

SOUTH AFRICA / JUDGMENT

Cilliers v Agri-Com Co-Operative Limited and Another (2126/2019)

[2020] ZAFSHC 264 (29 December 2020)

[2020] ZAFSHC 264

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman

CASE / FILE NUMBER

2126/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE PROVINCIAL DIVISION

Case No.: 2126/2019

In

the matter between:

MARIA
ELIZABETH
CILLIERS
Plaintiff[1]
and
AGRI-COM
CO-OPERATIVE LIMITED
1st Defendant[2]
JAN
ADRIAAN
DAVEL
2nd
Defendant[3]

Coram:

Opperman, J
Date
of hearing: 20 &
21 October 2020; Argument on 20 November 2020 by means of Heads of
Argument

Delivered:	The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 29 December 2020. The date and time for hand-down is deemed to be 29 December 2020 at 15h00.
Summary:	Trial - factual dispute - terms of oral agreement - alleged breach of contract

JUDGMENT

I Introduction

- [1] “The terms of the contract are the promises agreed on by the parties that together make up the contract. When there is doubt or dispute about what statements, oral or written, or conduct should be

included in the contract as terms, a court may have to carry out a two-stage inquiry to decide: first, what was said, written or done and second, whether it must be included among the terms of the contract.”[4] (Accentuation added)

- [2] The issue here is the determination of the terms of an oral contract in or about March[5]

2017. The 2nd Defendant did not join the litigation in any manner whatsoever and did not attend court. The case is a factual dispute and the alleged facts will become clear later. I apologise if some facts are re-iterated but it causes clarity where suitable.

II The Law

- [3] I deem it apposite to first deal with the law since the impression that flows from the case in its totality is that experienced, established and intelligent individuals want to blame the justice system for their slovenly conduct during their dealings. If they followed and respected the basic Law of Contract this case would not have ended in litigation nor so in the Free State Division of the High Court.[6]

- [4] Notwithstanding the Applicant's right to commence with litigation in the court of her choice in terms of section 34 of the Constitution of the Republic of South Africa, 1996; the Regional Court has jurisdiction and costs could have been curtailed. I will revert back to this aspect when I deal with costs.

- [5] An application for summary judgement against Agri-Com became opposed in the motion court on Thursday, 4 July 2019. Leave was granted to Agri-Com to defend the action and costs of the application for the

summary judgment was ordered to be costs in the cause. The application is for:

1. Payment of the amount of R213 545.58;

2. Interest on R213 545.58 calculated at 10,25% per year from 30 June 2017 up to date; both days included; and
 3. Costs.
- [6] The basic prerequisite in the circumstances of this case and of contract, is that it should be in writing to ensure legitimacy and security and avoid dispute. The manner in which business was conducted here is perplexing and all parties now have to suffer litigation to sort out the mess they created and that could have been prevented.
- [7] As noted, the matter in casu revolves around the Law of Contract. There is a tug-of-war between commercial certainty and prompt remedies in law for non-compliance with contracts on the one hand; and the right to access to courts on the other hand.
- [8] In *Basson v Chilwan and others*
- [1993] ZASCA 61; 1993 (3) SA 742 (A) at 762H Eksteen JA referred to:

“The paramount importance of upholding the sanctity of contracts, without which all trade would be impossible ...”

Further,

“If there is one thing that is more than public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this para-mount public policy to consider - that you are not lightly to interfere with this freedom of contract.”

