

SOUTH AFRICA / JUDGMENT

Goliath and Another v Chicory SA (Pty) Ltd (3382/2018) [2022] ZAECKMKHC 63 (13 September 2022) [2022] ZAECKMKHC 63

COURT

Eastern Cape High Court, Makhanda

BEFORE

Laing

CASE / FILE NUMBER

3382/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, MAKHANDA

CASE

NO. 3382/2018

In

the matter between:

CECIL

GOLIATH

First Plaintiff

EVERGREEN

EVERFRESH (PTY) LTD

Second Plaintiff

and

CHICORY

SA (PTY)

LTD

Defendant

JUDGMENT

LAING J

- [1] This an action for damages as a result of the failure of a chicory crop during the drought experienced in the Alexandria district, 2017-2018.

Background

- [2] The plaintiffs allege that, in or about February 2016, the parties entered into a verbal agreement for the production and supply of chicory. The material terms thereof were that the plaintiffs would supply chicory to the defendant at a price of R1,800 per ton, from which the defendant would be entitled to deduct all fair and reasonable expenses incurred by it on behalf of the plaintiffs during the production process. Furthermore, the defendant would be required
- to pay the VAT component of the price directly to the South African Revenue Service (SARS).
- [3] Over the period of December 2016 to May 2017, the plaintiffs allegedly delivered 922,014 kilogrammes of chicory, at a price of R1,891,973. The defendant duly deducted an amount of R459,930 for fair and reasonable expenses but failed to pay the balance.
- [4] The defendant denies the allegations and pleads that the first plaintiff (Mr Cecil Goliath) entered into a verbal agreement with the defendant, represented by a Mr Paul Griffiths, in or about November
2015. To that effect, Mr Goliath would use 44 hectares of identified farmland over the two growing seasons of 2016-2017 and 2017-2018 for the cultivation of chicory, which he would deliver to the defendant, who would pay a rate that was standard for all producers. The rate was calculated as R1,800 per ton. Furthermore, the defendant agreed to cover Mr Goliath's farming costs and to advance an amount of R3,000 per month to him for living expenses, which would be set off against the amount payable for the chicory delivered. At the end of the second growing season, 2017-2018, the defendant would carry out a reconciliation of accounts and pay to or claim from Mr Goliath such surplus or shortfall as was due.
- [5] In or about March 2016, alleges the defendant, Mr Goliath concluded a lease agreement with a third party lessor for the identified farmland in question, which was situated in the Kenton-on-Sea area, falling within the district of Alexandria. The lease agreement was for the two growing seasons described above. No rental was payable, provided that the farmland was returned to the lessor with pasture having been planted thereon.
- [6] The defendant alleges that Mr Goliath successfully cultivated the farmland during the first growing season. The value of the chicory produced and delivered was R2,011,835 and the total of Mr Goliath's

farming costs was R1,451,642. This translated to a profit of R560,193. However, alleges the defendant, Mr Goliath's farming

operations were badly affected by drought during the second growing season. He only earned R281,139 from the chicory produced and

delivered, and incurred farming costs of R1,055,029. This translated to a loss of R773,890.

[7] Overall, Mr Goliath suffered a net loss of R213,697. The defendant alleges that Mr Goliath failed to pay the amount in question, which forms the basis for the defendant's counterclaim. Moreover, the

defendant denies that there was an agreement to pay any amount to SARS, whether for VAT or otherwise.

[8] In their replication, the plaintiffs deny that the verbal agreement was concluded in or about November 2015, stating that it was concluded in February or March 2016. Moreover, the parties allegedly agreed that Mr Goliath would only be liable for his farming costs in the event of a successful harvest; this would not be the case in the

event of a failed crop, which had seemed a remote possibility at the time. The drought that occurred during the second growing season was a vis major, with the result that the parties' respective obligations were extinguished, such that Mr Goliath was not liable for any farming costs incurred during the period of 2017-2018. Nevertheless, allege the plaintiffs, the defendant remained liable for payment in relation to the successful harvest for the period of 2016-2017.

[9] The plaintiffs also allege in their replication that there were separate verbal agreements for each of the two growing seasons. The first was for the period of 2016-2017. The second, for 2017-2018, was

contingent upon the success of the earlier harvest and the readiness of the soil; it was concluded accordingly.

[10] With regard to the defendant's counter-claim, the plaintiffs deny that they are liable.

Issues

to be decided

[11] The plaintiffs bear the onus to prove the terms and conditions of the verbal agreement. The defendant bears the onus in relation to its counterclaim, which, similarly, hinges on its own version of the terms and conditions of the verbal agreement.

[12] With regard to the pre-trial minute, the parties were in agreement about the issues that were common cause and those that remained in dispute. The parties agreed that the second plaintiff had no locus standi and that none of the parties was to blame for the drought.[1]

- [13] The issues to be decided can, essentially, be reduced to exactly what rights and duties were created under the verbal agreement; more specifically: (a) when it commenced; (b) what was its duration; (c) what was the legal effect of the drought; (d) what expenses could be set off by the defendant against any amount owed to Mr Goliath; and (e) what amount was owed to Mr Goliath, alternatively to the defendant.
- [14] By reason of the many disputes of fact that characterise this matter, it is necessary to set out in some detail the evidence-in-chief for the parties, in accordance with the sequence in which the witnesses appeared.

The plaintiffs' evidence

Mr Cecil Goliath

- [15] The first witness was Mr Goliath himself. He testified that Mr Griffiths had approached him on or about 29 February 2016 to say that he had obtained land for him to farm from a Mr Justin Wilmot, representing the Bushman's Rest Trust, and that it would be necessary for the parties to enter into a lease agreement. This was done on or about 3 March 2016. At the same time, a verbal agreement was concluded between Mr Goliath and the defendant, represented by Mr Griffiths, to the effect that the defendant would provide farming resources and set off its expenses against the amount owed to Mr Goliath for the chicory produced and supplied. He disputed the defendant's contention that the verbal agreement had been concluded in November 2015.
- [16] Mr Goliath said that workers had then proceeded to clear the land and to plant Napier grass for windbreaks. The defendant's tractors had loosened the soil and planted and sprayed the chicory, which had sprouted a week or two later. The tractors were used on other farms, too, where his team of workers had removed weeds. The harvest for the first growing season had been in August - September 2016, using trucks that belonged to the defendant. The parties had not entered into any agreement in relation to the use of the trucks and the expenses associated therewith.
- [17] The parties had never talked about the drought, said Mr Goliath, other than to agree that if a drought occurred then no-one was to blame. As it turned out, work started for the second growing season in or about March 2017 but drought conditions prevailed during the period of April to December 2017. The defendant, stated Mr Goliath, had never requested payment for anything.
- [18] It was Mr Goliath's testimony that Mr Griffiths had agreed that the defendant would pay to the South African Revenue Service (SARS) the tax amount owed by Mr Goliath from the income generated by the harvest. SARS later contacted him to recover the outstanding amount, which had allegedly never been paid.

