

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case Number : 4645/2006

In the matter between:-

BIOFRESH (EDMS) BEPERK
(Registrasienommer 2001/018221/07)

Plaintiff

and

SETSOTO MUNISIPALITEIT

Defendant

HEARD ON: 18 AUGUST 2009

JUDGMENT BY: EBRAHIM, J

DELIVERED ON: 1 OCTOBER 2009

[1] The plaintiff has instituted action in this court claiming an amount of R13 041 285.00 from the defendant for damages allegedly suffered as a result of defendant's alleged repudiation of a contract entered into between the parties. The defendant has denied that any agreement was entered into between the parties and has alleged that the plaintiff had deserted the project which was being run by it on behalf of the defendant.

- [2] At the outset of the trial I was asked to separate the issues of merits and quantum and the trial proceeded on the question of the merits only. Two issues arise in this trial for determination. The first is whether an agreement was reached and entered into between the parties and secondly, should there have been such an agreement, did the defendant repudiate the agreement? In order to determine these issues, it is necessary to have regard to the factual background to this matter.
- [3] During 2000 the Setsoso Municipality decided that it was desirable that certain local development objectives be pursued with the primary aim of job creation utilising available financial and other resources in and surrounding its area of jurisdiction. In the Ficksburg area agricultural resources were identified as options for use in the development of these objectives and the idea of starting a fruit farming project took root and became acceptable to the Ficksburg community. In order to fund these local development projects, a local economic development fund was established, manned through and under the auspices of the municipal infrastructure grant system in the Department

of Provincial and Local Government in Pretoria and proposals were sought for community projects which the Department would then consider and decide whether to fund or not.

- [4] On behalf of the defendant on 14 March 2001 its then director of technical services, one M. Kohrs, submitted an application to the local economic development fund for the funding of a 50 hectare peach farm to be operated in terms of a business plan proposed by the I.G.I.T. Trust, the owner of Borneo Farm in Ladybrand, which was being run by one Rademan J. van Rensburg, in his capacity as the general manager of the farm and a known expert on peach farming. Funds from the local economic development fund were approved in May 2001 by the Department of Provincial and Local Government to finance an organic peach farm. An amount of R1 500 000.00 for the year 2002/2003 and R1 370 629.00 for 2003/2004 was made available by the Department.

- [5] The defendant engaged the services of a consultancy firm run by one Jan Hamer who initially ran a business known as

Urban Dynamics but thereafter started a new company known as Meerland Development (Pty) Ltd. It was Hamer's duty to co-ordinate the project under the auspices of his new consultancy firm and with the aid of the standing committee on technical and community services which was to form the steering committee on the peach project.

- [6] In August 2001 Meerland Development (Pty) Ltd submitted a comprehensive business plan endorsing the growth of organic peaches for export to Germany on a 50 hectare peach orchid southwest of the Mequeleng area in Ficksburg close to the Caledon River. The project would create 16 jobs immediately, another 25 jobs in 2005 and a further 500 indirect/part time or seasonal jobs. The plan endorsed the choice of Biofresh organic peach growers from Ladybrand as the expert peach growers to conduct the farming activities on the project. It was envisaged that the project would be sustained by the municipality and on proving profitable, would ultimately be handed over to the beneficiaries to be run for their own benefit and for the benefit of the local community.

[7] It was not disputed that Biofresh and Bionic organic farms of Ladybrand were one and the same entity referred to by Meerland in its business plan and by Rademan van Rensburg in the first plan submitted to the defendant on behalf of the I.G.I.T.Trust.

[8] It was agreed that the main stakeholders in the project would be:

- (i) the municipality (the defendant);
- (ii) the community;
- (iii) the professional team headed by Meerland Development (Pty) Ltd consisting of project management, agricultural engineering, electrical engineering, structural engineering.
- (iv) the strategic and/or smart partner namely Biofresh.
- (v) The project steering committee which would have representatives from councillors, municipal officials, community members and the projects team.

8.1 The beneficiaries would be selected through the following due process using predetermined and tested selection criteria:

- (i) by placing advertisements;
- (ii) calling for applications;
- (iii) short listing of candidates;
- (iv) interviews;
- (v) practical testing and evaluation for shortlisted candidates; and
- (vi) appointments.

8.2 A holding company to drive the entire project was to be established with the defendant owning a 60% shareholding therein and Biofresh the remaining 40%.
(i.e. the plaintiff)

8.3 Biofresh would be responsible for the operational framework of the project and for the first five years would appoint a managing director of its choice. It would also have a veto right in the holding company.

