

SOUTH AFRICA / JUDGMENT

Turvey Broers (Pty) Ltd v Orcin Investra 4 (Pty) Ltd ta Mountain View Nursery (1571/2019) [2021] ZAMPMBHC 70 (13 December 2021)

[2021] ZAMPMBHC 70

COURT

Mbombela High Court, Mpumalanga

BEFORE

Greyling-Coetzer AJ

CASE / FILE NUMBER

1571/2019

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE HIGH COURT OF

SOUTH AFRICA

MPUMALANGA DIVISION,

MBOMBELA (MAIN SEAT)

CASE

NUMBER: 1571/2019

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

In the matter between:

TURVEY
BROERS (PTY)
LTD
Plaintiff
and
ORCIN INVESTRA 4 (PTY)
LTD
t/a MOUNTAIN VIEW
NURSERY
(Registration Number:
2016/499660/07)
Defendant

JUDGMENT**GREYLING-COETZER AJ****Introduction**

- [1] The plaintiff, an aspirant macadamia farmer, instituted action against the defendant, a Macadamias South Africa (SAMAC) accredited nursery. The plaintiff claims R440 239.50, which amount is made up by two claims. The first in the amount of R413 719.50, is a balance due pursuant to the defendant's repudiation/plaintiff's cancellation of agreements, and the second in respect of damages suffered in the amount of R26 448.00.

Background

- [2] The plaintiff is a private company involved in farming in the Western Cape. Wanting to commence farming in macadamias, its director Mr Turvey researched on the topic and educating himself in issues relating to macadamia farming. Mr Turvey came to hear that the defendant is a reputable nursery from whom macadamia trees could be sourced. Mr Turvey consulted the SAMAC website, which organization functions as an industry guide and found the defendant to be listed as a SAMAC accredited nursery. He further consulted the defendant's website which similarly confirmed the defendants 5-star accreditation, displayed the SAMAC logo and copy of the defendant's accreditation certificate. Mr Turvey being assured traveled to the defendant's nursery intended on purchasing macadamia trees from the defendant.
- [3] Between the period June 2016 and September 2017, the plaintiff (represented by Mr. Willie Turvey) and the defendant (represented by either Mr. Stefan Östlind, alternatively an authorised representative) concluded various agreements. The plaintiff categorised the agreements as being three oral agreements, an oral addendum agreement and an oral contract of novation.
- [4] The plaintiff's particulars of claim set out what the alleged express, tacit or implied terms of the agreements were. Succinctly and according to the plaintiff, the agreements entail the following:-

4.1 The first agreement was for the purchase of 5 000 inoculated Beaumont macadamia trees at a price of R225 000.00 (plus 14% VAT). A deposit of R100 000.00 (plus 14% VAT) was payable within 10 (ten) days after receipt of a pro forma invoice from the defendant. The trees were to be delivered by February 2017, and the balance of the purchase price was payable on 1 February 2017. The trees would further comply with SAMAC standards, and should a breach of the agreement occur, the plaintiff would be entitled to cancel the agreement and obtain a refund of the amounts paid;

4.2 The second agreement, on similar terms that the first agreement was for the purchase of 15 000 inoculated Beaumont trees on similar terms as the first agreement. The purchase price was R675 000.00 (plus 14% VAT). A deposit of R300 000.00 (plus 14 VAT) was payable within 10 (ten) days of receipt of a pro forma invoice from the defendant, and delivery of the trees would take place by September 2017. The plaintiff also purchased 12 500 A4 inoculated macadamia trees, at a price of R687 500.00 (plus 14 VAT). The deposit in respect of the aforementioned was R250 000.00 (plus 14% VAT), payable within 10 (ten) days of receipt of a pro forma invoice from the defendant. These A4 trees would be delivered by January 2018;

4.3 The oral addendum replaced the first agreement and amended the second agreement. In terms of the addendum the 5 000 Beaumont macadamia trees ordered in terms of the first agreement would be cancelled with no financial consequences to either of the parties. Some of the trees which were delivered in terms of the second agreement, which have died, would be replaced by the defendant. The balance payable would be R132 525.00;

4.4 In terms of the third agreement the plaintiff purchased 4 000 A4 inoculated macadamia trees on similar terms as the first- and second agreements. The trees were to be delivered by December 2017 and a deposit of R125 400.00 (plus 14% VAT) was payable;

4.5 In respect of the novation agreement, it was alleged that during September 2017, and pursuant to a storm destroying the trees ordered by the plaintiff in terms of the second agreement (as amended) and third agreements, an oral novation agreement was concluded. In terms of this agreement the 16 500-outstanding inoculated A4 trees (purchased in terms of the amended second agreement and the third agreement) would be reduced to 6 500 inoculated A4 trees. The remaining 10 000 trees (purchased in terms of the amended second agreement and the third agreement) would be replaced by Nelmac 2 trees. 2 000 of the A4 trees would be delivered by December 2017, 10 000 Nelmac 2 trees would be delivered by March 2018 and the remaining trees would be delivered after winter in 2018.

[5] It is alleged that the defendant breached, alternatively repudiated the novation agreement by failing to deliver the 2 000 A4 trees during December 2017 and failed to deliver the Nelmac 2 and A4 trees as agreed. In addition, and upon inspection of the trees at the defendant's nursery, it was ascertained that the trees did not comply with SAMAC standards, and as a result the plaintiff elected to accept the defendant's repudiation and subsequently cancelled the novation agreement.

[6] The defendant admits that the plaintiff purchased various macadamia trees from the defendant during the alleged periods, but contends that the governing agreements were written, as set out in the various pro forma invoices, and not oral agreements. In respect of the novation agreement, the defendant contends that it is set out in pro forma invoice number PRO 0000217.

