IN THE NORTH WEST HIGH COURT

MAFIKENG

CASE NO.: 575/2005

In the matter between:

AFGRI BEDRYFS BEPERK **Plaintiff**

and

JAN ADRIAAN COETZEE **Defendant**

CIVIL MATTER

KGOELE J

DATE OF HEARING	**:**	**25 OCTOBER 2011**
DATE OF JUDGMENT	**:**	**01 MARCH 2012**
FOR THE PLAINTIFF	**:**	**Mr J.G. Bergenthuin**
FOR THE DEFENDANTNT	**:**	**Advocate Swart**

JUDGMENT

KGOELE J:

[1] Plaintiff is a company involved in the agriculture industry, more in particular, supplies agricultural products to farmers. Plaintiff furthermore finances farmers for production needs during a specific season.

[2] During the summer season of 2001/2002, plaintiff, in terms of a credit agreement entered into between the parties, granted a credit facility to defendant, a farmer, for the production of maize. Pertinent aspects of the credit agreement were:

2.1 The total limit of the facility allowed was R924 634-00. **(Clause 1)**

2.2 Interest was payable at a rate of 14,50% on any outstanding amount on the account of defendant, that is ABSA Bank's prime interest rate of 13%, plus 1,5%. **(Clause 1)**

2.3 Interest rates payable were linked to the prime interest rate of ABSA Bank, and would have changed accordingly. **(Clause 5.1)**

2.4 Any amount exceeding the credit limit, would be subject to a punitive interest rate of an additional 3%. **(Clause 5.4)**

2.5 The total outstanding amount was repayable to plaintiff at the end of the maize season on 31 August 2002. **(Clause 3)**

2.6 Defendant had to pay costs as taxed on an attorney and own client scale in respect of any recovery expenses incurred by plaintiff. **(Clause 12)**

2.7 Plaintiff has the discretion to allocate payments on defendant's account to an account or debt of plaintiff's choice. **(Clause 17)**

2.8 Bank statements had to be sent to defendant. Defendant could in writing object to any inscription on a bank statement. If not, the statement would be *prima facie* proof of the details reflected in such a statement. **(Clause 21)**

2.9 Notwithstanding the afore-mentioned stipulation, should there be any error on the statement of defendant, plaintiff was entitled to rectify such statement, to resent the rectified statement, and should there not be any written objection, within 3 (three) months, the statement would again be *prima facie* evidence of the content thereof. **(Clause 23)**

[3] Defendant concluded a grain purchase agreement with an entity called Unigrain, for the delivery of the maize produced by defendant during the summer 2001/2002 season. In terms of this agreement Unigrain purchased all maize produced by defendant at a price agreed between those parties. The right to the purchase consideration payable to defendant in terms of the grain agreement was ceded to plaintiff. The arrangement was therefore that the outstanding amount on the credit agreement payable by defendant to plaintiff, would be recovered from the proceeds of grain deliveries by defendant to Unigrain.

[4] Plaintiff's claim against defendant is consequently for the amount of R511 507-28, being the outstanding amount on the production account of defendant on 31 March 2009, after interest has been added up to that date. **(Exhibit A page 41)**. Further interest is payable on the amount of R511 507-28 at ABSA Bank's prime interest rate plus 2,25 %, being the interest rate continuously charged by Plaintiff, although

Plaintiff was entitled to charge the punitive interest rate agreed upon by the parties. As to how this amount was arrived at, will be clearer later in this judgment when I deal with the summary of the evidence before court. This total amount relates only to the second and the third claim as prayed for by the plaintiff in his amended summons because the first claim was abandoned by the plaintiff at the onset of the proceedings.

[5] On behalf of the plaintiff, the following witnesses testified:-

- Petrus Van Rensburg, a manager working in the collection unit of the plaintiff
- Jacquelene Swanepoel, employed also by the plaintiff as a money market and settlement officer

Mr Petrus Van Rensburg

[6] He confirmed that he was employed by the plaintiff and was tasked with the recovery of the money from the defendant. Further that a meeting was held with the defendant wherein the overpayment was discussed as he was having the necessary documents in this regard.

[7] Amongst the bundle of documents that were handed by the plaintiff and accepted as Exhibit "A" by the court he explained the following documents which he regard as the ones that are mostly relevant in this matter as follows:

Page 1 = Application by defendant for credit signed September 2002

Page 10 = Signature of the defendant (9 September 2002) that signify that the application was therefore to be for the subsequent year, 2003

Page 16 and 17 = Credit agreement by both parties. Introductory part explaining the purpose. "OTK Beperk" referred to as the name of the plaintiff. Interest reflected on page 16 was linked to the prime-rate of ABSA at that time. Penalty rate found in clause 4.