(Accentuation added)

- [9] Justice Ackermann in *Ferreira v Levin NO*; *Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) at paragraph 26 described it as “a central consideration in a constitutional state”. These statements aim for reasonable certainty, so that parties can go about their business knowing the rules of the game; constitutional economic integrity is vital. (Accentuation added)
- [10] Moseneke J (as he then was) pointed out in his dissent in *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC) at paragraph 98 that:

“Public policy cannot be determined at the behest of the idiosyncrasies of individual contracting parties. If it were so, the determination of public policy would be held ransom by the infinite variations to be found in any set of contracting

parties.”(Accentuation added)

- [11] At the heart of the above is the basic principle that commercial transactions, freely and honestly entered into, and not vitiated by fraud, misrepresentation, duress or public policy, should be respected and enforced. It is the case here. The truth may not be warped into a confusion of facts.
- [12] The constitutional right of the defendant lies in the use of courts to settle disputes; the right to access to courts in terms section 34 of the Constitution of the Republic of South Africa, 1996. Furthermore, to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. The Plaintiff has the right to commercial certainty and prompt remedies in law for non-compliance with alleged contracts and to be protected against delaying tactics of debtors. I want to add to this that abuse of the goodness of people and the law will not be tolerated and scheisters may not escape with impunity. To bring a case to court that clearly has a truth and the truth to be beknown to the Plaintiff is wrong.
- [13] Stellenbosch Farmers' Winery Group Ltd v Martell et Cie
- [2002] JOL 10175, 2003 (1) SA 11 (SCA) gives guidance to the adjudication of the issue that presents in this case:
- "[5] The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses;*
- (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi)

the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[14] The onus is on the Plaintiff to prove the terms she relies upon for her claim. The *Kriegler v Minitzer* and another 1949 (4) SA 821 (A) dictum applies. The person who claims relief must assert and prove the facts on which that claim is based. If the defendant, instead of merely denying the Plaintiff's version of a contract, adduce different terms as a defence, the onus will remain on the Plaintiff to prove her version of the contract in order to succeed in her claim.[8]

III "What was said, written and done"

[15] The Plaintiff has no proof whatsoever of a contract that the 1st Defendant is obliged to pay for the baling of the fodder of a third party, the 2nd Defendant. She relies on speculation and the foibles *Moseneke, AJA* referred to above. . The judgment will also show that her evidence is riddled with contradictions and improbabilities. It is fitting to introduce the parties and the events that caused the litigation at this stage.

[16] The parties to the litigation are:

1. The Plaintiff is Maria Elizabeth Cilliers also known as "Noekie", a major female and experienced business woman, residing at Plot 10 Eden, Bethlehem,[9] Free State Province. Since 1989 she and later her two sons, run a business whereby they harvest and do baling for farmers over the province and further.
2. The 1st Defendant is Agri-Com Cooperative Limited, a corporation registered in terms of the Cooperatives Act 14 of 2005 with registration number 2000/000025/24 and main place of business in Bethlehem in the Free State Province. They specialise in loans to farmers through the Landbank to enable farmers to, among others, harvest their crops. They specialise in the harvesting of seed. They do not trade in fodder and have never contracted as such.
3. Jan Davel is a major male farmer trading as JA Davel Boerdery, with his main place of business being the Farm Thaba Bosigo, Reitz, Free State Province. It is his crop of seed and fodder that forms the crux of the case. His conduct on the facts of the case borders on crime.

[17] The sloppy and haphazard manner in which Agri-Com conducted their business reflects in the documents that were handed in by the Plaintiff. The standard of the documents that were produced is most disturbing. These are a slapdash number of illegible handwritten notes that can be open to many interpretations that must now be interpreted in search for the truth. It purports to be the contracts that entails hundreds of thousands of Rands. If my interpretation of the business is correct, Agri-Com handled Landbank-monies to the sums that at least deserves a properly drafted contract. They now want for the justice system to solve their issues whereas they, as established experienced and highly educated business women and men could have done it with the application of basic professionalism and work ethic. They will now have to bear the consequences of their deeds and may not blame the justice system if the outcome does not suit them.

