

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

Case No. : 720/2007

In the matter between:-

MPUMELELO PROJECTS CONSTRUCTION CC

Plaintiff

and

SASOL WAX (PTY) LTD

Defendant

HEARD ON: 10 MARCH 2014

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 13 MARCH 2014

- [1] This is an application for leave to appeal. The applicant was the plaintiff and the respondent the defendant in the main action. For the sake of convenience I shall refer to the parties as in convention. On 23 January 2014 I made an order whereby I dismissed the plaintiff's action with costs, which costs included the costs consequent upon the employment of two counsels. In addition I also ordered the plaintiff to pay the qualifying and the reservation fees of five expert witnesses.
- [2] Mr Khang, who appeared for the plaintiff, argued that I committed a number of misdirections in my reasoning which underlined my judgment. Accordingly he submitted that there

was a reasonable prospect that a reasonable court with appellate jurisdiction might come to a different conclusion.

[3] Mr Leeuwner, who appeared on behalf of the defendant, differed. He argued that the judgment against which the plaintiff sought leave to appeal, was above any criticism. It was his view that the judgment was profoundly considered and well-founded. Accordingly, he supported the judgment in all respects and urged me to dismiss the application for leave to appeal with costs.

[4] The application for leave to appeal was directed at specific aspects of the judgment. The limited extent of the application is apparent from the plaintiff's notice of appeal. Consequently the defendant's reply was confined to those specific matters raised in the plaintiff's notice of an application for leave to appeal. I shall now proceed to examine the plaintiff's grounds of appeal *seriatim*.

[5] **"The honourable court erred in allowing and admitting the defendant's experts' evidence without notices, as required by the rules."** This was the plaintiff's first ground of appeal.

The required notices of all expert witnesses were duly given by the defendant. The plaintiff objected against the notices of the defendant's expert witnesses at the resumption of the trial and before the defendant adduced evidence. I dismissed the objection after consideration of all the evidence.

- [6] Rule 36(9) pertinently vests the trial court with a discretion to allow expert evidence, even without any notices in terms of the rule. Thus, even if there was any technical non-compliance with the rule, which the defendant denied, I judicially exercised my discretion and allowed the expert evidence of the defendant's witnesses. In my view the rule allowed me to do so. The plaintiff failed to allege any misdirection or error I committed in the exercise of the discretion entrusted to me.
- [7] "The court has to exercise a judicial discretion in this regard, favouring the admission of the evidence subject to the necessary safeguards." See Harms: **Civil Procedure in the Superior Courts**, Lexis Nexis, December 2013 at B-266. That comment is very apposite and correct.
- [8] My decision to admit the expert evidence tendered by the defendant cannot be faulted. The plaintiff was not thereby prejudiced. If there was any prejudice, the plaintiff was well entitled to recall any witness, including its own expert witnesses, if any. However, the plaintiff elected not to do so. The election not to do so, materially watered down its argument to the effect that my admission of the defendant's expert evidence constituted a misdirection.
- [9] At the end of the hearing, I invited the legal representatives to file heads of argument, which they did. The plaintiff explicitly enumerated the issues which it reckoned I was called upon to decide. Those issues were listed in paragraph 13 of the plaintiff's heads of argument. The alleged erroneous

admission of the expert evidence, tendered by the defendant's witnesses, was conspicuously absent from that list. On behalf of the defendant, Mr Leeuwner submitted that the belated complaint of the plaintiff about the admission of the expert evidence tendered by the defendant was a frivolous argument.

- [10] **"The honourable court erred by finding that none of the expertise of the defendant's experts was disputed."** This was the plaintiff's second ground of appeal.

I am certain that I correctly found that the expertise of the defendant's expert witnesses was not disputed. It was evident from the record that the plaintiff did not dispute their expertise. The following remark by the plaintiff's attorney during the cross-examination of the defendant's witness, Ms Fritz, illustrates the point:

"Mr Khang: Mam since **you are an expert** in this"

See page 139 in volume 1 of the record.

It was not put to Ms Fritz or Mr Rossouw, for that matter, that their expertise was disputed.

- [11] Similarly, the expertise of Mr Louw was also never disputed. The nearest indication of some obscure denial of the expertise of the defendant's witness was to be found in the cross-examination of Mr Louw.

“But that burning test, because this is what I am going to argue, is more or less the same as the test of Mr Opt’Hof because it is just based on observations.”

See page 185 column 4 volume 1.

That, in my view, did not in any sense detract from the expertise of Mr Louw, the defendant’s witness. Such a tame remark did not, in my view, amount to a challenge of the expertise of the defendant’s witness. By equating the test carried out by Mr Louw to that carried out by Mr Opt’Hof, the plaintiff implicitly recognised Mr Louw as an expert.

