

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION: BLOEMFONTEIN

Appeal Number: A281/2011

In the appeal between:-

A F REYNECKE

Appellant

and

E P NEL

Respondent

CORAM: JORDAAN, J *et* LEKALE, J

JUDGMENT: LEKALE, J

HEARD ON: 23 NOVEMBER 2015

DELIVERED ON: 3 DECEMBER 2015

INTRODUCTION AND BACKGROUND

- [1] On the 16 May 2003 the appellant and the respondent concluded a verbal agreement in terms of which the former leased a farm known as Makoupan in the district of Brandfort from the latter for one year on, *inter alia*, the basis that upon the expiry of the lease the farm would be restored in the same condition in which it was at the commencement of the contract.

- [2] During 2004 and following the expiry of the lease and evacuation of the farm by the appellant, the respondent issued summons against him out of the Brandfort Magistrates' Court for recovery of R1 559,85 being the costs of repairs to fences, gates and poles. The cause of action being the alleged failure by the appellant to restore the farm to the respondent in the same condition in which it was at the commencement of the lease agreement.
- [3] The appellant defended the action contending, *inter alia*, that he handed the farm back in a much better condition than it was when he took it over. The trial court, however, found against him firstly on merits and later on quantum after separating the litigation issues in terms of rule 29(4) of the Magistrates' Courts Rules per agreement between the parties.
- [4] The appellant feels aggrieved by the whole judgment and now approaches us on appeal against the same. The facts in this appeal as to the condition of the farm when the appellant vacated the same are effectively and largely common cause between the parties regard being had to the respondent's evidence on quantum. In the light of the view we have taken of the matter, the judgment only deals with issues dispositive of the appeal and not with all the issues raised in argument by the parties.

THE IMPUGNED JUDGMENT

- [5] In her judgment on merits the trial court found, *inter alia*, that in the light of contradictions in the evidence of the appellant's witnesses she was not convinced that the appellant left the farm in a better condition as alleged in his plea.
- [6] On quantum the court *a quo* found that the question before her was whether or not the respondent succeeded to prove his damages on a balance of probabilities and further that the undisputed expert evidence tendered for and on behalf of the respondent answered such a question in the affirmative.

THE RESPONDENT'S EVIDENCE ON QUANTUM

- [7] The respondent effectively testified that at the commencement of the lease the farm was livestock secure in that the fences separating various camps were able to keep livestock securely inside relevant camps. Towards the end of the contract it, however, came to his attention that his livestock and that of his son had wandered off and strayed onto the appellant's land because the fence was hanging low and/or lying flat on the ground resulting in a confrontation between the appellant and his son. He proceeded to secure a quotation from the fencing contractor and used the same to purchase the material necessary for repairing and/or replacing some parts of the affected fences in the land leased out to the appellant. He did not replace all of the affected fences and only ensured that

livestock was controlled and kept securely inside the camps. He did all these personally with the help of two of his employees although it was the appellant's contractual responsibility to attend to such defects. All the work in question was done during the currency of the lease and while the appellant was still in occupation of the leased property.

CONTENTIONS FOR THE PARTIES

- [8] On behalf of the appellant Mr Greyling submits, *inter alia*, that the evidence tendered by the respondent went to prove a case not before the trial court in so far as at the end of the lease contract the repairs had already been effected and the quantum proved, in fact, related to an enrichment claim and not to the alleged failure by the appellant to return the land in the condition in which it was at the commencement of the lease.
- [9] Mr Roux, on the other hand, contends for and on behalf of the respondent, *inter alia*, that paragraph 4 of the Particulars of Claim to the effect that the appellant failed to return the farm in the same condition in which it was at the commencement of the lease does not restrict the respondent's claim to the condition of the farm when the lease terminated and that, properly interpreted, it accommodates the respondent's evidence as to the repairs and/or replacements effected prior to the expiry of the contract.

APPLICABLE LEGAL PRINCIPLES

- [10] In our law the trial court's factual findings are presumed to be correct unless and until they are demonstrably shown to be clearly wrong. (See **S v Hadebe and Other** 1997 (2) SACR 641 (SCA).)
- [11] In a civil action parties stand and fall by their pleadings as filed with the trial court insofar as pleadings define issues between litigants. The *onus* on the plaintiff is to prove his claim on the balance of probabilities by adducing evidence in support of his alleged cause of action as set out in the summons to the extent disputed by the defendant in his plea. (See generally **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd** 1977(3) SA 534 (A) 548)
- [12] Absolution from the instance is an appropriate order where, at either the close of the plaintiff's case or the close of the case when both parties have had the opportunity to present whatever evidence they consider to be relevant, the evidence available before the court is insufficient for a finding to be made against the defendant. The defendant gets absolved from the instance if upon an evaluation of the evidence as a whole, the plaintiff's onus of proof has not been discharged because the plaintiff has not proved his claim against the defendant. It is not a bar to the plaintiff reinstituting the action in so far as it has not prescribed. As opposed to a positive finding that no claim exists against the defendant **"it is the appropriate order**

when after all the evidence the plaintiff has failed to discharge the normal burden of prove". (See **PRINCIPLES OF EVIDENCE** Revised 3rd Edition, P J Schwikkard and S E Van der Merwe, at chapter 32, page 578.)

