

**Louw NO and Another v Botes
(MG2/2012)
[2013] ZANWHC 52 (7 June 2013)**
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Adv. S Aucamp

JUDGMENT**KGOELE J:****A. INTRODUCTION**

[1] This is an appeal against the whole of the judgment of the Magistrate, Mr Kleynhans, in the Swartruggens Magistrate Court dated 8 November 2011.

[2] The appeal is founded upon the grounds that:-

“- the learned Magistrate misdirected himself in finding that the respondent proved that the pivot irrigation system (“the

pivot”) to a portion of the leased premises was totally defective and could not be used at all;

- in the alternative to the aforesaid ground, the learned Magistrate misdirected himself in accepting the evidence presented by the respondent that the respondent was unable to plant the intended crops (chillies) after 15 November 2010 in that it was too late in the season without any expert evidence having being led by the respondent in this regard and as a result concluding that the centre point was totally defective; and
- the respondent purportedly failed to provide any admissible evidence to prove the quantum of its alleged damages.”

B. BACKGROUND FACTS

[3] The Louw Family Trust (the appellants) and the respondent, concluded a written lease agreement (the agreement) on the 27 October 2009 in terms whereof the respondent leased from the appellants 42 hectares of fully irrigated agricultural land for a period of one year.

[4] Although the agreement was only signed by the respective parties on the 27 October 2009, the effective date was agreed to be the 1st September 2009, that being the date upon which the respondent took occupation of the land and the two pivots (the lease property)

[5] According to both the parties the express, alternative tacit, further alternative implied terms of the agreement were:

“- that the respondent leased from the appellants the property consisting of two portions, 26 hectares and 16 hectares respectively

land under irrigation, with each portion of the land having its own a fully functional pivot;

- that the respondent would be responsible for payment of:
 - water levies from the effective dates; and
 - electricity in the approximate amount of R1 000.00 per month;

that the respondent would be responsible for the maintenance of the pivots in order to ensure that they stay in a fully functional and working condition;

that any and all risk pertaining to damages in relation to the loss of crops would be carried by the respondent; and

that the rental calculated to an amount of R100 000.00 per annum of which R50 000.00 was payable in advance, and the balance thereof at the end of the lease term being the 31 August 2010.

- [6] The respondent at all relevant times intended to plant chillies on both portions of land. According to the respondent this was communicated to the first appellant prior to the effective date. Immediately after the respondent took occupation of the leased property, he commenced with the preparation of the land in respect of the 16 hectares of land so that the chillies could be planted in time. Before he could start with irrigating the portion of the land prepared, one of the towers of the pivot system collapsed. At this point in time the preparation of the relevant portion of land was at an advance stage in that 13 hectares of the 26 hectares had already been prepared for purposes of planting the chillies. To this extent, fertilizer and gypsum had also been worked into the land.
- [7] The day after the tower collapsed, the respondent, the first appellant and a certain Mr Jacobus Lewis, inspected the pivot. During the inspection the first appellant instructed Mr Lewis to attend to the repairs of the collapsed tower. He attended to the repairs of the tower save for the electrical repairs which he insisted that they had to be attended to by another technician. This was done during or about 9 November 2009.
- [8] According to the respondent, even after the electrical repairs were attended to, the pivot was still not fully functional and the time to plant the chillies had already ran out. To this extent the respondent at the end of November 2009 communicated to the first appellant his intention not to continue with the lease agreement in respect of the 26 hectares portion of land.
- [9] Respondent issued summons against the appellants alleging that the irrigation system on the 26 hectares was defective and in a totally unusable condition with the result that he could not plant anything on the specific land. He therefore claimed a reduction in the total rental payable. Respondent also alleged that he sustained damages due to the preparation done on the 26 hectares of the land.
- [10] The appellants who were the defendants in the court a quo instituted a counterclaim. Firstly, for an amount of R50 000-00 being rental arrears according to the contract, secondly, an amount of R12 000-00 for electricity, and thirdly, an amount of R69 442-30 for water.

- [11] The court a quo found that the respondent did prove that the irrigation system (pivot) on a part of the leased premises were totally defective and could not be used at all by the respondent as intended and awarded the respondent his damages and rental deductions as prayed for.

C. SUBMISSIONS

- [12] Counsel for the appellant submitted that the evidence before the court a quo did not establish that the 26 hectares with the irrigation system was totally defective and not reasonably acceptable for the due and proper enjoyment and occupation of the property let. He based this submission on the fact that Mr Van Greunen, an expert that testified on behalf of the appellants, maintained that he repaired the irrigation system and after the 9th/10th of November 2009, it was in a proper working condition.