Ms Thembeka Antonie

[19] The second witness for the plaintiffs was a farm worker, Ms Thembeke Antonie. She testified that, in March 2016, she had worked for Mr Goliath at Mr Wilmot's farm. This had entailed cutting down bushes and clearing the land so that the tractors could operate.

[20] That concluded her evidence.

Mrs Barbara Goliath

[21] The first plaintiff's wife, Mrs Barbara Goliath, followed as the third witness. She stated that she had assisted Mr Goliath in the running of his business after he had been assaulted and hospitalised. This had been in March 2017. In that regard, she had worked closely with both Mr Griffiths and Mr Elliott and had been responsible for supervising the workers, which had entailed keeping a record of their hours, referring same to the defendant, and ensuring that the workers

were paid. Mr Griffiths and Mr Elliott would visit and inspect the farm and issue instructions where necessary.

[22] Mrs Goliath also indicated that she had taken workers to Mr Wilmot's farm at Kasouga, under Mr Griffiths' supervision. She went on to describe how Mr Goliath's bakkie had broken down and how Mr Griffiths had arranged for it to be repaired and how he had given her R6,000 for payment to the mechanic.

[23] It was her evidence that Mr Griffiths and Mr Elliott had mostly worked with her, rather than Mr Goliath, at that time. They would make arrangements with her about spraying the chicory or the weeds. She testified that they had told her that the drought had affected the crop; however, Mr Elliott had said that no-one was to blame.

[24] After the failure of the crop, Mr Goliath had found land in the Peddie district. He and Mrs Goliath had requested Mr Griffiths and Mr Elliot to assist them in planting a new crop on the land. They had subsequently approached provincial and local government but their efforts had been hampered by Mr Goliath's inability to obtain a clearance certificate from SARS. This was because of an outstanding tax liability in the amount of approximately R246,000. Mrs Goliath confirmed that Mr Elliott had later provided copies of the receipts needed to deal with the tax problem.

The defendant's evidence

Mr Paul Griffiths

[25] The first witness for the defendant was Mr Griffiths. He testified that he had been employed by the defendant as an agricultural manager to, inter alia, locate producers, negotiate prices, and carry out an advisory role.

[26] Mr Griffiths originally met Mr Goliath in or around 2002, when the latter had managed a large crop on behalf of a Mr Colin Stirk. Consequently, Mr Griffiths had encountered Mr Goliath in June 2015 and had arranged for him to farm land that belonged to the Bushman's

Rest Trust. This was because the defendant had been short of chicory and had needed producers; the directors for the defendant had trusted Mr Goliath and had known that he would be able to produce the crop and to pay back the input costs. The land in question was unproductive, so Mr Griffiths had persuaded Mr Wilmot, representing

the trust, to allow Mr Goliath to clear it and to use it for the cultivation of chicory, after which the land would be returned with Rhodes grass having been established thereon for grazing purposes. The arrangement was made in late October 2015.

- [27] The land, said Mr Griffiths, was prepared in mid-November 2015 by AJ Pote Contracting, after which Mr Goliath had employed a team of workers to plant Napier grass for windbreaks. This was important because chicory was susceptible to wind damage; the land itself was exposed and situated at the top of a hill. The windbreaks had to be planted in time to permit the planting of the chicory in February
2016. Accordingly, it had been vital for the parties to have reached agreement on the way forward without delay, including the defendant's acceptance that it would fund the project and for Mr Goliath to have commenced with the clearing of the land and planting of the windbreaks as soon as possible.
- [28] Mr Griffiths testified that the defendant had no similar arrangements in place with anyone else; it had never adopted such an approach previously. Nevertheless, Mr Griffiths had persuaded its board of directors to take on the risk and to place its trust in Mr Goliath's capabilities.
- [29] Broadly speaking, stated Mr Griffiths, the verbal agreement with Mr Goliath was to the effect that the defendant would fund the project, which entailed the supply of equipment and materials at cost, and any profit made at the end of the project would be paid to Mr Goliath. He indicated that the rate of R1,800 per ton was used for all farmers, a standard price was applied.
- [30] With regard to the lease agreement, Mr Griffiths stated that this had only been signed on 3 March 2016 after he had urged the parties to formalise their arrangement. He confirmed that the lease agreement had been for two years. This was because the cost of preparing the land was expensive; it would not have been economical to have leased the land for one growing season. In practice, two growing seasons were preferred, after which crop rotation would be implemented for

four or five years to protect the soil.

- [31] The defendant would have paid the amount owed to Mr Goliath on 31 May 2018, at the conclusion of two growing seasons. When asked what would have happened in the event that Mr Goliath never made a profit, Mr Griffiths said that the defendant had not anticipated that anything would go wrong in the second growing season; Mr Goliath had been recognised as the best dry-land chicory producer in the Eastern Cape. The drought had never been expected.
- [32] With regard to the allegation that the defendant had undertaken to pay VAT to SARS on behalf of the plaintiffs, Mr Griffiths stated that he had no knowledge of this. Producers usually attended to their own tax affairs.

Mr Justin Wilmot

- [33] The second witness for the defendant was Mr Wilmot. He testified that the Bushman's Rest Trust owned the farming property that formed the subject of these proceedings. In October 2015, said Mr Wilmot, he had met with Mr Griffiths and Mr Goliath and had agreed that they would prepare the land, cultivate chicory for two consecutive growing seasons, and then return it after having established Rhodes grass thereon. He stated that the land itself had been overgrown with grass at the time, it had not been used for many years. Consequently, AJ Pote Contracting had prepared the land and windbreaks had been planted; this had happened in November-December 2015.
- [34] The lease agreement was only signed on 3 March 2016 because Mr Wilmot knew Mr Griffiths and had dealt with the defendant for a long time. Moreover, the Bushman's Rest Trust had nothing to lose, provided that the lease agreement was signed before the chicory was planted; if not, then Mr Wilmot would simply have planted the grass himself on the cleared land.
- [35] He explained that the reference to fencing in the lease agreement pertained to a first draft thereof to the effect that the Bushman's Rest Trust had to ensure that there was sufficient fencing. Mr Wilmot had not wished to incur the additional cost and had conveyed this to Mr Griffiths in February 2016. The first draft was revised and the resulting second draft was signed at the beginning of the next month. At that stage, the land had been ready for planting.