- [18] The same can be said of the Plaintiff; she is not the helpless destitute 67 years old lady that she portrays herself to be and that was allegedly foiled by hardened business people. She has been in the profession for decades and knows the tricks of the trade very well; this includes her customers.
- [19] To the contrary however; the impression gained from both the Plaintiff and the 1st Defendant is that Agri-Com treated the Plaintiff with the utmost grace in the past. I refer to, for instance, the Boshoff-case that I will deal with later. In the instance Agri-Com endeavoured to assist her to have a job and an income at Davel's by providing the input costs. If it was not for that she would have had to move her whole operation somewhere else and had to wait for another contract. She very well knew that Davel was of questionable integrity and financially unstable.
- [20] The rogue in the case is Jan Davel, the 2nd Defendant. It is common cause that on 24 March 2017 he was financially good with a crop, ready to be harvested and the fodder to be baled to, at the least, the amount of R1,169 million Rands. His account stood at plus minus R500 00.00 in debt with Agri-Com in March 2017. There was ample security for Agri-Com to grant him a loan to get his harvest and fodder of the land.
- [21] He booked the Plaintiff in November/December 2016 to do the harvesting and the baling. Pithily he, with creative treachery, caused Agri-Com to pay for the harvesting of his crop of the previous season; the year before
2017. He did not deliver the crop to Agri-Com in terms of a session and it is up until this judgment, not known what happened to the harvest. This caused Agri-Com to be weary of him.
- [22] He with the utmost cunningness persuaded the Plaintiff to convince Agri-Com to carry the cost for the harvesting of the Teff[10] on his land as in March 2017. He knew very well that the Plaintiff and Agri-Com had a good business relationship. He went as far as to convince her to influence Agri-Com to supply the input costs for the harvesting and bailing of the fodder.
- [23] He, again, did not deliver on the seed from the Teff and left Agri-Com to carry the costs for the harvesting thereof. He sold the bales of fodder to other entities in a sly and fraudulent manner; surreptitiously so and under the noses of the 1st Defendant and the Plaintiff. They were left destitute and defrauded.

- [24] To take a step back; with the numbers to their disposal Agri-Com assured the Plaintiff that Davel has the capacity to pay her for the baling of the fodder. They even undertook to ensure that any surplus will be paid over to her before it goes to Davel. Plaintiff now claims that the 1st Defendant undertook to pay her for the baling. This is devoid of any proof or sense and logic. Agri-Com was at the most; on the Plaintiff's own evidence, willing to process the flow of monies to her after Davel paid his debt.
- [25] There is not any proven contract between Agri-Com and the Plaintiff that they will carry the costs of the baling of the fodder towards her; nothing. It is not feasible that any straight-thinking business entity will take that chance to do so in the face of the recent history with Davel. It will be absurd if they pay for the baling knowing that Davel owns them hundreds and thousands of Rands. The probabilities just do not support the claim of the Plaintiff.
- [26] What is more probable is that Agri-Com endeavoured to assist the Plaintiff as far as possible to make some money since her implements, vehicles and workers were already on the farm of Davel when he informed her that he cannot pay her for the harvesting and the baling.
- [27] They, Agri-Com, because they had a session on the seed undertook to pay for the harvesting of the seed. This makes sense. If Davel paid the monies of the fodder into their account they would have processed payment to the Plaintiff and nothing more. They honoured this undertaking immediately when the Plaintiff claimed it.
- [28] As said; they even assisted with the input costs by way of diesel and bale rope; this does not in any manner allow the inference that they will pay for the baling.
- [29] Davel in a sly and fraudulent manner sold the bales of fodder to another party and pocketed the cash. He even evaded his cession contract by delivering the seed from his harvest to unknown entities. He is indeed the villain here and it is not surprising that he is absent from the proceedings.
- [30] The minutes of the meetings and financial statements that were handed in as evidence prove the above beyond any doubt. Reading of these documents also shows an undertaking from the 1st Defendant to pay for the harvesting and input costs of the baling in the form of diesel that later came to include rope too. Statements handed in shows that Davel is in debt with Agri-com to the amount of R1 327 976.64 as in August 2020 but that he was good for credit in the amount of R1,169 million Rands should he have delivered the seed as he contracted in March 2017. Agri-Com acted to protect their assets in the best possible manner circumstances allowed.
- [31] The Plaintiff now wants to hold the 1st Defendant accountable for Davel's conduct and fraud. It is not the law and the reality and Plaintiff knows this. As late as in September/November 2017 she inquired about the outcome of the auctions of Davel's property so as to get some of her money; from Davel not from Agri-Com. This brings me to the numerous versions of the Plaintiff.