- [13] Further that, the respondent's evidence clearly reveals that he relies on the fact that time was of the essence in the contract as he intended planting chillies on the 26 hectares land and could only do so until sometime in the middle of November 2010.

- [14] He pointed to the court the following as a basis for her submission that the respondent's case is not that he decided not to proceed to plant because of the holes in the pivot, but because there was a risk:-

14.1. the evidence of the respondent, Mr Botes, was that in middle November 2009, Mr Vermeulen, who was his farm foreman and mentor, informed him that the risk to plant on the 26 hectares will be too big in that after they planted, something might happen again with the irrigation system and they might be without water. It was then decided not to proceed with planting on the 26 hectares land;

14.2. Mr Botes also testified that they could not plant later as it would influence the production and they could not plant anything else on the 26 hectares;

14.3. Mr Vermeulen then testified about the allegation by Mr Van Greunen that after he last repaired the irrigation system in November 2009, it was in 100% working condition and said that this may be so, but the time to plant chillies was then over;

14.4. Mr Vermeulen then contradicted the evidence of the respondent by testifying that after Mr Van Greunen repaired the irrigation system, same could be used for irrigation but there will be some wet areas due to leaks. He further conceded that maize could have been planted instead of chillies.

- [15] According to the respondent's counsel the court therefore misdirected itself by not finding that time was of essence and further that, chillies could only be planted when the evidence of the appellant as pointed above was to this effect. He submitted, the respondent could have planted mielies as the evidence before the court a quo proved that the pivot system, although not working hundred percent, could still be used for irrigation purposes. It is for these reasons he submitted that, the court a quo should have found that the leased property

was reasonably and objectively acceptable for the due and proper enjoyment and occupation of the property let.

[16] In the event of this Court finding that the evidence did establish that the irrigation system on the 26 hectares was totally defective and not reasonably acceptable for the due and proper enjoyment and occupation of the property let, the appellant's counsel

submitted that the respondent failed dismally to present any admissible evidence of the quantum of his damages. According to him

the respondent attempted to prove the quantum of his damages by referring to two invoices for the fertilizers and one invoice for the gypsum annexed as Annexure 29 to 31 of the respondent's bundle in the court a quo. On questions from the court a quo and his legal representative to clear the matter up, the respondent testified that the said invoices constitute the fertilizer and gypsum bought and used on the relevant 26 hectares. During cross – examination of the respondent he was alerted to the fact that the said invoices cannot constitute proof of the fertilizer and gypsum used on the relevant 26 hectares as the dates on these invoices are approximately 2 months after the preparation work on the 26 hectares had started according to his own evidence. He then conceded that none of the invoices are for fertilizer or gypsum that were used on the 26 hectares and testified that invoices probably refers to fertilizer and gypsum bought and used for the 16 hectares land which does not form part of the dispute between the parties.

[17] Significantly, the appellant's counsel submitted, the respondent also conceded that evidence in the form of invoices does exist and could have been produced regarding the actual purchases for the fertilizer and gypsum used on the relevant 26 hectares but no explanation was ever furnished by the respondent on why this available evidence was not produced.

[18] Finally the appellant submitted that, it is abundantly clear that the respondent did not produce any evidence of the actual expenses incurred in buying fertilizer and gypsum that were used on the relevant 26 hectares. The mere handing in of invoices dated two months after the fertilizer and gypsum were used on the relevant 26 hectares can also not constitute admissible evidence of the fair and reasonable amount of fertilizer and gypsum at the time same were used. If respondent wanted to produce evidence to this effect, an expert in this specific field, with required Rule 24 (9) notices, should have been called to testify what the fair and reasonable price at the relevant time was. Therefore the respondent failed to present all available evidence to prove the quantum of his claim.

[19] The respondent on the contrary submitted that the grounds as set out by the appellants together with the submissions made, are without any substance or merit by virtue of the fact that:-

19.1. the Court a quo did not as contended for on behalf of the appellants, find that the respondent relied upon the fact that it was not capable of planting the intended crops after 15 November 2009 and that such inability constituted proof that the pivot was totally defective for the intended purpose;

the Court a quo found as a matter of fact that the pivot was at all relevant times totally defective instead on the following grounds;

19.2.1. the first appellant testified that he did not inspect the pivot prior to making same available to the respondent and that he simply assumed that it was in working condition;

19.2.2. the de facto position however was, according to the appellants' own version, that the system was only made operative, for the first time on 9 November 2009 (notwithstanding the fact that the system was supposed to have been in working condition from 1 September 2009);

19.2.3. Mr Vermeulen who testified on behalf of the respondent testified that this particular pivot was well known to him and that he had made the respondent aware of the bad condition in which the system was. The court accepted the evidence of Mr Vermeulen;

