

SOUTH AFRICA / JUDGMENT

Swanepoel v Joco Wildboerdery (Edms) Bpk (A903/2015) [2016] ZAWCHC 191 (14 December 2016) [2016] ZAWCHC 191

COURT

Western Cape High Court, Cape Town

BEFORE

Allie, Rogers

CASE / FILE NUMBER

A903/2015

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THE

HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

In

the matter between

Case

No: A903/2015

JOHANNES

STEPHANUS MARAIS SWANEPOEL

APPELLANT

And

JOCO

WILDBOERDERY (EDMS) BPK

RESPONDENT

Coram:

ALLIE & ROGERS JJ

Heard:

9 DECEMBER 2016

Delivered:

14 DECEMBER 2016

JUDGMENT

ROGERS J (ALLIE J concurring):

- [1] The appellant ('Swanepoel') appeals against the dismissal of his action in the court a quo. The appellant, who provides borehole drilling services, sued the respondent for R45 383,40 in respect of a borehole sunk on the respondent's farm during June 2014. The respondent's sole shareholder and representative in its dealings with the appellant was a Mr JH Coetzee ('Coetzee').
- [2] The factual dispute between the parties was whether, as Swanepoel alleged, the mandate was for him to sink a borehole three meters from an existing dilapidated well or whether, as the respondent alleged, the mandate was for him to clean the old well.
- [3] The respondent had recently purchased the farm for the purpose of carrying game. Water was, however, a problem. Coetzee engaged a geologist who marked a particular spot which he thought promising for a borehole. Coetzee asked Swanepoel to sink the borehole. They agreed a rate per metre. When Swanepoel arrived at the farm it turned out that his equipment could not reach the geologist's spot unless the road was cleared of vegetation.
- [4] Since this would take some time, Coetzee drove Swanepoel to a dilapidated well. This was near a small church. A disused windmill stood above the well. Coetzee told Swanepoel that this well was about 40 to 60 meters deep and according to the local community had once been a source of water. The idea was to utilise Swanepoel's services at this location while the road to the other spot was cleared.
- [5] A discussion between Swanepoel and Coetzee ensued at the old well. Coetzee asked Swanepoel whether he could clean it out. There is a dispute as to what happened next. Coetzee's version is that Swanepoel agreed to do so, whereupon Coetzee left, giving his foreman, Mr Cheslin Muis ('Muis'), instructions about assisting Swanepoel in the provision of water and diesel. Swanepoel's version is that he told Coetzee that he was not prepared to clean the old well. They then agreed that he would drill a borehole three meters away in the hope that they would strike the same source as had once fed the well.
- [6] What is common cause is that Swanepoel and his workers proceeded to sink a borehole three meters away from the opening of the old well. They did not strike water at 60 meters. They drilled to about 100 meters. Swanepoel then phoned Coetzee (this was on the next day) to say that he had still not found water but the signs were promising. Coetzee came back to the site and they agreed that he could go a little deeper. The enterprise was abandoned at a depth of 120 meters.

- [7] By this stage the road to the geologist's spot had been cleared. Swanepoel relocated his equipment there. With Coetzee in attendance, drilling began. Unfortunately this too was unsuccessful, operations eventually being abandoned at a depth of 160 meters.
- [8] Swanepoel issued separate invoices for the two boreholes. Coetzee paid the second invoice but not the first.
- [9] In support of his claim Swanepoel testified and called his foreman, Mr Joseph Snoek ('Snoek'). The respondent's witnesses were Coetzee and Muis. The magistrate did not make adverse credibility findings against any of them. She considered that the matter needed to be resolved with reference to the inherent probabilities. She mentioned two factors which in her view favoured the respondent's version:
- (i) The geologist had been very particular that the borehole contractor should sink the hole in the exact spot marked by him. It was unlikely in the circumstances that Coetzee would have agreed to sink a hole three meters away from the old well in the belief that water would be as likely to be found there as at the exact location of the old well.
 - (ii) There was a factual dispute as to whether Coetzee was present during the drilling operations at the site of the old well. If he was, and raised no complaint, this would be destructive of his version. On this aspect the magistrate thought that the probabilities favoured Coetzee's version. If the mandate was simply to clean the old well, it was unlikely that Coetzee would have hung around to observe the works. Furthermore, if – as Swanepoel testified – Coetzee returned to the location four or five times during the drilling works, it would not have been necessary for Swanepoel to phone him to say they had reached 100m without finding water.
- [10] The magistrate's observations are not compelling. As to the first factor, if – as Swanepoel testified – he made it clear that he was not willing to clean out the old well, the problem would have remained as to what Swanepoel would do with his time until the road to the geologist's spot was cleared. Coetzee was anxious for Swanepoel not to leave the farm since he was afraid it might be some time before he could get him back. Coetzee was desperate for water. He could not be certain that

