

SOUTH AFRICA / JUDGMENT

Muller v Trencor Service (Pty) Ltd (397/81) [1985] ZASCA 5 (27 March 1985) [1985] ZASCA 5

COURT

Supreme Court of Appeal

BEFORE

Corbett, Miller, Van Heerden, Nicholas, Eloff

CASE / FILE NUMBER

397/81

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CASE NO

ccc

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between

ERIC ANDRÉ MULLER APPELLANT

and

TRENCOR SERVICES (PTY) LTD. RESPONDENT

CORAM: CORBETT, MILLER, VAN HEERDEN, NICHOLAS

et ELOFF AJA

HEARD: 15 MARCH 1985 DELIVERED: 27 MARCH 1985

JUDGMENT

2. ELOFF, AJA The respondent is a cartage contracting company. It inter alia holds a public road carrier permit, issued in terms of the Road Transportation Act 74 of 1977, which entitles it to transport goods of all kinds within certain specified areas. These include the districts of Kenhardt and Namaqualand. The appellant also conducts business as a cartage contractor. He holds a public road carrier permit which allows him to convey inter alia "Shaft sinking equipment - within the Republic of South Africa". In March 1983 the respondent's representatives became aware that the appellant was transporting

cement/

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cement in pockets over the routes in Kenhardt and Namaqualand to which its permit relates. After further investigation it applied in the Cape Province

Division for an interdict restraining him from trans

porting inter alia cement over the routes in question

In an answering affidavit filed in opposition to the application, the appellant stated -

"Ek betoog dat die permit my magtig om sement en staal te vervoer solank as wat dit bestem is vir skaggraving."

He went on to say

"In alle gevalle het ek sement en staal vervoer terwyl ek bona fide geglo het dat dit deel uitmaak van 'shaft sinking equipment' en vir daardie doel gebruik sal word."

The/....

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The only dispute on the papers appeared to be whether the appellant had in fact transported cement and steel which had not specifically been earmarked for shaft sinking operations. The matter came before Burger J on 7 April 1983, and by consent he granted an order in these terms -

"It is ordered that first respondent (appellant) is interdicted and restrained from transporting cement and/ or steel in contravention of the Road Transportation Act No. 74 of 1977, including the transportation thereof to builder's merchants and mines, within the areas and/or the routes set forth in the public road carrier permit issued to applicant (respondent) in terms of the said Act."

It very soon thereafter came to the attention of the

respondent's/ 5 respondent's representative that the appellant was still transporting substantial quantities of cement in pockets over the above-mentioned routes. It took the matter up with the appellant, who now adopted an attitude differing markedly from that reflected in his answering affidavit in the interdict proceedings. He claimed that since cement could be used for shaft sinking purposes, he was entitled to transport it over the above-mentioned routes regardless of whether it was actually designated for use for shaft sinking purposes. The respondent thereupon again approached the Cape Provincial Division for relief. By notice of motion it sought an order declaring that the appellant "has failed/....6. failed to comply with the terms of the interdict granted by this Honourable Court on 7 April 1983", and for other relief. In an answering affidavit the appellant acknowledged that he had transported cement over the routes in question after 7 April 1983, and that it was not designated for shaft sinking purposes. He presented evidence, however, that cement is extensively used in shaft sinking operations, and is for that reason considered to be one of the components of shaft sinking equipment. He averred that he undertook the transportation complained of on legal advice to the effect that the attitude adopted by him in the proceedings before Burger J was wrong.

The matter came before Rose-Innes J who

on/

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on 4 August 1983 made an order declaring -

"1(a) That the public road transportation permit... issued to and held by respondent (appellant) in terms of the Road Transportation Act, 1977, and which authorises the conveyance in classes (b) (b) of the annexures attached thereto of: (b) shaft sinking equipment -(b) within the Republic of South

Africa authorises respondent in terms of the said clauses (b) (b) to convey, inter alia, cement to be used for the purpose of shaft sinking, but does not authorise the conveyance of cement to be used for any other purpose; and (b) That the interdict granted by this

Court on 7 April 1983 in Case No 3091 of 1983 has the effect, inter alia, of interdicting and restraining respondent from transporting cement otherwise than in accordance with

the/

8.

the provisions of clauses (b) (b) of respondent's said permit, herein before referred to in paragraph 1(a) of this order, that is to say otherwise than to be used for the purpose of shaft sinking.

2 that respondent has failed to

comply with the aforesaid interdict in that respondent on 10 May and 19 May 1983 conveyed cement otherwise than in accordance with the provisions of respondent's aforesaid permit."

Leave to appeal was subsequently refused by Rose-Innes J

but such leave was thereafter granted to the appellant pursuant to a petition therefor addressed to the Chief Justice.