Mr Craig Elliott

- [36] The third witness was Mr Elliott, who had worked for the defendant as an agricultural manager since 2015. He stated that he was responsible for contracting work, whereby the defendant undertook farming activities on behalf of farmers; he also advised farmers in general.

- [37] With regard to what constituted chicory farming expenses, Mr Elliott stated that these included the costs for agricultural machinery, labour, fertiliser, seed, chemicals, and transport. He explained the nature and details of the expenses listed in the spreadsheets attached to the defendant's plea; he further explained how the costs associated with the use of tractors had been calculated, saying that they had been required for soil preparation prior to the planting of the chicory.
- [38] In relation to the condition of the land itself, Mr Elliott testified that it had been 'run down' and covered in grass and bush and numerous trees. For chicory to have been planted, it would have been necessary to have cleared the vegetation and to have prepared the soil by 'ripping' and 'disking'; it would also have been necessary to have planted windbreaks. He indicated that it would have taken a considerable length of time to have prepared the land for planting. All the organic matter would have had to be burned or worked into the ground and allowed to decompose before planting could have commenced. Mr Elliott stated that it would have been impossible for Mr Goliath to have started preparing the land after 3 March 2016 and to have been ready to sow two weeks later.
- [39] Mr Elliott indicated that he had become involved with the project in December 2015, which is when the first invoice had been issued. He confirmed that the income and expenditure amounts on the spreadsheet for the first growing season were correct. In relation to the second growing season, Mr Elliott stated that it had been very dry; there had been no reserve moisture in the soil because the crop had been harvested in December 2016 and no rain had fallen over that time. Planting had commenced in February 2017 but the first crop had been a failure. Consequently, Mr Goliath had insisted that the crop be replanted, which is what happened. The second crop was also unsuccessful. There was nothing much that could have been done to have saved the crop, said Mr Elliott, the farmer was at the mercy of the elements. Mr Goliath managed to produce some chicory but, ultimately, it was a very poor growing season.

Mr Tony Swift

- [40] The fourth and final witness was Mr Tony Swift, who had been General Manager for the defendant since approximately 2002. He testified that Mr Goliath was well-known as a successful chicory farmer and that Mr Griffith had contacted him because the defendant had been short of produce. Pursuant to discussions between the two individuals, the defendant had agreed to fund a two-year contract in terms of which credit was extended to Mr Goliath, repayable at the end of the project; the defendant would not participate in the proceeds. Mr Swift confirmed that he had approved the arrangement. His role, subsequently, had been to monitor the costs incurred.

- [41] There had been pressure at the commencement of the project, said Mr Swift, to ensure that the parties reached agreement. It was essential for the seed to have been planted in March, so as to allow for a seven-month growing period, after which the crop would have been harvested in October-November 2016. He denied that the contract had been limited to the 2016-2017 season, saying that projects ran according to a two-year cycle by reason of the high land preparation costs entailed.
- [42] Mr Swift went on to state that Mr Goliath had kept records for purposes of the defendant's payment of wages to the workers involved. In that regard, he confirmed that the defendant had made payment on 17 December 2015. Moreover, he indicated that the price of R1,800 per ton, agreed with Mr Goliath, was identical to what was paid to other producers. The price was set at the beginning of the season.
- [43] He testified that Mr Goliath's profit or loss was calculated as the aggregate for two seasons. This approach also informed the basis upon which the defendant's counterclaim had been determined. Mr Swift stated further that, in the event of a failed harvest, Mr Goliath would have been expected to have compensated the defendant for any credit shortfall. He denied that the defendant had ever been involved in making VAT payments to SARS on behalf of a producer.
- [44] Mr Swift indicated that the defendant had never taken steps to recover the credit shortfall from Mr Goliath. Its stance had changed, however, upon receipt of the summons.

Legal framework

- [45] As a starting point, it is useful to reiterate a basic principle that applies in civil matters such as the present. In Schwikkard PJ (et al), *Principles of Evidence*, the learned writer observed that:

'In civil cases the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a "balance of probabilities" but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to the other. What is required is that the probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed.'

- [46] The parties, here, bear the onus of discharging the burden of proof with regard to the claim and counterclaim respectively. The subject of onus was addressed in this division in the case of *National Employers' General Insurance Co Ltd v Jagers* [1984] 4 All SA 622 (E), where Eksteen J, for a full bench, held as follows, at 624-5:

'...in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the

defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[47] The proper approach to be adopted in a civil matter where there are factual disputes, especially with regard to the evaluation of a witness, was set out in *Stellenbosch Farmers' Winery Group Ltd and another v Martell et cie and others* 2003 (1) SA 11, where Nienaber JA held, at [5], that:

'...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 extracurial statements or actions, (v) the probability of improbability of particular aspects of his version, (vi) the calibre and cogency of his performance 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.'

[48] The above decisions are useful for purposes of setting out the manner in which this court will be required to decide whether the parties have discharged their respective burdens of proof and how to resolve the disputes of fact that have arisen.[3]

Assessment of the witnesses

- [49] Mr Goliath was a reliable witness inasmuch as he had been intimately involved in the project from the very beginning. He had negotiated the terms of the verbal agreement with Mr Griffith, he had employed a team of workers to prepare the land, he had (with his son's assistance) entered into the lease agreement with the Bushman's Rest Trust, and he had planted, cultivated and harvested the crop itself during the first growing season. Whereas his involvement in the project during the second growing season had been compromised by the injuries that he had sustained during his assault, he was, nevertheless, still actively engaged in farming activities.
- [50] It cannot be said, however, that Mr Goliath's credibility as a witness was beyond reproach. Besides having a clear interest in presenting a version of events that advanced his case, he was vague about the precise terms of the verbal agreement and evasive when confronted with the unlikelihood of his assertions in relation to its commencement date and duration, the fair and reasonable expenses that could have been deducted, and his liability for the losses incurred.
- [51] Counsel for Mr Goliath referred to *President of the RSA and others v SARFU and others* 1999 (10) BCLR 1059 (CC) to caution against attaching too much weight to the demeanour of a witness when assessing the truthfulness of his or her evidence. Differences in culture, race or gender may prevent the court's proper interpretation of the witness's behaviour. Consequently, the court cannot rely on demeanour alone for purposes of its assessment.
- [52] Notwithstanding, Mr Goliath's testimony under cross-examination gave rise to a number of key contradictions in relation to what he had pleaded. The first was his admission that the duration of the verbal agreement was two growing seasons, there had not been a separate agreement for each; the second was his concession that if he had made a loss at the end of the project then he would have had to compensate the defendant; and the third was his assertion that weeds had been the cause of the failure of the crop, rather than a drought.
- [53] Counsel drew the court's attention to *Santam Bpk v Biddulph*
- [2004] 2 All SA 23 (SCA), where Zulman JA observed, at [10], that the proper test for the assessment of a witness's evidence was not whether he or she was truthful or reliable in all that he or she said. Rather, the test was whether, on a balance of probabilities, the essential features of his or her story were true. A court should not reject a witness's evidence because of discrepancies in minor points of detail.[4]
- [54] The difficulty for Mr Goliath remains, nevertheless, that the discrepancies between his pleadings and his testimony cannot be described as minor points of detail. They pertain to essential features of his case and have a direct impact on his credibility.