- [7] The defendant pleads that these pro forma invoices explicitly set out the terms and conditions applicable to the agreements. The defendant further pleads that the deposits payable by the plaintiff were non-refundable, and denies that it was responsible to control the quality of the trees post-delivery to the plaintiff.
- [8] The defendant denies that any of the delivered trees and/or nursery trees grown for the plaintiff had defective roots or did not comply with SAMAC standards. The defendant qualified the former by adding that the trees concerned did not have to comply with SAMAC, as SAMAC standards are only recommendatory. Further that in June 2018 the trees concerned did not have to comply with any standard/recommendation as the due date for delivery had yet to occur.
- [9] In replication it was contended that should the court find that the agreements were written or partially oral and partially written, and that the written portion of the agreements are reflected on the various pro forma invoices, the plaintiff was not ad idem with the terms of the written portion of the agreements as reflected in the pro forma invoices, alternatively should it be found that the terms and conditions reflected in the pro forma invoices were agreed on between the parties, the 50% non-refundable deposits constitute a penalty as envisaged in the Conventional

Penalties Act, Act 15 of 1962.

Plaintiff's evidence

- [10] The plaintiff led the evidence of two witnesses, the first being Mr Turvey, a director of the plaintiff. I do not intend dealing with his evidence in detail. In a nutshell, Mr Turvey's evidence was to the following effect:-

10.1 as a prospective macadamia farmer, he was advised by a neighbour that the defendant was a nursery which can provide source trees. He then proceeded to consult the SAMAC website in order to check for accredited nurseries. From the SAMAC website it appeared that the defendant was such an accredited nursery, and the defendant, on its website, listed itself as 5-star SAMAC accredited nursery;

10.2 Mr Turvey, being a director of the plaintiff's farming activities situated in the Western Cape, was a first-time macadamia farmer and he therefore researched the standards and criteria for source macadamia trees. Satisfied by his research that the defendant was an accredited, and therefore an appropriate nursery from which to source macadamia trees, he travelled to the defendant's nursery during June 2016;

10.3 in engaging with Mr Östlind, the purchase price was discussed and agreed upon, as well as that a deposit would be payable. The delivery date of the Beaumont trees was agreed to be between January 2017 and February 2017. This, according to Mr Turvey, constituted the first agreement. He received a pro forma invoice, being pro forma invoice number PRO 00001111, and that a deposit amount of R114 000.00 was paid by the plaintiff;

10.4 a further order was placed for 15 000 Beaumont trees and 12 500 A4 trees. This constituted the second agreement, which was done during July 2016. According to Mr Turvey, it was a term that SAMAC criteria would be followed. In respect of this second order a pro forma invoice, being pro forma invoice number PRO 0000112 was issued by the defendant, which indicated two deposits being payable in the amounts of R342 000.00 and R285 000.00 respectively. These deposit amounts were similarly duly paid by the plaintiff. It was a further term of the second agreement that a 5% discount would be allowed on every 10 000 trees ordered.

10.5 a further 4 000 A4 trees were ordered by the plaintiff from the defendant. A tax invoice was issued during November 2016. and a deposit of R125 400.00 was paid by the plaintiff;

10.6 in respect of pro forma invoice number PRO111 a further payment of R142 000.00 was made;

10.7 during the first half of 2017, 15 000 trees were delivered together with additional trees in order to make up for losses. This was so, because when the first batch of trees were received, most of them died, and after communicating with Mr Ruan Eksteen from the defendant, he agreed to send the plaintiff extra trees;

10.8 although more than 15 000 trees were ordered at that stage, and upon contacting the defendant to arrange delivery of 5 000 trees, Mr Turvey was advised that there were not enough trees available. In September 2017 Mr Eksteen said there was a storm which damaged the trees. Mr Turvey testified that he then flew to the defendant where a meeting was held with Mr Östlind and Mr Eksteen. During this meeting the changes to the standing orders were discussed, and it was agreed that as the plaintiff already planned in respect of the Beaumont trees and the A4 trees pollinators, the plaintiff would take any trees in order to plant as soon as possible;

10.9 it was suggested that the plaintiff take Nelmac 2 trees instead of Beaumont trees, and split A4 to Nelmac 2 and A4 grafted trees. It was thus agreed that as the defendant was unable to deliver the last 5 000 Beaumont trees, the order for the latter would be cancelled, and the second and third order would be changed to Nelmac 2 trees. The new agreement concluded in September 2017 would thus be that 10 000 grafted Nelmac 2 trees would be delivered in March

2018. Mr Turvey explained that “grafted” refers to inoculated trees;

10.10 in December 2017 the 2 000 A4 trees were not delivered, as Mr Ruan Eksteen advised that no trees were available, but indicated that a satellite nursery of the defendant, situated in Klein Brak, had approximately 500 to 600 trees which the plaintiff could take. In this respect the plaintiff received 540 trees. Currently only 80 trees still stand, and about 400 had died. According to Mr Turvey these trees died due to root deformities, which they call “J-root”;

10.11 Mr Turvey, not being an expert in macadamia trees, but being a third generation farmer, testified that any reasonable farmer would be able to identify that something was wrong with a root looking like the ones dug up. According to Mr Turvey, SAMAC standards indicated that roots need to be healthy with a healthy tap, and the side roots not to be bent in order for it to grow bigger. According to him this problem was created by transplant problems and not on the farm. He elaborated that with “transplant” he meant that when a tree is transplanted from a small bag

to a bigger bag;

10.12 Mr Turvey, testified that a total of 17 770 Beaumont trees were received. In January 2018 a credit note was issued to the plaintiff,

due to the defendant's failure to deliver. This credit note however does not reflect the correct numbers and the plaintiff was charged for trees that were sent to replace the ones that had died. Furthermore, the discount was also not correctly reflected. This was communicated by Mr Turvey to Mr Östlind by way of e-mail, wherein it was stated that the following needed to be corrected: the 816's were only 20 and not 320; the A4's were 540 and not 400;

10.13 January 2018 a further agreement was reached in respect of 10 000 Nelmac 2 trees and the remaining 6 000 A4 trees. This was documented in pro forma invoice number PRO 0000217. According to Mr Turvey the dates reflecting on pro forma invoice PRO 0000217 were incorrect, in which respect he contacted Mr Östlind to state that those were not the dates agreed upon. Mr Östlind, according to Mr Turvey, replied that he should not worry about the dates as the trees were at the nursery and that they would be ready in March 2015. In respect of pro forma invoice PRO 0000217, the deposits were duly paid;

10.14 in March 2018 the Nelmac 2 trees were not delivered, as Mr Eksteen indicated that the trees were too small, and the delivery date was pushed to May 2018. By May 2018 Mr Eksteen indicated that the trees were still not on standard as they were still too small, and that he would keep them in a safe environment at the nursery, to be planted next season;

10.15 he obtained expert advice from Mayo Mac Production Factory ("Mayo Mac"), who provided the plaintiff with technical advice through a technical advisor, Mr Armand Smit.

