



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Not reportable

CASE NO. 3223/2017

In the matter between:

RENNIE CHARLES BLAINE PRICE N.O.	First plaintiff
MICHAEL LOWELL BLAINE PRICE N.O.	Second plaintiff
ROBIN OWEN JEFFERSON	Third plaintiff
TORTELLO INVESTMENTS NO. 20 (PTY) LTD	Fourth plaintiff
EQUISTOCK PROPERTIES 7 (PTY) LTD	Fifth plaintiff

and

SUN CITRUS PACKERS (PTY) LTD	Defendant
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JUDGMENT

LAING J

[1] This is an interlocutory application pertaining to a joint minute prepared by the parties' respective accounting experts, Mr Greg Johnson and Mr Charl Gerber. The minute pertains to a meeting held on 7 October 2024 in Cape Town. The defendant seeks a declarator to the effect that neither expert was authorised to make certain factual admissions and that the defendant is accordingly not bound thereby;

alternatively, the defendant seeks leave to withdraw such admissions. The application was opposed.

[2] The minute concerns the data bases contained in the electronic files that were stored on a flash drive ('the Mulder *stokkie*') that was provided to the plaintiffs' accountants, represented by Mr J P Mulder. In that regard, the experts recorded, inter alia, the following:

'4. Topics covered by the Experts included:

- a. ...
- b. ...
- c. The importance of the following data schedules required by Gerber to complete his 2015 Payment Reconciliations:
 - i. Sun Citrus Packers Final Payment Advice data base – as discovered by Defendant in his 6th Discovery dated 11-Sep-24 ("SCP Data Base")
 - ii. Sun Citrus Exporters data base – as discovered by Defendant in his 5th Discovery dated 26-Jul-23 ("SCE Data Base")
 - iii. ...
 - iv. ...
- d. ...
- e. ...
- f. ...

Findings and Conclusions agreed upon by the Experts

5. Data Bases included in the Data Dump, as per para 4c above and the Annexure attached, were as follows:

a. SCP Data Base –

Where the SCP Data Base was available with all the season's line items, this was embedded in Excel Pivot tables.

The SCP Data Base was complete for season 2014 and 2015.

In 2013 it was incomplete (payment weeks 24 and 25 were not included).

The SCP Data Base for 2016 was included, in a new more detailed format, in file "ReconRep_201619_201641.xls".

b. SCE Data Base

The complete SCE Data Base for seasons 2013 to 2016 were made available to Johnson on 30-Jul-19. Included in the Data Dump was a partial extract of this data for season 2013 ("CB.xlsx") and what appears to be a full extract of the data for season 2016 ("ReconRep_201619_201641.xls").

No SCE Data Bases were included for the 2014 to 2015 seasons...'

[3] In a founding affidavit deposed to by Dr Cecil Brummer, the defendant alleged that the minute was factually incorrect in two respects: (a) the assertion that payment weeks 24 and 25 were not included in the SCP database contained on the Mulder *stokkie*; and (b) the assertion that no SCE databases were included for the 2014 to 2015 seasons. Dr Brummer only realised the true position during trial preparation, immediately before the resumption of the current proceedings.

[4] The court must determine whether the above findings or conclusions bind the defendant, considering its contention that that there was insufficient authority for the experts to have made them. Furthermore, the court must decide whether, in the circumstances, the defendant can nevertheless withdraw the findings or conclusions made, notwithstanding the question of authority.

[5] The principles involved are well-established, as illustrated in several recent decisions by the Supreme Court of Appeal. In *Bee v Road Accident Fund*,¹ Seriti JA emphasised that, for an expert's opinion to be underpinned by proper reasoning, it must be based on correct facts, failing which it would not be helpful to a court.² Similarly, the court cannot base its decision on unreliable evidence.³ The relevant principles were mentioned in *AM and Another v MEC for Health, Western Cape*,⁴ too, where Wallis JA acknowledged the need for clarity as to the facts on which an opinion is based.⁵ The drawing of inferences from the facts must be based on admitted or proven facts and not matters of speculation.⁶ In *NSS obo AS v MEC for Health*,

¹ 2018 (4) SA 366 (SCA).

² Para 23.

³ Para 31.

⁴ 2021 (3) SA 337 (SCA).

⁵ Para 20.

⁶ Para 21.