[55] In contrast, Mrs Goliath was a more credible witness. Although the possibility of bias in her testimony by reason of her relationship to the first plaintiff cannot be excluded, her evidence was, on the whole, cogent and logical. She explained how she had taken over the administration of the project after Mr Goliath's assault, how she had managed the team of workers required for farming activities, and how she had interacted with Mr Griffiths and Mr Elliott. She was

adamant that drought had been the cause of the failure of the crop during the second growing season. With regard to the tax question,

Mrs Goliath clearly narrated the history of the parties' engagement with each other and with SARS but was vague about the

defendant's alleged obligation to pay VAT on behalf of Mr Goliath and the extent to which this had anything to do with SARS's

claim for an outstanding amount owed by the first plaintiff.

[56] The limitations to Mrs Goliath's evidence are most apparent, however, in relation to the terms of the verbal agreement. She could not testify on the details thereof because she had not been involved with the project at the time that it had commenced. She had only become involved in March 2017, after Mr Goliath's assault. For obvious reasons, she was simply not a reliable witness in that regard.

[57] The remaining witness for the plaintiffs was Ms Antonie. The court is unable to make any findings on credibility by reason of the brevity of her testimony. To the extent that the value of her evidence to the plaintiffs pertains to the issue of when the verbal agreement commenced, any further assessment must be deferred until the probabilities of the evidence are evaluated.

[58] Mr Griffiths was Mr Goliath's counterpart, both in the trial proceedings and the project itself. He was responsible for the protection of the defendant's interests and this on its own has the implication that the court is obliged to be conscious of potential bias in his evidence. On the whole, however, he was a credible witness. His testimony was not contradictory and his performance in the stand was of a better calibre than that of Mr Goliath.

[59] Counsel for the plaintiffs cited *Katz and another v Katz and others* [2004] 4 All SA 545 (C) as authority for the approach that little weight should be attached to the evidence of a witness who is emotional, dogmatic and irrational. This was especially so where he or she had allowed his or her judgment and objectivity to be clouded by emotion, to the extent that he or she was unwilling to make concessions, even when objective facts demanded this.

[60] The court is most reluctant to describe Mr Griffiths in these terms. Whereas he had refused to consider the possibility that he was mistaken with regard to the commencement of the verbal agreement, this may simply have been because it had indeed been his understanding in light of the discussions that he had had at the time, as well as his knowledge and

experience of chicory farming in general. He did, in fact, make several concessions. He could not dispute that Mr Elliott had requested Mr Goliath to mend fencing on a neighbouring farm; he admitted that he had not discussed liability for the cost of transport with Mr Goliath; and he conceded that the parties had never anticipated a drought and that no-one was to blame for it. This has the effect of enhancing his credibility as a witness, rather than detracting from it.

[61] It was clear from the testimony of Mr Griffiths that he had respected Mr Goliath's reputation as a chicory farmer and had enjoyed a close relationship with him. The two individuals were primarily responsible for the inception and execution of the project and had remained involved for the duration thereof, save to the extent that Mr Goliath had been affected by his assault. Mr Griffiths was able to testify in detail about what had happened. The quality and integrity

of his recollection of events cannot seriously be challenged and consequently the court is willing to regard him as a reliable

witness.

[62] Insofar as Mr Griffiths was accused of having 'coached' a witness for the defendant during trial proceedings, the court is of the view that he merely assisted the witness in question (Mr Wilmot) spontaneously, when the latter was unable to remember the term, 'windbreak'. Although Mr Griffiths' conduct may have been inappropriate, it was clearly a spur-of-the-moment incident and most certainly does not give rise to the accusation made against him; it undermines neither his credibility nor his reliability.

[63] Mr Wilmot was a reliable witness in relation to the circumstances that had existed at the time that the lease agreement had been concluded. He had engaged directly with both Mr Goliath and the defendant, represented by Mr Griffiths. He was able to testify about the overgrown and unproductive nature of the land that was used for the project. He was also able to explain why the lease agreement had only been signed a few months after the commencement of the verbal agreement.

[64] There was no indication that Mr Wilmot's evidence was contradictory; it served to support the defendant's case with regard to when the project commenced. Insofar as Mr Wilmot had dealt with the defendant previously and had known Mr Griffiths for a long time, the court recognises the potential lack of impartiality in his testimony. Nevertheless, he was, on the face of it, an independent witness and there was little basis upon which to doubt his credibility.

[65] The possibility of bias in relation to Mr Elliott's evidence must be acknowledged. As an agricultural manager for the defendant, he would have had an interest in presenting a version of events that suited his employer. His testimony was, however, compelling and his performance in the stand was satisfactory, his having admitted that Mr Goliath had repaired fencing on a neighbouring farm and that none of the parties had anticipated or foreseen the

drought. There were no obvious contradictions in his evidence, which was consistent with the defendant's case. He was a credible witness.

- [66] Moreover, Mr Elliott's close involvement in the project and the quality and integrity of his description with regard to what had been required in November-December 2015 to prepare the land for planting, his recollection of how the various expenses had been calculated, and the circumstances at the time that the crop had failed during the second growing season, underscored the reliability of his evidence. It must nevertheless be accepted that he was not directly involved in the negotiation of the terms of the verbal agreement.
- [67] In contrast, Mr Swift had indeed been involved in the above negotiation. He had discussed and approved the terms with Mr Griffiths before the verbal agreement with Mr Goliath had been concluded. He had subsequently monitored the costs incurred. He had, however, not played any part in the farming activities. Consequently, the reliability of his evidence must be confined to the nature and extent of the terms of the verbal agreement rather than what happened during the implementation thereof. Besides the potential lack of neutrality in his testimony, there was nothing to suggest that Mr Swift's credibility should be questioned.
- [68] At this point, the probabilities of the matter must be considered. This will be undertaken with specific regard to the issues to be decided.