[32] The trial consisted of the pleading bundle, 1st Defendant's bundle, a further bundle handed in by agreement by the Plaintiff marked Exhibit A, the oral evidence of the Plaintiff,

oral evidence of Das du Toit in his capacity as director of Agri-Com and oral evidence of Adri Oosthuizen in her capacity as accountant

and director of Agri-Com.

[33] The pun must be pardoned but I had to sift through numerous versions, nuances and circumstances to endeavour a finding. The Plaintiff testified in the trial and handed in the pleadings bundle, together with a new bundle by agreement and some other documents. Her evidence lacked veracity and was contradictory in its own; not to mention in comparison with the strong and stable evidence of Du Toit and Oosthuizen.

[34] The evidence of the Plaintiff is non-specific without any proof of a contract. Her testimony proves that Agri-Com agreed to help her to process monies from Davel to her; not to pay for the services she rendered to Davel. This is her evidence:

1. During November/December 2016 she receive an order from Jan Davel to harvest his crop of Teff. She had been working with him on numerous occasions in the past and knows him well. She accepted the invitation.
2. In the meanwhile, in March 2017 one Kobus (He is not affiliated with Agri-Com) contacted her in urgency and haste and informed her that the crop of Jan Davel must be harvested urgently otherwise it would lose its value. He supplied the seed for the planting of the crop and had an interest in the outcome. Here the first red lights had to start to flicker for the Plaintiff. At the same time, Agri-Com had a session on the seed that was to be harvested. Davel; to the knowledge of the Plaintiff contracted his crop in the form of the seed to Kobus and the 1st Defendant.
3. From her evidence she then immediately took all her implements, vehicles and workers to the farm of Davel to commence with the agreement with Davel that she must harvest and bale his crop urgently.
4. She knew Davel struggled financially and this was confirmed when she arrived on the farm in, apparently, late March 2017. He told her that he cannot pay her for her services and that she had to go and talk to Das Du Toit from Agri-Com. It is not clear what she had to get out of Das Du Toit. She got into her vehicle and met with "Das, Madeleine, Adri and Kobie": "They sat around the desk in Das's office and work out the "costs". It must be noted that the word "costs" was use by the Plaintiff and on the document and not "contract".
5. I pause to emphasize that the words this witness used when she testified are of significance. She never entered into a written contract with Agri-Com. Her terminology or use of words if carefully listen to, is vague. What is also imperative to realise is that Davel fed her the wrong information. This comprises of apparent cessions on the whole of the harvest and the baling held by Agri-Com. She subjectively and truly believed that Agri-Com had a hold on the

baling of the fodder from which she was going to make her biggest profit. How she came to the conclusion if she already knew that the seed belonged to Kobus, is not clear.