water would be found at the geologist's spot. However, however picky the geologist may have been about his precise spot, the

geologist had said nothing about the old well. He had not identified it as a spot where water could still be found. The people who had dug the old well decades before (Swanepoel thought it might have been a hundred years old) would not have had advanced technology to identify a precise spot. Most people would think it a matter of common sense that if there was still water beneath the old well there would also be water nearby.

[11] The other factor mentioned by the magistrate begs the question. The magistrate based her probability finding on an assumption that the mandate was to clean out the old well but that was the very point in issue. Even on the magistrate's question-begging assumption, I do not see why it should be supposed that Coetzee would not have been interested in the operations. He was desperate for water. It was not known that the old well would still have water. He says he assumed that the cost of cleaning the old well

would be the same rate per metre as drilling a new hole so it was not as if the cleaning of the old well was a comparatively cheap

operation. The cleaning of the old well would, in the circumstances, have been every bit as interesting and commercially significant as drilling a new hole three meters away.

[12] More significantly, however, there are important inherent probabilities which the magistrate failed to consider. The first and most striking is the undisputed evidence that almost immediately after the conclusion of the oral agreement Swanepoel proceeded to start drilling a hole three meters away from the old well. He did not even try to remove the old windmill. In other words, he did not do the very thing which according to Coetzee he had just agreed to do. On Coetzee's version, Swanepoel's conduct was incomprehensible. Even if Coetzee was not present when the drilling operations began or at any time before they reached 100 metres, Swanepoel was not going to be able to hide from Coetzee that he had drilled a new hole rather than cleaned the old well. While Coetzee might have been happy if water had been found in the new hole, Swanepoel knew that there was no guarantee of finding water. He would thus have been at material risk of non-payment for his time, labour and materials (the latter in the form of the metal casings inserted to prevent the borehole from caving) if he deviated so obviously from his mandate without delivering results.

[13] There are only three possibilities:

(i) Swanepoel, without notifying Coetzee, decided to ignore the mandate and drill a new hole; (ii) there was a misunderstanding between Swanepoel and Coetzee about the mandate; (iii) the mandate was as Swanepoel alleged. I have shown why the first of these possibilities is wholly implausible. The second is ruled out by the evidence of the parties – neither Swanepoel nor Coetzee's versions would be consistent with a misunderstanding. Each of them regarded the mandate as quite clear. This leaves the third of the three possibilities as the most inherently plausible.

[14] We asked Mr Claassen, who appeared for the respondent in the appeal, what in his submission was going on in Swanepoel's head when he ignored the mandate and drilled a new hole. All that Mr Claassen could suggest was that Swanepoel, as a seasoned driller, had simply decided that he knew what was best. There would, however, have been no reason for Swanepoel not to make his view known from the outset.

[15] Then there is the fact that if Swanepoel was to clean the old well the disused windmill had to be removed. It was apparently bolted to cement blocks. Swanepoel testified that he did not have equipment to remove it. Coetzee's evidence on the issue was equivocal. His attorney put to Swanepoel that Coetzee would testify that they had discussed the removal of the windmill and that Coetzee had said to Swanepoel that it would not be difficult to dismantle. When Coetzee testified, however, he did not claim that the removal of the windmill was expressly discussed. He testified that he had simply assumed that Swanepoel would remove the windmill.