When the project commenced and its duration

- [69] The most important issue for immediate purposes is when the project commenced. The answer to that will decide, to a great extent, what expenses could have been set off by the defendant against any amount owed to Mr Goliath.
- [70] It is highly improbable that the parties only entered into the verbal agreement in February 2016, as Mr Goliath contends. For he and Mr Griffiths to have found suitable land, negotiated a lease agreement with Mr Wilmot, obtained approval from the defendant to commence a project based on an untested business model,[5] employed AJ Pote Contracting to 'rip' and 'disk' 44 hectares of overgrown and unproductive land, burned or worked the uprooted trees and bushes and vegetation back into the ground to decompose, and then planted Napier grass windbreaks, within the space of two to three weeks, is simply not plausible. Pertinently, the defendant's witnesses were consistent in their evidence to the effect that extensive preparation of the land had been required prior to planting. Mr Elliott went so far as to state, bluntly, that it would have been impossible for the work to have been done within the time period asserted by Mr Goliath.
- [71] The evidence of Ms Antonie does not assist the plaintiffs. She merely testified that she had worked for Mr Goliath at Mr Wilmot's farm in March 2016, cutting down bushes and clearing the land. She did not testify about any period prior to such date. Her evidence does not exclude the possibility that preparation of the land, covering an area of 44 hectares, had commenced before March 2016 and that it had continued right up until the time of planting. Her evidence does not persuade the court that it was anything but highly improbable that

the parties only entered into the verbal agreement in February 2016.

[72] Counsel for the plaintiffs argued strenuously that the defendant's plea contradicted the evidence of its witnesses in relation to when the project commenced. The relevant portion reads as follows:

'6.1. In or about March 2016 the first plaintiff, trading as the second plaintiff, and represented by his son, concluded a lease agreement in respect of 44 hectares of farmland ("the farmland") in the Kenton-on-Sea area. A copy of the written lease agreement is attached hereto marked "P1".

6.2. At the time, the first plaintiff had been in discussions with the defendant in regards the farming and cultivation of chicory which he indicated he intended to do on the farmland.'

[Emphasis added.]

[73] Whereas the interpretation favoured by counsel for the plaintiffs can certainly not be discounted entirely, the phrase in question ('at the time') is vague. It can be interpreted either narrowly or widely. The auxiliary verb ('had') that follows the phrase suggests that discussions had already been concluded when the lease agreement was signed. If there had been any doubt about the correct interpretation, however, then this would have been dispelled

by the clear allegation made subsequently to the following effect:

'7. In or about November 2015 and at Alexandria, alternatively, Kenton-on-Sea, the First Plaintiff in person and the Defendant duly represented by Paul Griffiths, concluded an oral agreement ("the agreement").'

[74] This, together with the unequivocal testimony of Mr Griffiths to the effect that he had agreed with Mr Goliath on the terms of the verbal agreement in October-November 2015, supported by the testimony of Mr Elliott and Mr Swift, indicate that the interpretation advanced by counsel for the plaintiffs cannot be accepted.

[75] Moreover, the evidence of Mr Wilmot must be taken into account. As an independent witness, he testified that he had met with both Mr Griffiths and Mr Goliath in October 2015 and had agreed that the identified land could be used for the cultivation of chicory over two consecutive growing seasons. He stated that the land was consequently prepared and windbreaks were planted in November-December 2015. No work would have been permitted on the land without there having been an agreement in place, said Mr Wilmot. This was indeed the case and it gave rise to the written lease agreement a few months later. Mr Wilmot attributed the delay to the fact that he knew Mr Griffiths, had dealt with the defendant for a long time, and had nothing to lose from the preparation of the land, provided that the lease agreement was signed prior to the planting of the chicory. All of this presupposes that there must have already been a verbal agreement in place between Mr Goliath and the defendant.

- [76] In the circumstances, the court finds that, on a balance of probabilities, the parties entered a verbal agreement well before March 2016. The evidence supports the contention that the project commenced in October-November 2015 and not as Mr Goliath has contended.
- [77] The plaintiffs did not pursue the allegation that there had been a separate verbal agreement for each of the growing seasons. It was clear from the testimony of Mr Goliath that there had been a single verbal agreement. This was consistent with the evidence of the defendant's witnesses and the provisions of the lease agreement.

Legal effect of the drought and the expenses that can be deducted

- [78] In his replication, Mr Goliath pleaded that he would only had been liable for farming costs in the event of a successful harvest, not in the event that the crop failed, which had seemed a remote possibility at the time. He pleaded further that the drought that occurred during the second growing season had been a vis major, giving rise to a supervening impossibility as a result of which the parties' respective obligations had been extinguished.
- [79] The supervening impossibility argument lies, to a great extent, at the heart of the plaintiffs' case. If it succeeds, then Mr Goliath would have a basis upon which to claim the unpaid profit earned for the growing season; if not, then there is a basis for the defendant's counterclaim.
- [80] Counsel for the plaintiffs has helpfully summarised much of the case law pertaining to supervening impossibility. The basic principle is that when it becomes impossible for a debtor to render the performance which is due in terms of an obligation, the obligation is extinguished.[6] To that effect, however, the obligation is only extinguished when the impossibility is absolute or objective.[7] In *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd* 2000 (4) SA 191, Flemming DJP held, at 198B-D, that:

'A contract is, however, terminated only by objective impossibility (which always or normally has to be total). Subjective impossibility to receive or make performance at most justifies the other party in exercising an election to cancel the contract... Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable. Deteriorations of that nature are foreseeable in the business world at the time when the contract is concluded.'