6. She believed that the bales of fodder were going to be either, delivered to Agri-Com or they will get the monies from the sale and she will then be paid from the surplus. She felt safe and secure to proceed with the work on the misrepresentation of Davel; not Das du Toit. As the saying goes; no good deed goes unpunished and Agri-Com has to bear the brunt of their willingness to assist the Plaintiff to make a living.
7. The truth of the matter is and was; as was proven by the session contracts that were handed in, Agri-Com only had a cession on the seed; they trade in seed and they did not have any hold on the fodder that was baled. The misconception of the Plaintiff came from Davel. He manipulated her to convince Agri-Com to supply the inset costs for the harvesting in the form of diesel and bale rope.
8. Imperative is the fact that the supply of rope and diesel for the baling does not prove an undertaking from Agri-Com to pay for the baling. It cannot be automatically deemed as conduct that reflect accountability for the payment of the baling of the fodder.
9. None of the documents handed in by way of the minutes confirms that Agri-Com will pay for the baling. There is not any indication of that. To the contrary; it refers to the harvesting that must be co-ordinated between the Plaintiff and Adri and that Davel can decide how much Plaintiff may be paid from the bales. It proves beyond doubt that Davel undermined the Plaintiff and brought her under the wrong impression.
10. From the calculations by Agri-Com he was at all time in possession of the assets in the form of seed to honour his debt. Op 24 March 2017 Davel was good for R1,169million Rands from the Teff and the “akkerbone”. Davel did not even delivered the beans.[11] This is the sum-total of his character.
11. What support the version of the 1st Defendant is that they would have paid Plaintiff from the surplus after Davel had settled his account. Plaintiff had a similar

agreement earlier and it worked very well in the case of one John Boshoff that had a loan with Agri-Com to get his harvest from the land. The Plaintiff did the harvesting and baling. Boshoff honoured his payments and she was paid for her services through a process handled by Agri-Com. One can only hope that Agri-com will discontinue this informal custom immediately.

12. Imperative is the common cause fact that the Plaintiff is not a finance client with Agri-com; in her own words she pays everything in cash. This, among others, confirms that there was not any finance contract between her and Agri-Com at any stage; that they would process payment to her from her client, Davel, is true but it is a completely different legal concept. The client will honour his payment to Agri-Com and then instruct Agri-Com to pay Plaintiff from their surplus or monies available. There is no direct

contract between Plaintiff and Agri-Com at all to be found in all the evidence adduced.

13. The input costs of diesel and bale rope was for the account of Davel and had nothing to do with the Plaintiff. The orders were made out to him and he took control and possession of it. The fact that it was done this way suggests a contract with Davel and not the Plaintiff.
14. The 1st Defendant did not have any legal hold on the bales but held hopes that Davel might possess the integrity to use the monies to pay them. He did not. They also believed that he will deliver the seed to a corporation where they can affect their cession; he did not. They endeavoured an auction but this also failed.
15. A WhatsApp message from the Plaintiff confirmed that she realised that as soon as they get the money from Davel she will be paid. The payment will be from the assets of Davel and not Agri-Com.
16. What stands beyond doubt is that if the monies are somehow obtained from Davel the 1st Defendant will honour the agreement to pay the Plaintiff from the surplus. They will honour their charity venture to the Plaintiff.
17. The record will show that there are several versions of the contract averred by the Plaintiff. This destroys her credibility completely. The first two or three are to be found in the pleadings-bundle that was submitted as evidence.
18. The particulars of claim of the Plaintiff reads that both Davel and Agri-Com instructed her and are jointly liable:

“During March 2017 at Bethlehem an oral agreement was entered into between the 1st Defendant (As represented by Das Du Toit), the 2nd Defendant and the Plaintiff [12] that:

1. The 1st and 2nd Defendant jointly[13] instructed the Plaintiff to, on their behalf, harvest and bale about 140 hectares of Teff belonging to the 2nd Defendant on the Farm Thaba Bosigo, District, Reitz, Free State.
2. In order for the Plaintiff to render the services the 1st Defendant undertook to pay the input costs in the form of the diesel and the bale rope by way of order to the Free State Co-operation Ltd (VBK).[14]
3. The 1st Defendant did, apart from the input costs, also accepted liability for the harvest and bale costs per hectare on conclusion of the work and on delivery of an account to the 1st Defendant.[15]
4. Although the 1st Defendant accepted liability for the input costs in regard to the bale rope, diesel and harvest and bale costs per hectare, the 2nd Defendant was not exempted[16] from his accountability to the account of the Plaintiff.
5. The Plaintiff ‘s account would become due and payable with delivery thereof at the current mora rate interest on any payment outstanding for longer than thirty days.”

