



REPUBLIC OF SOUTH AFRICA

63/98

***THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA***

Case No 173/95

In the matter between :

NGODWANA MILL LTD

Appellant

and

EGGERS TRANSPORT CONSULTANCY CC

Respondent

Coram: Vivier, Harms, Schutz, Zulman JJA *et* Melunsky AJJA.

Heard: 31 August 1998

Delivered: 09 September 1998

JUDGMENT

VIVIER JA

VIVIER JA:

The respondent ("the plaintiff") is a close corporation carrying on business as a transport economics consultant. The appellant ("the defendant") operates a paper mill at Ngodwana in Mpumalanga. The plaintiff instituted an action against the defendant in the Witwatersrand Local Division for the payment of fees in terms of a consultancy contract ("the contract") concluded between the parties during June 1988 and amended during July 1988. The plaintiff's case essentially was that it had been instructed by the defendant to investigate and report on the latter's road and rail transport system with a view to effecting cost savings and improving operational efficiencies; that it had duly carried out its mandate and made certain recommendations; that the defendant had accepted and implemented certain of its recommendations and that this had resulted in substantial savings which entitled it to the fees claimed. Neither the

conclusion of the contract nor its terms were disputed by the defendant. It was denied, however, that the plaintiff had performed its mandate or that any of its recommendations had been implemented.

During the course of the trial before **Botha J** it was ordered by agreement between the parties that the issue of the defendant's liability under the contract be determined first and separately from the issue of the quantum of the claims, which was ordered to stand over for later determination. After evidence had been led and argument heard on the issue relating to the defendant's liability **Botha J** dismissed certain of the claims but granted an order declaring that, save in one respect (which I will refer to later), the plaintiff had performed its mandate to the extent that the recommendation contained in para 11(1) of its report dated 25 August 1988 ("the Eggers Report") had been accepted and implemented resulting in cost savings. The defendant was ordered to pay the costs of the action. With

the leave of the Court *a quo* the defendant now appeals to this Court.

The defendant is one of several companies in the Sappi group of companies and is a wholly owned subsidiary of Sappi Limited ("Sappi").

The latter company operates through a number of management companies such as Sappi Kraft (Pty) Ltd ("Sappi Kraft"), Sappi Waste Paper (Pty) Ltd

(formerly Saveall Waste Paper (Pty) Ltd) ("Saveall"), Sappi Fine Papers

(Pty) Ltd ("Sappi Fine Papers") and Sappi International (Pty) Ltd ("Sappi

International"). The mills in the group are operated on a decentralised and

autonomous basis. Thus the Ngodwana mill is operated by the defendant

for its own account although it was at first managed by Sappi Fine Papers

and has been under the management of Sappi Kraft since it started

producing kraft liner board (the lining of cardboard boxes) in 1985. Other

mills managed by the latter company are the Tugela mill and the Cape Kraft

mill. The Enstra, Adamas and Stanger mills are managed by Sappi Fine

Papers. During 1988 Sappi also acquired the Saiccor mill at Umkomaas and the Usutu mill in Swaziland. Each of the mills within the Sappi group was responsible for its own arrangements for the transportation of its products to its customers.

At the time of the compilation of the Eggers Report, kraft liner board and pulp were railed from the Ngodwana mill to the Reef by the South African Transport Services (SATS) as it was then known, and paper for newsprint ("newsprint") was conveyed to the Reef by road by Norman's Transport Line (Pty) Ltd ("Norman's") in terms of a written agreement which was due to expire on 31 May 1989. Pulp was railed to the Mondi paper mill at Durban and pulp, kraft liner board and newsprint for domestic use were transported to Durban and Isithebe by road. Products sent to Durban for export were conveyed mainly by rail but also by road. Products sent to the Eastern and Western Cape were conveyed both by road and rail.