Cost of recovery of debts on attorney and client scale agreed upon is found in clause 12. Clause 17 gave the plaintiff discretion to allocate payment on behalf of defendant. Clause 21 deals with the issuing and sending of the monthly statements. Clause 23 deals with the right of the plaintiff to rectify the mistake if found and only after no objection was received from farmers within 3 months.

Page 33 -34 = Spread sheet of various accounts of farmers. If a farmer has applied for assistance for a particular year, the plaintiff, after he had given the sum of money to that farmer, opens an account for a famer called a summer protection account. All the details goes into this account.

Page 35 = BBG Summer account 2002 same. Most of the debits were in this account.

Page 36	=	That is where the amount of R254 621, 81 appears alongside the date of 30/05/2002 and reflected there as a payment.
Page 37	=	An amount of R174 621,80 appears alongside the date 3/06/2002 as “Vordering Products” and credit to the defendant “OTK agterstallig” account is opened if payment had been made twice.
Page 38	=	“OTK oorlaat” containes all the accounts that had not been paid. An amount of R381 711,87 was reflected there is the amount which was outstanding on that account on the 13/07/2007.
Page 39	=	An amount of R381 711,87 reflected on this page represent when a transfer was made from “OTK oorlaat” account to “OTK agterstallig”.
Page 33-39	=	Is not a statement that is send to defendant, but a summary of what happens to the farmers (defendant’s) accounts.
Page 64-66	=	Statements of account send to the defendant.
Page 66	=	Shows an amount of R254 621,81 when it was debited into defendant’s account (Erroneous credit made by plaintiff)

[8] A summary of Mr Van Rensburg evidence in regard to the pages he referred to is to the effect that an amount of R254 621-81 was paid by Unigrain on behalf of defendant to plaintiff on or about 26 April 2002 (Exhibit A page 21). The payment of R254 621-81 by Unigrain to Plaintiff was credited on Plaintiff's outstanding summer account on 30 May 2002. (Exhibit A page 45).

[9] The single payment of R254 621-81 by Unigrain on behalf of defendant was for a second time credited to a proceeds account, which is merely a disbursement account, on 31 May 2002. (Exhibit A page 32). From the disbursement account an amount of R174 621-80 was transferred as a credit to defendant's outstanding summer credit account (Exhibit A page 49), and an amount of R80 000-00 was paid by electronic funds transfer directly into defendant's bank account. (Exhibit A page 28, 29). As a result of the aforegoing, defendant was credited two times with one single payment of R254 621,81. Consequently the inscription on the summer account of defendant was reversed on 1 March 2004, when the error made was discovered. (Exhibit A page 66).

[10] He on behalf of plaintiff contacted defendant, and met with defendant at his farm. The error and the overpayment was discussed, and defendant confirmed the overpayment in the amount of R254 621-81. Defendant subsequently paid an amount of R50 000-00 to plaintiff. (Exhibit A page 38), but thereafter refused to make any further payments to plaintiff.

[11] During cross-examination he admitted the fact that the money claimed from the defendant was not a double payment made towards him, but explained that the money consists of two payments which were made to the defendant in two different accounts which they used between them and the farmers, in particular defendant.

[12] He further admitted that the source documents are not available, he only relied on the computer generated documents discovered in this matter compiled by the plaintiff.

Ms Jacqueline Swanepoel

[13] She testified that her duties on a daily basis since 1/10/2004 is to reconcile bank statements. She confirmed that the payment of R254 621,81 consist of two credit payments made to the defendant. This was a mistake by the plaintiff which was discovered when they reconciled the bank statement and the allocation sheet they received which were allocated to various clients. This mistake was not discovered by her but by Alrina Van der Walt who worked there before her. The mistake took long to be discovered because there was at a certain period a staff turnaround. She testified that she herself did go through the plaintiff reconciliation statements and satisfied herself that the amount in issue reflect that it was credited twice.

[14] During cross examination she admitted that when she verified the mistake then she was not having the bank statements. The bank statements could not be supplied by the bank as they did not have the code for that specific account. The reason for the plaintiff's account department to have no code is that the records that are usually 3 years

old or more are sent to their other office in Bethal and further that that office had a flooding sometime ago.

[15] It also came to light during cross examination that she was requested to investigate this matter after 8 years of the mistake being detected. She maintained that despite the absence of the source documents and the lapse of time, she could still verify the mistake because of her extensive experience in working with reconciliation statements.

[16] The plaintiff closed his case and the defendant himself testified.

