



IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 2756/2015

In the matter between:

ZANOXOLO JACOBS N.O.

1st Plaintiff

NANDIPHA JACOBS N.O.

2nd Plaintiff

and

MANTSOPA LOCAL MUNICIPALITY

Defendant

JUDGMENT BY: MHLAMBI J,

HEARD ON: 23, 24 and 26 NOVEMBER 2021

DELIVERED ON: 09 December 2021

MHLAMBI, J

Introduction

- [1] The plaintiffs, as trustees of the ZNZ Trust that leased the farm Middelkraal in the district of Ladybrand, instituted an action against the recovery of damages arising from a fire that broke out on the landfill site next to the farm on 6

October 2021. The landfill belonged and was under the control of the defendant.

- [2] On 3 February 2020, the court ordered that the defendant was liable to pay 100% of the plaintiffs' proven or agreed damages and costs. The present proceedings are to determine the quantum of such damages.
- [3] At the inception of the proceedings, the plaintiffs' counsel handed in a joint report (which was marked exhibit A) by the two experts: Professor C van der Westhuizen, the plaintiffs' expert witness, and Dr. PJ Malan for the defendant. It contained the minutes of a meeting which was held on 22 November 2021 between the two experts assessing the financial implications of the veld fire which took place on 6 October 2013 on the farm leased by the plaintiffs. He took the court through the report indicating the points in dispute and those that were common cause.

The Joint Minute

- [4] The two experts' findings were based on two different reports by BLK Quantity Surveyors dated November 2014 and March 2020. The plaintiffs relied on the latter while the defendant relied on the former. The damages were classified as losses of the following: grazing, fence, irrigation- and drinking water, electric cables, livestock (cattle and sheep), eragrostis round bales, and interest.
- [5] The parties were ad idem as to the calculation of the loss of grazing and the increased fertilizer costs totaling R446 377.49; the damages to the fence in the amount of R592 776.00; the damages to the pumps in the amount of R13 000.00 and R19 145.00 for the drinking water pipes. The price per unit of the irrigation pipes (R15.36 per meter), electric cables (R80.00 per meter), cows (R9 500.00 per cow), sheep (R1 350.00 per sheep), and R 375.00 per bale, was agreed upon but the quantity was in dispute. Furthermore, it was not in dispute that the consumer price index based on 4% and 6% was a more reliable guideline for the annual year-on-year increases for 2013 to 2020.

The issues

- [6] The real points in dispute are, firstly, the quantities of the damaged or lost items and secondly, which of the two reports should be used for the calculation of the damages.

The evidence

- [7] The evidence of Mr. Jacobs, who testified on behalf of the plaintiffs, is that he provided information to the BLK Quantity surveyors after the veld fire to enable them to compile the 2014 report which was annexure "A" to the particulars of claim in which an amount of R2 600 553.20 was claimed. He testified that he lost 52 of the 124 herds of cattle he had on the farm. 200 sheep were also missing. He provided Professor Van der Westhuizen with the necessary information to compile his report as well as The BLK quantity surveyors for the compilation of their March 2020 report. When his negotiations with the defendant failed, he approached his attorney for legal assistance. The failed negotiations related to the promise by the defendant to compensate him for the damages by paying him R2 600 000.00 and the award of a 10-year contract for a freezing factory. Armed with this information and the BLK report, he approached his attorney and the defendant was sued for compensation in the amount of R2 600 553.20, in line with the 2014 BLK report.
- [8] Professor Van der Westhuizen testified that he was not aware of the 2014 BLK report. He only used the 2020 BLK report which he received from Mr. Jacobs. The values arrived at were scientifically based. He and Dr. Malan respected each other and both agreed on the values per item. The differences between them were not scientific but related to the differences in numbers. He based his calculations for the loss of bales on the number 4000 which was contained in the BLK 2020 report and the invoice for the 4000 bales which was provided by Mr. Jacobs as proof of the 4000 bales. He never queried the number of the bales and assumed that there were bales all over the farm. As to the 52 herds of cattle lost, he relied on the BLK report as he did not have the cattle register. He agreed with Dr. Malan on the price of R9 500.00 per cow and R2 100.00 per ewe. The number of the lost ewes of 120, was based on the BLK report and Mr. Jacob's information. He altered his report in line with Dr. Malan's suggestions.

- [9] Dr. Malan's testimony was much in line with Professor Van der Westhuizen's, save for a few deviations here and there. He confirmed the points of agreement as contained in the joint minute.

The differences in the calculations

- [10] On a comparison of the two reports, it is evident that the lengths and the numbers of the lost or damaged items increased between 2014 and 2020. No plausible reason was proffered for the marked difference save the one advanced in argument¹ that the defendant appointed a quantity surveyor to assist Mr Jacobs with the claim. The former was to ascertain that the budgeted amount of R2 600 000.00, as contained in the 2014 report, was not exceeded. As an emerging farmer who saw an opportunity, he did not want to be seen to rock the boat.
- [11] The question that arises is, if it is accepted that Mr. Jacobs was naïve and never wanted to be seen to rock the boat, why did the plaintiffs base their claim on the 2014 report when it was clear to them that the defendant was not prepared to act by its promises and/or alleged undertaking? Differently put, why was the defendant, seen in the light of his refusal to honour his obligations in terms of the alleged agreement, not sued for the actual damages that the plaintiffs suffered as at the time they arose? In 2018, the particulars of claim were amended and the amount claimed remained the same as in the initial summons. No basis whatsoever was set for the difference and the increase of the lengths of the electric cables and the irrigation pipes from 2014 to 2020. So also the difference and increase in the numbers of the livestock.
- [12] The number of cows and sheep differ for the years 2014 and 2020. As indicated above, the reasons advanced by the plaintiffs are not cogent. The defendant correctly pointed out in argument that, even though the applicant amended the particulars of claim to reflect a higher claim amount after the judgment was given, the amendment deviated from the pleaded case, *id est*, the plaintiff should have stated in the particulars of claim that the amount originally claimed represented a negotiated amount, as alleged by the plaintiffs. The plaintiffs were legally represented at the time of the drafting and the