It will be seen that the declaratory orders

granted relate both to the interpretation and effect

of/

9. of the order granted by Burger J on 7 April 1983,

and to the construction of appellant's permit. The

correctness of both parts of the court's order is

challenged in this appeal, and it follows, I think,

that whatever view we take of the meaning and effect

of the order of 7 April 1983, we still have to state our conclusions on the construction of the appellant's permit. I find it convenient firstly to discuss the question of the meaning of the order granted by Burger J. The order is certainly not as explicit as it might ideally have been. To clarify the resultant ambiguity it is, I think, permissible to have

regard/

10. regard to the circumstances prevailing at the time

"As was said in the case of *Richter v Bloemfontein Town Council* (1922 AD 69), 'every document of course should be read in the light of the circumstances existing at the time, and evidence may rightly be given of every material fact which will place the Court as near as may be in the situation of the parties to the instrument' These words, it is true, had reference to an agreement, but they would be equally applicable to an order made by a Court of Justice, which on the face of it was ambiguous".

(Solomon CJ in *Garlick v Smartt & Another*, 1928 AD 82 at p 87). Of prime importance in this regard is the context of the case before the court. It was common cause in the proceedings before Burger J that the appellant's

permit/

11.

permit did not authorise the transportation of cement otherwise than for use for shaft sinking operations. The sole dispute, as I said earlier, was whether the appellant believed that the cement conveyed by him was destined for shaft sinking operations. It can accordingly be said with reasonable certainty that Burger J intended to prohibit the transportation of cement which was not earmarked for shaft sinking operations. It is also reasonable to suppose that Burger J intended his order to have content, and not to leave the question of the scope of appellant's permit open. It is in these circumstances necessary to place a gloss on the words in the order which imperfectly reflect that which

Burger/

12. Burger J had in mind. I conclude that it is a necessary implication of the order of 7 April 1983 that it restrains the conveyance of cement which is not destined for shaft sinking purposes. I accordingly hold that the court a quo correctly granted the above-quoted declarator numbered 1 (b). I turn now to the question of the interpretation of the appellant's permit, and more particularly of the words "Shaft sinking equipment". The permit, as any other document of a like nature, has to be construed in accordance with the ordinary sense of the words used (c f *Gentiruco A G v Firestone S A (Pty) Ltd.* 1972(1) S A 589(A) at p 614 (A-D)).

I/ 13. I agree with the court a quo that the evidence established that cement is frequently used in shaft sinking operations. I also share its view that in that setting the word "materials" would have been more appropriate to describe a commodity such as cement and I shall assume that the word "equipment" is capable of a meaning sufficiently wide to include cement. And I have no doubt that it correctly rejected the contention that because cement could be a component in shaft sinking equipment, the appellant's permit should be construed so as to authorise the conveyance of cement regardless of the purpose for which it is to be used. In my opinion the qualification of "equipment" by the adjectival phrase

"shaft/

14. "shaft sinking" clearly indicates the purpose for which

the equipment is to be used. Such a combination is common in English parlance, e g camping equipment, or building materials; in each case the adjective denotes an objective., "Shaft sinking equipment", in my view, denotes apparatus or material which either is exclusively used in shaft sinking operations, or, while capable of use for other purposes, is intended to be used for the purpose of shaft sinking. This view of the matter disposes of the contention advanced by appellant's counsel, that the phrase in question is ambiguous, and that it is accordingly possible to adopt the meaning "equipment capable of use for shaft sinking!"

To/

15.

To adopt the interpretation contended for by appellant would in my opinion lead to absurd results. If every item which could conceivably in some way or another be used in shaft sinking operations qualifies for that reason as shaft sinking equipment regardless of the real purpose of use, an enormous variety of items may be transported by virtue of the permit. That could never have been the intention of the issuing authority. Counsel for the appellant contended that because section 21(3)(c) of the Act enjoins the Board inter alia to specify "the class or classes of goods which may be conveyed under a permit" and

because/ 16. because section 13 of the Act provides for the granting -of permits subject to conditions, the words "shaft sinking equipment" should be construed as specifying a class of goods without the imposition of a condition, i e the purpose for which the goods are to be used. In my view since the purpose for which the goods are to be used is implicit in the class of goods which may be transported, it would be tautologous to add a condition specifying the purpose. Appellant's counsel argued that to construe the permit as the court a quo did, leads to the imposition upon the permit holder of an obligation to ascertain the state of mind of the consignee. How is the permit

holder/ 17. holder to know for what purpose the goods are going to be used? I do not think that this need be a real problem. In many cases the destination and purpose of use will be obvious to the permit holder. Reference may be made to the facts of this case. The appellant must have known perfectly well that the cement transported by him was not destined for a mine, and would

probably not be used for shaft sinking operations. In less obvious cases the appellant should make enquiries, and I think that he would be on safe ground if he were to be given an assurance that shaft sinking is the objective. It appears that it is not unusual for permits issued in terms of the Act to limit the class

18. of goods to be conveyed by reference to the end use. The very permit under discussion contains in part of it, such limitations. It inter alia authorises the transportation of transformers "for immediate installation", certain type of building material "not for replenishing stocks", and machinery "for urgent repairs".

In my judgment the court a quo was correct in granting the above-quoted declaratory order numbered 1(a).

In the result the appeal is dismissed with costs including the costs consequent on the employment of two counsel.

ELOFF, AJA CORBETT JA)

MILLER JA)

) CONCURVAN HEERDEN JA) NICHOLAS JA)

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Prepared on 13 October 2026 · Esheria