona fide in its interpretation of the agreement and that subjectively it intended to be bound by the agreement and not to repudiate it. This fact

does not, however, preclude the conclusion that its conduct constituted repudiation in law. Respondent was not manifesting any intention to conduct its relations with appellant and to discharge its duties to appellant in accordance with what it was obliged to do on an objective interpretation of the agreement. In effect, it was insisting on a different contract, however bona fide it might have been in its belief that it was not.'

Conceivably it could therefore happen that one party, in truth intending to repudiate (as he later confesses), expressed himself so inconclusively that he is afterwards held not to have done so; conversely, that his conduct may justify the inference that he did not propose to perform even though he can afterwards demonstrate his good faith and his best intentions at the time. The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach. [17] As such a repudiatory breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor. Whether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance.

[18] The conduct from which the inference of impending non- or malperformance is to be drawn must be clearcut and unequivocal, ie not equally consistent with any other feasible hypothesis.

Repudiation, it has often been stated, is 'a serious matter' (cf Ross T Smyth & Co Ltd v T D J Bailey, Son & Co [1940] 3 All ER 60 (HL) at 72B; Metalmil (Pty) Ltd v AECI Explosives and A Chemicals Ltd (supra at 685B - C), requiring anxious consideration and - because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments - not lightly to be presumed. "

See also **South African Forestry Co Ltd v York Timbers Ltd**

2005 (3) SA 323 (SCA) 342E-F (para 38).

15. Awendgloed's letter dated 27 January 2009 does not expound on the reasons why it believes Elsiesdrift repudiated the Lucerne Contract. The answer seems to lie in the opening paragraph of the letter which appears to assume that no controversy is anticipated. It is addressed to Mr Arduus Lubbe and reads (translated):

"LEASE AGREEMENT: ELSIESDRIFT PLASE (EDMS) BPK/AWENDGLOED BOERDERY (EDMS) BPK.

I hereby confirm the discussion you had with me on 26 January 2009, during which you informed me that you do not intend to proceed with the leasing of the property (land) and water-rights relating to the farm Lubbeshoop.

I once again wish to put it to you that I really regret that decision. During the discussion in question you put it to me that I must furnish you with the expenses I incurred in the preparation to commence with the Lease Agreement. You offered to reimburse the wasted expenditure in this regard. I hereby formally accept your cancellation of the Lease Contract and offer to refund my wasted expenditure: provided you refund my wasted costs."

16. This letter (of 27 January 2009) is five-and-a-half (5½) typed pages long. Mr Du Preez testified that a legally qualified person, Mr Daan Botha, (implying that it was not necessarily an admitted legal practitioner), drafted it for him which he transposed onto

Awendgloed's letterhead. The body of the letter deals comprehensively with the nature of the damages incurred, in line with the pleadings already adverted to. Towards the end of the letter the following allegations made are apposite (translated):

"I am currently personally under tremendous pressure as a result of the default in implementing this agreement and earnestly wish to put this matter to rest. I trust that you understand.

I further wish to emphasise that the foregoing is expenditure that I reckon you ought to bear because it was logically incurred in order to carry out the farming.

In light thereof:

(a) *That the contract was provided to me by your attorney;*

(b) *That I had already signed it;*

(c) *That I had already taken occupation of the land; and*

(d) *That I had indeed already furnished you with a list of defects.*

I therefore had no reservation that we had a contract in place in this regard.

I also accept that this must be the reason why you informed me that you will pay my expenses in this regard because you evidently also understood it in the same way as I did."

THE DAMAGES CLAIM FOR THE PURCHASE OF TWO HARVESTERS.

17. Mr Du Preez testified that the purchase of two harvesters was made pursuant to an oral five year Lucerne Agreement that he claimed was concluded in October 2007. According to him the harvesters were destined to be utilized on Lubbeshoop. However, they were, on the contrary, delivered and utilized at Maselsfontein where Du Preez conducted Lucerne farming in terms of an agreement with Hanrè Lubbe. Another difficulty for Awendgloed and Du Preez is that Exh "C" establishes that the harvesters were already ordered on 20 September 2007. In the premises to hold Elsiesdrift Plase liable for breach of contract from October 2007 for the cultivation of Lucerne which would only be ready for harvest

two years in the future, in September 2009, is to stretch credulity to its outer limits. The claimed damages are too remote to connect causally to or be linked to Awendgloed's purported loss starting October 2007. Besides, and in truth, the overwhelming probabilities point towards the harvesters having been purchased for Maselsfontein.