- [12] That remote implication of doubt was completely erased by the attorney of the plaintiff in the further cross-examination of the same witness.

“So I would argue that the conditions under which he did it was substantially the same as the condition under which you conducted your own, because he is **also an expert** in the field.”

See page 16 column 3 – 6 volume 1 of the record.

This statement in fact indicated that the expertise of the witness was not disputed and that, on the contrary, it was implicitly conceded and admitted as a given fact. In view of this, it cannot now be convincingly argued that the expertise of the defendant’s witness was challenged at the trial.

- [13] **The honourable court erred in finding that –**

“Both parties signed a written contract into which certain standard and general terms of sale had been incorporated by reference.”

This was the plaintiff's third ground of appeal.

It is so that there was no single document or written contract signed by both parties, which incorporated the defendant's standard general terms of sale. However it was an undisputed fact that each of the order confirmations incorporating the general terms of sale, was signed by Dr C.S. Chalera, on behalf of the plaintiff. Those two order forms were prepared by the defendant and presented to the plaintiff for signing. Dr Chalera signed them for and on behalf of the plaintiff.

[14] The documents so signed at the request of the defendant could logically be regarded as also having been signed by the defendant. Those order confirmations made reference to the standard general terms of sale. Such terms of sale were expressly incorporated into the order forms by reference. Granted I made an error by saying that there was a written contract signed by both parties. However, any reliance on lack of the defendant's signature on the order confirmations was disingenuous. Both parties treated the order confirmations as though they had been signed by both parties.

[15] The credit application form which Dr C.S. Chalera also signed on behalf of the plaintiff, similarly incorporated the standard general terms of sale by reference. Those terms of sales were

expressly incorporated into the credit application signed for and on behalf of the plaintiff. Those terms had no bearing on the memorandum of understanding at all. The contention that the plaintiff thought that those terms of sales referred to the memorandum of understanding and not to the credit agreement, failed to impress me. Accordingly, there were at least two documents signed by Dr C.S. Chalera on behalf of the plaintiff whereby the plaintiff accepted that the standard general terms of sales were applicable and binding on the plaintiff as the purchaser of the defendant's product.

[16] The honourable court erred in finding that –

“Defendant conclusively proved that the plaintiff received the attachment of a document titled Standard General Terms of Sale.”

This was the plaintiff's fourth ground of appeal.

The document in which the standard general terms of sale were embodied, was attached to the defendant's email, together with another document which was completed and signed by the plaintiff's Dr C.S. Chalera. One of the two attachments was the credit application form to which I have already referred. Those documents were attached to one and the same email. The email was exhibited in court for all to see. It was undisputed that Dr Chalera received the email, downloaded the credit application form, printed it, signed it and faxed it back to the defendant's employee, Ms Cawood.

[17] I found that it was unlikely that Dr Chalera received the attached credit application form, but not the standard general terms of sale which, according to the heading of the email, were also attached. It was significant to note that notwithstanding the email heading, Dr Chalera never pointed out to the defendant that there was only one document and not two attached to the email.

[18] At paragraph [21] of the judgment I said the following about this particular ground of appeal:

“... it can be objectively deduced from the proven facts that it appeared more probable than not that Dr Chalera received such a document on behalf of the plaintiff; that Dr Chalera’s undisputed actual receipt, completion, signing and ultimate faxing of the credit application form, which was also attached to the same email militated against his denial. In coming to this conclusion I am fortified by the fact that although Dr Chalera initially denied that he actually received the email itself, he later admitted he in fact did.”

In the circumstances I am not persuaded that I have misdirected myself in coming to that conclusion.

[19] **The court *a quo* erred in finding that –**

“The samples of the product were not supplied to the plaintiff for the purpose of marketing.”

That was the fifth ground of appeal.

The evidence relating to the purpose for which the samples were supplied to the plaintiff, was undisputable if not common cause. I found that the samples were supplied by the defendant to the plaintiff for the purpose of testing the product and not for the purpose of marketing it. However, according to the plaintiff's own witnesses, the product was sold to them straight away. They reacted angrily towards Dr Chalera, because they believed he had sold them the product of a very poor quality.

[20] It was a hollow argument to say a distinction had to be made between testing the product, on the one hand, and testing the market, on the other hand. In my view there was no fundamental distinction. The testing entailed the supply of the product to the targeted end consumers in order to gauge or ascertain whether they would react positively or unfavourably to the use of the product. Such a commercial exercise had nothing to do with the chemical or scientific analysis of the product.