19. To pour fuel on the fire of discrepancies on 8 June 2017 an invoice was delivered to Agri-Com for the payment of R308 485.30. On 30 June 2017 Plaintiff received R94 939.72, being payment for the harvesting of the Teff plus VAT and less the amount due by the Plaintiff towards the Trading Division of Agri- Com. She claimed for Teff harvested and fodder baled. One Adri assisted her to complete the invoice. The motive was clearly that the invoice is for VAT purposes and not prove of contract. Agri-Com will pay as soon as Davel pays.[17]
20. On 15 December 2017 in a letter by the legal representative of the Plaintiff addressed to Agri-Com it was stated that:

“3.1 het u klient[18] my versoek om namens Agri-Com sekere stroop-en baalwerk op die lande van Jan Davel te Reitz te doen...”

Important:

“U het my klient ingelig dat u oesfinansiering aan Jan Davel verskaf het en daarom instaan vir die werk by Mnr Davel.”[19]

“Instaan” vir die werk by Davel” is not a contract to pay on behalf of Davel. It is what it is on the facts of the case; when Davel pays she will be paid. This is another flagrant and opportunistic misrepresentation by the Plaintiff.

- [35] The reaction of Agri-Com is that they admit that they undertook to, during or about[20] March 2017, pay for the harvesting of approximately 140 hectares of Teff of the 2nd Defendant and also accept liability for all the diesel bought from VKB.[21]
- [36] The pleadings reflect the further versions of the terms of the oral contract in paragraph 4 of the 1st Defendants Opposing Affidavit by Das Du Toit. It remained stable and with veracity throughout the trial. Adri Oosthuizen was an excellent witness that testified with impressive accuracy. The evidence is:
1. I confirm that on or about March 2017 and at Bethlehem a verbal agreement was concluded between Plaintiff and 1st Defendant, represented by myself and the 2nd Defendant.[22]
 2. I deny that the terms of the verbal agreement were as set out by the Plaintiff in paragraph 5 of the Plaintiff’s particulars of claim.
 3. I confirm that it was agreed that 1st Defendant would pay the Plaintiff for the harvesting of approximately 140 hectares of Teff of the 2nd Defendant on the farm Thaba Bosigo, Reitz District, Free State province.
 4. 1st Defendant also accept liability for diesel bought from the Free State Cooperation Limited.
 5. 1st Defendant did not undertake to pay Plaintiff for baling of the Teff and baling wire. 1st Defendant agreed that, should any of the bales of Teff be sold and the purchase price be paid over to 1st Defendant, 1st Defendant would pay any surplus to the Plaintiff.[23]

6. 1st Defendant duly complied with all its obligations in terms of said verbal agreement by:

6.1 Paying for the diesel purchases made at Vrystaat Kooperasie Limited and;

6.2 Paying for the harvesting costs of 140.9 hectares of Teff. The amount calculated as follows....”

6.3 The session agreement shows that Jan Davel ceded his summer crop of 2015/2016 to Agri-Com. The agreement was signed on 2 March 2016.

6.4 On 15 July 2016 Jan Davel signed a credit agreement with Agri-Com wherein he had put as security a “Dekkingsverband” valued at R300 000.00, “Algemeen Speciale Notariële Verband” BN8151/2013 to the value of R250 00-00 and “Algemeen Speciale Notariële Verband” BN43/2015 to the value of R400 00-00 for his winter production account. His summer production account stood at R304 200.00.

6.5 Exhibit A also consists of hand written minutes of meetings of Agri-Com. The documents are written in terse words, numbers and abbreviations that are open for many different inferences. They are dated 4 April 2017, 5 April 2017, 5 April 2017, 21 April 2017, 24 April 2017 and 8 June 2017.