18. Du Preez's evidence that Oos Vrystaat Kaapbedryfs Beperk (OVK) granted Awendgloed production credit on the strength of the oral five-year lease agreement allegedly concluded in the already discredited or rejected October 2007 date suffers short-shrift based on the assessment in paras 17 above. In addition the evidence in respect of the OVK file reveals that it only contains an application for production credit for purposes of the Lucerne operation on Maselsfontein (Hanrè Lubbe's farm) as well as Nuweland and Atherton (which are farms belonging to Du Preez and his father). The application(s) is/are dated 01 April 2008. Du Preez later conceded his mistake under cross-examination.

THE DAMAGES CLAIM FOR THE PURCHASE OF TWO TRACTORS.

19. Mr Du Preez conceded, fairly and correctly but belatedly, under cross-examination that the two tractors were purchased with production credit applied for on 01 April 2008 for farming operations on Maselsfontein, Nuweland and Atherton, unrelated to Lubbershoop. The suggested contract date of October 2007 therefore also falls by the wayside.

THE ELECTRICITY AGREEMENT WITH ESKOM

20. Clearly, Mr Du Preez misconstrued the endorsement "Rev March 2008" to mean that Awendgloed concluded the electricity agreement with Eskom in March 2008 and, consequently, before

May 2008. However, the accepted evidence is that the endorsement connotes that the standard Eskom Ruraflex agreement was last “revised in March 2008”. Awendgloed’s own witness, Mr Van Rooyen, employed by Eskom, also underscored Mr Du Preez’s mistake.

THE REGISTRATION OF MORTGAGE BOND OVER DU PREEZ’S PROPERTY.

21. Mr Du Preez testified that this mortgage bond was registered over his own farm as a result of the five year Lucerne Contract concluded in 2007. He intimated that Mr Booysen of OVK insisted on the conclusion of a five year contract. The mortgage bond served as security for the purchase for farming equipment and production credit for use on Lubbeshoop. However, the objective evidence (documentation) shows that the purchase of the equipment and the production credit was meant for his own farm. Besides, the bond was only registered after 08 April 2009. Mr Du Preez was here also shown up to have made a mistake.

22. The nub of Awendgloed’s case, pertaining to the merits and whether Elsiesdrift Plase breached the five-year Lucerne Agreement or not, has been succinctly captured by the trial Judge in the following terms (paras 19-26):
 - “19. On or about 05 January 2009 Du Preez received a water bill meant for a previous lessee which emanated from Thomas Lubbe Jnr. On 07 January 2009 Gerhard Boucher and Serfontein accompanied Du Preez to meet Thomas Lubbe Jnr to dispute responsibility for the bill. Thomas Lubbe Jnr was not pleased with the approach. He was extremely insolent and aggressive.

 20. Du Preez intimated that a discussion on the list of defects followed. Thomas Lubbe Jnr then called GWK and ordered

some pipes. In the end issues were amicably resolved. Du Preez says that on the same afternoon of 07 January 2009 he received a call from Thomas Lubbe Jnr who asked him to report at Van Heerden's offices. Lubbe called an electrician and a pivot installer and told them to repair the pivots immediately as Du Preez wanted to plant Lucerne.

21. On 12 January 2009 attorney Van Heerden, Ardu Lubbe Snr, Thomas Lubbe Jnr and Handré Lubbe met Du Preez. Ardu Lubbe Snr informed Du Preez that the Lubbes were no longer prepared to lease the land to him. He told the Lubbes that he felt that this was a unilateral decision which he could not agree with. He enquired what the problem was. Ardu Lubbe Snr told him that he stood by his decision and that Du Preez and his people had done nothing wrong. Du Preez went on to say:

'Thomas Lubbe Junior het met sy kop gesit en agteroor gelê op die stoel en vir my gesê "Oom Jan, kom ek sê maar ek is die do..s (derogatory utterance) in die verhaal.'