10.16 Mr Smit visited the farm in the Western Cape during the beginning of 2018, where he inspected the trees that died. According to Mr Turvey, Mr Smit indicated that the trees died from J-root. Mr Smit also advised Mr Turvey that he was at the defendant's nursery with another farmer during 2018, and that there were no trees for the order placed by the plaintiff. Mr Turvey then flew to Nelspruit, together with his father in July 2018 in order to visit the defendant's nursery.

10.17 at the defendant's nursery there were very few trees. In the tunnels there were less than 2 000 A4 trees, which were in bad shape and covered in mould. Mr Turvey was shown 10 000 Nelmac 2 trees, which were the trees promised to the plaintiff in August

2018. These trees, were similarly not on standard, in that the colour of the leaves were not right. The leaves were yellow and the trees looked 'sick'. They were approximately 40cm in height'

10.18 Mr Eksteen suggested that the issue be discussed. Mr Turvey indicated that they wished to cancel the tree order, as the trees were clearly not ready as promised. At that point Mr Eksteen called Mr Östlind and he advised that Mr Östlind said that a cancellation was in order. Mr Eksteen indicated that they were quite glad that the orders were cancelled, as they were behind on their orders. Mr Turvey enquired as to whether the deposits would be refunded, to which Mr Eksteen

responded that he was happy to refund the plaintiff, so that the plaintiff could purchase other trees;

10.19 They visited four other nurseries in the area and purchased other Nelmac 2 trees from SAMAC Nurseries (Pty) Ltd and one Mr R Lauwrens. According to the evidence of Mr Turvey, as set out in the e-mail dated 6 August 2018, Mr Östlind made a payment in the amount of R200 000.00 and indicated that he was strongly advised not to pay out any further deposits until the defendant has reviewed the situation with its attorney;

10.20 Mr Östlind indicated that he would pay the remaining outstanding amounts by 15 December 2018. An amount of R130 600.00 was refunded to the plaintiff during January 2019, but no repayment was made in respect of the 6 000 A4 trees;

10.21 Mr Turvey testified that he spoke to Mr Eksteen in January 2019, and he indicated that Mr Östlind did not want to pay the money back as agreed. In e-mail exchanges Mr Östlind offered various alternatives to the plaintiff, one of which was that the plaintiff

pays another R174 000.00 (plus VAT) before 31 January 2019 and collect A4 trees before the end of February 2019. Wanting to mitigate any losses, Mr Turvey, during January 2019, sent Mr Smit to inspect the trees at the defendant's nursery. Upon Mr Smit's arrival he was refused access to the defendant's nursery. Mr Turvey testified that notwithstanding the ostensible offer of collection of the trees by Mr Östlind, Mr Eksteen confirmed that there were no A4 trees available.

[11] The second witness called by the plaintiff was Mr Armand Smit. Mr Smit was previously employed by Mayo Mac and has a BSc degree in plant and soil. He also prepared an expert report which was submitted into evidence. Mr Smit's evidence can be summarised as follows:-

11.1 He was an honours student and recently submitted his dissertation with the focus on macadamias, water stress, and health and quality of macadamias. He further testified that his exposure in respect of cultivating of macadamias was intensive;

11.2 Mr Smit provided an extensive history of his involvement in macadamia trees. More relevant is that during his employment at Mayo Mac, he, as technical advisor, attended to various advices to macadamia farmers in respect of the pre-establishment, site selection,

irrigation, pesticide management, and up to harvesting and propagation. Mr Smit obtained international accreditation for his skill and qualification, and is currently employed by the Macadamia Farmers Headquarters in Australia, where he is in a similar role as a technical advisor;

11.3 Mr Smit's evidence related to the criteria for obtaining SAMAC accreditation through the Macadamia Growers' Handbook and all the SAMAC protocols to be followed;

11.4 in February 2018 he visited the plaintiff's farm where they discussed several matters surrounding macadamia farming, tree

selection and the then quality of the trees. He further indicated that tests were conducted by pulling or digging out the trees and inspecting the roots, wood structure and direction. On the plaintiff's farm Mr Smit noticed that various trees had J-root;

11.5 Mr Smit then gave evidence in respect of the various causes of J-root. He testified that in July 2018 he accompanied Mr Turvey to the defendant's nursery where they were received by Mr Eksteen. They observed the A4 and Beaumont trees to be very small. The Nelmac 2 trees had some new flush, but they had mould on them. What was however noticeable was that it was the same batch of trees which were presented to one Mr Freddy Stegman, who was unable to indicate the exact number of grafted trees that he observed. There were however not enough trees, nor were they of good enough quality for the plaintiff's order. According to Mr Smit, if the defendant had to start afresh in cultivating the trees, it would take, from start, approximately 18 months;

11.6 in terms of the report he compiled, he concluded that both the planted and the nursery trees inspected did not adhere to the SAMAC tree quality standards. Mr Smit did not inspect all 400 trees which allegedly died, nor did all the trees which he inspected die from defective roots;

11.7 in conclusion Mr Smit testified that based on the nursery trees inspected, the said nursery trees presented by the defendant upon the time of the inspection did not meet the SAMAC quality standards and would not have met the plaintiff's nursery tree order deadline.