19.2.4. Mr Van Greunen who testified as an expert on behalf of the appellants gave evidence that when he attended to the pivot the first time on 16 October 2009:

19.2.4.1. the condition of the electrical wiring was "nie soos ons dit doen nie" meaning that it was in a very poor condition; and

19.2.4.2. the main pipeline feeding the water to the pivot was in such a poor condition of deterioration that it would have made it difficult to effectively irrigate as a result of all the leaks in the pipeline;

19.2.4.3. the pivot in its condition would provide water unequally and uncontrolled;

19.2.4.4. the pivot could not perform in an effective manner;

19.2.4.5. that it was possible that the tower collapsed as a result of the bad condition of the pipes; and

19.2.4.6. pieces of rubber tubing were bound around the pipes in order to help ensure that the water in the main line got to the nozzles for purposes of irrigation equally.

19.3. ex facie the photographs presented by the respondent at the hearing of the trial, the court observed and found "lyk die spilpunt maar voos en vrot. Indien gate met gemak daarin gedruk kan word met 'n bakkie se sleutels is dit geen wonder dat dele daarvan in mekaar geval het nie. Binnebande is rondom die pyp gedraai."

19.4. accordingly the court came to the conclusion that the pivot was de facto and on a balance of probabilities in a total state of disrepair and incapable to be applied for the intended use by the respondent.

[20] In as far as damages are concerned, the respondent submitted at the outset that the respondent has made use of negative interesse as a formula to calculate his damages suffered, and not the usual formulation, the positive interesse. Accordingly the respondent claimed to be placed back in the position he was immediately prior to the conclusion of the agreement in respect of the 26 hectares of land, had the agreement in respect of the 26

hectares of land not been concluded. It was the respondent's submission that he would not have incurred the expenses pertaining to fertilizer and gypsum in preparing the land.

[21] The respondent further submitted that at no stage was it disputed by the appellants that:

the respondent purchased the fertilizer and gypsum in bulk for use as and when required. In fact, the appellant admitted the quantum of damages applied for and that it was de facto applicable. Only the monetary amount was eventually in dispute;

the amounts reflected on the invoices, in respect of the fertilizer and gypsum purchased in bulk by the respondent did not represent the actual fertilizer applied by the respondent on the specific land; and

the respondent indeed prepared the 26 hectares of land inter alia with fertilizer and gypsum and in the quantities as alleged by the respondent.

D. THE LAW

[22] The general approach of the Appeal Court in an appeal which is directed at findings of fact and credibility, is that it will only interfere if the judgment was wrong. The Appeal Court will not reverse the decision if it merely has a reasonable doubt about the correctness of the decision. (*R v Dhlumayo* 1948 (2) SA 677 (A)).

[23] A trial court has the obvious and important advantage of seeing and hearing the witnesses and of being steeped in the atmosphere of the trial. Those advantages are not possessed by a Court of Appeal. (*Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another* 2002 (4) SA 408 (SCA)).

[24] If there exists no misdirection, it is presumed that the court a quo was correct. A misdirection in any event by itself is not sufficient to entitle the Court to interfere on appeal. (*S v Pillay* 1977 (4) SA 531 (A)).

[25] An Appeal Court may, however, interfere if it can be demonstrated that the exercise of the discretion was influenced by bias, was arrived at capriciously or without substantial reasons, or was based on a wrong principle. Where the appeal turns on the point of law, the question is simply whether the trial court was right or wrong. Where the appeal turns on a question of fact, the Appeal Court applies the principles known as the "Dhlumayo Principles", derived from the case of *R v Dhlumayo* 1948(2) SA 677 (A).

E. ANALYSIS

[26] It is quite apparent that there is a difference of opinions as to what forms the basis upon which the court a quo made its findings between the appellant and the respondent both in as far as the merits and the quantum. Fortunately, the court a quo submitted, together with the record, a comprehensive and well reasoned judgment that assisted this Court in the determination of this difference and the issue before it.

[27] A careful reading of the said judgment, reveals that the court a quo found as correctly submitted by the respondent's counsel that the pivot was at all relevant times totally defective. In fact the court a quo specifically dealt with this aspect and stated as follows in its judgment:-

“Hoe dit ook al sy, die hof is tevrede dat die Eiser se saak inderwaarheid nie gebasser is op die feit dat Eiser nie teen later as middel November nie meer rissies kon plant nie. Eiser se saak is gebaseer daarop dat die spilpunt op daardie 26 ha nie na behore gewerk het nie, met die gevolg dat hy dit dus nie kon plant nie, en skade as gevolg daarvan gely het.