- [81] The above findings rest on well-established case law; it has long been accepted in our jurisprudence that mere difficulty of performance is insufficient to release a debtor from his or her obligation.[8] Recently, the Supreme Court of Appeal dealt with supervening impossibility in *Post Office Retirement Fund v South African Post Office SOC Ltd* and others

[2022] 2 All SA 71 (SCA), where Plasket JA held, at [80]:

'In order to establish impossibility of performance, whether initial or supervening, four requirements must be met by the party relying on this defence. They have been set out by Bradfield as follows:

“First, the impossibility must be absolute as opposed to probable. The mere likelihood that performance will prove impossible is not sufficient to destroy the contract. Second, the impossibility must be absolute as opposed to relative. If I promise to do something which, in general, can be done, but which I cannot do, I am liable on the contract. Third, the impossibility must not be the fault of either party. A party who has caused the impossibility cannot take advantage of it and so will be liable on the contract. Fourth, the principle must give way to the contrary common intention of the parties. This intention may be expressed, as when, for example, a seller expressly represents or guarantees that the goods sold exist.”[9]

[82] In the present matter, it is common cause that the essential terms of the verbal agreement between the parties were that Mr Goliath would cultivate chicory on a portion of Mr Wilmot’s farm and supply the crop to the defendant, which would in turn fund the production thereof and deduct certain expenses or farming costs from the delivery price of R1,800 per ton. As counsel for the defendant has convincingly argued, however, the drought never prevented Mr Goliath from cultivating and supplying chicory during the second growing season; he had simply failed to achieve the volumes that he had achieved during the first growing season, with the result that the accompanying farming costs far exceeded any income that he had derived from the initial harvest. Mr Goliath had clearly experienced difficulty with regard to the production of the crop at the time but the climatic conditions had not prevented him, absolutely, from rendering performance. It cannot be said that the drought was an intervening impossibility.

[83] The first plaintiff’s argument is further undermined by his own testimony. During cross-examination he made the following admission:

‘MR BROWN: Sorry, Mr Goliath, I’m nearly done here but I just want to clear that up. So it wasn’t the drought, is that what you’re saying, it was because they didn’t come to your farm fast enough to remove the weeds?’

MR GOLIATH: That chicory should have been a success if we removed those weeds at the right time as theirs.’

[84] Later, in re-examination, Mr Goliath emphasised that the drought had not, in fact, been the problem. The cause of the failure of his crop had been weeds, which had not been removed in time. This appears from the exchange below:

‘MR NGUTA: Then, Mr Goliath, I just want you to clear up your evidence, to explain because you spoke about two things, you spoke about weeds and then the drought. Can you just explain whether there was drought in the second year in 2017?’

MR GOLIATH: It was not the drought that can kill everything. It was just a little drought. You must look at this, the other farmers, they planted chicory and the others who are near my farm. Why is this drought just on my chicory, it affected my chicory? What happened is that at my chicory they didn’t have the care for my chicory because my

chicory was already dirty and they said that we must go and remove the weeds at their chicory. If at that stage we arrived at my chicory and they said that we must organise people to remove those weeds, that chicory, meaning that my chicory, should have been a success.

MR NGUTA: I just want you to give just a straight answer, was there a drought or not in 2017? Just, just explain.

MR GOLIATH: There was no drought because the other farms with chicory had the chicory.'

[85] The parties were in agreement, at the commencement of trial proceedings, that there had indeed been a drought during the second growing season. There was also agreement that 'none of the parties were [sic] to blame for the 2017 drought'.^[10] Quite what that statement meant, however, never fully emerged during the course of the trial. Insofar as counsel for the plaintiffs sought to place reliance thereon to bolster the supervening impossibility argument, further buttressed by the admissions made by Mr Griffiths and Mr Elliott that none of the parties had anticipated the drought, the undisputed fact is that Mr Goliath had managed to cultivate and supply chicory during the second growing season, as had been his obligation. This is sufficient evidence on its own to refute the argument. Once Mr Goliath's own testimony is taken into consideration, the argument collapses.

[86] Consequently, it cannot be said that it was impossible for Mr Goliath to have rendered performance in terms of the verbal agreement. He did so, albeit not as successfully or effectively as during the first growing season. The resulting loss wiped out the profit that he had made previously.

[87] To the extent that the first plaintiff's case rested on the assertion that Mr Goliath would only have been liable for the farming costs in the event of a successful harvest, this must be rejected as nothing less than improbable. It is simply not plausible that a commercial entity such as the defendant would have been prepared to extend substantial amounts of credit to an individual farmer and then absorb, without further ado, any losses that were sustained, whether by reason of drought or otherwise. The defendant would have gained nothing from such an arrangement; it would have carried all the risk. The more probable version is that a two-year growing cycle had been envisaged, as contemplated under the lease agreement and as conceded by Mr Goliath under cross-examination; the defendant would have taken delivery of whatever was produced, paid the agreed price, and the resulting profit or loss would have been accrued to Mr Goliath. The difference between Mr Goliath and the next producer, however, was that his farming activities had been funded entirely by the defendant. This is common cause. He had had no working capital to pay for the costs of labour, the use of tractors and other machinery, fuel, repairs and maintenance, seed, fertilizers, herbicides, and so forth. This had extended even to the cost of repairs carried out on his bakkie; the defendant had funded the expenses involved. The plaintiffs admit in their particulars of claim that the defendant had been entitled to the deduction of fair and reasonable expenses from the price payable. However, it is improbable for the principle to have applied only when there was a successful harvest, when fortune favoured Mr Goliath.

[88] On the basis of the findings made in relation to the commencement date and duration of the project, as well as the legal effect of the drought, it follows that the defendant is entitled to claim at least the following farming costs: those incurred prior to 3 March 2016, as listed in the schedule that was marked “P2” (attached to the amended plea); those incurred after the above date until 31 December 2016 inasmuch as they were not disputed by the plaintiffs, save for the costs of transport which will be discussed further below;[11] and the farming costs of the second growing season, as listed in the schedule marked “P3”. There was also no dispute that the defendants were entitled to recover monthly payments of R3,000 that had been made to Mr Goliath to cover a portion of his living expenses.

[89] The question of liability for transport costs remains.

Transport costs

[90] It is common cause that liability for transport costs was never discussed specifically. Consequently, argued counsel for the plaintiffs, an onus was placed on the defendant to prove that it had been a tacit term of the verbal agreement that Mr Goliath had been liable for the expenses incurred in the defendant’s collection of the crop from the land and delivery to the factory. The court’s attention was drawn to *City of Cape Town (CMC Administration) v Bourbon-Leftley NO and another* [2006] 1 All SA 561 (SCA), where Brand JA discusses the legal principles pertaining to tacit terms at [19]:

‘...a tacit term is based on an inference of what both parties must or necessarily would have agreed to, but which, for some reason or other remained unexpressed. Like all other inferences, acceptance of the proposed tacit term is entirely dependent on the facts. But, as also appears from the cases referred to, a tacit term is not easily inferred by the courts. The reason for this reluctance is closely linked to the postulate that the courts can neither make contracts for people, nor supplement their agreements merely because it appears reasonable or convenient to do so... It follows that a term cannot be inferred because it would, on the application of the well-known “officious bystander” test, have been unreasonable of one of the parties not to agree to it upon the bystander’s suggestion. Nor can it be inferred because it would be convenient and might therefore very well have been incorporated in the contract if the parties had thought about it at the time. A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would necessarily have agreed upon such a term if it had been suggested to them at the time... If the inference is that the response by one of the parties to the bystander’s question might have been that he would first like to discuss and consider the suggested term, the importation of the term would not be justified.’