Defendant's evidence

[12] Mr Östlind testified on behalf of the defendant. He is a former director and owner of the defendant, and was in control of the administrative function of the defendant. Mr Östlind's evidence was briefly put:-

12.1 Pro forma invoices were issued on which the standard terms and conditions are contained in respect of the agreement of sale. Such pro forma invoices would be preceded by dialogue with a customer in respect of the type of trees, the quantity etc. The pro forma invoice would set out the deposit payable, and upon receipt of payment of the required deposit, a tax invoice would be issued, which serves as confirmation of the order;

12.2 according to Mr Östlind, no other terms and conditions existed or were agreed upon, other than that set out in the pro forma invoices although some detail had to be changed from time to time, like delivery dates;

12.3 Mr Östlind admitted all the payments reflected and made by the plaintiff. On 1 October 2017 the terms and conditions were amended to include a term that a purchaser needs to do quality control and reject any tree on the seller's premises;

12.4 Mr Östlind testified that R198 000.00 was retained in respect of the non-refundable deposit paid by the plaintiff in respect of the A4 trees which were due for delivery in December 2018. All other payments due to the plaintiff in respect of cancelled orders, such as the 10 000 Nelmac 2 trees, have already been refunded to the plaintiff;

12.5 in July 2018 the plaintiff prematurely cancelled the order in respect of the A4 trees scheduled to be delivered in December 2018, therefore the plaintiff forfeited its deposit. A deposit is necessary in this type of business, as a tree from start to delivery takes 24 months. During this period there are various costs involved, and trees older than 2 years cannot be resold, therefore the deposit is to protect the grower (the defendant) from a customer changing its mind and the defendant being stuck with the tree and the accompanying production costs;

12.6 pursuant to the plaintiff cancelling the order for the A4 trees, the defendant was unable to sell the trees due to unforeseen circumstances such as land expropriation. Normally the defendant re-sells the trees and pays back the deposit, but in this instance it was not possible. The trees were therefore discarded. According to Mr Östlind no novation agreement, which encapsulated all the agreements between the parties, came into existence, and the said agreement was a separate agreement referring to pro forma invoice number PRO 0000217;

12.7 the evidence of Mr Östlind, in respect of the SAMAC standards, was that the defendant had always complied as it gets audited every year. The defendant is one of 15 nurseries with the highest SAMAC rating, but that such compliance is not a term and condition of the agreement. The defendant called no further witnesses.

Issues

to be determined

[13] At the conclusion of the evidence, the parties elected to file written heads of argument. In the written submissions filed by both parties, counsel for the plaintiff identified the following issues to be determined:-

13.1 whether it was a tacit or implied term of the agreements that the defendant had to comply with the SAMAC standards, and if not, whether the defendant is estopped from denying that the SAMAC standards are not applicable;

13.2 whether the agreements, especially the agreement relating to pro forma invoice number PRO 0000217 was an oral agreement, a written agreement or a partly oral and partly written agreement;

13.3 in the event that it is found that pro forma invoice number PRO 0000217 is a written agreement (or partly oral and partly written agreement), whether the defendant repudiated that agreement, alternatively whether the defendant was in material breach of that agreement;

13.4 in the event that it is found that the defendant did not repudiate pro forma invoice number PRO 0000217, whether the defendant was in material breach of pro forma invoice number PRO 0000217, and whether there were 6 000 A4 trees at the defendant's nursery in January 2019 when the plaintiff attempted to inspect the nursery in order to ascertain whether it wanted to purchase the trees which were allegedly available at that stage. And if not, whether the penalty stood to be reduced as envisaged in the Conventional Penalties Act, Act 15 of 1962;

13.5 the amount the defendant is entitled to retain (i.e. the payments received minus the value of the trees which have been delivered to the plaintiff in accordance with the respective agreements; and

13.6 whether the plaintiff is entitled to damages, and if so, the amount thereof.

[14] According to counsel for the defendant, the following needs to be decided:-

14.1 the form and terms of the agreements;

14.2 the performance by the defendant, i.e. amount of trees delivered and a simple calculation on amount owing, if any;

14.3 whether the agreement in terms of pro forma invoice PRO 0000217 was prematurely cancelled; and

14.4 the defendants entitlement to retain the penalty deposit.

Form and terms of the agreements

[15] The form of the agreements i.e. written or oral received a lot of attention in the pleadings and during the trial. Although the former clouds the true issues between the parties, having regard to the common cause facts, more specifically that the parties were ad idem that:

15.1 various agreements were concluded during the period June 2016 to September 2017 in terms of which the plaintiff ordered trees from the defendant;

15.2 the plaintiff was required to pay an initial deposit and make final payment on delivery;

15.3 the trees were to be delivered at certain future dates;

15.4 5% discount would be applicable on order over 10 000;

15.5 a pro forma invoice was issued in respect of order; and

15.6 the plaintiff made payment of R 1 505 199.00 to defendant.

the form of the agreements informs the determination of the remaining issues, whether it was a term of the agreement that the trees would comply with SAMAC standards, and whether the defendant is ultimately entitled to retain the deposits paid.

[16] The pleaded case for the plaintiff is based on oral agreements. As referenced supra the replication contends that should the agreements be found to be written or partly oral and partly written the plaintiff was not ad idem with the terms of the written portion of the agreements as reflected in the pro forma invoices, and should it be found that the terms and conditions reflected in the pro forma invoices were agreed on between the parties, the non-refundable deposits constitute a penalty as envisaged in the Conventional Penalties Act, Act 15 of 1962.

- [17] Despite the persistence in argument that the agreements were exclusively oral the evidence by Mr Turvey did not fully align itself therewith. This however does not justify a finding that the agreements were exclusively written agreements as Mr Östlind's evidence similarly did not fully align itself with the case pleaded by the defendant. Does this mean the plaintiff's case stands to be dismissed outright?
- [18] It is trite that a pleader must, as it provided for in Uniform Rule 18, set out its claim by pleading clear and concise statements of the material facts upon which the pleader relies for its claim. Such shall be with sufficient particularity to enable the opposing party to reply thereto. A party who relies on a contract shall state whether the contract is written or oral, and if the contract is written, a true copy thereof or of the part relied upon shall be annexed to the pleading.
- [19] Parties are generally limited to their pleadings, and a plaintiff cannot be allowed to direct the attention of the defendant to one issue and then at trial attempt to canvas another.[1] A court however has a wide discretion to make a finding on the evidence in relation to the true issues between the parties, as well as on issues not fully foreshadowed in the pleadings. This is so as pleadings are made for the court, not the court for the pleadings.[2]
- [20] In Absa Bank Ltd v Zalvest Twenty (Pty) Ltd and Another[3] the court held in respect of Rule 18(6) that:
- “(t)he rules of court exist in order to ensure fair play and good order in the conduct of litigation. The rules do not lay down the substantive legal requirements for a cause of action, nor in general are they concerned with the substantive law of evidence. the substantive law is to be found elsewhere, mainly in legislation and the common law.*
- ...the rules of court exist to facilitate the ventilation of disputes arising from substantive law. the rules of court may only regulate procedure; they cannot make or alter substantive law...
- ...as has often been said, the rules exist for the courts, not the courts for the rules...”
- [21] Where the pleadings are not completely reconcilable with the evidence lead at trial the Court is never the less duty bound to determine the real issues between the parties, provided that no prejudice is caused to either party in doing so.
- [22] The particulars of claim could have been better worded, but it cannot be said that the defendant attention was directed to one thing in the pleadings and that another was then canvassed at trial. This is even more so having regard to the common cause facts. Both parties utilised the opportunity to fully place the facts before court. There is thus no prejudice to the defendant for the real issues between the parties to be determined. In the circumstances it will be overly formalistic to dismiss the plaintiff's claim.