The original contract with the plaintiff was concluded on defendant's behalf by Mr C Casalvolone of Sappi Kraft and its terms appear from a letter dated 3 May 1985 addressed to Casalvolone. The plaintiff's mandate was to investigate the defendant's road and rail transport arrangements (both its own and hired transport) with a view "to effecting cost economies and improving operational efficiencies". The plaintiff would be entitled to fees only if any of its recommendations were "accepted and implemented" and savings effected as a result. No fees were payable unless savings of at least R10 000 (including tax savings and additional net revenue) were achieved. The fees payable were the amount of R5 000 or 25 percent of the first year's savings, whichever was the greater. On 11 July 1988 the contract was amended when the plaintiff's mandate was extended to include an investigation of the warehousing arrangements with Grindrod's Warehousing for newsprint carried by Norman's to the Reef. The

extension of the mandate was embodied in a letter addressed to the plaintiff by Mr S H Walker of Sappi Kraft.

The plaintiff's case on the pleadings was that three of the recommendations in the Eggers Report were accepted and implemented by the defendant. The first of these appears in para 11(1) of the section of the report headed "Railage of pulp, kraft liner board, newsprint and soap skimmings" and recommends that "together with Mr Van Schalkwyk of the Tugela mill, Mr Rohrs of the Stanger mill and the responsible member of the Saveall management team you investigate the possibilities and relative savings of annulling the current Tugela contract and negotiating a new contract with SATS for the combined tonnage, at a significantly higher discount". (Earlier in the report reference is made to a contract between SATS and the Tugela mill for the railage of the latter's products at an effective discount of 26,9 percent and to the fact that Saveall was railing

waste paper to the Ngodwana mill for use in its production process.)

The second recommendation relied upon by the plaintiff in the pleadings relates to the transportation of newsprint and kraft liner board to Durban and Isithebe. At the trial the claim based on the acceptance of this recommendation was not proceeded with.

The third recommendation relied upon by the plaintiff appears in paras 23 to 30 of the section of the Eggers Report headed "Transportation by road of newsprint to the PWV area". The claim based on this recommendation was dismissed by the Court *a quo* on the ground that it dealt solely with the transportation of newsprint to the Reef by road and that railage of newsprint was not recommended. The Court *a quo* held that the recommendation in para 11(1) that all existing rail transport be combined in one contract did not assist the plaintiff since it was specifically not recommended that newsprint be railed to the Reef. There is no cross-appeal

against the dismissal of this claim.

During the trial a further claim based on the savings achieved by railing waste paper to Ngodwana was introduced. This claim was dismissed on the ground that any savings achieved were not for defendant's account but for the account of Saveall. There is no cross-appeal against this finding either.

The only issue before this Court is accordingly whether the trial Court correctly held that the recommendation in para 11(1) of the Eggers Report was accepted and implemented by the defendant. Counsel for the appellant correctly conceded that if this was established the plaintiff would be entitled to remuneration. The trial Court held that the defendant implemented this recommendation during 1989 when, together with a number of other companies in the Sappi group, it concluded a comprehensive contract with SATS for the railage of the total combined tonnage of their products at

reduced rates ("the 1989 SATS Contract"). The trial court rejected the defendant's contention that in concluding the 1989 SATS it had no regard to the plaintiff's recommendations and was not in any way influenced thereby and that this contract was the result of negotiations with SATS which had started long before the Eggers Report.

The terms of the 1989 SATS contract as well as those of an earlier contract ("the 1987 SATS contract") were not in issue. Those of the 1987 SATS contract appear from a letter dated 26 June 1987 addressed by SATS to Sappi Kraft in which SATS offered to rail paper from the mills at Ngodwana and Stanger at reduced rates in specially modified rail trucks called SPLJ's. On 31 August 1987 a further reduced rate for the transportation of paper from Ngodwana was offered. These offers were accepted on 2 September 1987. In the case of the defendant the 1987 SATS contract provided only for the railage of paper to Durban. In the

event no products were ever transported in terms of this contract and it was not in issue that its sole purpose was to serve as justification for the building of the SPLJ trucks.