[21] At paragraph [35] of the judgment I dealt with the matter as follows:

“... the plaintiff approached the defendant and proposed purchasing and reselling the latter's product. The defendant gave the plaintiff ample samples of the product to enable the plaintiff to test the market. The plaintiff did so and later returned for further supplies. The defendant then required the plaintiff to apply for credit...”

[22] I may add that the first samples were provided by the defendant to the plaintiff free of charge. However, the plaintiff did not freely test the market or the product. When the plaintiff returned to the defendant for further supplies of the product, the defendant no longer wanted to supply such samples free of charge, which was why the defendant required the plaintiff to apply for credit. By doing so, the defendant did not thereby endorse the samples that were further provided to the plaintiff as being suitable for the purpose for which the plaintiff wanted them.

[23] Although the plaintiff had to pay for those samples, the purpose for which the defendant supplied the samples to the plaintiff did not change. It remained the same. The purpose was still aimed at testing the consumer market and not commercially selling the samples for a profit. In the light of the foregoing I am not persuaded that I erred in finding that the samples of the products were not supplied to the plaintiff for the purpose of marketing.

[24] **The honourable court erred in finding that –**

“The plaintiff failed to prove the misrepresentation and/or fact it relied upon.”

This was the sixth ground of appeal.

It remains my firm view that, on the evidence, I correctly found no misrepresentation in respect of the product was made by

the defendant. My finding was materially supported by the evidence of Dr Chalera when he said:

“... when I proposed to Sasol Wax that I think, I personally tested this product and I think it is a product that is going to be accepted in the market... let’s test this market and see how the response of the market is going to be. The response I got was that if I think the product can work and it is my responsibility to buy the product on my own and test the market.”

- [25] The foregoing passage demonstrated, without any doubt, that the defendant did not endorse the product as being a marketable brand of illuminating paraffin and did not represent to the plaintiff that the product he had tested was suitable for the purpose of being used as domestic illuminating paraffin. The defendant did not make such a representation on Dr Chalera’s own evidence.

“The response I got was that if I think the product can work and it was my responsibility to buy the product on my own and test the market.”

The emphasis I provided clearly indicated that the defendant left it to the plaintiff to decide whether the product could work for the commercial purpose for which he wanted to market it.

- [26] Evidently the plaintiff was not induced or misled by the defendant to purchase or market the product. The responsibility of making the decision whether the product was suitable for the purpose of commercially exploiting it, rested

squarely on Dr Chalera's shoulders. That conclusion is fortified by Dr Chalera's own say-so, as outlined and analysed in the foregoing paragraph. I am not persuaded that the conclusion I reached was incorrect. It seemed to me that Mr Leeuwner was correct in saying that that conclusion was undoubtedly correct.

[27] The honourable court should have found that –

“The memorandum of understanding transmuted into a supply agreement.....”

This was the seventh ground of the appeal.

I was at pains to deal with the transmutation as a legal concept and otherwise. I believe that I properly and fully discussed the concept. I drew a distinction between the implied meaning of such a term, as being a suspensive condition, on the one hand, or simply as a *pactum de contrahendo*, on the other hand.

I found that the suspensive condition must contain within itself the terms and meaning of the condition. The transmutation upon development of the business plan required separate agreement on further terms and conditions as would be contained in the envisaged business plan. In the circumstances I came to the conclusion that the transmutation condition relied upon was but a *pactum de contrahendo* and not a suspensive condition.

[28] Mr Leeuwner contended that my decision in fact and in law on the point of the alleged transmutation was unassailable. At paragraph [41] of the judgment I dealt with the point at length.

A condition which was dependent on another separate agreement to be concluded was not enforceable.

“... because of the absolute discretion vested in the parties to agree or disagree.”

In the final analysis I came to the conclusion that the memorandum of understanding as such could not be regarded as a supply agreement because of its vagueness as more fully explained at paragraph [42] of the judgment. In my view the memorandum of understanding was never transmuted into a supply agreement. There were simply too many unknown factors to validate such a transition.

[29] **The honourable court should have found that –**

“the defendant misrepresented to the plaintiff that the product met the legal requirements...”

This was the eighth ground of appeal.

The purported ground of appeal presumably refers to the definition of illuminating paraffin in the Petroleum Product Act. The contention of the plaintiff was founded on a misconception of the provisions and the purpose of the particular statute. Paraffin with a composition that does not comply with the composition of the product defined as illuminating paraffin in

the particular statute, is not *per se* a prohibited substance, as the plaintiff would have it. It entailed that it was not the statutorily defined brand of illuminating paraffin. Simply put – it might nonetheless still be illuminating paraffin, but not illuminating brand of paraffin as statutorily and chemically defined paraffin. It was not demonised or banned by law. The statute simply does not apply to such a product. That is all.