- [23] Three issues turn on the form the agreements took. Firstly, whether it was a term of the agreements that the deposit was non-refundable. Secondly, whether it was an express, implied or tacit term of the agreements that the trees sold by the defendant would comply with SAMAC standards. Lastly, what the delivery dates were in respect of pro forma invoice number PRO 0000217.
- [24] From the evidence the parties' various involvement with one another in formulating and conduct in concluding the agreements, the agreements were clearly partly written and partly oral. The written portion being set out in each pro forma invoice. This means the term that the deposit was non-refundable was a term of the agreements and the delivery dates of the ordered A4 trees per pro forma invoice PRO 0000217 was December 2018.
- [25] As to the contention pleaded in the replication, that the plaintiff was not ad idem with the terms set out on the pro forma invoice, it is trite that absent a claim for rectification there is simply no room for a finding that the parties were not ad idem with the written portion of the agreements as reflected in the pro forma invoices. The pro forma invoices were received and provide that the deposit payable would be non-refundable and set out the delivery dates of each order. Even if I am wrong in this respect, and evidence was placed before court, which was not, that on receipt of the various pro forma invoice issue was taken with the term that the deposit was non-refundable or as was placed before court that the delivery dates were not correctly reflected in the pro forma invoices same is inadmissible as it contradicts or attempt to vary the written portion of the agreement.
- [26] In *Affirmative Portfolios CC v Transnet Limited t/a Metrorail* 2009 (1) SA 196 (SCA), it was held that:
- "where an agreement is partially written and partially oral, then the parol evidence rule prevents the admission only of extrinsic evidence to contradict or vary the written portion without precluding proof of the additional or supplemental oral agreement. This is often referred to as the 'partial integration' rule."*
- [27] It was evidently not an express term of the agreement that the trees sold and delivered by the defendant would comply with SAMAC standards. Similarly, it was not a term implied by law or trade. What remains is a tacit term, if any term at all.
- [28] A tacit term or a term implied by facts was described by Corbett AJA in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*[4] as
- "an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances..."*[5]
- [29] The starting point is the express terms. The express terms of the various agreements do not deliberately exclude the possibility of importing tacit terms of a particular type, more specifically, such as in the present instance, whether the trees to be provided by the defendant to the plaintiff would comply with the relevant SAMAC standards.

- [30] Because a tacit term is derived from an inference as to what both parties must have intended if they had applied their minds, the inference will be drawn only if it is a necessary one. Once there is difficulty and doubt as to how the term should be formulated, or how far it should go, it can hardly be said that the parties clearly intended the proposed term to be part of their agreement.[6]
- [31] In the matter of Wilkins N.O. v Voges [1994] ZASCA 53; 1994 (3) SA 130 (A) it was stated:
- “A practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term would readily be imported into a contract if it is necessary to ensure its business efficiency; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional.”*
- [32] The term that the macadamia trees sold by the defendant to the plaintiff needed to comply with SAMAC standards is in my view necessary to ensure the efficiency of the agreement(s). This borne out by the evidence that the defendant is a SAMAC accredited nursery, which fact is put up for display and marketed through its website. The plaintiff’s is persuaded to source the trees from the defendant after consulting the SAMAC standards and confirming through the SAMAC website that the defendant is indeed such an accredited nursery. The very reason why the plaintiff approached the defendant to secure source macadamia trees was the fact that the defendant nursery was a SAMAC accredited nursery, which speaks a certain quality of product produced and of compliance with SAMAC standards. The defendant’s accreditation certificate being up for display fortifies this.
- [33] SAMAC standards thought the Code of Practice Protocols did not only set out the basic qualifying criteria in respect of nursery accreditation, but also explicitly what can be expected in respect of the site, the raised platform, planting medium drainage, irrigation water, mother material, seed and seedling selection, nursery bag, weak plant separation protocol, displayed administration protocol, plant quality, identified pathogen protocol, general nursing protocol and tree despatch.
- [34] Mr Östlind (director of the defendant) admitted using the SAMAC accreditation for marketing purposes, but also to avoid mistakes in the nursery. In his evidence he stated that SAMAC provides guidelines as to how it should be, and if one follows these guidelines, it shows that you are doing a good job. He further testified that the defendant’s clients are all commercial farmers who require quality trees. For this reason the defendant has always complied with the SAMAC guidelines and has therefore always been accredited with SAMAC.
- [35] In the circumstances, it was a tacit term of the agreements that the trees sold and delivered to the plaintiff by the defendant would comply with SAMAC standards.