6.6 The oral evidence of Adri Oosthuizen indicated that she searched for similar minutes in March 2017 and there are none. Reading of the minutes of 4 April 2017 and 5 April 2017 together with the other meetings leads to a conclusion that this is the meeting Plaintiff refers to in March 2017 and Agri-Com will only pay for the harvesting and that: “R250-00/baal wat gelaai word, kan R50-00 in Noekie se rekening betaal word (tef)”, proofs the instruction from Davel. This confirms Agri-Com’s version that the Plaintiff will only be paid by Agri-Com after Davel has delivered on his part of the contract.

6.7 The 1st Defendant’s bundle shows Davel, on 31 March 2017, was indebted to Agri-Com in the amount of R505 483.65. On 31 August 2020 it stood at R1 327 97.00

6.8 Adri denied unequivocally that they will pay for the baling. They trade in seed not fodder. The WhatsApp’s from their phones confirmed that the Plaintiff realised that her monies will only be paid after Davel has paid his dues. It was on 20 September 2017, 16 October 2017 and 8 November 2017.

6.9 The evidence of Adri Oosthuizen was excellent, chronological and to the point. She gave an excellent explanation of the minutes and it concluded into the result that Agri-Com agreed to pay for the harvest and diesel. Rope was given for the input costs of the baling for the account of Davel. Plaintiff would be paid if Davel honoured his payments and Agri-Com will process the payment to the Plaintiff from the surplus. The note indicate harvest and not baling. On 5 April 2015 there was a note that Plaintiff and Adri will deal with the harvesting. Plaintiff rendered the services because she was under the impression that Davel will pay her. She was convinced of this in her testimony; hence her worry about the removal of the bales by Davel. Adri testified that they will never pay for the baling and the note confirms it. The reason why the baling was on the invoice was because they will get the monies from the seed and then pay the Plaintiff. An invoice

is only for VAT and not proof of contract. The payment for the baling would follow payment by Davel from the seed.

IV Conclusion; What may be included in the contract.

The case of the Plaintiff lacks credibility and reliability. The probabilities do not support her case. Numerous core contradictions with the proven reality trips her case. The calibre of her evidence is poor and vague. The documentary evidence that was placed before the court supports the case of the 1st Defendant in some instances and is of no use whatsoever in other instances. In the assessment of the case as a whole; in its totality, the Plaintiff, burdened with the onus of proof, has failed. As was eloquently put in *Body Corporate of Dumbarton Oaks v Faiga* [1998] ZASCA 101; 1999 (1) SA 975 (SCA) at 979J:

“The Judge's failure to decide the case without regard to the wider probabilities is a clear misdirection and entitle us to

reassess Mrs Shiloane's evidence. It was also wrong of the Judge to consider that a non-acceptance of her evidence of necessity requires a finding that she is a deliberate liar and perjurer (at 661B--C). That is an emotional approach. In a civil trial the question is whether her evidence is, on the probabilities, correct. Few witnesses whose evidence is not accepted can be described as deliberate liars and perjurers.”

The probabilities when all the factors were equipoised cause but one ruling and that is the failure of the Plaintiff's case. She might not be a liar but was foiled and deceived by the circumstances and Davel. Charity does not create a contract.

V Costs

This brings me to the aspect of costs. There was not any reason placed before this court as to why a High Court had to be seized with this case. It could have been resolved with due expediency and expertise in the Regional Court. I therefore order that the Plaintiff shall carry the costs for the litigation and that it be calculated on the scale as per the Regional Court.

VI Order

1. The application is dismissed.
2. Costs to be costs in the cause and to be calculated on the scale as legislatively prescribed in the Regional Court.

M OPPERMAN, J[24]

APPEARANCES

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[1] “Noekie”.

[2] “Agri-Com”.

[3] “Davel”.

[4] Bradfield, Christie’s Law of Contract in South Africa, LexisNexis, (2016) 7th edition, Original text by RH Christie. Last Updated: 7th Edition 2016 (reflects the law as at 31 December 2015) at page 180 and 5.1.