In a letter dated 20 June 1989 SATS referred to the 1987 SATS contract, announced that a fleet of 164 SPLJ trucks would be in operation in the near future and enquired whether the defendant wished to continue with the existing agreement or preferred a new agreement to be negotiated. On 3 August 1989 SATS prepared a new draft agreement which was sent to Sappi Management Services (Pty) Ltd, ("Sappi Management Services") which was at that stage the defendant's holding company. Save for the Tugela mill contract which existed prior to this date, it was the first time that a contract for the railage at reduced rates in trucks other than the SPLJ's was proposed. This draft was never signed on behalf of Sappi Management Services and on 16 October 1989 the SATS offer was extended to include

further routes at reduced tariffs. Further amendments were thereafter effected in an ongoing exchange of telefaxes so that the final written contract was signed only on 29 March 1991, two days before it was due to expire. It is common cause, however, that from the time it was first implemented on 1 September 1989 the parties regarded themselves as bound thereby.

The 1989 SATS contract was indeed a comprehensive contract. The parties were Spoornet, a division of Transnet Limited (the successor to SATS) on the one hand, and Sappi and seven of its subsidiaries, including Sappi Kraft, on the other. It provided for the railage of a certain minimum tons of Sappi products consisting of paper, woodpulp, novoboard, sawn timber and waste paper between points stipulated at reduced rates. It converted the defendant's transportation of its products to the Reef from road to rail. It provided for conveyance by rail in DZ-, B-, DJ-, DZA-, DZI, DLJ-, SPLJ-, STJ3, STL7 and DGLJ type trucks. Provision was made

for the off-loading and warehousing of goods railed to the Reef at the Kaserne and Natalspruit sidings from where the goods would be conveyed by road to the defendant's clients. Kaserne was used from 1 September 1989, but the defendant was apparently not satisfied with the service at Kaserne and also wanted direct involvement in its warehousing facilities. The 1989 SATS contract was accordingly amended to provide for the offloading and warehousing to take place at Natalspruit private siding from June 1990 by a SATS subsidiary, Forest Products Distributors (Pty) Ltd, under defendant's control.

The trial court held that it was the announcement of the availability of the SPLJ trucks in the letter of 20 June 1989 which sparked off the further exchanges between the parties and which ultimately resulted in the conclusion of the 1989 SATS contract. The trial court said that the agreement relating to rates for railage in SPLJ trucks was a common feature

and the link between the 1987 and 1989 SATS contracts and that the one flowed out of the other. Railage in trucks other than the SPLJ trucks, however, had no place in the defendant's earlier scheme of things, and the inclusion of these ordinary trucks in the comprehensive 1989 SATS contract came as a result of the Eggers Report and was not something which the defendant had previously considered. The trial Court accordingly excluded the SPLJ- and all new or modified trucks from the declaratory order granted by it.

On the question whether the concept of a comprehensive SATS contract using trucks other than the SPLJ's resulted from the Eggers Report the defendant's main witness was Mr A Christison. He joined the Sappi group in May 1983 as export manager of Sappi Fine Papers, which at that stage managed the Ngodwana mill. From the beginning of 1986 he was attached to Sappi International as group export and shipping manager for

fine print and kraft liner board. In February 1989 he was appointed as group transport manager.

Christison testified that the Ngodwana mill started producing newsprint in September 1983 and was scheduled to produce upwards of 2000 tons of pulp and paper a day at full production. After 1985 it also commenced the production of kraft liner board. From the outset he was dissatisfied with the condition in which products destined for export were delivered by SATS at the Durban harbour. Products were often damaged or soiled beyond repair due to a variety of causes associated with railing the products in the DZ type rail truck, which was the only type then used by SATS. An excessive amount of money was spent on repairs caused by transportation damage and some paper reels had to be repulped. Delays caused by damaged products affected customer service. The same problems were experienced with newsprint which was at that time railed

to the Reef. This led to an application during late 1983 to the then Road Transportation Board for a road carrier permit to transport newsprint from Ngodwana to the Reef and waste paper back to Ngodwana by road. The application was resisted by SATS and the resultant dispute was only resolved when review proceedings were decided in favour of Sappi Management Services in a judgment delivered by **Van Zyl J** on 4 February 1987 in the Transvaal Provincial Division. At the stage when application for a permit was made, road transportation was cheaper than rail transportation. This position was reversed subsequently.