22. Du Preez says he enquired about the expenses that he had already incurred. Ardu Lubbe Snr requested him to compile a list for them and undertook to reimburse Du Preez and also pay Serfontein's annual salary.

23. Du Preez stated that after the meeting of 12 January 2009 he contacted Van Heerden who informed him that he would discuss the matter with Ardu Lubbe Snr. Du Preez visited Ardu Lubbe Snr to plead his [case] but was told:

'Jy en jou mense het niks verkeerd gedoen nie en dat dit beter is om uit te trek, want vorentoe gaan ons net koppe stamp.'

24. Toward the end of January 2009 Thomas Lubbe Jnr instructed Du Preez's workers to vacate the land. Du Preez intimates

that on or about 26 January 2009 he received a call from Ardu Lubbe Snr who informed him that he was not prepared to pay Awendgloed's expenses. Du Preez consulted a legally qualified person, who assisted him to draft a five-page letter dated 27 January 2009 which Du Preez directed to Ardu Lubbe Snr wherein he, amongst others, accepted the cancellation of the contract on condition that he be reimbursed his wasted expenditure. Du Preez did not receive any response thereto.

25. *Mr Gerhard Bouwer confirmed the incidents that took place at the meeting of 07 January 2009 when they (Du Preez, Bouwer, and Serfontein) met Thomas Lubbe Jnr. Bouwer added that upon Thomas Lubbe Jnr receiving the list of defects from Serfontein he informed Serfontein that: 'hy moet sorg dat hy sy k..k regmaak.' As for the meeting of September/October 2007 he intimated: '(O)p daai stadium het dit vir my geklink dit sou positief gewees het dat ons daai kontrak aangegaan het om lusern te plant daar.*
26. *Mr Abrie Serfontein is Du Preez's nephew. He was permanently employed by Arbeid Adel, in Petrusburg, Free State Province since 2004. His wife worked for PCA School in the same area. He says that around March 2008 Awendgloed offered him employment at Lubbeshoop. Du Preez told him that he was acquiring a lease on Lubbeshoop Farm which would be for a renewal period of five years. The employment offer, which he accepted, was also for the same period. Serfontein resigned from his employment; sold his house; and relocated with his family to Lubbeshoop where he started to work as a foreman from 01 July 2008."*

THOMAS LUBBE'S EVIDENCE.

23. Mr Thomas Lubbe, who testified for Elsiesdrift Plase, sketched a rosy picture concerning the good relationship that Elsiesdrift Plase had with Mr Nicolaas Burger Jacobs who farmed through a company called NB Jacobs & Seun Edms Bpk. They had a five-year agreement (2003-2008) whereby the company cultivated wheat and mealies. Jacobs informed them close to the expiry of the contract (January 2008) that the company would not renew the contract, although Elsiesdrift Plase was keen to do so. Thomas confirmed that the contract with Awendgloed was concluded in May 2008 following the non-renewal of the contract with Jacobs.
24. According to Thomas the contracts were split up, into six months and five years, because of his own feisty temperament. The six months was a trial run because his father (Ardus) wanted to observe whether he (Thomas) and Du Preez are compatible in the farming venture. This explanation, I must hasten to add, is so patently ridiculous, particularly from a farming business point of view, as to be dismissed out of hand.
25. Thomas states that Du Preez sought a meeting:
- 25.1 To amend the apportionment to 62/38% as apposed to 60/40% stipulated in the contract in Clause 4.6 (already quoted at para 11.3 above). That proposal deadlocked at a meeting held on 08 January 2009.
- 25.2 The “EP1” list was another bone of contention. Thomas maintained that “EP1” contained a list of exorbitant demands which his father refused to accede to. His father deprecated Du Preez’s attitude and terminated the lessor/lessee relationship. He claimed that Du Preez said: so be it. (“Dan moet dit maar so wees.”)
- 25.3 Lastly, that Du Preez demanded to be reimbursed the entire costs of the preparation of the fields for Lucerne planting at Lubbeshoop.