Mr Jan Adriaan Coetze

[17] The defendant admitted the following in his testimony:-

- that in October 2001 he concluded an agreement with the plaintiff as contained in Exhibit “A” for credit for some reasons;
- the contract entailed delivery of maize to the plaintiff;
- that a credit limit of R924 634,00 was granted to him;
- a credit invoice of September 2002 indicated that he does not owe any money;
- an amount of R80 000,00 was paid to him.

[18] He denied that he received an amount of R100 710,95 and that of R41 139,94 and further the monthly statement reflecting such amount.

[19] During cross examination he admitted that the account number reflected in the papers before court of 990240124 at ABSA Bank is his and further, the folio number as reflected by plaintiff.

[20] It also became clear during cross examination that the amount that he agreed to pay when Mr Van Rensburg had visited him was only R80 000,00 not R254 621,81. He was surprised that when he received a letter explaining the mistake the amount reflected was not the one they talked about.

[21] The defendant closed his case without calling further witnesses.

[22] In a civil trial the onus of proof is discharged on a balance of probabilities. What a court does is to draw inferences from the proven facts. The inferences drawn is the most probable, though not necessarily the only inference to be drawn. See **Cooper & Another NNO v Merchant Trade Finance Ltd 2000 (3) SA 1009 (SCA) at page 1027 F to 1028 D.**

[23] The following were said by **Niernaber JA** in the case **of Stellenbosch Farmer Winery Group Ltd & Another vs Martell at Cie & Another 2003 (1) SA 11 (SCA) at pages 14 – 15.**

> "To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or

improbability of particular aspects of his version. , (vi) the calibre and congency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probabilities or improbabilities of each party's version on each of the disputed issues. In the light of its assessment of (a), and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility finding compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[24] In the case of **National Employers General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E) J Esksteen AJP** said the following:-

In deciding whether the plaintiff has discharged the onus of proof, the estimate of the credibility of a witness will be inextricably bound – with a consideration of the probabilities of the case and, if balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's the plaintiff can only succeed if the court nonetheless believes him and is satisfied that his evidence is true and that the defendants version is false. It is not desirable for a court first to consider the question to the credibility of the witnesses and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects

constitute separate fields of inquiry".

[25] The evidence of Mr Van Rensburg was mainly in a form of an explanatory exposition and gave substance at to what the documents discovered and filed in this matter in support of their claim entails. No criticism was levelled against his evidence, nor was it shaken up during cross examination.

[26] The same applies to the evidence of Ms Swanepoel. It only dealt with the manner in which the accounts are reconciled in their employment. The only criticism levelled against her evidence which is worth mentioning is to the effect that "how was she able to verify that the reconciliation is correct and that there was a mistake made by plaintiff without the source documents, more especially as she was not the one that detected the mistake."

[27] Their evidence is totally independent from one another, the only part where one can find some form of corroboration is that they both alleged that the mistake was made by the plaintiff and that no double payments was made, but two credits instead which amounted to the amount as claimed by the plaintiff.

[28] The evidence of the defendant does not put in issue the major part of Mr Van Rensburg's exposition of the agreement between the parties and how it operated. It differs with that of Mr Van Rensburg on the fact that he did not receive the other amount claimed by the plaintiff except the R80 000,00.

[29] Both Mr Van Rensburg and Ms Swanepoel are regarded as credible

witnesses and their evidence is regarded by this court as reliable.

[30] The evidence by the defendant on the other hand as it will become more clearer in this judgment, is unsatisfactory. There were several questions that were either left unanswered by him and or he could not offer a simple explanation when required to do so. Some answers rendered his credibility to be somehow tainted.

[31] The bone of contention is therefore whether the plaintiff had proved its case that an amount of R254 621,81 was credited twice or not. Linked to this issue is a question whether the cause of action by the plaintiff is based on contract or undue enrichment.

[32] According to the submission made by plaintiff's counsel, plaintiff managed to prove that in September 2002 the statement send to the defendant reflected a zero balance. The amount of R174 621,80 was taken into account to arrive at a zero balance. The reason being that according to page 49 of Exhibit "A" a payment of R425 456,60 was taken into account as payment made by plaintiff on behalf of the defendant. The defendant admit only the amount of R80 000,00 which made this fact common cause.

[33] He further submitted that it has also been proven by plaintiff that an amount of R254 621,81 was credited to the defendant, which amount was already credited to the defendant as evidence by page 45 of Exhibit "A".

[34] According to him the defendant only admit the one amount of R80 000,00 and is silent or does not know about the other part

R174 000,00 which was credited to his account.