Christison said that the SATS service did not improve after 1983.

During the years 1983 to 1986 he visited a number of overseas countries to investigate the transportation systems and rail trucks used to convey products from mills in those countries. During late 1985 he started negotiations with SATS for the development of a new specialised rail truck.

He finally found the truck he was looking for in France and he persuaded SATS to convert an existing truck to his specifications. The result was the SPLJ-type truck and the 1987 SATS contract. This contract was, as I have said, intended to be no more than a commitment from Sappi required by SATS before commencing the construction of the new trucks. The first of these came off the production line only in April 1988 and the last in December 1988. An improved version, the SPLJ2, was first produced in June 1991.

Christison testified that, despite having concluded the 1987 SATS contract, the Sappi management was, for a number of reasons, not prepared at that stage to conclude a comprehensive contract with SATS. He said that they were not prepared to sign any contract "that even remotely suggested perpetuating the DZ situation". He described the consequences of using the DZ trucks as "an ongoing tale of woe and disaster" and said

that all the D- and B type trucks were not of an acceptable standard. He said that the SATS rail service had other serious shortcomings as well. The transit times were unreliable and a particular consignment could take anything between two and eleven days to arrive at its destination. SATS used to hold back trucks and then bunch and dispatch them together either as a whole train or part of a train. This resulted in large volumes of products being delivered to customers at the same time which they could not handle. Sappi therefore considered it essential to have trains running according to a fixed timetable and for provision to be made for warehousing at the end of each route before concluding any long term contract with SATS.

Christison spent the time between February 1988 and July 1988 at the Houston office of Sappi International in the United States and was unaware of the Eggers Report until his superior, Mr J Forbes, handed him a copy on

13 November 1988 and asked him for his comment. He did so in a letter to Forbes the next day in which he recommended that "one person be appointed to negotiate this arrangement to a satisfactory result and thereafter we get on with taking the sensible parts of this report and include them into the Groupwide exercise we have advocated". Christison testified that he realised at the time that the one sensible part in the Eggers Report was the recommendation in para 11 that a combined contract with SATS be negotiated. He explained that by the words "satisfactory result" he referred to "an agreement between Eggers and Sappi as to what was right about it and what was wrong". He expected the report to cause trouble for Sappi, and in cross-examination specified the trouble as follows :

"The point is, Mr Christison, as you have told us, the principal reason why you were expecting trouble here, is because there was a sensible portion of the report and on your contention, that was being implemented, but not as a result of the report?"

You were doing so in any event? --- No, I told you what the problem was, it related to the financial arrangements.”

There are other passages in Christison's evidence which are to the same effect. They show, in my view, that he was prepared to accept the para 11(1) recommendation in the Eggers Report provided a more reasonable remuneration was negotiated. These passages are consistent with what Eggers testified Christison told him after he had presented his report, as I will show later.

Christison testified that even before he saw the Eggers Report he had on more than one occasion suggested to Forbes that Sappi should undertake a full review of its domestic transport arrangements. The abovementioned recommendation in his letter meant no more than that the Eggers Report be taken into account in the bigger survey he had previously suggested to Forbes. He conceded, however, that he knew very little about what he

termed domestic transport prior to his appointment as group transport manager. In fact, one of the reasons he gave for not taking steps to finalise the recommendations in the Eggers Report was his lack of knowledge of the domestic transport market. There is nothing to suggest that Christison ever discussed matters such as those which form the subject-matter of the para 11(1) recommendation or the use of trucks other than the specialised trucks with Forbes. Christison's evidence as to whether he ever considered negotiating contracts for trucks other than the SPLJ's was described by the Court *a quo* as contradictory.

In re-examination Christison changed his stance and declared bluntly that there were no points in the Eggers Report which Sappi could use.