26. In the Lubbes' view Du Preez was out of line and his conduct was tantamount to breaching the contract. This, Thomas says, precipitated their communication to Du Preez that they foresee the road ahead will be very rocky and that they are opting out of the arrangement.
27. Much time was needlessly taken up on whether the meeting at which the parties parted ways took place on 08 January 2009 (on Elsiesdrift Plase's version) or on 12 January 2009 (on what Awendgloed allege). This is petty. What does it matter. The parties deal with the same meeting which was attended by the same protagonists. They differ by a matter of about four days which is not in any way material.

HANRÈ LUBBE'S EVIDENCE.

28. Of interest is Hanrè's evidence confirming that Awendgloed conducted farming operations at Maselsfontein, Riandi and Nuweland (which are Elsiesdrift Plase farms under the control of Hanrè). This was done in terms of a 5-year lease which commenced on 01 July 2005. Mainly Lucerne was cultivated. This makes the six months trial run allegation by Thomas even more ridiculous because the parties had been involved in similar farming ventures for nearly four years by January 2009.
29. Hanrè testified that he and Thomas conducted separate farming operations. This was undisputed. According to him the dispute between Thomas and his father on the one hand and Du Preez on the other was not pertinent to him. He attended the breaking-up meeting at Van Heerden's (attorney's) offices by sheer coincidence as he happened to be in Douglas:

29.1 According to Hanrè only the 6-months contract was concluded. This is contrary to the testimony of attorney Van Heerden and his brother, Thomas.

29.2 He stated that the 5-year contract was still inchoate as his father expressed reservations that Du Preez and Thomas would be compatible, business-wise. His father urged that they should rather abandon the contract or the arrangement.

29.3 To his credit Thomas reiterated the essence of the requirement that Elsiesdrift Place, according to Du Preez's intimation, had to fix the defects in time so that the blame should not in the end be shifted or attributed to Awendgloed.

THE EVIDENCE OF ATTORNEY VAN HEERDEN.

30. Mr Snellenberg has catalogued nine valid points in respect of which Mr Van Heerden's evidence leaves a lot to be desired. These involve the lack of consultation notes except the initial instruction to draw up the lease agreements; that it was put to Du Preez that Van Heerden gave him (Du Preez) a copy of the 6-month contract to sign whereas Van Heerden in his testimony contradicted that statement by stating that he (Van Heerden) left the contract with his secretary to arrange with Du Preez to collect it.

31. Further, that Mr Van Heerden's memory left him in the lurch on several specified occasions (which need not be gone into) but displayed a vivid memory, without any diary entry or file notes, of what occurred on 7, 8 and 21 January 2008, concerning how the consultations went. This is an important aspect because it relates to the occasion which led to the break-up of relations and the repudiation claims by both sides. Not to have made any notes on such a crucial aspect by an attorney does not inspire any confidence in him.

32. What is also difficult to comprehend, and it is common cause, is that there is not a single note made by Van Heerden pertaining to the proposition by Arduus that the signature of the 5-year contract be deferred for six months to observe how the tempestuous Thomas and Oom Jan Du Preez would relate to each other during the tenure of the wheat contract. As I have already pointed out this was just a lame excuse.

THE FAILURE TO ADDUCE THE EVIDENCE OF MR ARDUUS LUBBE (SNR).

33. Elsiesdrift Plase decided not to call the patriarch of the Lubbe family, Mr Arduus Lubbe. In terms of the witnesses for Awendgloed (the plaintiff) and Elsiesdrift Plase (the defendant) every final decision pivoted around Arduus.

- 33.1 Mr Snellenburg encapsulates Mr Arduus Lubbe's role as follows in his written submission:

"The defendant ultimately failed to present the evidence of Mr Arduus Lubbe (Snr) who would allegedly have accepted the repudiation. No statements regarding what Mr Lubbe (Snr) will deny or testify to are therefore supported by his testimony. In light of the facts of the matter the failure of Mr Lubbe (Snr) to testify is significant. On the appellant's version he concluded the extension contract on a date unknown, he would have accepted the repudiation and he was part and parcel of key moments on the defendant's version and also the plaintiff's version where the repudiation by the one or the other manifested and was accepted."