8.4 On the project becoming profitable the shares of the municipality could only be sold to the beneficiaries.

- [9] As a precursor to a formal agreement being drafted for the incorporation of the holding company, the formulation of the respective roles and responsibilities of all the parties and the defining of the institutional arrangements, a document entitled “The Memorandum of Understanding” was drawn up by Jan Hamer for signature by Biofresh, the plaintiff and the defendant. This document re-enforced the institutional arrangements relating to shareholding in the company to be created for the purposes of the running of the peach project.
- [10] The project commenced in 2002 and the operation thereof continued under the supervision and management of Rademeyer van Rensburg. A number of project steering committee meetings were at which the institutional arrangements and roles and responsibilities of the various stakeholders were discussed. No formal agreement was signed by either party. The Memorandum of Understanding was circulated at these meetings at which representatives of the defendant and plaintiff and representatives of the beneficiaries were present. Discussions were held with regard to the provisions of The Memorandum of Understanding and amendments were made in accordance

with decisions taken at these meetings, but no contract or agreement was signed by either party in accordance with provisions of The Memorandum of Understanding.

[11] At a special meeting of defendant's council on 13 November 2003 at Senekal a slide presentation was made by Jan Hamer, the defendant's consultant from Meerland Development (Pty) Ltd. A progress report was furnished in regard to the project in order to finalise an agreement in respect of the institutional arrangements governing the relationship between the plaintiff and defendant with respect to the project and with respect also to the appointment of beneficiaries. It was proposed that:

- (i) Biofresh would manage the farm in the same way as it had been doing during 2002/2003. Mr. Koen Scheepers of Biofresh would remain on the farm and Rademan van Rensburg would continue to give technical input. A monthly management farm fee of R13 000.00 exclusive of VAT would be payable to Biofresh which would be increased to R15 000.00 after the signing of the agreement between plaintiff and defendant. Van Rensburg would be appointed as

general manager of the company for a period of 20 years.

- (ii) Biofresh would continue to supply the necessary equipment to the project as may be required from time to time. The equipment would be supplied on an actual cost basis as determined by the Department of Agriculture from time to time.
- (iii) Biofresh would market all the produce of the farm at a fee of 8% of the sale value of the produce exclusive of VAT. The normal conditions of a marketing agent would apply.
- (iv) Biofresh would be entitled to 15% profit share for the financial years 2004/2005 and 2005/2006. Thereafter Biofresh would be entitled to 20% profit share if production outputs were met.
- (v) Biofresh would be appointed as an external director to the newly formed company for a period of 20 years.
- (vi) Biofresh would assist in the financial control of the business for a period of 20 years and would actively participate in financial decisions. Finances will be managed by a financial committee for a period of five years consisting of:

- (a) One Biofresh representative;
- (b) One project beneficiary;
- (c) The financial officer;
- (d) One representative of the municipality.

[12] At the Senekal meeting it was proposed that all recommendations with regard to the respective roles of the plaintiff and defendant in regard to the peach project be accepted and approved. On the basis of this recommendation the plaintiff claims that a formal agreement came into being between the parties at the Senekal council meeting on 13 November 2003. The defendant denies that any agreement was entered into raising several areas of dispute in regard to The Memorandum which could not be satisfactory resolved. I shall deal with these areas of dispute later on in this judgment.

[13] During October 2003 the auditor general raised certain concerns regarding the Meqheleng peach project which related mainly to the funds paid to the plaintiff and the manner in which those funds were being spent on various running costs and on salaries for the beneficiaries. It was

agreed thereafter that the funds should remain with defendant's council which would then make the necessary disbursements in respect of the project and the building of an access road to the project. A dispute arose between Meerland Development (Pty) Ltd, that is Jan Hamer, and the then municipal manager, John Makelelane, relating to the quality of the road works constructed and Hamer accused Makelelane of misappropriating those funds, resulting in a rift between them. According to Hamer Makelelane ordered him off the project. There was then deadlock until a meeting was arranged on 6 July 2005 in Bloemfontein to discuss the relationship between Hamer and Makelelane and the further progress of the peach project. At this meeting both Hamer and Makelelane were present with other council members, tempers were short and accusations were levelled at Hamer that he had drawn too much money in respect of his own consultancy fees. It was eventually recommended by the acting mayor that an audit of already allocated and utilised funds be conducted and that the project be "put on hold" until the audit had been completed and an audit report received clarifying the areas of dispute between the plaintiff and defendant as well as Jan Hamer's consultancy. Until then it

was agreed that the project should be sustained with the exclusive support of defendant's council.