One of the copies of the Eggers Report before the trial Court contained handwritten notes made by Christison when he first read the report. A handwritten note stating "Invalid - already negotiated for Durban

exports" was made against para 15 of the report which dealt with the estimated savings in respect of the para 11(1) recommendation. This note gives a figure for the Durban exports to the effect that the plaintiff's claim for remuneration should be reduced by 53 percent due to the plaintiff's failure to take into account the transport to Durban in the SPLJ trucks. The trial Court held that his note shows that Christison accepted the merit of the plaintiff's recommendation and the resultant claim for remuneration at least in part.

In a memorandum on the Eggers Report to the Sappi Kraft general manager dated 6 September 1988 Casalvolone referred, *inter alia*, to the Tugela mill's contract with SATS and stated that there would be little point in the defendant concluding a similar independent contract. He continued as follows :

"It is believed though that improved rates are a possibility providing the approach to SATS is encompassing the whole of the Sappi Group requirements, and thus would strongly recommend this route ..."

Casalvolone nevertheless proposed that the plaintiff's recommendation be rejected and that the plaintiff be "re-engaged on terms to be agreed upon for the whole group exercise". It would thus seem that Casalvolone, like Christison, was prepared to accept the plaintiff's recommendation provided an acceptable remuneration was paid. Casalvolone did not testify at the trial to explain the passage from his memorandum quoted above which, on the face of it, indicates an acceptance of the para 11(1) recommendation.

During June to August 1989 Christison, with the assistance of a newly appointed transport consultant, Ms Agnesia Agrella, undertook a comprehensive and detailed analysis of the entire transportation and distribution system of the Sappi group, including that of the Ngodwana mill,

whose production by then exceeded that of any other mill in the group.

Christison's analysis was presented to the Sappi board and according to Forbes it was on the strength of his report that the 1989 SATS contract was concluded.

The plaintiff called only one witness, Mr Rudiger Eggers ("Eggers"). He was the sole author of the Eggers Report. He testified that he visited the mill at Ngodwana on 14 June 1988 to commence his investigations. He spoke to Casalvolone and it was immediately clear to him that Casalvolone's reasons for not having concluded a comprehensive contract with SATS were not valid and that his first recommendation would be for defendant to negotiate such a contract with SATS. The reasons given by Casalvolone, according to Eggers's notes of the meeting, were that SATS insisted on tonnage and time commitments and that Casalvolone was afraid that if market conditions changed or there was a factory break-down

defendant would not be able to deliver in terms of the contract. Eggers knew that these objections could easily be overcome. Together with his father, Dr Eggers, who was a co-member of the plaintiff, he attended a number of meetings with the defendant's representatives after completing the report. When he presented the report on 25 August 1988 he read the report to the defendant's representatives and left the report with them to consider. He said that he never heard from them again. He eventually managed to arrange a meeting on 3 November 1988 with Forbes and Mr K Jokipii who was the newly appointed chief executive of Sappi Fine Papers.

At this meeting further copies of the Eggers Report as well as a schedule itemising the recommendations and estimated savings were handed to the Sappi officials. Dr Eggers recommended that one person be appointed to negotiate a combined contract with SATS. Forbes and Jokipii undertook to discuss the appointment of such a negotiator but nothing further was

heard from them. Eggers arranged a further meeting with Jokippi which took place in early January 1989. At this meeting Jokippi said that a negotiator would be appointed shortly. He confirmed this at a further meeting with Eggers on 31 January 1989. At Eggers's insistence another meeting with Forbes took place on 15 March 1989. Forbes then told him that a decision had already been made for the appointment of a negotiator but that his name could not yet be announced. He undertook to notify Eggers as soon as possible so that he could meet the person who had been appointed. Within the next day or two Forbes advised Eggers that Christison had been appointed to the position and a meeting was held with him on 20 March 1989. According to Eggers, Christison criticized the financial implications of the contract and said that he wanted to re-negotiate the fee basis. He also offered Eggers other work. Christison gave no indication whether the plaintiff's recommendations were being

accepted. Eggers said that he held a further meeting with Christison on a later date he could not recall. At this meeting Christison said that he intended "finalising the fine papers arrangement", referring to a report the plaintiff had compiled for Sappi Fine Papers, before he would entertain any discussion on the Eggers Report. He again offered Eggers additional work. At a further meeting with Eggers during August 1989 Christison again said that he would not discuss the Eggers Report until he had finalised the fine papers arrangement. He did not hear from Christison again.