¹ Paras 13-15: Plaintiffs' heads of argument.

amendment of the particulars of claim. The 2014 report should be accepted as the basis point for the calculation of the damages as it was “the nearest to the incident”.²

[13] In his expert report,³ Professor Van der Westhuizen stated that “During the time of the fire, 4000 bales were already baled and in stock on the farm (-see **Photos 1 & 2** hereunder)...the total production of the whole year was thus available when the ZNZ Trust took over the farm in mid-2023. The contractors also started baling soon after the takeover, thus at the time of the veld fire (Oct. 2013), all the available pasture fields have been cut, raked and baled already...In Photo 2 it can be seen that this stack of bales consisted of 3 rows x +_18 bales at the bottom, 2 rows of 18 in the middle and one row on top, thus 108 bales were destroyed in this stack alone. As mentioned, according to Mr. Jacobs there were 4000 bales on the farm during on the date of the fire.”

[14] These statements do not add up. If 4000 bales were already baled and in stock on the farm during the time of the veld fire, it was unnecessary for the plaintiffs to source 4000 bales, as per Annexure “A” to the summons, from outside suppliers shortly before the veld fire started. According to the expert report, the 4000 bales were already baled and in stock. Secondly, photo 2⁴ does not assist in the calculation of the bales lost. According to the report, 108 bales were lost in that stack alone. Taking into account the expert witness’ testimony that he assumed that there were bales all over the farm and that he never queried the number of the 4000 bales, the question that arises is, what would his report have been like, had he taken the 2014 BLK report into account before he drafted his current report. In my view, the tax invoice as supplied by Driefontein Agree Co-Op. Ltd dated 25 September 2013, contained on page 37 of the plaintiffs’ supplementary trial bundle of documents on quantum, does not assist the plaintiffs’ case; instead, it has a negative effect.

The arguments

[15] Even though the parties are agreed on the points in dispute, they have divergent views as to the report to be accepted by the court as the foundational document for the calculation of the damages suffered by the plaintiffs. It was contended on behalf of the plaintiffs that Mr. Jacob’s evidence stood

² Defendant’s heads of argument: para 5.9.

³ On page 27.

⁴ Page 28/51 of the report.

uncontested. It followed that the 2014 report should be ignored and the 2020 report should stand as the only credible one whose admissibility was not in issue. Professor Van der Westhuizen's report should also stand with the necessary changes as a result of the concessions he made. It was argued that the defendant's expert witness was partisan, his assessment of the matter generalistic, speculative and full of assumptions.

- [16] It was contended on behalf of the defendant that the plaintiffs failed to provide proof that they had owned livestock or that the bales of hay existed as they were unable to provide their location. The photos in the plaintiffs' expert report failed to provide proof of the lengths of the damaged pipes. It was submitted that the 2014 report should be used as it was submitted by the plaintiffs and formed part of the court papers.
- [17] I am not satisfied that the plaintiffs have shown that the 2020 report is the only credible report that the court can base its findings on. Despite the plaintiffs' misgivings of Dr. Malan's testimony, it is obvious that his contributions led to concessions and the correction of Professor Van der Westhuizen's report. Having regard to the remarks I made above about the plaintiffs' approach and their handling of this matter, I am of the view that the 2014 report should be utilized for the calculation of the plaintiffs' damages.

Conclusion

- [18] Having arrived at this conclusion, the calculation of the damages will be done based on the numbers contained in that report. It was contended in the plaintiffs' oral and written heads that judgment should be entered for the plaintiffs for the payment of R6 370 379.81 less R38 000.00, interest on the applicable rate, and the costs of suit. The capital claim, however, is based on the 2020 report and includes the inflation rate of 6% (CPI) from 2013 to 2020. The amount of R2 000 000.00, the interim payment as ordered by the court previously, should be deducted from the final amount of the damages awarded.
- [19] The calculations based on the 2014 report show a total accumulated loss of R1 688 153.00⁵ as of October 2013 and R 3 022 518.22 as of October 2020,

⁵ Exhibit "A2" before the court.

after the inclusion of the interest-based on the annual consumer price index in October. Not included in these calculations were the amounts of R78 921.49 and R367 450.00 for the loss of grazing which would give a different total as at the end of the different periods. I was urged by the plaintiffs' counsel that a more realistic approach would be the consideration of the summary cost of the financial impact, based on the two reports attached to his heads of argument. The one relating to the 2014 report, inclusive of the 6% interest application, included the loss of grazing and shows a total accumulated loss of R 3 729 752.83 as of October 2020. I agree. Deducting the amount of R2 000 000.00 already advanced, the plaintiffs are entitled to the payment of R1 729 752.83 by the defendant. The costs should follow the event.

[20] I therefore make the following order:

Order

1. The defendant is ordered to pay the amount of R 1 729 752.83 to the plaintiffs;
2. Interest at the rate of 7% per annum from the date of judgment to the date of the final payment;
3. Costs of suit.

J.J MHLAMBI, J

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