IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 593/2023P

In the matter between:

DAVID SCHALK JANSE VAN RENSBURG	**PLAINTIFF /RESPONDENT**
And	
CORNELIUS IGNATIUS MICHAEL JOUBERT	**FIRST DEFENDANT /FIRST APPLICANT**
MARION ROBERT MOXHAM	**SECOND DEFENDANT /SECOND APPLICANT**

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

P C BEZUIDENHOUT J:

[1] Applicants seek leave to appeal against my order granting summary judgment against them in terms of paragraph 1, 1.1 and 1.3 of the notice of application for summary judgment. A lengthy notice of application for leave to appeal setting out various factors which it was submitted is incorrectly found and what should have been

found was filed and I am not going to repeat it herein as it forms part of the papers. I will however deal with various of the issues which in my view are relevant.

[2] Applicants filed heads of argument in support of their application for leave to appeal. In paragraph 2.1 is it stated that the Court erred in not distinguishing between Charcoal and Biochar. No distinction was made because neither the agreement of sale nor the 2018 report refers to Biochar, nor is there any explanation that Biochar may be called something else. The agreement specifically states that it is a sale of a Pyrolysis Charcoal Plant. Also the certificate which is referred to and which at the time that the sale was concluded was already two years old does not refer to Biochar but only to activated carbon. Accordingly nowhere in the papers except in the affidavit filed on behalf of Applicants is there reference to Biochar.

[3] It was further submitted that in paragraph [8] of the judgment it was found that the plant produces 83 % Biochar. This is incorrect without foundation and misleading as in paragraph 8 it states as follows:

> "It is contended on behalf of Defendants that this report is a guarantee given to them that it would produce 97 % pure Biochar where it was only producing 83 % pure Biochar."

It was therefore not a finding that was made by the Court.

[4] In paragraph 4.6 of the heads of argument it is submitted that the Court erred in finding that the plant produces at 83 % purity and in paragraph 4.8 that this was factually incorrect as 83 % is not Biochar and refer to paragraph 14 of the judgment. Once again it is quoted incorrect and misleading as in paragraph [14] of the judgment it states:

> "In paragraph 5 to 7 of their plea they set out that the agreement was concluded at a time when plaintiff was informed what the plant was required for and that it

was sold as being capable of producing a product known as Biochar with the purity of 97.2 %. That it is not suitable for that purpose, could not produce it and only produce Biochar at a purity of 83 % or less."

There is no finding by the Court that it was producing at 83 % purity.

[5] During argument it was submitted that the report of Mr Phipps indicate that the plant was incapable of producing this product. In paragraph 2.8 on page 18 of the summary judgment papers it states:

"The test batches reveal that the plant could only produce fixed carbon of 84 % quality and volatiles of excess of 15 %. The test confirming the said results were conducted by Mr. Daryl Phipps from adsorb."

The report of Mr. Phipps is attached at page 53 of the indexed papers. The report of Mr. Phipps makes no mention that he conducted any tests and only states that it is his opinion following the review of photographs. There is also no mention in the plea of any such report.

[6] In considering the summary judgment it is to be considered having regard to the particulars of claim and the plea and counter claim. Applicant relies mainly on the clause in the agreement which is contained in paragraph 5.1 that states:

"The plant is sold as a used plant with no guarantees after production has been proved."

It is submitted that in light of the case of Joob Joob Investments (Pty) Ltd v Stocks Mavundla ZEK Joint Venture 2009 (5) SA 1 (SCA) that it must be fully ventilated at trial as there were emails complaining about the plant. It cannot produce Biochar and that it was not what the parties had intended to purchase. What was alleged the plant can produce it cannot produce. There is a factual dispute and accordingly leave to appeal

should be granted. There must be a triable issue on a *bona fide* defence for summary judgment to be refused. In my view this decision does not assist Applicants.

[7] It was submitted on behalf of Respondents that in the agreement it sets out the terms on which the plant was sold. It did produce and nowhere does it state that it had to produce Biochar but that it is a Pyrolysis Charcoal Plant which was sold. Also from the letters and the emails it is apparent that Applicants stated that they were doing something wrong. In paragraph 13.1 of the agreement it specifically states that neither party shall be bound by any representations, warranty, promise or the like not recorded therein. In paragraph 13.2 no addition to, various or agreed cancellation of the sale agreement shall be of any force or effect unless in writing and singed by and on behalf of the parties.

[8] It was submitted that production was proved and that accordingly there is no prospects of success on appeal.

[9] As set out above various contentions by Applicants regarding what was held in the judgment is incorrect.

[10] Further the main reliance of Applicant is on clause 5.1 where it says:

> "The plant is sold as a used plant with no guarantees after production has been proved."

It is submitted by Applicants that it was not proved that production of what was agreed concerned. As I set out in the judgment if it was such a necessary term of the agreement and that it was agreed between the parties one would have expected that the agreement would have clearly set out that Biochar of purity of 97.2 % had to be produced. No such can be found in either the agreement nor in the report which as I have stated clearly did not form part of the agreement. The terms of the agreement are clear and that no other guarantees were provided.

[11] It was submitted that I should have found that the agreement was breached as no assistance was given and ought to have incorporated the 2018 report into the sale agreement. Clauses 13.1 and 13.2 of the agreement excludes this.

[12] The counter claim is based solely upon the reasons which have been set out in the plea which was found not to be sufficient and sustainable and accordingly the counter application could also not succeed.

[13] Having regard to the terms of the agreement, where no mention of Biochar is made nor in the report which as I have stated was made two years prior to that and which is specifically excluded in terms of the agreement, production was indeed done and there was nothing in clause 5.1 stating what production was necessary but merely production. If that was a vital part that it had to produce Biochar at 97.2 % one would have expected clause 5.1 to have set that out.

[14] Considering all these factors which I have dealt with, in my view, there is no prospect that another court will come to a different conclusion on these facts.

Order:

The application for leave to appeal is dismissed with costs.

_____

P C BEZUIDENHOUT J.

JUDGMENT RESERVED ON: **23 OCTOBER 2024**

JUDGMENT HANDED DOWN ON: **28 NOVEMBER 2024**

COUNSEL FOR PLAINTIFF/RESPONDENT: **ADV B DE BEER**

Instructed by: **Olivier and Pinto Inc. attorneys**
Pretoria
Tel: 0878222142/0824660186
Email: info@olivierpinto.co.za ; omatt@netactive.co.za
Ref: LIT – J1
c/o: Botha & Olivier Inc. Attorneys
Pietermaritzburg
033 3427190
Email: cathys@bando.co.za
Ref: Sanet Botha/cls/0.44

COUNSEL FOR DEFENDANTS/APPLLICANTS: **ADV E COLRMAN**

Instructed by: **EW Van Zyl Attorneys**
Johannesburg
Tel: 011 472 1473/011 472 1640
Email: ewvanzyl@ewvanzylatt.co.za ; info@ewvanzylatt.co.za
Ref: EWVZ//M910
c/o: Viv Greene Attorneys
Tel: 033 342 2766
Email: anasia@vglaw.co.za