[14] A week later on 13 July 2005 John Makelelane wrote to the municipal infrastructure grant manager at the Department of Provincial and Local Government in Pretoria to advise of the breakdown in the trust relationship between the municipality and Jan Hamer and that a dispute had been declared and was to be investigated. He furnished the following reasons for the breakdown in that relationship. I quote from his letter:

- “(a) The first project budget of R3,4 million was depleted and yet Hamer continued to claim project management fees;
- (b) Hamer was not engaged in the current R2,5 million budget for project management fees but he continued to appoint other consultants and other services without any permission to do so;
- (c) In stead, Mr. Hamer went behind my back to report grievances he had with the municipality to people who are external to the project, thus breaking the trust relationship.
- (d) The partnership between Biofresh and Meqheleng peaches was expected to give returns of a R1 million. To

our dismay only R42 000.00 was realised and the municipality carried all the costs. The explanation given, was that loss could be attributed to theft. Theft is possible where there are edibles, but this is unacceptable.

- (e) The project is still continuing and supported by the municipality in terms of irrigation equipment and other supplies needed to keep the project sustainable.”

[15] Makelelane then instructed a Bloemfontein firm of chartered accountants, GOBODO Chartered Accountants, to value the Meqheleng peach project in order to determine what could be done about the concerns listed in its report dated 5 September 2005 at paragraphs 1 – 4. These were:

- “1. Determine at what date did the Meqheleng peach project overspend the grant that was allocated to the project by the local economic development fund;
- 2. To determine to what extent, if any, can money be recuperated from Biofresh (Pty) Ltd and what the agreement was between the parties;
- 3. To determine what the amount was that Bopa-Lesedi Management Consultants were entitled to as consultants on the project;

4. To indicate what steps need to be taken to ensure the sustainability of the project.”

[16] As is clear the concerns related mainly to the expenses of the project and how the funds were spent. Makelelane told the court that his main problem with Hamer was regarding the implementation of the capital and that he differed with him on the procurement process employed by him. He said Hamer did not consult him about the appointment of service providers, saying that he was the project manager and could appoint whoever he wanted to appoint. Makelelane said this was not in accordance with statutory procurement provisions which he was obliged to follow. No audit was conducted but from GOBODO's report it was clear that Makelelane had utilised money voted and approved by council for use in the payment of wages of beneficiaries as part of the municipal expenses for the financial year ending 2006. In regard specifically to the plaintiff, the report concluded that there was a mutual understanding between the parties which had been forged in the following respects:

- (a) That Mr. Koen Scheepers of Biofresh would act as manager of the farm.

- (b) Mr. R. van Rensburg would supply technical input.
- (c) A monthly farm management fee of R13 000.00 exclusive of VAT which increased to R15 000.00 exclusive of VAT, would be paid as soon as contracts were signed. At the time of the writing of the report, no signed contracts existed.
- (d) Biofresh would supply the equipment to the project. This would be supplied on an actual cost basis as determined by the Department of Agriculture. No comparison to the cost basis according to the Department of Agriculture was done.

As far as Jan Hamer's consultancy was concerned, the report concluded that the consultant had been overpaid by an amount of R168 788.00 which amount was to be reclaimed by the defendant.

- [17] On 7 September 2005 Makelelane wrote to Jan Hamer giving him seven days to deliver all documents and any property acquired by him on behalf of the defendant in his possession, failing which Makelelane would take legal steps to recover the same.

[18] According to both Jan Hamer and Rademan van Rensburg who testified on behalf of the plaintiff in this matter, they were told at the Bloemfontein meeting on 6 July 2005 that their services were no longer required on the Meqheleng peach project and Rademan van Rensburg was asked to remove his equipment from the farm and leave the project. According to both of them they were (in laymen's terms) "fired" from the project at the Bloemfontein meeting on 6 July 2005. This is denied by the defendant. John Makelelane's testimony was (and it was so minuted) that the project was "put on hold" pending an audit investigation into the project funds.

[19] Against this background then the question arises whether in fact an agreement was entered into by the defendant with the plaintiff in regard to the Meqheleng peach project to render services as referred to in the minutes of the meeting held at Senekal on 13 November 2003 at the prescribed fee mentioned therein and governed by the institutional arrangements discussed at that meeting and recorded in the second business plan prepared by Jan Hamer and in The Memorandum of Understanding.

[20] It was common cause that disputes had arisen between the beneficiaries and Rademan van Rensburg over the issue of the appointment of a new foreman, Koos de Wet in the place of Mr. Koen Scheepers, who had been removed by Van Rensburg. The beneficiaries did not like De Wet and did not get on with him. There were allegations relating to the theft of peaches, where the beneficiaries accused Van Rensburg of stealing the produce for his own benefit. In turn Van Rensburg accused the beneficiaries of stealing the produce. Van Rensburg in fact laid a charge of theft against the beneficiaries and as a result the relationship between him, his foreman, Koos de Wet, and the beneficiaries soured to the extent that he refused, as he had been doing over the years, to transport the beneficiaries to and from the farm to the township where they lived. Because of that the beneficiaries refused to allow Van Rensburg to keep his equipment on the farm and demanded that it be removed. This was done after the meeting in Bloemfontein in July 2005. Despite the removal and Van Rensburg quitting the project, farming operations on the peach project continued by the beneficiaries themselves under the supervision of the defendant and no external service providers were appointed.