[91] Counsel for the plaintiffs argued that Mr Goliath would never have agreed to pay the defendant’s business expense. He would have wished to have made a profit from the project and not to have rewarded the defendant with an undeserved windfall without at least having negotiated a *quid pro quo*.

[92] The argument ignores the fact that Mr Goliath had no transport of his own for delivery of the crop to the defendant's factory, he had relied on the defendant to do so. As Mr Griffiths testified, the crop was worth nothing while it remained on the land. If the defendant had not arranged for transport, then Mr Goliath would have had to rely on a third party to have taken the crop to the factory; it was an undisputed term of the verbal agreement that the first plaintiff

would produce and supply chicory to the defendant. He remained liable for the expenses involved. The cost of transportation was a cost of production.

[93] Counsel for the defendant pointed out, too, that Mr Goliath himself had acknowledged this during his testimony. The following exchange is pertinent:

'MR NGUTA: ...Okay, so let us, Mr Goliath, in your evidence you...

spoke about expenses to be deducted from the money as you put in... What were these expenses? Can you explain to the, to the Court?

MR GOLIATH: The expenditures for the people who were removing those weeds at the chicory, even the tractors which were planting, the lorries or the trucks which were loading this chicory or transporting the chicory. That is all.'

[94] Further examples were provided of where Mr Goliath had admitted that the costs of transportation were to have been deducted from the price payable for the crop.

[95] It is clear from the above that, with reference to the principles discussed in *Bourbon-Leftley* NO, the parties would necessarily have agreed that Mr Goliath was liable for the expenses incurred in the defendant's collection of the crop from the land and delivery to the factory. The fact that Mr Goliath had no transport of his own is sufficient for the tacit term to be inferred. It was essential for purposes of lending business efficacy to the verbal agreement. [12]

[96] With regard to the argument that the tacit term was contrary to public policy, counsel for the plaintiffs cited the seminal decision in *Sasfin (Pty) Ltd v Beukes* [1988] ZASCA 95; [1989] 1 All SA 347 (A), which dealt with the terms of a deed of cession between a financier (the appellant) and a specialist anaesthetist (the respondent). In that regard, Smalberger JA held as follows, at 356-7:

'The effect of what I conceive to be the proper interpretation of clause 3.4 and 3.14 was to put Sasfin, from the time the deed of cession was executed, and at all times thereafter, in immediate and effective control of all Beukes' earnings as a specialist anaesthetist... As a result, Beukes could effectively be deprived of his income and means of support for himself and his family. He would, to that extent, virtually be relegated to the position of a slave, working for the benefit of Sasfin (or, for that matter, any of the other creditors). What is more, this situation could, in terms of clause 3.14, have continued indefinitely at the pleasure of Sasfin (or the other creditors).

Beukes was powerless to bring it to an end, as clause 3.14 specifically provides that “this cession shall be and continue to be of full force and effect until terminated by all the creditors”. Neither an absence of indebtedness, nor reasonable notice to terminate by Beukes in those circumstances would, according to the wording of clause 3.14, have sufficed to bring the deed of cession to an end. An agreement having this effect is clearly unconscionable and incompatible with the public interest, and therefore contrary to public policy.’

[97] The facts in the present matter bear little or no resemblance to those in *Sasfin*, which concerned a clause in a deed of cession that was unambiguously one-sided and draconian. Here, the question is merely whether a tacit term, to the effect that Mr Goliath was liable for the costs of transport supplied by the defendant, was contrary to public policy. This cannot be so. Reliance on *Sasfin*, for present purposes, is misplaced.

[98] Counsel for the plaintiffs also referred to the ground-breaking decision in *Beadica 231 CC and others v Trustees for the Time Being of the Oregon trust and others 2020 (9) BCLR 1098 (CC)* as authority for an enjoiner to this court to adopt an approach based on transformative adjudication. It was asserted that this court should not hesitate to take public policy considerations into account when deciding the enforceability of a contract, especially when there was unequal bargaining power on the part of Mr Goliath and the defendant.[13]

[99] In that regard, the decision in *Beadica* must be treated with great care. Whereas constitutional principles have a direct influence on the determination of whether a contractual term is contrary to public policy, a court’s interference with the principles of *pacta sunt servanda* must be properly reasoned and must be based on the facts placed before it. To that extent, Theron J observed as follows, at [76]:

‘Indeed, this court has recognised the necessity of infusing our law of contract with constitutional values. This requires courts to exercise both resourcefulness and restraint. In line with this Court’s repeated warnings against overzealous judicial reform, the power held by the courts to develop the common law must be exercised in an incremental fashion as the facts of each case require. The development of new doctrines must also be capable of finding certain, generalised application beyond the particular factual matrix of the case in which a court is called upon to develop the common law. While abstract values provide a normative basis for the development of new doctrines, prudent and disciplined reasoning is required to ensure certainty of the law.’

[100] The facts of this case do not call for transformative adjudication, as counsel for the plaintiffs would have it. There is no evidence that the relative situations of the contracting parties were so unequal that the court is required to interfere. On the contrary, it is clear from the testimony of Mr Griffiths, who represented the defendant when the verbal agreement was negotiated, that he had held Mr Goliath in high esteem and that he had engaged with him at the same level. The parties had viewed the verbal agreement as the first of its kind and each had been just as anxious as the other to ensure that the project was a success, notwithstanding alleged scepticism on the part of other local farmers. There was no

evidence whatsoever to the effect that Mr Goliath had been prevented from using a third party to supply the necessary transport or that he had been coerced into relying solely on the defendant for transport or that the transport costs had been exorbitant. Instead, it is apparent that transport costs had only become an issue when the defendant filed its counterclaim, bringing to light the real impact of the crop failure

during the second growing season, not only on Mr Goliath but also the defendant.