The Court *a quo* held that Christison's initial reaction and comments on the Eggers Report, as well as the treatment which Eggers and his father received at the hands of the Sappi officials during the meetings referred to above, provided strong substantiation for the proposition that the plaintiff's recommendations had been accepted.

The recommendation in para 11(1) of the Eggers Report that a

comprehensive contract for the railage of the combined products of the Sappi mills be concluded seems a very simple one, as Botha J has said in his judgment. The fact remains that, apart from the 1987 SATS contract which provided for the railage of products from the Ngodwana and Stanger mills in SPLJ trucks, defendant did not attempt to do so prior to the Eggers Report. Christison suggested that the main reasons actively considered by him for not concluding a comprehensive contract earlier were the absence of proper warehousing at the end of each route and the irregular train service which made the use of the older type of trucks totally unacceptable. He said that it was the provision of sufficient warehousing and scheduled trains in the 1989 SATS contract which persuaded Sappi to conclude a comprehensive contract using trucks other than the SPLJ's. I have already pointed out that prior to his appointment as group transport manager Christison had limited knowledge of domestic transport in the Sappi group.

He clearly had no authority to conclude domestic transport agreements on behalf of the defendant or any other mill. Both Christison and Forbes conceded in their evidence that the conclusion of a collective contract using trucks other than the SPLJ's was never discussed by them.

Christison's reasons for not concluding a comprehensive contract earlier are not convincing. As regards warehousing he conceded that 72 percent of the defendant's total production at the time of the Eggers Report was railed to four destinations where no additional warehousing was required, ie Sappi International in Durban, the Sappi mills at Stanger and Enstra and the Mondi mill in Durban. Under the 1989 SATS contract products were railed to these destinations as before save for the introduction of SPLJ trucks. With regard to the lack of scheduled trains, there was no suggestion that these could not have been introduced as part of the comprehensive contract recommended in the Eggers Report.

There are other reasons which come to mind why a comprehensive contract was not earlier concluded. One is that road transportation of products from the mills was traditionally cheaper than railage, hence Sappi's application in late 1983 for a road transportation permit. According to Christison this position was later reversed so that railage became the cheaper medium. The Eggers Report reminded Sappi of this fact when it was stated in para 7 of the report that "SATS will always take the road transportation rates into account and endeavour to beat them". Another reason is the autonomy of the Sappi mills. In this regard it should be emphasised that Christison only became group transport manager, a newly created post, and commenced his own investigation of the Sappi transport system, long after the Eggers Report had been submitted to Sappi.

In all the circumstances one is driven to the same conclusion as the one reached by the trial Court namely that railage in trucks other than the

SPLJ trucks had no place in the defendant's scheme of things and that it was the Eggers Report which caused the use of these trucks to be included in the 1989 SATS contract. I should add that had Christison or the defendant's officials previously considered a comprehensive contract using ordinary trucks, their reaction to the Eggers Report would have been totally different from the one evinced by Christison's notes and letter, his treatment of Eggers and Casalvoloni's memo to which I have already referred. Their reaction would then simply have been that the Eggers recommendation had already been considered. Instead their reaction shows, in my view, an acceptance and implementation of the recommendation in para 11(1) of the Eggers Report. The fact that this recommendation was included in a contract which also dealt with other aspects is irrelevant.

For these reasons the appeal is dismissed with costs.

W VIVIER JA.

Harms JA)

Schutz JA)

Zulman JA)

Melunsky AJA) Concurred.