Eastern Cape Province,⁷ Schippers JA reiterated that a court must be satisfied that an opinion is based on facts and that the expert has reached a defensible conclusion on the matter.⁸

[6] As counsel for the defendant argued, it would be a travesty of justice for the true factual position not to be established. The point is well made. There are, however, additional principles involved when the facts have been agreed. In *Thomas v BD Sarens (Pty) Ltd*,⁹ Sutherland J dealt with the subject, restating the principle that what constitutes the facts on any issue is the preserve of the court. The exception to this was where the parties have agreed on the facts. A court might be sceptical about the agreed facts, but was not permitted to 'go behind' the parties' agreement.¹⁰ The learned judge held that the agreement bound both litigants; neither litigant could repudiate an agreement to which its expert was a party unless this was done clearly and, at the very latest, at the outset of the trial.¹¹ Such agreement enjoys the same *de facto* status as facts that are common cause on the pleadings or facts that have been agreed at a pre-trial conference or in an exchange of admissions.¹² The Supreme Court of Appeal subsequently endorsed Sutherland J's findings. In *Bee*, Rogers AJA stated the following:

' . . . Facts and opinions on which the litigants' experts agree are not quite the same as admissions by or agreements between the litigants themselves . . . because a witness is not an agent of the litigant who engages him or her. Expert witnesses nevertheless stand on a different footing from other witnesses. A party cannot call an expert witness without furnishing a summary of the expert's opinions and reasons for the opinions. Since it is common for experts to agree on some matters and disagree on others, it is desirable, for efficient case management, that the experts should meet with a view to reaching sensible agreement on as much as possible so that the expert testimony can be confined to matters truly in dispute. Where, as here, the court has directed experts to meet and file joint minutes, and where the experts have done so, the joint minute will correctly be understood as limiting the issues on which evidence is needed. If a litigant for any reason does not wish to be bound by the limitation, fair warning must be given. In the absence of repudiation (ie fair warning), the other

⁷ 2023 (6) SA 408 (SCA).

⁸ Para 25.

⁹ 2012 JDR 1711 (GSJ).

¹⁰ Para 9.

¹¹ Para 11.

¹² Para 12.

litigant is entitled to run the case on the basis that the matters agreed between the experts are not in issue.¹³

[7] The Supreme Court of Appeal further held that the limits on repudiation, particularly its timing, were matters for the trial court. Repudiation must, however, occur clearly and timeously; whether a trial court would allow such a disruption would depend on the circumstances.¹⁴

[8] In the present matter, the court is not convinced that it is entirely accurate to refer to the ‘authorization’ of an expert in relation to the making of findings or conclusions in a joint minute. The expert may well be instructed by a party to provide an opinion on a set of facts, but he or she is not the litigant’s agent. As Bands AJ remarked in *Williams v MEC for Health, Eastern Cape*,¹⁵ the key function of an expert is to guide the court in its decision-making process on questions which fall within the ambit of the expert’s specialised field of knowledge.¹⁶ The parties may, in that regard, set the parameters or terms of reference according to which the experts are required to seek agreement. To say, however, that an expert who went beyond such parameters or exceeded the terms of reference was ‘unauthorized’ is unhelpful.

[9] For immediate purposes, the various items of correspondence, notices, and the joint minute itself indicate that the purpose of the meeting between Mr Johnson and Mr Gerber on 7 October 2024 was, at the very least, to identify areas of agreement and disagreement. Part of that process would inevitably have entailed the identification, comparison, and clarification of the available data — to avoid a situation where the experts were comparing apples to oranges, to use an unfortunate idiom. Logically, this would have involved the determination of what information was contained on the Mulder *stokkie*. It is highly improbable that this would not have been contemplated as a necessary exercise that fell within the parameters or terms of reference set by the parties for the respective experts. Importantly, however, it cannot be said that Dr Brummer simply played no part in the formulation of the joint minute. The evidence indicates that he was very much involved. The signed version was clearly approved

¹³ Para 66.

¹⁴ Para 69.

¹⁵ 2022 JDR 2582 (ECP).

¹⁶ Para 18.

before finalization and filed without any objection on his part. In the end, the court cannot find that the experts were 'unauthorized' in relation to the factual admissions described.

[10] Turning to the remaining issue, the court is not persuaded that the admissions are indeed factually incorrect. As counsel for the plaintiffs pointed out, the joint minute defines the 'SCP Data Base' as 'the Sun Citrus Packers Final Payment Advice data base – as discovered by Defendant in his 6th Discovery dated 11-Sep-24'; similarly, the 'SCE Data Base' means 'the Sun Citrus Exporters data base – as discovered by Defendant in his 5th Discovery dated 26-Jul-23'.¹⁷ Despite Dr Brummer's demonstration at court of what was purportedly contained on the Mulder *stokkie*, the plaintiff's argument remains that the relevant information does not correspond to what was disclosed in the defendant's discovery affidavit. The prospect of a factual dispute arises.