[21] In my view, the probabilities are overwhelming that the reason no agreement was actually signed by the parties, was due to the fact that there were constant disputes between them in respect of a number of areas as testified to by John Makelelane, Jan Hamer and Rademan van Rensburg. I have no reason to reject this evidence nor was any reason suggested by the plaintiff as to why I should do so. Although Makelelane agrees that it was envisaged that Biofresh (the plaintiff) would be a strategic partner in order to provide training and capacity building in respect of the beneficiaries, he was not in agreement that there should be a strategic partnership to provide training and capacity building for more than 10 years in respect of the pruning of peach trees. He said he would have been comfortable with one to two years training in that regard. He also testified that he had an issue with Biofresh being given a veto right, because such a right was incompatible with local government management as it would have made the defendant council vulnerable to the control and dictates of Biofresh in respect of the running of the project. He said that was unacceptable as defendant council in terms of local government management had to be supreme. He, accordingly, raised this as a concern at a

meeting but could not get consensus from council members in respect of the veto right. Makelelane also agreed that the plaintiff had implemented the project by planting peach trees, installing irrigation systems, feeding plants organic poisons, had managed the pruning and clipping of the peach trees and had sought export markets for the marketing of the produce, for all of which it was paid a fee. He said that he continued to honour his liabilities in respect of payment to the plaintiff because it was important to the defendant and himself that a sustainable project was created and maintained for the benefit of the beneficiaries as part of the municipality's constitutional obligations towards the community it served. He testified that he also had reservations about the fate of the land on which the project was to be implemented which had to be ironed out. No provision was made in The Memorandum of Understanding in regard to this. There was no indication as to whether the land was to be sold by the municipality to the beneficiaries or leased to them or donated to them. Consequently because The Memorandum of Understanding created disputed areas for him in regard to the veto right and periods of training and

the land issue, he was unable to enter into a formal agreement with the plaintiff.

[22] It was clear from the manner in which they gave evidence that both Rademan van Rensburg and Makelelane were strong and dominant personalities, equipped with qualities of leadership and, I suppose, it was inevitable that this resulted in a clash of wills between them. But, having said that, I must add that both impressed me as credible witnesses as regards the content of the testimony each gave to the court, such that I am unable on the facts as testified to by both of them to make a finding that the probabilities of the case favour the version of either of them, insofar as the underlying causes of the various disputes relating to the peach project as testified to by each of them is concerned. I make the finding therefore that in this regard, the probabilities are equivocal. In making such a finding, I must emphasize that I do not make that finding in regard to the events which occurred at the meeting of 6 July 2005 in Bloemfontein which, on plaintiff's version amounted to a repudiation by the defendant of the agreement between the parties.

[23] Having regard to these findings, I hold the view that The Memorandum of Understanding drafted by Jan Hamer and proposed as a pre-cursor to a formal agreement between the parties, amounts to nothing more than an un-enforceable preliminary agreement for the simple reason that the parties had absolute discretion to agree or disagree the terms; that the discretion was vested in the parties because they were required to sign a contract the precise terms of which were not fixed is clear from the evidence of both Van Rensburg and Makelelane in respect of the veto right. Van Rensburg insisted on having a veto right in order to protect his interests and Makelelane insisted there be no veto right in order to protect the interests of the defendant. There was accordingly room for a breakdown in negotiations before a contract was concluded and indeed such a breakdown did occur as a result of disputes which arose in regard to the operation of the project itself and the implementation of the capital and funding made available by the local economic development fund for the project. In addition, the beneficiaries themselves were not satisfied with the manner in which the project was being run by Van Rensburg.

[24] Accordingly, it cannot be said that there was agreement between the parties as to the essential terms and conditions of the contract. I conclude therefore that the preliminary agreement as incorporated in The Memorandum of Understanding, was not legally enforceable. See **PREMIER, FREE STATE, AND OTHERS v FIRECHEM FREE STATE (PTY) LTD** 2000 (4) SA 413 (SCA) at 431 G – H; **SOUTHERNPORT DEVELOPMENTS (PTY) LTD v TRANSNET LTD** 2005 (2) SA 202 (SCA) para [11] – [16].

[25] In the result the plaintiff has failed to discharge the overall onus it carries of proving its case on a balance of probabilities. Its claim is dismissed with costs.

S. EBRAHIM, J

On behalf of plaintiff:

Adv. P.R. Cronje
Instructed by:
Stander Venter & Kleynhans
BLOEMFONTEIN

On behalf of defendant:

Adv. J.P. Daffue SC
Instructed by:
Bokwa Attorneys
BLOEMFONTEIN

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