Die skriftelike kontrak tussen die Eiser en die Verweerder skop op die eerste bladsy daarvan af deur ondubbelsinnig te meld dat Botes 42 ha spilpuntgronde vanaf die Trust huur. Of Botes nou rissies daarop wou plant, mielies, of enige ander gewas, die punt is: Hy huur spilpunte. En die spilpunte moes behoorlik werk. Dit is dan hoekom Louw gedurende kruisondervraging dit eens was met Adv. Aucamp dat hy op 01/09/2009 spilpunte aan Botes moes gee wat in werkende toestand is.

Uit die getuienis kan die hof aanvaar dat Louw deeglik bewus was daarvan dat daardie grond deur Botes gebruik gaan word om rissies te plant. Louw sou op die waarskynlikhede vir Botes gevra het wat hy daar beoog en Botes sou hom gesê het. Dit is verder op 'n oorwig van waarskynlikhede bewys dat Botes aan Louw gesê het dat tyd 'n faktor is by die plant van rissies. Dis die enigste en voor-die-handliggende rede hoekom Louw solank die grond aan Botes beskikbaar gestel het alhoewel die kontrak eers byna 2 maande later geteken is: Sodat Botes solank die grond kan begin bewerk, aangesien hy haastig was om te plant.”

[28] The following can also be seen from the judgment of the court a quo:-

“Die hof kom dus tot die feitebevinding dat die 26 ha spilpunt weens die algemene toestand van verval daarvan, nie in 'n werkende

toestand vir die doel waarvoor Eiser dit gehuur het, was nie. Die trust het dus nie hul verpligting in terme van die huurooreenkoms

nagekom nie.”

[29] From the above, it is quite apparent that the court a quo did not come to the conclusion that the pivot was defective based on the fact that the respondent was not able to plant the intended crops after the 15 November 2011. I fully agree with the respondent's counsel that besides the evidence that was presented before this Court as to how the pivot was repaired, the court a quo also took in its consideration of this aspect, an important factor from the appellant's version that, “he did not inspect the pilot prior to making same available to the respondent and simply assumed that it was in working condition”.

[30] The submission by the appellant's counsel that the irrigation system was usable although not hundred percent as it can still irrigate is in my view not justified. In fact the evidence shows that the pivot collapsed before somebody was sent to repair it. After it was so

repaired, the electrical component thereof could still not work. What is most disturbing is the fact that even after the electrical component was fixed, it could still not work properly as the condition of the electrical wiring was, “nie soos ons dit doen nie” meaning that it was in a very poor condition, the main pipeline feeding the water to the pivot was having leaks and could not effectively

irrigate, would provide water unequally and uncontrollable.

- [31] This Court can therefore not agree with the submission that the court a quo based its finding on the fact that time was of essence for it to come to the finding that the pivot system was in a total defective condition. It is common cause between the parties that the respondent leased the property as “land which was accompanied by an effective and working pivot”. On the analysis of the evidence tendered in the court a quo, it is clear that on the 1st September 2009, the pivot did not work effectively.
- [32] In as far as the proof of the damages is concerned, I fully agree with the respondent’s submission that the purpose of the invoices presented was to establish the actual cost price per ton by merely referring to the said invoices and then determine the price of the fertilizers and the gypsum at the particular time when they were purchased, and thereafter to apportion it to the extent of the land that was capable of being used by the respondent.
- [33] The court a quo was also mindful of the fact that the respondent in acquiring the required fertilizer and gypsum that it did so in relation to both portions of properties which were leased from the appellants and that the relevant materials were accordingly acquired in bulk. In fact the first appellant during cross examination when confronted with the quantum of fertilizer and gypsum used by the respondent stated: “Dit klink reg”.
- [34] Of significance is the fact that the respondent did not claim loss of profit in this matter, but, out of pocket expenses, meaning that he wanted to be placed back into the position he was. He is therefore entitled to be compensated for the expenses that he incurred. As indicated above, appellant did not dispute the quantum claimed by the respondent in his evidence. The court a quo was therefore not called upon to make a finding on this fact because it was not disputed. The court a quo was alive to this fact. The record of proceedings clearly indicates that the court a quo just used these invoices as a basis of calculating how much the cost of the fertilizers and the gypsum was around that particular period.

F. CONCLUSION

- [35] I come to the conclusion that there is nothing in the record of the trial court that indicates that the trial court’s finding of facts was patently wrong, arrived at capriciously or without substantial reasons. I am of the view that there is no reason to disturb the trial court’s finding with regard to both the merits and quantum.

G. ORDER

- [36] Consequently the following order is made:-

36.1 The appeal is dismissed with costs.

A M KGOELE

JUDGE OF THE HIGH COURT

I agree

R D HENDRICKS

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JOHANNESBURG

17

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