Repudiation and/or Anticipated Breach

- [36] In terms of the agreement under pro forma invoice number PRO 0000217 the plaintiff ordered 10 000 Nelmac 2 trees at a price of R330 600.00 (inclusive of VAT), which trees were to be delivered between June 2018 and September 2018, and 6 000 A4 trees at a price of R198 360.00 (inclusive of VAT), which were to be delivered in December 2018.
- [37] It is common cause that the amount of R496 299.00 was paid by the plaintiff to the defendant on 25 January 2018 in respect of this agreement and as provided for on the pro forma invoice number PRO 0000217. It is further common cause that the defendant could not deliver in terms of the Nelmac 2 order and repaid the deposit in amount of R330 600.00. This was paid in two payments R 200 000.00 in August 2018 and the remainder in January 2019.
- [38] According to Mr Östlind's the defendant cancelled the Nelmac 2 order as it could not deliver and that was the only portion of the agreement that was cancelled/repudiated. According to him that's also the reason why he only repaid the deposit in respect of the Nelmac 2 trees. The portion of the agreement relating to the A4 trees remained intact as the trees were only due in December 2018.
- [39] Mr Turvey testified that pursuant to a visit to the defendant's nursery in July 2018, and observing the state of the trees and the lack of trees, the plaintiff after engaging the Mr Eksteen who in turn engaged Mr Östlind telephonically, elected to cancel the order. During the engagement Mr Eksteen explaining to Mr Östlind that the plaintiff wished to cancel the order. Whereafter Mr Eksteen confirmed that Mr Östlind stated that it was fine for the plaintiff to cancel the order. Mr Eksteen expressed his relief that the order was cancelled, as they (the defendant) was approximately 4 to 5 months behind on all their orders.
- [40] Mr Turvey testified that during the aforesaid conversation the plaintiff enquired whether upon cancellation of the order, the deposit would be refunded. Mr Eksteen confirmed that the deposit will be paid back to the plaintiff. According to Mr Turvey the whole agreement was cancelled as the defendant was not as at July 2018 able to deliver the Nelmac 2 trees due between June and September 2018 as well as the A4 trees. Having found that the agreements were partly written and partly oral, with the written portion set out in the pro forma invoices it has to be accepted that the delivery date in respect of the A4 trees was December 2018.
- [41] In the face of the written terms of the agreement, Mr Turvey's evidence that Mr Östlind through Mr Eksteen agreed to the repayment of the deposit does not justify a finding that the defendant was obliged to repay the deposit in respect of the A4 trees.
- [42] It stands to be decided whether the defendant breach/repudiate the agreement in respect of the A4 trees as at July 2018, in circumstances where the trees were only to be delivered in December

2018. Mr Turvey and Mr Smit testified that upon attending the defendant's nursery in July 2018, they were received and shown around by Mr Eksteen, Mr Östlind was not present. They observed the situation at the defendant's nursery to be dire. The few trees present at the nursery were small, pale, yellow, and seemed nutritionally deficient. Black mould were growing on many of the root stock stems and leaves. They concluded that the trees were not up to SAMAC standards.
- [43] Mr Smit testified that the trees shown to them were the same trees that were previously presented to Mr Stegmann, which, according to Mr Smit, is against the SAMAC display and administration code of practical protocol. This is so having regard to the fact that the trees are specifically grafted upon receipt of an order, and therefore those trees may not be offered to different customers, while under order. The evidence of both Mr Turvey and Mr Smit were that there were not enough A4 trees present to satisfy the order under pro forma invoice PRO 0000217.
- [44] The defendant failed to call any witnesses to rebut the specifics of this evidence. Generally on the issue, Mr Östlind contended that as the A4 trees were only due for delivery in December 2018, the plaintiff cancelled the order prematurely, and this justifies the plaintiff to forfeited its deposit. He further testified that at all relevant times there were enough A4 trees to fill the order. as the A4 trees were duly grafted upon confirmation of the order during January/February 2018. Mr Östlind also confirmed during his evidence that in early 2019 the A4 trees remained ready and available. Without providing any detail in respect of attempts made, Mr Östlind testified that the defendant was unable to re-sell the said A4 trees, and as these trees could not be kept for longer than 24 months, they were discarded on an unknown date. No contemporaneous or documentary evidence as place before court in this respect.
- [45] At odds with Mr Östlind's evidence is the evidence of Mr Smit that on attempting to visit the defendant's nursery on 31 January 2019, he was refused access to the defendant nursery. Mr Smit's visit was prompted by the e-mail exchanges between Mr Turvey and Mr Östlind during early January 2019, wherein Mr Östlind indicated that he would not be refunding the deposit paid in respect of the A4 trees. In this respect Mr Turvey confirmed that Mr Eksteen, communicated to him that the order was cancelled in July 2018 and that there were no trees in the nursery that were ready to be planted. No explanation was professed why Mr Smit was refused access in the circumstances nor was any evidence led in rebuttal as to the communication with Mr Eksteen.
- [46] Having found that it was a tacit term of the agreements that the trees were to comply with SAMAC standars and the evidence by Mr Turvey and Mr Smit as to the state of the trees during their visit in July 2018 remains undisputed it's found that the defendant repudiated the agreement in respect of the A4 trees when at July 2018 there we not enough trees present at the nursery in compliance with the SAMAC standards. The fact that the order was only to be filed in December 2018 does not assist the defendant as according to Mr Östlind the trees were prepared/grafted during January/February 2018 and should thus have been at the

nursery during the visit in July 2018.

- [47] During questioning it was suggested by Counsel appearing for the defendant that even if there weren't enough trees at the nursery in July 2018, the defendant could have procured or granted other trees by the delivery date of December 2018. This would not have complied with SAMAC standards nor would it have been possible to regraft these trees considering the evidence by Mr Östlind that it takes 10 – 12 months for A4 trees to be ready for delivery.
- [48] Where a contract is cancelled (whether unilaterally or by agreement) the general principle is that the parties are required to return

everything received thereunder.[7] This applies equally to the 'guilty' party and the 'innocent' party,[8] and gives rise to a "distinct contractual remedy" to claim restitution. The plaintiff is in the circumstances entitled to repayment of the deposit retained by the defendant in amount of R 198 360.00.

Conventional Penalties Act 15 Of 1962

- [49] Should I be wrong in above respect, it remains to be decided whether the plaintiff has discharged its onus in showing that the penalty is excessive as contemplated in Conventional Penalties Act, Act 15 of 1962.
- [50] The following Sections of the Act are relevant and provide as follows:-
- "1 Stipulations for penalties in case of breach of contract to be enforceable*
- (1) A stipulation, hereinafter referred to as a penalty stipulation, whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person, hereinafter referred to as a creditor, either by way of a penalty or as liquidated damages, shall, subject to the provisions of this Act, be capable of being enforced in any competent court.
- (2) Any sum of money for the payment of which or anything for the delivery or performance of which a person may so become liable, is in this Act referred to as a penalty.

