

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: A29/2010

In the matter between:

SAND VAN HEERDEN (EDMS) BPK

Appellant

and

PROBOU

Respondent

CORAM:

RAMPAI, J *et* KRUGER, J

JUDGMENT BY:

RAMPAI, J *et* KRUGER, J

HEARD ON:

13 SEPTEMBER 2010

DELIVERED ON:

23 SEPTEMBER 2010

[1] This is an appeal from the magistrate's court at Kroonstad.

The respondent sued the appellant for the delivery of 905,8m³ of sand, alternatively for the payment of the sum of R90 051,20. On 22 October 2009 judgment was granted in favour of the respondent. Against that judgment, the appellant came on appeal. The respondent opposed the appeal.

[2] In its particulars of claim the respondent alleged that it

purchased sand at Kroonstad from the appellant during the period stretching from 1998 until 2006. In response to the appellant's request for further particulars, the respondent furnished the appellant with details of various purchases it made during that period. It tabulated four different sand products it purchased, namely: plastering sand, medium sand, building sand and garden soil. The respondent furnished details such as the product ordered, the quantity thereof, the order number and the date of each transaction. However, the required price in respect of each sand product so purchased was not furnished. The respondent's explanation was that it no longer had copies of the delivery notes for the relevant period.

- [3] The appellant requested the respondent to state the price the respondent paid to the appellant per cubic metre of each sand product and to explain how the claim of R103 312,00 was made up and calculated. The respondent answered that such prices fluctuated from time to time over the years during the period under consideration. The respondent then proceeded to use the 'values' per cubic metre in respect of the different sand products to explain how its claim was

calculated and made up. The alleged product deficits were multiplied by the alleged values. The products were then added up. The result of the mathematical operation was R90 051,20 instead of R104 312,00. Such an amount represented a 20% shortfall of the total sand the respondent had ordered and paid for which the appellant did not deliver during the eight year period.

[4] In the appellant's pleadings the appellant denied the respondent's claim as amplified by the further particulars. The appellant specifically denied: firstly, that any sand load it delivered to the respondent was 20% less than the 4 529m³, quantity the respondent had ordered; secondly the extent of the shortage, if any, thirdly the price or rather the value of the shortfall; and fourth the quantum of the respondent's alleged claim of R104 312,000 (R90 051,20).

[5] The appellant also raised a special plea of prescription as an alternative defence. The essence thereof was that if the court should uphold the respondent's main claim by finding that the appellant had actually supplied less sand quantity than the respondent had ordered and paid for, which

allegation the appellant denied, then in that event, the appellant pleaded that the respondent's claim had prescribed in terms of words the provisions of the Prescription Act, No. 68 of 1969 as amended.

- [6] The version of the respondent was narrated by one witness, namely Mr E L Stoltz, the proprietor of the business enterprise. He testified that during May 2005 he realised that the resale of sand was not generating as much income as he was expecting. Such dwindling profit margins made him suspect that there was something wrong somewhere. He started to investigate.
- [7] On 25 May 2006 he ordered two loads of 3m^3 each. The appellant was supposed to deliver $2 \times 3\text{m}^3 = 6\text{m}^3$. The two loads were off-loaded on a concrete slab in the respondent's yard. Two months later he measured each load delivered. He established that the appellant had actually delivered 5m^3 ($2 \times 2.5\text{m}^3$) instead of 6m^3 . The shortage of $0,5\text{m}^3 = 2,5\text{m}^3 \div 3,0\text{m}^3 \times 100\% = 20\%$ per load of sand. That was the first test.

- [8] On 25 July 2006 he ordered 10m³ sand. The sand was delivered to his client, a certain Mr Saaiman, where it was off-loaded on 25 July 2006. The respondent drove there. He owned a 3m³ truck. He then caused the sand to be loaded on and off his truck. On the first occasion, his truck was fully filled up with a 3m³ sand. So also on the second occasion. On the third occasion, the remaining sand was not enough to fill the truck. The third load was only 2m³. Instead of 10m³, he discovered that the appellant had only delivered 8m³. The deficit of 2m³ (10m³ minus 8m³) was equal to $2\text{m}^3 \div 10\text{m}^3 \times 100\% = 20\%$ shortage.
- [9] Still on 25 July 2006 Mr A van Heerden Jr came over to respondent's premises. They measured the carrying capacity of the respondent's Iveco truck. They were agreed that it was a 3m³ truck. However, none of the appellant's trucks were ever measured by the respondent. Although they were not measured, they were fully loaded whenever they were off-loaded on the respondent's yard.
- [10] The appellant used three trucks to deliver sand to the respondent. Those were BBG868FS with an alleged

carrying capacity of 3m³; BYL378FS with an alleged carrying capacity of 3m³ and BFB795FS with an alleged carrying capacity of 6m³. But the actual carrying capacities of the trucks were smaller than they were supposed to be. That concluded the respondent's evidence.