[35] He further submitted that although plaintiff conceded to having made an error in this regard, clause 21 and 23 of the agreement between the parties rescued the position of the plaintiff. Clause 21 provide that the amount reflected in a statement are deemed to be *prima facie* until proven otherwise. Clause 23 allows or entitles plaintiff to correct erroneous what is contained in a statement.

[36] It is plaintiff's further submission that he managed to prove that the amounts credited to defendant was incorrect. The plaintiff therefore rebutted the onus that rested upon him on these aspects. Secondly, the plaintiff reversed the credited amount as per agreement signed. This is the reason why the claim is said to be contractual in nature.

[37] He concluded by saying that in fact defendant avoids to refer to pertinent facts. This is borne by the fact that he firstly said he does not know anything about the payment. He later changed to say that he did not receive the payment. When documents are shown to him, he simply does not know anything about them and further did not request the said payment. Therefore, there cannot be any weight attached to the evidence of the defendant as he does not know and/or cannot disprove the evidence of the plaintiff.

[38] Counsel for the defendant submitted that the plaintiff failed to discharge the onus rested upon him. According to him this is so because the documents contained in Exhibit "A" are all computer generated documents copies, which have not been certified. They therefore cannot be used as a *prima facie* evidence. He quoted

provisions of the Electronic Communications Act and Transactions Act 25 of 2002 is support of his submissions.

[39] According to him this was compounded by the fact that neither Mr Van Rensburg nor Ms Swanepoel were the originators of these documents. They did not talk about the reliability of these documents. The author was not even called, the reason for that not explained. He maintains that one cannot prove a mistake from the documents that you did not create as it remains hearsay.

[40] Defendant's counsel further submitted that no where in the agreement between the parties is there a provision made for services such as cash payments, or supplies thereof. There was also no proof whatsoever provided to the court that there was a request for cash payment by the defendant. It only arose in November 2010 for the first time. He maintains that if this court rules that the cash payment were made, they could not have been done through the agreement, but by mistake of the plaintiff, which is undue enrichment, which was not a cause of action in this matter.

[41] According to defendant's counsel plaintiff did not also comply with clause 15 which deals with the sending of monthly statements, as according to him there is no proof produced in this matter that statements were send out to defendant, and further, no statement were discovered by the plaintiff. The result of this is that plaintiff cannot rely on clause 21 or 23 of the agreement. He therefore does not see the reason why the defendant has to be held liable for the things that were never sent to him.

[42] His final submission was that the evidence in respect of all the statement or documents including page 82 and 83 contained in Exhibit “A” should not be accepted as evidence as they are hearsay evidence. He requested that defendant should be absolved from the instance.

[43] On the issue of admissibility of documents I may hasten to say that page 82 and 83 of Exhibit “A” were ruled inadmissible during the trial of this matter by this court when the objection to their admissibility was raised, mainly because they were not even discovered. The issue is no longer relevant at this stage. In as far as the other documents in Exhibit “A” are concerned, it suffice to say that they were properly discovered in that state and handed to the defendant during the pre-trial conference, and no objection to their admissibility was raised by the defendant at that stage. In fact according to the defendant’s answer to the questions posed to him during the pre-trial conference by the plaintiff, he agreed that all the documents which had been discovered, can be used at a trial without formally being proven.

[44] It is trite law that a pre-trial conference is a meeting of the parties in order to examine the case as a whole. Parties determine which matters remain in dispute at the time of closure of the pleadings, which are those that they are prepared to admit and which matters they intend to canvass at the trial. Matters relating to admissibility of documents, are dealt with at this stage. In addition, the defendant further failed to object to the handing of the said documents before they were accepted by this court during the course of the trial. The plaintiff referred freely in cross-examination to the printout when questions were put by the defendant’s counsel. The issue about the

admissibility of the documents cropped out for the first time during the submissions by counsel of the defendant. To raise the point for the first time during argument is to conduct a trial by ambush.

[45] Notwithstanding the fact that the raising of the issue regarding admissibility of the documents to have been misplaced, there is evidence before this court by the two witnesses called by the plaintiff that the original documents so referred to as the source documents are statements from the bank, which could not be obtained because of passage of time of record keeping of these documents together with the flooding that occurred at their main office. The defendant could not dispute this and therefore a plausible explanation as to why only the documents generated by the defendant were used was proffered and is found to be sufficient.

[46] Defendant was not steadfast in his version. He kept on changing it during cross-examination. He could not answer some of the questions put to him. He initially said he does not know anything about the amount credited. He later changed to the version that he does not owe the plaintiff as he never received the amounts claimed nor seen any statement reflecting the said amount. He on the same breath admitted the other part of the money which the plaintiff alleges that it was paid to him by mistake. That is why he repaid back R50 000,00 thereof.

