

REPUBLIC OF SOUTH AFRICA



GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA,
PRETORIA

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED.
<u>2013-10-18</u> DATE	
<u>[Signature]</u> SIGNATURE	

47580/11

16/10/2013

In the matter between:

ZALENCO PLANT CC

PLAINTIFF

and

TROLLPE MINING SERVICES 222 (PTY) LTD

RESPONDENT

J U D G M E N T

HIEMSTRA AJ

[1] The plaintiff sued the defendant for damages flowing from the defendant's alleged breach of contract.

[2] The plaintiff's business is the letting and operating of mining equipment to mining contractors. The defendant is a mining contractor with a number of operations on the Mpumalanga Highveld.

[3] The parties concluded an oral agreement during May 2010 in terms of which the plaintiff would supply a water truck to the defendant for use at the defendant's mining operations at the Kangra Mine near Piet Retief, against payment of R270 per hour.

[4] The sole member of the plaintiff is Mrs Shannon Kleynhans. In concluding the agreement, the plaintiff was represented by Mr Len Kleynhans, the husband of Mrs Shannon Kleynhans. The defendant was represented by Mr Fanie van Dyk, the area manager of the defendant. He was responsible for the mining operations at Kangra Mine and other mines to which the defendant had been contracted. The contract was concluded telephonically.

[5] At the commencement of the trial, the parties agreed that the issues of quantum of damages and liability should be separated. I accordingly made such an order. The trial therefore concerned liability only.

[6] In issue in this matter is the duration of the agreement, the plaintiff contending that it was for five years and the defendant contending that it was a month-to-month contract, terminable on reasonable notice.

[7] Ten months into the agreement, during March 2011, Mr van Dyk, on behalf of the defendant, gave notice of the termination of the contract to Mr Kleynhans by the end of May 2011. The reasonableness of the notice period is not in issue. Accordingly it is only the duration of the contract that is in dispute. The plaintiff's claim is for damages equal to the loss of income for the remainder of the five years, or until he found an alternative lessee.

[8] Mr Kleynhans testified on behalf of the plaintiff. He said that he had purchased the water truck on behalf of the plaintiff for R1 500 000 in terms of an instalment sale agreement over a term of five years. In order to pay the instalments the plaintiff needed a steady monthly income for five years. He was emphatic that he had therefore agreed with Mr van Dyk on a five-year contract, to coincide with the period of the instalment sale agreement. He further testified that he had agreed to provide the water truck for two 12-hour shifts per day, which were later reduced to 10 hours per shift. For this purpose he employed two drivers.

[9] During November 2010, Mrs Shannon Kleynhans wanted to buy a motor vehicle in the name of the plaintiff. In order to obtain finance, the bank required proof of income. Mr Kleynhans testified that Mrs Kleynhans had then telephoned Mrs Celest Moller (then van Wyk), the personal assistant to Mr van Dyk, and requested a letter from the defendant to confirm the monthly income from the water truck. Mrs Moller told her that she had no authority to issue such a letter and suggested that she contact Mr van Dyk. She asked her husband to speak to Mr van Dyk. Mr Kleynhans duly phoned Mr van Dyk and

asked for such a letter. Mr van Dyk gave permission and said that Mrs Kleynhans should speak to Mrs Moller to make the arrangements. It is common cause that Mr van Dyk had authorised Mrs Moller to prepare such a letter. She then drafted the following letter:

"26 November 2010

To whom it may concern

We would herby like to confirm that Zalenco Plant CC, Reg No. 2009/206944/23, are currently working for Trollope Mining Services. We have been using their services for the last year and we intend to make use of their services for at least the next four years or as long as our projects allow thereafter.

It is our intention to extend their services if business continues beyond this time and projects and economy allow the use of their services.

We trust that you will find this in order.

Kind regards

JS VAN DYK

PROJECT MANAGER"

[10] Mrs Moller sent the letter to Mrs Kleynhans per e-mail to make sure that it meets her requirements. Mrs Moller said that she had not been in her office, but that she was carrying her laptop computer with her in order to make changes if necessary. Mrs Kleynhans found the letter in order and thanked Mrs Moller profusely. Neither Mrs Moller nor Mr van Dyk signed the letter. Mrs Kleynhans collected the letter from the office of Mrs Moller. A signed copy of the letter was presented to the bank. Both Mrs Moller and Mr van Dyk denied that they had signed it. The suspicion looms large that Mrs Kleynhans had

signed on the letter in an illegible contrived handwriting. However, as it turned out, nothing turns on this issue. The contents of the letter, as drafted by Mrs Moller, had not been changed. Upon a question by the Court, Mrs Moller said that she had read the letter to Mr van Dyk on the telephone and that he had approved it. Any possible skulduggery on the part of Mrs Kleynhans was probably in order to satisfy the bank's requirements. The contents had been agreed by Mr van Dyk.

[11] Mr van Dyk and Mrs Moller testified on behalf of the defendant. Mr van Dyk said that he had never agreed to a five-year contract. He said he could not have agreed to such a contract because the contract of the defendant with Kangra Mining was for only 30 months or until the coal had been depleted. He admitted, however, that the defendant had other projects where a water truck could be used. He further testified that the defendant only required the water truck because the defendant's own water truck had broken down and for as long as it took to repair it.

[12] He further denied that he had instructed Mrs Moller to write the letter of 26 November 2011 in the form that she did. He had merely authorised her to write a letter for the purpose that Mrs Kleynhans required. He said that he did not know where Mrs Moller had obtained the facts set out therein. Mrs Moller said that Mrs Kleynhans had told her what had to be in the letter and that she had drafted it according to Mrs Kleynhans's request. However, she said that she confirmed the contents with Mr van Dyk.