- [11] The appellant called two witnesses, Mr Jordaan an engineer, and Mr Van Heerden Snr, the director of the appellant company. The engineer testified that he measured the volume of appellant's three trucks, by loading them level. The 6 cubic metre truck, BFB795FS measured 6,03m³. The capacity of BBG868FS was 2,91m³, and that of DYC378FS 3,07m³. These facts were confirmed in cross-examination. This means that the capacity of the two 3 cubic metre trucks, calculated jointly, was 5,98m³, and on average 2,99m³. Bearing in mind that the 6 metre truck took more than 6 metres, and not knowing which trucks were used for the loads over the 8 year period, and how often each truck was used, there is a chance, if not a probability that too much sand was delivered. Jordaan also stated that if sand was off-loaded and then loaded again, some of the sand which was off-loaded could have been lost. Capacity can also be

relevant to volume.

[12] Van Heerden testified that the respondent was supposed to pay cash for the sand, but fell into arrears. Then the respondent, after five or six years, alleged that there was a shortfall in delivering after having measured two loads. Van Heerden testified that there were always persons who supervised the workers when the trucks were loaded to ensure that they were loaded with the sand level at the top. The appellant received the respondent's first complaint at a stage when the respondent was five to six months in arrears with his payments. The person who received the sand on behalf of the respondent, one Saayman, never complained to appellant about the alleged short delivery.

[13] The magistrate found that the respondent's witness, Mr Stoltz, was a very good witness who presented his case coherently and with certainty. The magistrate mentioned that Stolz could possibly be criticized for waiting so long before he complained. The magistrate pointed out that the evidence of Jordaan, the engineer, was never really in dispute. As to the appellant's witness, Van Heerden, the

magistrate found him a poor witness who adapted his version. The magistrate referred in particular to Van Heerden's evidence regarding the capacities of the trucks and weight of a cubic metre of sand.

[14] In Mr De Wet's heads of argument the point is made that the magistrate's conclusion is the most plausible explanation on the facts. The delivered sand did not generate the required profits. As a result of the respondent's measurements of the trucks, the inference could be drawn that too little sand was delivered. Mr De Wet points out that two loads of sand which were directly delivered to Saayman in his personal capacity measured only 2,5m³ when re-loaded.

[15] Mr Claassen, on behalf of appellant, pointed out that the respondent never indicated how it arrived at the claimed "average price" of R100. Three types of sand which were delivered over an eight-year period, during which prices changed, were involved. The respondent relied for its claim of short delivery on the test of only two loads of sand which were actually measured. The respondent relies on a photograph of one of appellant's trucks which was taken

from a distance of 100 metres. There were three compartments on the truck, and on respondent's own version the loads were 85,216%, which on respondent's own version, is less than the 20% shortfall for which the respondent got judgment.

[16] The second measurement on which the respondent relied was done in respect of sand which had been off-loaded two months previously. Mr Claassen points out that according to the respondent, the appellant's 6 ton truck had a capacity of 5,5 tons. This is a shortfall of 8%, not 20% for which respondent got judgment. According to the further particulars about all the loads were transported on the 6 ton truck.

[17] According to Mr Claassen the crux of this case is the volume of the three trucks. The respondent never measured the volume (capacity) of appellant's three trucks. Appellant called an engineer who measured the trucks:

BFB – 6m = 6,039m³

BBG – 3m = 2,91m³

DYC – 3m = 3,07m³

[18] Thus only one truck was under capacity, and one does not know which trucks were used on which occasions. Over an eight-year period one would expect that the lesser loads were cancelled out by the greater loads delivered on the two trucks with excessive capacity.

[19] The appellant testified that the trucks were always loaded “flat”, i.e. level with the top of the side of the truck. The sand was combed to be level. Mr Claasen submits that the respondent’s claim calls for exact measurement, not the probabilities or credibility. The magistrate should have ordered absolution.

[20] The issue in this appeal is whether the respondent proved its case on preponderance of probabilities.

[21] The onus was on the respondent to prove that over an eight-year period it had received 20% less sand than it had paid for. The respondent also had to prove the price it paid, with reasonable certainty. It did not. Instead it wrongly relied on ‘values’ which were not even verified by an expert.

[22] Prescription is raised as a defence for part of respondent's claim. There was no reason why the respondent could not have become aware of its claim sooner. The appellant did not hide anything. The respondent should be assessed according to the normal knowledge and know-how of a reasonable person in his position – **DRENNAN MAUD & PARTNERS v PENNINGTON TOWN BOARD** 1998 (3) SA 200 (SCA) 209F- G. According to Mr De Wet's calculations prescription, if upheld, would extinguish R48 580,00 of the respondent's claim.

[23] **CONCLUSION**

The respondent had to prove its case. The respondent gave no satisfactory evidence as to how the price of the four types of sand over an eight-year period had been calculated for purposes of its claim. As to the short-delivery, the evidence does not prove respondent's claim of a consistent shortfall of 20% over the entire period. Two of the trucks took more than their stated 3 ton and 6 ton capacities. One 3 ton truck took fractionally less. One does not know which trucks were used for which loads. There is a great deal of uncertainty

about the respondent's claim. Absolution from the instance should have been granted.

[24] **Order**

1. The appeal succeeds with costs.
2. The magistrate's order is replaced with the following:

“Absolution from the instance with costs.”

M. H. RAMPAL, J

A. KRUGER, J

On behalf of the appellant:

Adv. J. Y. Claassen SC
Instructed by:
Naudes
BLOEMFONTEIN

On behalf of the respondents:

Adv. P. J. T. de Wet
Instructed by:
Symington & De Kok
BLOEMFONTEIN

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