

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 3382/2018

In the matter between:

CECIL GOLIATH

First Applicant

EVERGREEN EVERFRESH (PTY) LTD

Second Applicant

and

CHICORY SA (PTY) LTD

Respondent

JUDGMENT

LAING J

[1] This is an application for leave to appeal in relation to a claim for damages because of the failure of a chicory crop. The judgment deals primarily with the merits of the application but also canvasses a secondary issue that arose, viz. the language and tone used by the applicants in the conduct of the application. The two aspects are treated separately in the paragraphs that follow.

Background

[2] It was common cause that a verbal agreement had been concluded by the parties for the plaintiffs' production and supply of chicory to the defendant. Whereas the first growing season had been a success, the second growing season had been badly affected by a drought that had occurred in the Alexandria district during the period, 2017-2018.

[3] The court previously dismissed the applicants' claim and awarded the counterclaim to the respondent, with costs. The applicants now seek leave to appeal against the whole judgment.

Grounds for appeal

[4] The grounds for the appeal include the following: that the court disregarded the pre-trial minutes; that the court failed to deal with the applicants' argument in relation to the divisibility of performance; that the court erred in its findings about the date upon which the verbal agreement for the production and supply of chicory commenced; that the court erred in its findings about liability for the transport costs; and that the court misdirected itself with regard to the alleged 'coaching' of a witness during the course of the trial.

[5] The applicants built their case, to a large extent, on the contents of a pre-trial minute where agreement was reached to the effect that 'none of the parties were [sic] to blame for the 2017 drought'. They argue that the court disregarded this admission and ignored the relevant legislation and case law. Mention was made of section 15 of the Civil Proceedings Evidence Act 25 of 1965, which provides as follows:

'15 Admissions on record

It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings.'

[6] All that the parties admitted was that there had been a drought in 2017 and that none of the parties was to blame. The meaning of the first clause was clear enough; the meaning of the second clause was very far from clear. In the circumstances, it was unnecessary for any of the parties to have proved that a drought had occurred, this was never in dispute. However, it was entirely necessary for the parties to have led evidence to prove (or disprove) what exactly was meant by the assertion that no-one was to blame. If that meant that no-one was to blame for the consequences or effects of the drought, then the question arises as to what extent. Did the parties imply the failure of the entire crop, or just a reduced yield? Furthermore, what implications did such an admission, as vague as it was, have for the parties' respective rights and duties? Did it imply that the drought had indeed amounted to a supervening impossibility and that this had extinguished the

obligations of the first applicant, Mr Cecil Goliath? Did it imply something else? The pre-trial minute, on its own, was simply inadequate to allow any findings to be made without the presentation of evidence.

[7] The applicants also contend that the court ignored the applicable case law, especially the decision in *MEC for Economic Affairs, Environment and Tourism v Kruizenga*,¹ where Cachalia JA held as follows:

‘...The issue in this matter is whether the appellant may resile from agreements made by his attorney, without his knowledge, at a rule 37 conference... The rule was introduced to shorten the length of trials, to facilitate settlements between the parties, narrow the issues and to curb costs. One of the methods the parties use to achieve these objectives is to make admissions concerning the number of issues which the pleadings raise. Admissions of fact at a rule 37 conference, constitute sufficient proof of those facts... Rule 37 is thus of critical importance in the litigation process. This is why this court has held that in the absence of any special circumstances a party is not entitled to resile from an agreement deliberately reached at a rule 37 conference...’

[8] This court accepts completely, with respect, the principles enunciated by the Supreme Court of Appeal. However, the decision is of no assistance to the applicants in the present matter. The only admission of fact arising from the pre-trial minute is that there was a drought. The admission that none of the parties was to blame for the drought, on its own, did not promote the purposes of rule 37; it failed to narrow the issues raised by the applicants in their replication to the effect that the drought had been a *vis major* and that this had extinguished the parties’ respective obligations. If the parties had intended to mean that the respondent admitted the applicants’ allegations about the nature of the drought and its legal impact, then this ought to have been spelled out unequivocally in the pre-trial minute itself or in terms of a supplementary minute. That such intention had ever existed was not at all apparent. The applicants argue for an interpretation of the pre-trial minute that is

¹ [2010] 4 All SA 23 (SCA), at paragraph [6].

simply not evident from the text and argue for an approach that would, effectively, have resulted in the court's either disregarding entirely or otherwise attaching minimal weight to the evidence led in relation to the nature and legal impact of the drought.