[11] It is useful, at this stage, to return to the principles enunciated in *Thomas* and subsequently endorsed in *Bee*. A party is entitled to repudiate a joint minute if it does so clearly and timeously. In *M obo L v MEC for Health, Gauteng*,¹⁸ a full bench, per Wilson AJ, observed as follows:

'There will no doubt be difficult cases in which, having accepted an agreed fact as true, a party will in good faith wish to change tack, perhaps because of the emergence of a series of factors or complications which were not considered by the experts previously, or because of new information about the qualifications or expertise of a particular expert, or because of the emergence of new learning on a subject that might be particularly relevant to the facts at hand. This is not a closed list. There may be a variety of other reasons for revisiting expert agreements, capable of motivation by one of the parties . . .'¹⁹

The court proceeded further:

'However, given the importance of expert agreements, their repudiation should, in my view, be rare. When necessary, it should be motivated, on application to the trial court, and that application should be granted on good cause shown. In seeking to show good cause, a party ought, at the very least, to identify the specific agreements sought to be repudiated, and the facts to which they relate; to set out, clearly and succinctly, the new facts sought to be proved;

¹⁷ Emphasis added.

¹⁸ 2021 JDR 2485 (GJ).

¹⁹ Para 37.

to explain why those facts are so material to the issues at trial that they justify the undoing of the relevant expert agreements; and to demonstrate that the need to introduce those facts overcomes any prejudice caused to any party by setting aside the expert agreements already reached.²⁰

[12] An agreement reached on fact or opinion or both, as contained in a joint minute, is designed to narrow the issues for determination at trial. A party is entitled to prepare and to run his or her case on the basis that what the experts have agreed does not form part of the dispute. As Rogers AJA remarked in *Bee*, the object of litigation should be just adjudication, achieved as efficiently and inexpensively as reasonably possible. Private funds and stretched judicial resources should be expended only on genuine issues.²¹ It would seem to follow that the longer the delay in any attempted repudiation of a joint minute, the higher the threshold must be for successfully demonstrating good cause.

[13] The difficulty that faces the defendant in the present matter is that Dr Brummer has failed to explain why the admissions are of such vital importance to the trial issues that the joint minute can be repudiated, at this stage, either as a whole or in part. He has also failed to address the obvious prejudice that will be caused to the plaintiffs if the withdrawal of the admissions is allowed. After the filing of the joint minute on 9 October 2024, six weeks of trial ensued. The plaintiffs conducted their case according to the experts' agreement in relation to the databases in question; the defendant conducted its defence on the same basis, cross-examining witnesses and putting its version in accordance with the agreed facts. If the court were to permit the repudiation or withdrawal sought, then the full consequences thereof for the proceedings would be unknown. It may (or may not) have a bearing on Mr Johnson's opinion; it may (or may not) have a bearing on the evidence already led by Mr Mulder. There is, too, the troubling question about what would have to be made of the versions already put by counsel on behalf of the defendant. It is impossible to determine the length of an unknown piece of string.

²⁰ Para 38.

²¹ *Bee*, para 67.

[14] Counsel for the defendant pointed out that fair play in litigation dictates the rejection of agreed facts which are incorrect. Conversely, however, fair play also dictates that the repudiation or withdrawal of admissions, at this stage of proceedings, not be tolerated. Dealing briefly with the suggestion made by the defendant that the application be held over for determination in argument at the end of the matter, as was the case in *Jacobs & Nel (Pty) Ltd and Others v Van der Merwe and Another*,²² it is necessary to remark that this was not the relief contemplated in the founding papers. The delay in that matter was not of the same magnitude; it was, moreover, the plaintiffs who brought the application prior to closing their case. The circumstances are distinguishable.

[15] The court is not satisfied that there is merit in the present application. Regarding costs, the scale and complexity of the matter justify an award on scale C, but not on the punitive basis sought by the plaintiffs.

[16] Consequently, the following order is made:

- (a) the application is dismissed; and
- (b) the defendant is ordered to pay the plaintiffs' party-and-party costs, including those of two counsel, on scale C.

JGA LAING
JUDGE OF THE HIGH COURT

²² (Unreported, case no. 64/2020, Eastern Cape Division, Makhanda), 17 September 2024.

Appearances

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Date heard:	30 January 2026.
Date delivered:	3 February 2026.