- 33.2 Arduus is also alleged to have reprimanded Thomas not to be disrespectful to "Oom Jan" because he is an elderly man.

33.3 Arduus was instrumental in evicting Du Preez and the employees of Awendgloed from Lubbeshoop.

34. In the circumstances the failure to adduce the evidence of Arduus can justifiably attract an adverse inference in that Elsiesdrift Plase must have believed that he was likely to contradict the evidence of Thomas, Hanrè and Van Heerden who were not always on the same page. See **Titus v Shield Insurance Co Ltd** 1980 (3) SA 119 (A) at 133D-H:

*“In **Magagula v Senator Insurance Co Ltd** 1980 (1) SA 717 (N) DIDCOTT J had occasion to consider the circumstances in which an adverse inference should be drawn against a party who deliberately refrained from calling a witness who might be expected to be able to elucidate the facts and in the course of his judgment he referred in pertinent detail to most of the cases in this Court on that subject. ---. It is clearly not an invariable rule that an adverse inference be drawn; in the final result the decision must depend in large measure upon 'the particular circumstances of the litigation' in which the question arises. And one of the circumstances that must be taken into account and given due weight, is the strength or weakness of the case which faces the party who refrains from calling the witness. It would ordinarily be unsafe to draw an adverse inference against a defendant when the evidence of the plaintiff, at the close of the latter's case, was so vague and ineffectual that the Court could only by a process of speculation or very dubious inferential reasoning, attempt to find the facts. (See **Marine & Trade Insurance Co Ltd v Van der Schyff** 1972 (1) SA 26 (A) at 40E, 49F - H.)”*

35. Having painstakingly analysed the evidence the trial Judge concluded:

“[82] It was also not put to Du Preez that on 08 January 2009, following Arduus Lubbe Snr's decision that the parties part

ways on account of his breach, Du Preez raised his hands and said “Dan is dit maar so”. On assessment of this statement it implies that Awendgloed correspondingly accepted the cancellation of the lease. It is to be recalled that Du Preez testified that after Arduus Lubbe Snr had informed him that the Lubbes were no longer prepared to lease the land to him he told Arduus Lubbe Snr that he was not satisfied and would not agree to this unilateral decision.

[83] It bears repeating that Thomas Lubbe Jnr and Van Heerden intimated that after Du Preez had handed the list of repairs which had to be effected he said that if the maintenance work was not carried out the Lubbes would institute action against Awendgloed upon the expiry of the lease agreement. This important piece of evidence was to a large extent confirmed by Handrè Lubbe who says: “Meneer Du Preez wou gehad het dat dit moet reg kom sodat hy nie op ‘n latere stadium hoor dit is sy foute gewees nie u Edele.” In my view these averments do not portray the attitude of a man who wanted to resile from a contract. Put differently, it does not evince an unequivocal intention no longer to be bound by the lease. In any event such conduct was not of such a material degree that it strikes at the very substratum of the contract.

[84] Du Preez said that on the date Arduus Lubbe Snr made his decision to bring an end to the lease Thomas Lubbe Jnr uttered words to the effect that “he was the culprit in the story”. During his cross examination Thomas disputed that he made these utterances. What further appears on record is the following:

“Goed, en as ons dit net ‘n bietjie verder neem, die getuienis was ook gewees dat, en ek lees vir u voor, Mnr Arduus Lubbe het vir Thomas Lubbe gemaan daartoe om nie met Oom Jan

[Du Preez] so te praat nie, hy is 'n grootmens. Wat sê u daarvan? = Is dit nou wat Oom Jan gesê het? Het u- het dit gebeur? Is dit korrek wat hier staan? = Ek kan nie onthou nie u Edele Maar dit is ook nie betwis nie = Nee u Edele."

The profound effect of words said to have been expressed by Thomas Lubbe Jnr is that he was responsible for the termination of the lease. Amidst the discussions of 08 January 2009, following termination of the lease, it was not disputed that, Ardus Lubbe Snr said to Du Preez 'he and his people did nothing wrong'.