[13] Mr Kleynhans testified that when he had arrived at the site during May 2010, the foreman told him that the defendant had "stopped the water truck". He immediately phoned Mr van Dyk to ask him about it. Mr van Dyk then told him that the defendant had acquired its own water truck and that they no longer required the plaintiff's water truck. He said he had seen the water truck of another company, Phakaniso Logistics on the site. This company belongs to a certain Gawie, who, it is common cause, had been in a relationship with Mrs Moller at one stage before her current marriage. Any insinuation that Mrs Moller had somehow manipulated the appointment of Gawie's company was not pursued by Mr de Klerk, appearing on behalf of the plaintiff.

[14] Mr van Dyk testified on behalf of the defendant. He admitted that he had concluded the contract with the plaintiff. He said, however, that Mr Kleynhans had never mentioned the financing of the water truck to him. He said that Mr Kleynhans had merely told him that he had a water truck available and offered its services to the defendant. He said that the defendant's own water truck had broken down and that they had to hire another one until their own water truck had been repaired. He was thoroughly cross-examined on the period that he had envisioned for the repair of the defendant's water truck, but he could not give a satisfactory answer. He did not know what was wrong with the truck, and did not enquire as to how long it would be out of operation. He remained adamant that he could not have agreed to a period of five years because of the limited duration of the defendant's contract with Kangra.

[13] After the defendant had closed its case, Mr De Klerk applied to re-open the plaintiff's case in order to call Mrs Kleynhans to testify. Mr Daniels, for the defendant, had no objection and I therefore granted such permission. This application was made at the end of the first day of the trial and the court adjourned to the next day. On the next day Mr de Klerk informed me that he had decided not to call Mrs Kleynhans.

[14] Should I find that the parties had entered into a five-year contract, the consequence is that the defendant had breached it and the plaintiff must succeed on the merits.

[15] It is my task to attempt to resolve the issue by using the well-known techniques, such as described in *Stellenbosch Farmers' Winery Group Ltd & Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA). If, after examining the credibility of the witnesses and the probabilities, I am unable to find the one version more probable than the other, then the plaintiff will not have succeeded in discharging its onus of proof and I must absolve the defendant from the instance.

THE CREDIBILITY OF THE WITNESSES

[16] Mr Kleynhans acquitted himself well in the witness box. His version is logical and not improbable. The reason that he gave for insisting on a five-year contract appears compelling. The water truck had to generate income in order for the plaintiff to maintain the instalments. It could be argued that it had been a mere expectation and that the defendant had not actually agreed to a five-

year term. That is possible, but I must first decide whether the defendant's version passes muster.

[17] Mr Daniels on behalf of the defendant urged me to draw a negative inference from the fact that the plaintiff had not called Mrs Kleynhans. She could have shed light on the signature on the letter, but that is not a crucial issue.

[18] Mr van Dyk gave two versions as to why he could not grant the plaintiff a five-year contract. The first is the limited duration of the defendant's contract with Kangra, which was 30 months. There is nothing inherently implausible about that. He admitted however, that the defendant had other operations in the area where water trucks were also being used and that his area of responsibility comprised such other operations. Moreover, the letter of 26 November 2010 also refers to projects (plural). He approved the contents of the letter and it is not unreasonable to infer that Mr van Dyk had at that time envisaged that the water truck could be used at any of projects where it might be required. It was therefore not impossible for the defendant to have agreed to a five-year contract.

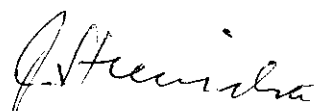
[19] Mr van Dyk's second reason why he could not have concluded a five-year contract is that the defendant only required the water truck for the period that the defendant's own water truck was disabled. I find that unconvincing. He could give no estimation of the time it would take to repair it and appeared evasive. He said he did not know what had been wrong with the truck, that he had not enquired about the extent of the breakdown and that he had no idea

how long it would take to repair. He would not even venture a vague estimation. It could have been a few days or a few weeks. As it turned out, it took ten months. However, during November 2010, when the defendant had been using the plaintiff's water truck for a period of about seven months, Mr van Dyk was prepared to inform the plaintiff's bank that the defendant intended to use the plaintiff's services for at least the next four years or for as long as their projects allow thereafter. If the contract had only been for the period that the defendant's own water truck was disabled, Mr van Dyk could not have given the bank that assurance. Not only did the defendant inform the bank that it would continue using the services of the plaintiff for at least the next four years, but that they intended to extend the plaintiff's services beyond that time if their business continues and the economy allows the use of its services." It can be inferred from the letter that the defendant would use the services of the plaintiff indefinitely or for as long as the defendant remains in business.

[20] For the above reasons, I am satisfied that on the probabilities, the plaintiff has discharged its onus of proof.

In the result I make the following order:

1. The defendant is liable to pay to the plaintiff the amount damages that the plaintiff may prove that it had suffered;
2. The determination of the plaintiff's damages is postponed *sine die*;
3. The defendant is ordered to pay the plaintiff's costs.


J. HIEMSTRA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Date heard:	11 & 14 October 2013
Date of judgment:	18 October 2013
Counsel for the plaintiff:	Adv J.P.F. De Klerk
Attorney for the plaintiff:	Van Zyl Smith & Associates Inc
Counsel for the defendant:	Adv Jasper Daniels
Attorneys for the defendant: Webber	Wentzel,
	c/o MacRobert Attorney