[5] The Plaintiff cannot supply a date or proof of the contract whatsoever and the 1st Defendant has no record of a meeting with the Plaintiff in March

2017. The documentation adduced into evidence points to early April 2017.

[6] The Magistrates' Courts consist of District and Regional Courts with a monetary jurisdiction of the District Court being limited to R200,000.00 and below and the Regional Court being limited to R400,000.00 and below.

[7] Also see Rooyendal (Pty) Ltd v Minister of Land Affairs

[2013] 3 All SA 588 (LCC) at [71].

- [8] Due cognisance is taken of the Pillay v Krishna dictum. The facts of this case suit the Kriegler scenario. Also see Harms: Amler's Precedents of Pleadings (8th Edition, 2015) at 106. Also see the cases of African Eagle Life Insurance v Cainer 1980 (2) 234 WLD on 237 F to G, National Employers General Insurance v Jagers 1984 (4) SA 432 ECD at 440 F and Mabona v Minister of Law-and-Order 1988 (2) SA 654 SECLD on 662 D to F as was quoted in the 1st Defendants's Heads of Argument.
- [9] According to the pleadings.
- [10] An African cereal which is cultivated almost exclusively in Ethiopia, used mainly to make flour.
- [11] "Akkerbone" referred to in the contract.
- [12] Note that the Plaintiff avers the oral agreement was between herself, Agri-Com and Davel. During her oral evidence in court, she alleged that the instruction was from Agri-Com alone and not also Davel.
- [13] The Plaintiff's version during her oral evidence is in stark contrast to this. Her version was that Davel said he cannot pay her nor instruct her and that she must get the instruction from Das Du Toit.
- [14] This is admitted by the 1st Defendant as far as the diesel is concerned and that they did pay for rope for the baling. In other words; they contracted to the diesel but outside contract paid for rope.
- [15] This just not make sense in that an entity with no interest in an asset will sponsor it and pay for further service thereon. It borders on the absurd.
- [16] Note that the Plaintiff during the trial claimed from the 1st Defendant only. The fact that Davel was not exempted shows that either she knew that Davel was contracted to pay her for the baling from the sale thereof or she wanted to keep a back door open for if her claim failed. This confirms Agri-Com's version that they would pay Plaintiff on and or after payment by Davel. If only Agri-Com incurred liability as she now avers; then she has no claim against Davel.
- [17] The invoice is not proof of the contract but can go to both versions; that of the complainant that alleges Agri-Com to be accountable for the harvesting and baling or that Agri-Com will pay the Plaintiff as soon as Davel delivered or settled his account.
- [18] Here the version now changed to only Agri-Com that instructed and contracted with her.
- [19] Davel is now relieved from his liability in stark contrast to the pleadings. This again confirms Agri-Com's version that they will pay the Plaintiff when Davel has honoured his side of the contract. If there were discussion in March 2017 there would have been notes. They searched for it but none could be traced.

- [20] Evidence adduce by the 1st Defendant indicates that the Plaintiff might have the date of the contract wrong; she is vague about it. Documentation adduced by the 1st Defendant shows the beginning of April to be the date of the contract.
- [21] This seems to include the diesel for the harvesting and the baling. Not the baling costs itself.
- [22] Note that Davel is included in the contract/agreement. It will later reflect in minutes of a meeting that Davel ordered that Plaintiff be paid from monies earned from the sale of the bales. So, the bales had first to be sold and the monies paid to 1st Defendant and then they can pay her. The WhatsApp messages shows that Plaintiff was waiting for monies to be obtained from Davel
before she could expect payment.
- [23] This corresponds with the minutes of the meetings dated 4-5 April 2017 referred to hereunder. Plaintiff knew very well that this was the agreement because on her own account she testified that she phoned 1st Defendant and informed them that Davel is transporting the bales from the farm. She was worried about it. She wanted to protect the manner in which her income was disposed of.
- [24] The signed document is available in the file.
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