[30] The honourable court should have found that –

“No agreement was signed between the parties other than the MOU.”

That was the ninth ground of appeal.

The argument had no substance. The fact of the matter was that pertinent order confirmations were signed by the plaintiff's agent. Moreover, the credit application was also similarly signed. Although none of the two documents were signed by the defendant and notwithstanding lack of the defendant's signature on them, the defendant gave effect to them and regarded them as binding on both parties just as the plaintiff did. It was never the plaintiff's case that because the order confirmations and the credit application were not signed by the plaintiff, they were therefore of no legal force and effect in law. This ground of the plaintiff's appeal was spurious, as Mr Leeuwner described it.

[31] The plaintiff also complained about the evidence relating to annexure x. The plaintiff complained that the document was submitted after the closure of the plaintiff's case and that the plaintiff was not given an opportunity to commend on it. As a result of that the plaintiff objected to the use of the document and disputed its contents. See the plaintiff's supplementary heads of argument.

[32] Obviously that argument referred to the email sent by Ms Cawood to Dr Chalera. The plaintiff raised the objection against that email. However the evidence of Ms Cawood in this regard was fully canvassed in cross-examination by the plaintiff's counsel. The plaintiff was properly informed of this damning evidence and the defendant's intention to adduce such evidence. It was put to Dr Chalera during his evidence. Mr Ellis, counsel for the defendant, said the following:

“Sir evidence will be presented that the credit application was e-mailed to yourself with the Standard Terms and Conditions of Sale...”

In my view the plaintiff's argument about the missing icon was a proverbial storm in a tea cup.

[33] It can therefore be clearly seen that the objection and complaint now raised by the plaintiff during its application for leave to appeal, was without any merit. I do not intend to deal with the plaintiff's supplementary heads of argument any further. The gist of the points made in them has already been

dealt with earlier in this judgment. Such points do not deserve any further attention.

[34] Mr Leeuwner argued that as regards the points raised from paragraph 7 onwards in the supplementary heads of argument the submission of the plaintiff were not supported by the evidence and that much of the reference to evidence was factually incorrect and not in accordance with the record. Indeed, Mr Leeuwner's submission was correct. It will serve no useful purpose to refer to the errors contained in the plaintiff's supplementary heads of argument.

[35] I now turn to the prospects of success if the matter were to be allowed to go on appeal. In my view it is not necessary to elaborate upon the complete dearth of the prospects of success on appeal. I pause to point out, however, that the plaintiff did not take issue with my judgment pertaining to its failure to prove a legal duty of care to prevent the incurrence of pure economic loss. I dealt with that topic from paragraph [32] to [34] of the judgment. I have nothing more to add.

[36] Furthermore the plaintiff did not take issue with my judgment concerning the composition and basis of the calculation of recoverable damages. I found, and I want to believe that I correctly did so, that the plaintiff's claim was founded on nothing but the true delictual foundation. *Vide* paragraph [10] of the judgment. In that regard my judgment entailed that even if the complaints raised by the plaintiff against my judgment, were all sustained, then the damages claimed by the plaintiff

were not recoverable in law and that the plaintiff had failed to prove any damages at all.

The plaintiff should have proven its damages based on the position in which it would have been had the alleged misstatement not been made. That the plaintiff failed to do. *Vide* paragraph [52] of the judgment. That being the case, the plaintiff failed to prove damages. On that score alone the plaintiff's claim cannot, in any event, succeed.

[37] Having considered all the argument presented to me for consideration, I am not persuaded that I have committed any appealable and material misdirection either on any matter of fact or on any question of law. As I see it Mr Leeuwner was correct in his principal submission, that there is no reasonable prospect that another court might come to a different conclusion. Accordingly I am not inclined to grant the relief sought.

[38] There remains one more aspect to comment on. Professor Philip Lloyd and Mr Justus van Wyk were among the experts the defendant had intended calling. However, the two were not finally called. In view of that the defendant has graciously and on its own accord undertaken to waive its right to recover the costs, which I erroneously awarded in its favour in respect of those two expert witnesses. I am indebted to Mr Leeuwner and his clients for their responsible attitude.

[39] Accordingly I make the following order:

39.1 The plaintiff is refused leave to appeal against the judgment.

39.2 The plaintiff is directed to pay the costs relating to this application for leave to appeal.

M. H. RAMPAL, J

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