[85] The demands which Du Preez is said to have made are not in harmony with the lease agreement he had already signed. By appending his signature to the agreements Du Preez, on behalf of Awendgloed, accepted the terms thereof. Therefore, nothing prevented Elsiesdrif from demanding performance from Awendgloed if it was not forthcoming. To my mind the termination of the lease was premature.

*[86] **On a conspectus of the evidence Du Preez's version that the Lubbes (Elsiesdrif) repudiated the agreement is more probable and acceptable. I am therefore satisfied that the contract was not cancelled by mutual consent but was repudiated at the instance of Elsiesdrif.***" (Own emphasis).

36. Before arriving at the above quoted conclusion:

36.1 The trial court was acutely aware that on the core issue as regards who repudiated the contract she was dealing in large measure with diametrically opposed versions, and invoked the judgment in **Stellenbosch Farmers' Winery Group Ltd and**

Another v Martell et cie and Others 2003 (1) SA 11 (SCA) at 14h-15E (para 5);

36.2 The Court dealt with all the instances where the envisaged version of Elsiesdrift Plase was not put to the witnesses to whom it should reasonably have been done, particularly that of Du Preez, on important aspects. The Court also analysed the reasons proffered in argument by Elsiesdrift Plase's counsel why such issues were not taken up with the relevant witnesses and expressed its views in the judgment. The Court relied on **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** 2000 (1) SA 1 (CC) at 36J-37B para 61. I would add that paras 62-65 at pp37C-38B are equally important and need to be had regard to.

36.3 Furthermore, whereas the Court did not refer to any authority it stated, correctly:

"[43] Awendgloed bore the onus to prove that the lease agreement was concluded in September/October 2007 and that Elsiesdrif repudiated it which entitled Awendgloed to cancel the agreement. It should also establish the facts pertaining to its claim for enrichment."

37. In light of the foregoing the approach to be adopted by a court of appeal becomes even more important. In **S v Shaik and Others** 2007 (1) SA 240 (SCA) at 274E-J (paras 87 and 88) the Full Court (Howie P, Mpati DP, Streicher JA, Navsa J and Heher JA) stated:

"[87] It is settled law that a Court of appeal will not lightly disturb a trial Court's factual findings, including conclusions on credibility, where the trial Court has been able to hear the evidence being given and observe the witnesses while giving it. This is because a trial Court has that peculiar advantage and a Court of appeal does not. Nor is the present case one in which we are in just as good a position as the trial Court to draw inferences from the facts found proved. And we are certainly in nowhere as good a position to

assess the personalities of the witnesses or their apparent propensities for truth or falsehood. What is important in this case is that the trial lasted not just weeks. It was in progress from October 2004 until mid-2005. That was an extensive period in which the trial Court was able to immerse itself, as it were, in the evidence and the inherent probabilities. In particular the Court was able to observe Shaik in the witness box for many days, thus acquiring an exceptional opportunity to assess his trustworthiness. The product of its labours is a judgment which subjects the evidence to close analysis before stating its conclusions with care and clarity.

[88] The question, then, is whether the appellants have shown that the trial Court overlooked important evidence or materially misconstrued the evidence it did consider. If so, there would be a basis on which we could endeavour to form our own conclusions on credibility, difficult as that exercise might be, based purely on the printed record. If not, we would at least defer to the factual findings of the trial Court even if not entirely satisfied that all those findings were correct. What is stated in this and the preceding paragraph outlines the long-established approach to appellate adjudication. It is all the more to be borne in mind where the judgment under consideration is as comprehensive, and covers as many issues and as much evidence, as that of the trial Court in this matter.”

I am not satisfied that the trial Court misdirected itself. The appeal must therefore fail with costs.

ORDER:

The appeal is dismissed with costs.

F DIALE KGOMO
JUDGE PRESIDENT

Northern Cape High Court, Kimberley

I concur.

M.C MAMOSEBO
JUDGE

Northern Cape High Court, Kimberley

I concur.

L.G LEVER
ACTING JUDGE

Northern Cape High Court, Kimberley

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