[9] Ultimately, the court is not at all persuaded by the argument that it disregarded the pre-trial minute. The legislation and case law mentioned do not advance the applicants' position.

[10] Closely tied to the above ground of appeal is the contention that the court failed to deal with the applicants' argument regarding the divisibility of performance. The application of the principle, however, could only have been triggered if the court had found that the drought had been a supervening impossibility. The court made no such finding. For Mr Goliath's obligations in relation to the second growing season to have been extinguished (on the premise that the underlying verbal agreement was indeed divisible), it was necessary for the drought to have amounted to an absolute or objective impossibility. That the drought merely made it difficult for Mr Goliath to have produced and supplied chicory was insufficient to have released him from his obligations. See *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd*; and *Post Office Retirement Fund v South African Post Office SOC Ltd and others*.²

[11] Similarly, the argument about the foreseeability of the drought and the issues in relation thereto only become relevant where the drought is found, when viewed objectively, to have been a supervening impossibility that prevented Mr Goliath, absolutely, from producing and supplying chicory. The evidence demonstrated otherwise.

[12] The applicants' remaining grounds of appeal pertain to the date of the contract, the transport expense, and the alleged 'coaching' incident. Having considered the applicants' arguments in this regard and having listened to counsel's submissions, the court, nevertheless, stands by and confirms the findings made in

² 2000 (4) SA 191, at 198B-D; and [2022] 2 All SA 71 (SCA), at paragraph [80]. See, too, Harms LTC, 'Obligations', in *LAWSA* (Vol 31, 3ed, LexisNexis, 2022), at 250.

the main judgment. Overall, the court is not of the opinion that the appeal would have a reasonable prospect of success, as required under section 17(1)(c) of the Superior Courts Act 10 of 2013.

Language and tone of application

[13] It would be remiss of the court not to deal at this stage with the language and tone of the applicants' application for leave to appeal. Regarding the ground that the court disregarded the pre-trial minutes, the drafter alleges that:

'From the very outset, the trial court was engaged in obfuscation, and it clearly did not understand the applicable law or simply disregarded it. In rather confused terms, the court allowed evidence on the common cause issue of drought...'

[14] The drafter goes on to accuse the court of making elementary and glaring errors and of evaluating evidence 'in a wholly contrived fashion'. Further accusations are made that the court 'failed to ask the right questions'; that 'the Learned Judge, with respect, simply misunderstood the law'; that 'the Learned Judge simply did not understand the application of [the] principle'; that 'the Learned Judge's findings on the date of the contract suffers [sic] from serious shortcomings'. Dealing with the court's interpretation of the respondent's plea, the drafter states as follows:

'Again, the court finds... that the auxiliary verb "had" suggests that the discussions had already been concluded between the parties. However, that kind of interpretation is completely unnatural and amounts to pure sophistry.'³

[15] The court is then accused of having 'hurtled towards an illogical conclusion'. Later, in relation to the 'coaching' incident, the drafter accuses the court of a 'remarkable degree of arbitrariness and favourable bias [sic] towards the

³ The term, 'sophistry', means 'specious or oversubtle reasoning, the use of intentionally deceptive arguments; casuistry; the use or practice of specious reasoning as an art or dialectic exercise.' Another meaning attributed to the term is 'cunning, trickery, craft'. WR Trumble (*et al*), *Shorter Oxford English Dictionary* (OUP, 5ed, 2002, vol 2), at 2924.

Defendant's witness' and asserts that 'the court's finding was simply based on conjecture'.

[16] Similar language and tone characterise the heads of argument. Presumably these were prepared by the same drafter.

[17] The range and depth of the attack on the court's findings are, quite simply, astonishing. In another context, the language and tone of the documents might evoke a smile and a shrug, but this is not another context. The work of a court and of all who appear before it is a serious business. The words that are spoken, the words that are written, and the decisions that are made, have far-reaching consequences for the litigants. Responsibility for ensuring proper access to the court, respect for its proceedings, and the legitimacy of its findings, rests as much with counsel as with the judge.

[18] Whereas a court is to be mindful of the need to approach an application for leave to appeal objectively, dispassionately, and without being unduly sensitive to the criticism levelled against it, a court must also, on occasion, draw a line and indicate, unequivocally, when counsel's conduct falls below the standard required of an officer of the court. The language and tone used in the present application and heads of argument are unacceptable. They undermine the decorum and dignity of the court and prevent the upholding of the responsibilities described in the preceding paragraph. To aggravate matters, the applicants' lead counsel failed to appear on the day of the hearing, provided no apology or excuse for his absence, and left his junior (who was clearly unprepared) to face the court's discontentment. This, too, is unacceptable.