...

3 Reduction of excessive penalty

If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question."

- [51] In *Western Credit Bank Ltd v Kajee*[9] it was held as follows:-

“If the 'penalty is out of proportion to the prejudice suffered by the creditor...the Court may reduce the penalty to such extent as it may consider equitable in the circumstances'.

The words 'out of proportion' do not postulate that the penalty must be outrageously excessive in relation to the prejudice for the Court to intervene. If that had been intended, the Legislature would have said so. What is contemplated, it seems to me, is that the penalty is to be reduced if it has no relation to the prejudice, if it is markedly, not infinitesimally, beyond the prejudice, if the excess is such that it would be unfair to the debtor not to reduce the penalty; but otherwise, if the amount of the penalty approximates that of the prejudice, the penalty should be awarded.”

And further:-

“The damages suffered by the plaintiff are not the sole criterion, for the operation of sec. 3 of the Act hinges on prejudice, which is wider in its connotation than damages. The full extent of this may be difficult to ascertain in any particular case, but Rex v Dhlamini, 1943 T.P.D. 20 at p. 23, followed in Rex v Williams, 1943 CPD 206 at

- p. 208, indicates that prejudice includes 'far more than pecuniary loss' and may, according to the circumstances, include impairment of reputation or personal dignity and possibly cover any substantial inconvenience. If the plaintiff contends for any prejudice in a wider sense than damages suffered by it, it will be for it to produce evidence to establish this.”

- [52] However, the final sentence in the preceding passage was later rejected by the Supreme Court of Appeal in the matter of Steinberg v Lazard.[10] The onus on the plaintiff to prove that the penalty is out of proportion to the prejudice suffered by the defendants was dealt with as follows:-

“[7] The Legislature provided protection to a debtor against an excessive penalty. In terms of the section, as construed by this Court, the debtor bears the onus of proving that the penalty is disproportionate to the prejudice suffered and to what extent (see Smit v Bester 1977

- (4) SA 937 (A) at 942D - G).”

- [53] In Van Staden v Central South African Lands and Mines,[11] approved by National Sorghum Breweries (supra), the following views on what constitutes prejudice and how the enquiry into prejudice may proceed was made:-

“It seems to me that everything that can reasonably be considered to harm or hurt, or be calculated to harm or hurt a creditor in his property, his person, his reputation, his work, his activities, his convenience, his mind, or in any way whatever interferes with his rightful interests as a result of the act or omission of the debtor, must, if it is brought to the notice of the Court, be taken into account by the Court in deciding whether the penalty is out of proportion to the prejudice suffered by the creditor as a result of the act or omission of the debtor.

The test as to all this is, in my view, a subjective test of prejudice. It seems to me that there can be no room for the concept that the prejudice suffered must, as in damages cases, be within the contemplation of the parties; ... No doubt in most cases the monetary aspect will play an

important role, indeed the paramount role in the consideration of the matter by the Court, but one can conceive of circumstances where a seller may sustain no pecuniary loss arising directly out of the breach, yet he may nevertheless be seriously prejudiced in one or other of the ways mentioned.”

[54] The agreement makes no specific provision for cancellation. Support is found for a finding that the the deposit as penalty is excessive and/or out of proportion in:

54.1 according to the defendant, the remaining 6 000 A4 trees were grafted during January/February 2018 pursuant to receiving the deposit by the plaintiff. The plaintiff paid the said deposit on 25 January 2018;

54.2 in June 2018 Mr Smit attended the defendant’s nursery with other farmers, and subsequently informed the plaintiff that the trees did not comply with SAMAC standards;

54.3 in July 2018 both Mr Turvey and Mr Smit attended the defendant’s nursery and made various observations as dealt with herein above;

54.4 in January 2019 the defendant provides an proposition to the plaintiff upon payment of the 6 000 A4 trees. One option being that the plaintiff make the final payment of R 174 000.00

plus vat and collect the A4 trees before February 2019;

54.5 on 25 January 2019 the defendant refunds a further amount of R130 600.00 to the plaintiff, in support of the contention that only the Nelmac 2 ;

54.6 the plaintiff sends Mr Smit to conduct a nursery inspection on 31 January 2019 in order to view the A4 trees but Mr Smit is refused access to the defendant’s nursery.

54.7 the defendant’s repudiation of the agreement as dealt with supra;

54.8 the defendant’s failure to discover any documents relating to its sales figures at the relevant time, or the records of planting and grafting dates during the relevant period, notwithstanding these documents being requested in terms of Rule 35(3) and Mr Östlind admitted during cross-examination that he was in possession of the aforesaid documents;

54.9 Mr Eksteen confirming that there were no trees during January 2019.

[55] In rebuttal its contended by the defendant that the retention of the deposit amount is just and equitable on the basis of Mr Östlind’s evidence that he attempted to remarket and re-sell the trees, however as a result of circumstances beyond his control, he was not able to do so and had to discard of the trees. The reasons for this were explained as follows:-

55.1 the supply and demand for these trees were upset as a result of the threatening land expropriation without compensation announcement at the time, which resulted in the farmers/purchasers of these trees refraining from developing land any further; and

55.2 the trees cannot be held over in their condition for long after it is ready for planting, as they outgrow their bags which results in development

issues.

[56] Absent any direct evidence challenging the undisputed evidence of Mr Turvey and Smit the penalty (deposit) is excessive and stand to be reduced with R 198 360.00

Balance on the account

[57] It is common cause that the plaintiff paid R 1 505 199,00[12] to the defendant and that not all of the agreements were fulfilled. This resulted in amended, new and replacement agreements or

arrangements being made. The exact circumstances is irrelevant for the present purpose, as this issue can easily be decided on the common cause facts.

[58] It is common cause that 17 700 x 695 Beaumont trees where delivered. The plaintiff's contends that 15 000 trees were delivered and chargeable as 2 700 trees were provided as replacement trees by Mr Eksteen as replacement trees for trees that dies.