[47] The defendant failed during cross-examination to explain why in his plea which was filed on the 26/01/2006 he denied having received the R80 000,00 when during his evidence in chief he admitted having received it and paid R50 000,00.

[48] The further particulars furnished by the defendant also reveals that there is an admission that an amount of R254 621,81 was paid in by the plaintiff by cheque to the plaintiff's account OTK 15 days after the 26/04/2002. To this defendant replied during cross-examination that this was a mistake which was not done by him and this amount should not appear. He maintained that he did not know about it at all.

[49] Furthermore, in the particulars supplied by the defendant, he indicated in his reply that this amount and the other reflected therein were for the following types of services that were supplied: "Saad, kunsmis, diesel, onderdele, versekering". Unfortunately, this admission again flies against what defendant's counsel submitted during the argument stage that nowhere in the agreement is a provision made for services such as income in the form of cash payments or for supplies as indicated by the plaintiff's witness.

[50] The defendant denied that the statement of accounts were not sent to him from August 2002 and yet he admitted in his evidence in chief and in his plea that in September 2002 he received a statement of account which indicated that he does have a zero balance. I find it highly unlikely that the plaintiff could have only sent this statement and not the others as defendant alleges.

[51] Defendant testified that he knows nothing about the amounts alleged to have been mistakenly credited. According to him he does not owe plaintiff anything. He did not use more credit than what he paid back. He admits that he was erroneously paid R80 000,00. He paid back R50 000,00. According to him and his counsel, this means that he

paid more than what the credit limit required by an amount of R30 000,00. This proposition cannot be correct at all. I am saying this because defendant himself testified that after Mr Van Rensburg talked to him regarding the mistake during his visit, he then investigated the matter with his bookkeeper, and it took him a year to do that. He only paid the R50 000,00 after this period. If indeed this is what the defendant did, then he could have detected earlier than the date of when the court proceedings started in this matter that he was suppose to have only paid R20 000,00. The question that remains unanswered is why did he pay R50 000,00 then? I find it highly improbable that he could accept paying this amount when he knew that he did not owe the plaintiff anything, nor have requested any payment of it or have no knowledge thereof, and last but not least, pay an amount which is far in excess to what he purportedly owed.

[52] On the other hand, if this proposition is accepted as it is being said, it clearly demonstrate how the defendant keeps on somersaulting and changing his version when it suites him as indicated above, because this amounts to a third version from him.

[53] Defendant admits that Mr Van Rensburg visited him and they talked about the mistake the plaintiff alleges to have made on the 23 June 2004. He denies that he promised to pay but said he will “get into the situation” (to use his own words). Surprisingly enough, he did not and only decided on his own accord to pay the R50 000,00 without talking to Mr Van Rensburg again after “getting into the situation” I find it highly impossible that the defendant just paid this part payment of the amount that he did not agree to when he did not at all notify the plaintiff that he does not agree to the amount, so stipulated in the

negotiations.

[54] Perusing the documents submitted in Exhibit “A”, it is clear that the amount of R174 621,80 and that of R80 000,00 are from the same origin or source document. I find it highly unlikely that the plaintiff can only claim R80 000,00 from defendant when they discovered the mistake. It is also surprising why now the defendant admits having received this amount only and not the other. Probabilities weighs more favourably towards the fact that the plaintiff indeed erroneously paid this two amounts together as they allege.

[55] It seems to me that the plaintiff and the defendant when concluding their agreement, they envisaged possibilities of one of them making mistakes in the supply of information that is exchanged between them. In particular the plaintiff, as he is a big company involved in the agriculture industry with farmers. Not only does the plaintiff supplies agricultural products to farmers, but he finances farmers for production needs during a specific season. It is therefore understandable why clause 21 and 23 which regulates the statements and how they should be rectified was included in the agreement.

[56] It is for these reasons that I fully agree with the plaintiff that his claim is contractual in nature, not based on unjustified enrichment.

[57] I come to the conclusion that plaintiff managed on a balance of probabilities to proof that there was a mistake which was detected by the plaintiff in the statements sent to the defendant; that the said mistake was corrected by the plaintiff; that the defendant was made aware of the mistake; that the defendant agreed to pay back the

amount plaintiff showed to him; that he only paid R50 000,00 thereof. Under the circumstances plaintiff succeed in his two claims as prayed for in the plaintiff's summons.

[58] Consequently, an order is hereby made in terms of paragraphs 3,4,5,6 and 7 of the plaintiff summons as amended and dated 19/10/2011.

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A M KGOELE
JUDGE OF THE HIGH COURT

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