[19] Counsel for the respondent suggested in argument that the circumstances may warrant a costs order *de bonis propriis*. The court consequently invited written submissions from the parties' legal representatives on why such an order should not be made. These were submitted and have been of considerable assistance.

[20] The court's attention was drawn by counsel for the respondent to a recent article by Seegobin J, titled 'Restoring dignity to our courts: the duties of legal

practitioners'. The learned judge observes therein that there has been a growing tendency for legal practitioners to use 'insulting, inappropriate, vulgar, and disparaging language' towards judicial officers, staff, and fellow practitioners. This conflicted with their duty to conduct themselves with the highest degree of integrity and to ensure that the dignity and decorum of the court was maintained.⁴

[21] Reference was also made to *S v Khathutshelo*,⁵ where the court remarked as follows:

'[t]he words used by counsel were both unnecessary and unfortunate. They demonstrated acute lack of respect for the court and its role in the administration of justice. Judges and magistrates alike have been entrusted with the most difficult job: to find the truth and administer justice between man and man. They are fallible like all others and, in recognition of this weakness, there is a hierarchy of courts so that mistakes can be corrected on appeal or review...

...The ethics of the legal profession says an advocate is an officer of the court. As an officer of the court he is required to assist the court in the administration of justice. In as much as counsel has a duty to advance his/her client's case with zeal, vigour and determination, he should always remember that his primary duty is to the court. His role in court is not only to push his or her client's interests in the adversarial process...

...He should always maintain the decorum of the court and protect its legitimacy in the eyes of the public so that its confidence is not eroded in their eyes.'⁶

[22] In their submissions, the applicants' legal representatives apologised at the outset. They went on, nonetheless, to inform the court that they had sought advice from two senior counsel (unnamed) and had been advised that the application for

⁴ <https://www.groundup.org.za/article/restoring-dignity-to-our-courts-the-duties-legal-practitioners/> accessed on 1 February 2023.

⁵ 2019 (1) SACR 480 (LT).

⁶ At paragraphs [20], [21] and [23].

leave to appeal did not border on a personal attack or a gratuitous insult. Instead, they were advised, so they say, that the court ought to be ‘thick-skinned’.

[23] This appears to have missed the point somewhat. The submissions made by the applicants’ legal representatives served to exacerbate rather than ameliorate the problems already discussed.

[24] The applicant’s legal representatives cited the decision in *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*.⁷ The court in that matter pointed out that the policy consideration underlying a court’s reluctance to order costs against legal representatives personally was that attorneys and counsel were expected to pursue their client’s rights fearlessly, without undue regard for personal convenience. They ought not to be intimidated by their opponent or even by the court. Examples of where such an order would not be inappropriate were dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetence and a lack of care.⁸

[25] The purpose of a costs order *de bonis propriis* is to indemnify a party against an account for the legal costs of his or her own representative.⁹ The case law is clear that it should only be awarded in exceptional circumstances.¹⁰

[26] This court respectively considers itself bound by the above principles. At the same time, it is necessary to add that a litigant ought not to be punished for the conduct of his or her legal representatives.

Relief and order

⁷ [2013] 4 All SA 346 (GNP).

⁸ At paragraphs [34] and [35].

⁹ *Pieter Bezuidenhout-Larochelle Boerdery (Edms) Bpk v Wetorius Boerdery (Edms) Bpk* 1983 (2) SA 233 (O), at 236; *Kenton-on-Sea Ratepayers Association v Ndlambe Local Municipality* 2017 (2) SA 86 (ECG), at 118F.

¹⁰ *Stainbank v South African Apartheid Museum at Freedom Park* 2011 (10) BCLR 1058 (CC), at paragraph [52].

[27] Ultimately, this matter concerns the applicants' application for leave to appeal. The court has already expressed its opinion that an appeal would not have a reasonable prospect of success. The court has also expressed its views regarding the language and tone of the drafting. Nothing further needs to be said.

[28] In the circumstances, the following order is made:

- (a) the application for leave to appeal is dismissed; and
- (b) the applicants are directed to pay the respondent's costs on a party-and-party scale.

JGA LAING
JUDGE OF THE HIGH COURT

APPEARANCE

For the applicants:	Adv Nguta with Adv Mzamo, instructed by Mgangatho Attorneys, Makhandu.
For the respondent:	Adv Brown, instructed by De Jager & Lordan Attorneys, Makhandu.

Date of hearing: 09 November 2022.

Date of delivery of judgment: 07 February 2023.