[16] Coetzee testified that he had not thought it would be very hard to saw through the windmill's legs and tow it away with a rope. It was not suggested, however, that Swanepoel had a rope. When questioned on this aspect, Swanepoel said that to saw the legs off and tow the windmill would have been a dangerous operation which could have injured his staff and damaged his equipment. He thought one would need apparatus to lift the windmill vertically off its base. The metal casing used in the boreholes is thin. His cutting torch would not have been suitable to tackle the windmill. Another preparatory step would have been to remove the old

casings from the well, which might not have been an easy exercise.

[17] There is also Swanepoel's uncontested evidence that he does not clean out old wells because he has expensive imported equipment which could be damaged. His foreman, Snoek, who has worked with him since 1981, confirmed this, referring to an incident where his equipment had got stuck in an old hole. They have various drill-bit sizes. Existing wells sunk by other people may not match their equipment for size. Both Coetzee and Muis confirmed in their evidence that Swanepoel told them that he did not clean other people's wells. But on their version Swanepoel only gave this explanation after being challenged about having sunk a new hole

rather than cleaning the old well. I find it difficult to believe that if Swanepoel's attitude in general was that he would not clean old wells, he would have reached the agreement which Coetzee claims.

[18] Assuming that Coetzee, as he testified, was not present when the drilling began or at any time before a depth of 100 metres was reached, his reaction upon being phoned by Swanepoel was not what one would have expected if the mandate was to clean out the old well. One would have anticipated an immediate challenge as to how Swanepoel could have reached a depth of 100 meters if he was merely

cleaning out a well with a depth of 40 to 60 meters. This is not to say that Coetzee was pleased with the news. Nobody would want to spend money on a borehole and not find water. He came to the site. According to Swanepoel, Coetzee agreed that they could drill a bit deeper in view of the encouraging signs. There was no complaint that Swanepoel should not have been drilling a new hole.

- [19] Coetzee's version was that on arrival he immediately asked Swanepoel why he had not cleaned out the old well. Swanepoel's response was that he does not clean old wells or remove old windmills. The discussion continued. Coetzee told Swanepoel that he had drilled too deep. Swanepoel replied that the little stones which were being extracted at a depth of 100 meters were promising signs of water beneath. Coetzee questioned him as to how he would know if he had struck water: he was pumping so much water into the hole that he could not know whether the water coming out was this water or fresh water. He says he did not know what to do and in the end just turned around and went back to his bakkie. He did not tell Swanepoel that he would not be paying for the borehole. He was reticent to confront Swanepoel because he still needed his services to drill the borehole at the geologist's spot.
- [20] Whatever his subjective reasons, Coetzee did not behave like someone who had just discovered that his borehole contractor was not to be trusted and had ignored his mandate.
- [21] I do not intend to delve at length into the disputed questions as to whether drilling at the site of the old well began on the day of the discussion or only on the following morning and whether Coetzee was present when the drilling began or at any stage prior to a depth of 100 metres being reached and as to when it was that Coetzee's wife accompanied him to the site. If it be assumed that the evidence of Coetzee and Muis is correct and that Swanepoel and Snoek's contrary recollections were mistaken, it would not alter my conclusion on the probabilities. I nevertheless observe that there was no good reason for Swanepoel not to have begun drilling that same day. And Coetzee does not seem to have had other business that would have detained him and prevented him from visiting the works to see how things were coming along.
- [22] In my opinion, therefore, the appeal must succeed. I would thus grant the following order:
- (a) The appeal succeeds with costs.
 - (b) The order of the court a quo is set aside and replaced with the following order:
 - (i) Judgment is granted in the plaintiff's favour for R45 383,40 and interest thereon at 9% a tempore morae from 21 April 2015 to date of payment.
 - (ii) The defendant is to pay the plaintiff's costs of suit.

ALLIE J:

[23] I concur and it is so ordered.

ALLIE J

ROGERS J

APPEARANCES

For Appellant Mr A de V la Grange SC Instructed by Du Bois Attorneys 23 Church Street
Robertson For Respondent Mr James Claasen Raubenheimers Inc 60 Cathedral Street George

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