[59] In respect of the additional 2 700 Beaumont trees, Mr Turvey testified that Mr Eksteen sent them as replacement for trees that had died and which were not up to standard. In this respect the aforesaid was not rebutted by the defendant. Mr Östlind did however concede that his managers had a certain degree of discretion. It was clear that the appropriate person to be called as a witness was Mr Eksteen, and that the latter was easily accessible to the defendant, but was not called to testify. Absent rebuttal, the evidence by Mr Turvey stands to be accepted in that 15 000 x 695 Beaumont trees were delivered and chargeable at R45.00 each plus VAT less 5% discount = R 731 025.00.

[60] It is further common cause that the following trees were delivered:

60.1 540 x A4 macadamia trees at R55.00 each plus VAT less 5% discount = R 32 165.10

60.2 20 x 816 macadamia trees at R55.00 each plus VAT less 5% discount = R 1 919.30

[61] The defendant is thus indebted to the plaintiff in amount of R , calculated as follow:

Payments made

R 1 505 199.00

less value of trees received

R 765 109.40

less deposit repaid in respect of Nelmac 2 R 330 600.00

TOTAL

R 409 489.60

Damages

- [62] The plaintiff seeks damages in the amount of R26 448.00.
- [63] Ordinarily a party wishing to claim damages resulting from a breach of contract must allege and prove (a) the contract;
- (b) breach of the contract; (c) the damages; (d) a causal link between the breach of the contract and the damages and (e) that the loss was not too remote.
- [64] The agreement, as already stated herein above, was partly written and partly oral, the written portion being as set out in pro forma invoice PRO 0000217. It was a tacit term of the agreement that the trees would comply with SAMAC standards.
- [65] In terms of the agreement the defendant delivered 540 A4 trees to the value of R29 782.50, of which the plaintiff alleges that 400 died due to defective roots.
- [66] The plaintiff pleaded a repudiation of the agreement by the defendant, in that 16 000 of the trees could not be delivered. This resulted in the plaintiff cancelling the agreement in July 2018. A breach of the agreement on the basis of delivery of sub-standard trees resulting in the death of the 400 trees was not specifically pleaded. The plaintiff did, in a peculiar fashion under the heading 'damages' and per paragraph 41 of the amended particulars of claim plead that the damage was in the parties' contemplation when the agreement was entered into, alternatively flowed naturally from the breach of the agreement.
- [67] The breach referenced in paragraph 41 can only be the pleaded breach, i.e. repudiation of the agreement as set out in paragraph 27 to 34 of the amended particulars of claim.
- [68] Its contended that the trees died due to root deformities resultant from the defendant failure to comply with SAMAC standards. Per the evidence, these trees were delivered in December 2017. It is unknown when the trees died and when they were dug up.
- [69] Mr Smit on behalf of the plaintiff testified that during February 2018 he conducted an in-field inspection in respect of the A4 trees delivered during December 2017. According to Mr Smit he inspected samples of the trees which had been alleged to have died. From his sampling he concluded that the trees did not adhere to SAMAC tree quality standards. Mr Smit conceded that not all of the trees he sampled died due to defective roots.
- [70] In this respect the defendant contend that a complaint was only raised by the plaintiff 6 months later. He added that its accepted that between 1% and 5% of trees planted die. He disputed that J-root was possible in small trees.

- [71] Absent a specific allegation that the defendant breached the agreement under pro forma invoice PRO0000217, by supplying trees of a sub-standard quality, which resulted in the death of 400 trees, together with evidence displaying exactly how the trees were handled as from delivery to death, and documentary evidence of the defective roots, the plaintiff's claim is doomed to fail.
- [72] Mr Smit could further not confirm that the trees which he examined were the trees received by the plaintiff from the defendant, nor could he positively testify that the 400 trees died of the same cause, being defective roots. But even should I be wrong in the aforementioned respect, the agreement having found that it is partly written and partly oral, the written portion places an obligation on the purchaser (the plaintiff herein) to attend to quality control and to reject any trees. Duly allowing that the quality of the roots will in all probability only be established once the trees are planted, and that being an opportune time to reject the tree(s) and communicate same to the defendant, in the circumstances the damages claim has not been proven.

Costs

- [73] The usual principle is that the successful party should be awarded its costs. But for the damages claim and error in calculation in the written submission the plaintiff is substantially successful and I therefor see no reason to deviate from the usual principle.

Conclusion

[74] The following order is made:-

1. The defendant to pay the plaintiff the amount of R 409 489.60;
2. The defendant to pay interest on R 409 489.60 at the prescribed interests rate, ex tempore morae;
3. The defendant to pay the cost of suit.

DATE OF HEARING: 23-26 August 2021

DATE OF WRITTEN

SUBMISSIONS:

26 September 2021

DATE OF JUDGMENT: 13 December 2021

FOR THE PLAINTIFF: Adv. Wessels

Instructed by Dawie Beyers Attorneys

E-mail: lit2@dawiebeyers.co.za

c/o Du Toit Smuts and Partners

Ref: Beyers/BD481/Maree

FOR THE DEFENDANT: Adv. Van Vuren

Instructed by Pieter Swanepoel Attorneys

E-mail: meyer@vilswan.co.za

Ref: P. Swanepoel/Meyer Mare/ORC6/0001

[1] Kali v Incorporated General Insurances Ltd 1976 (2) SA 179 (D) at 182A

[2] Robinson v Randfontein Estate GM Co Ltd 1925 AD 173

[3] 2014

(2) SA 119 (WCC) at 122D-G; 123C-D

[4] 1974

(3) SA 506 (A)

[5] At 531

[6] Desai and Others v Greyridge Investments (Pty) Ltd 1974

(1) SA 509 (A) at 522H-523A

[7] Baines Motors v Piek 1955

(1) SA 534 (A) at 544

[8] Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd
2002

(1) SA 708 (C) at 717H – 718A. This issue was not dealt with in the successful appeal

[9] 1967

(4) SA 386 (N) at 391

[10] 2006

(5) SA 42 (SCA) at par [7]

[11] 1969

(4) SA 349 (W) at 352H-353C

[12] Inclusive of the deposit amount of R 198 360.00

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAMPMBHC/2021/70.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/turvey-broers-pty-ltd-v-orcin-unknown-topic-ampmbhc-2021>

Prepared on 27 October 2026 · Esheria