[101] Importantly, however, the alleged unenforceability of the tacit term by reason of public policy considerations was never pleaded. The subject seems to have come to the fore only during pre-trial proceedings when the parties agreed that the question of whether the defendant was entitled to have deducted transport costs in the amount of R111,208 was identified as an issue in dispute, nothing more.

Payment of VAT

[102] The remaining issue still to be addressed is Mr Goliath's allegation that the defendant was obligated to pay VAT on his behalf to SARS in relation to the price paid for the chicory produced and supplied. This is a most puzzling aspect of the first plaintiff's case; its bearing on Mr Goliath's claim, at the end of trial, is still far from clear. As counsel for the defendant has argued, Mr Goliath has alleged that it was a material term of the verbal agreement that the defendant, not Mr Goliath, would pay VAT to SARS on the contract price by reason of the latter's alleged financial illiteracy; however, Mr Goliath has sought payment of an amount that includes VAT. The contradiction is obvious.

[103] Furthermore, the evidence indicates that although the defendant may well have assisted Mr Goliath in collating the necessary source documents to deal with SARS's claim for outstanding tax, quite what the demand related to is simply not apparent. It may have been for income tax, it may have been for VAT; it may have been in relation to the first growing season, it may have been for a different tax period altogether. Moreover, the amount claimed by Mr Goliath for VAT (R232,348) differs from the amount mentioned by Mrs Goliath in her testimony as the amount claimed by SARS (R246,000). She also admitted that she and Mr Goliath had never submitted a tax return, which would undoubtedly have assisted in demonstrating Mr Goliath's tax status at the time.

[104] For its part, the defendant strongly denies any obligation to have paid VAT on behalf of the first plaintiff. It had not been a term of the verbal agreement and both Mr Griffiths and Mr Swift testified that the defendant never became involved in making VAT payments to SARS on behalf of a producer; this was something for the producer and his or her accountants.

[105] In the end, nothing seems to turn on this aspect and the court is persuaded that, on a balance of probabilities, the parties never reached any agreement to that effect.

Relief and costs

[106] It is necessary, at this stage, to decide whether Mr Goliath has succeeded in discharging the onus in relation to his claim. Upon the basis of the evidence presented, the court is not persuaded that Mr Goliath has proved the terms of the verbal agreement, as pleaded. On the contrary, the evidence presented and the concessions made by Mr Goliath demonstrate the following: the verbal agreement had commenced in or about October 2015 (not February 2016); it had been for a duration of two years, to coincide with consecutive growing seasons; the drought had not amounted to a supervening impossibility; and the defendant had been entitled to deduct the expenses listed in schedules 'P2' and 'P3', attached to its plea, including transport costs.

[107] This is a matter where the best intentions of the parties were frustrated by the weather. As Mr Griffiths remarked during his testimony, farming is a gamble. Here, the weather dealt Mr Goliath a good hand for the first growing season but a bad hand for the second growing season. Notwithstanding his skills and abilities as a chicory farmer, Mr Goliath was unable to accommodate the change in fortune. The matter would undoubtedly have turned out differently had there been no drought. Nevertheless, the drought cannot be used, in these circumstances, as a basis upon which to relieve the parties of their respective rights and duties.

[108] Consequently, the court is satisfied that the first plaintiff has not proved his claim. The court is satisfied, however, that the defendant has successfully proved its counterclaim. It is entitled to payment of the sum indicated as well as interest thereon.

[109] In relation to costs, there is no reason why these should not follow the result.

Order

[110] The following order is made:

- (a) the plaintiffs' claim is dismissed with costs, to be borne by the plaintiffs jointly and severally; and
- (b) the defendant's counterclaim succeeds, with the effect that the first plaintiff is ordered to pay to the defendant:
 - (i) the sum of R213,697.12;
 - (ii) interest on the above sum at the prescribed rate, calculated from the date of service of the counterclaim until the date of payment; and
 - (iii) costs.

JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE

For the plaintiffs:

Adv Nguta with Adv Mzamo, instructed by Mgangatho Attorneys, Makhanda.

For the defendant:

Adv Brown, instructed by De Jager & Lordan Attorneys, Makhanda.

Dates of hearing:

14 – 18 February 2022 and 23 – 24 June 2022

Date of delivery of judgment: 13 September 2022

[1] The pre-trial minute recorded that '[n]one of the parties were [sic] to blame for the 2017 drought.' This seemingly obvious statement ultimately constituted a significant component of the plaintiffs' case, as shall be demonstrated.

[2] 4th Ed, 2016, ch32-p 628.

[3] Both the above cases were cited with cited with approval by Brand JA in Dreyer NO and another v AXZS Industries (Pty) Ltd

[2006] 3 All SA 219 (SCA), at [30].

[4] See, too, Rex v Kristusamy 1945 AD 549, at 555.

[5] The business model entailed the defendant's funding of the necessary farming expenses, in the absence of Mr Goliath's

access to working capital. The defendant effectively granted unsecured credit to Mr Goliath purely on the strength of his reputation as a chicory farmer.

[6] Harms LTC, 'Obligations', in LAWSA (Vol 31, 3ed, LexisNexis, 2022), at 250. See, too, Peters Flamman & Co v Kokstad Municipality 1919 AD 427 and more recently Kudu Granite Operations (Pty) Ltd v Caterna Ltd

[2003] 3 All SA 1 (SCA).

[7] Ibid.

[8] Ibid. See, too, Voet 22 1 29, Ward v Francis

(1896) 8 HCG 82, Yodaiken v Angehrn & Piel 1914 TPD 254, and Hersman v Shapiro & Co 1926 TPD 367.

[9] See Bradfield GB, Christie's Law of Contract in South Africa (7ed) (2016), at 549.

[10] Paragraph 2.5, pre-trial minute, 27 October 2021.

[11] This only emerged, clearly, during the actual trial proceedings, when counsel for the plaintiffs confirmed that Mr Goliath did not dispute the farming costs incurred between 3 March and 31 December

2016. The costs of transport, however, remained in dispute for the period in question.

[12] See *City of Tshwane Metropolitan Municipality v Brooklyn Edge (Pty) Ltd and another*

[2022] 2 All SA 334 (SCA), at [16].

[13] Counsel for the plaintiffs referred to *Barkhuizen v Napier*

[2007] ZACC 5; 2007 (7) BCLR 691 (CC), where Ngcobo J confirmed, at [59], that the relative situation of the contracting parties is a relevant consideration in determining whether a contractual term is contrary to public policy.

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