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS

- [13] The respondent's cause of action was the alleged failure on the part of the appellant to restore the farm to the respondent in the same condition in which it was when he took the same over at the commencement of the lease. The determinative stage for the purposes of the claim in the instant matter was, therefore, the end of the lease when the appellant handed the farm back to the respondent as the lessor.
- [14] On the salient facts of the respondent's case and in order to succeed in his claim, it was essential for the respondent to show that at the commencement of the lease the fence around the relevant camps could keep livestock securely inside the camps in question and that at the end of the contract that was no longer the case.
- [15] It was common cause between the parties that the relevant camps were livestock secure at the commencement of the lease. The question before the court below was, therefore, whether or not at the end of the lease the camps were still in that condition. A reading of the respondent's evidence on quantum shows that the relevant

camps were in fact still secure when the appellant vacated the farm at the end of the lease because the respondent had repaired and/or replaced low hanging or flat lying fences at the cost of R1 559,85 some few weeks before the lease terminated. The court below, thus, clearly and demonstrably misdirected herself materially in her finding that the respondent, as the plaintiff, proved his claim against the appellant, as the defendant, on a balance probabilities.

- [16] It follows, thus, that the evidence tendered in support of the claim was insufficient to prove the cause of action relied upon in the summons. Mr Roux's contention that the relevant cause of action was wide enough to entitle the respondent to the relief claimed on the basis of his evidence to the effect that he incurred the relevant costs in repairing and/or replacing the fence some few weeks before the farm was restored to him is, with respect, without merit regard being had to the clear and unequivocal wording of the relevant paragraph read in the context of the Particulars of Claim as a whole. In order for such evidence to be relevant and to entitle the respondent to the relief claimed, law and equity as well as rules of natural justice demanded that the cause of action be amended in accordance with applicable Magistrates' Courts Rules. No such amendment was effected and the parties were bound by their pleadings as they stood and served before the court below. As Mr Greyling correctly and effectively submits, the respondent's evidence before the trial court established a cause of action which was not before the court and did not sustain the one properly before

that court.

- [17] On the evidence available to the trial court it could not positively be said that the respondent had no claim against the appellant. The appellant's prayer for dismissal of the claim was, with respect, not supported by available evidence. In our view absolution from the instance was an appropriate order in the circumstances.

COSTS

- [18] On the 2 March 2015 the appeal was removed from the roll with the question of costs standing over for argument at a later stage. The parties are *ad idem* that the reason for the removal was that copy of the impugned judgment of the trial court on quantum was not before the court on that day. It is not in dispute between the parties that the duty to place such a document before the court of appeal was on the appellant as *dominus litis* in the instant matter. Mr Roux correctly submits that fairness demands that the appellant carry the relevant wasted costs. On the part of the appellant Mr Greyling effectively leaves the matter in the hands of the court.
- [19] In conclusion it is apposite to mention *en passant* that it is unfortunate, regrettable and unacceptable that this matter, which clearly and properly belonged in the Small Claims Court, eventually found its way to this court at, no doubt, exorbitant costs to the parties. A lot of valuable court time was expended on the matter all

because parties allowed their emotions to dictate their conduct to the extent that they thought more with their hearts than with their heads. The matter served before members of this division on at least three occasions inclusive of the present sitting. First when it was taken on appeal prematurely before the quantum of damages was determined and later when judgment on quantum was not before the appeal court. It can only be hoped that the parties learnt their lesson and would, in future, not burden the courts with trifles at the risk of being confronted with the *de minimis non curat lex* rule when they can sort out their differences amicably between themselves.

ORDER

[20] In consequence the appeal succeeds with costs excluding wasted costs of the 2 March 2015 which shall be borne by the appellant.

[21] The order of the court *a quo* is set aside and in its place and stead is substituted the following:

“Absolution from the instance is ordered in favour of the defendant and the plaintiff is to pay the costs of the action.”

L. J. LEKALE, J

I concur.

A. F. JORDAAN, J

On behalf of the appellant: Adv.P DU P Greyling
Instructed by:
Steenkamp De Villiers & Coetzee Inc.
BLOEMFONTEIN

On behalf of the respondent: Adv. L A Roux
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