REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 3396/96 & 315/2002
Reportable

In the matter between:

ROBERT STANLEY ROSS ARMSTRONG **APPELLANT**

and

SEHADEW OREE t/a OREE'S CARTAGE & PLANT HIRE **RESPONDENT**

CORAM: FARLAM, NAVSA, CLOETE JJA, SOUTHWOOD et MLAMBO AJJA

HEARD: 2 SEPTEMBER 2003

DELIVERED: 14 NOVEMBER 2003

SUMMARY: Section 3(1) Act 50 of 1956 – mineral – whether ordinary sand a 'mineral' within the meaning of section 3(1)

JUDGMENT

FARLAM JA

[1] This is an appeal from a judgment of the Natal Provincial Division (Van der Reyden and Nicholson JJ) upholding an appeal against a judgment given in favour of the appellant in the magistrate's court for the district of Lower Tugela, sitting at Stanger, in which the respondent was ordered to pay the appellant R342 000, plus interest and costs.

[2] The amount of R342 000 in respect of which judgment was given in the magistrate's court (to which I shall hereinafter refer as 'the trial court') represented the value of 76 000 cubic metres of soil (computed at the rate of R4-50 per cubic metre) which the trial court found that the respondent had removed from a property described as 'Remainder of Portion 43 of Erf 69 No 917' without paying for it. In what follows I shall refer to the property from which the sand in question was taken as 'Portion 43'. At the time when the respondent removed the 76 000 cubic metres of sand from Portion 43, as found by the trial court, Portion 43 belonged to the Umhlali Beach Town Board. The appellant and the Town Board anticipated that an agreement of exchange would be formalised between them in terms of which Portion 43 was to be exchanged for a property described as 'Portion 151 (of 28) of the Farm Erf 69 No 917' (to which I shall refer in what follows as 'Portion 151'). In the meantime the Town Board allowed the appellant to use portion 43 as his own.

[3] On 7 November 1991 the appellant and the respondent had concluded a notarial agreement, described as 'Sale of Right to Win

Sand'. In terms of this agreement the respondent acquired from the appellant what was described 'the sole and exclusive right to win sand' from an area, described in the agreement as 'the extraction area', which was an area of land some two hectares in extent, which was duly demarcated on a plan annexed to the agreement, and which formed part of a property belonging to the appellant described as 'Sub 28 of Lot 69 No 917' (in what follows I shall refer to this area as 'Sub 28').

[4] This agreement provided that the consideration payable by the respondent to the appellant for the rights acquired thereunder would be determined at a rate of R3-85 per cubic metre of sand extracted and removed from the extraction area and that this rate would be subject to increases agreed to by the parties annually for as long as the agreement endured. It was also provided in the agreement that the respondent was to keep full and proper records of the volume of sand recovered from the extraction area and that he was to pay an agreed amount to the appellant weekly in advance for the sand to be extracted, subject to an appropriate adjustment being made weekly in arrears. The appellant was entitled to employ a representative at the extraction area to supervise his interests, to check the loads of sand taken by the respondent and to check the records kept by the respondent. The notarial agreement contained a clause to the effect that no amendment or variation to it would be of any force and effect unless reduced to writing and signed by the parties.

[6] What happened in practice was that at the end of each month the appellant caused an invoice to be made out setting out the quantity of sand that had been removed by the respondent during the month, based upon figures submitted to the appellant by his checker, together with the price.

[7] When the sand to be removed from the extraction area was exhausted, the respondent moved to another portion of Sub 28, pursuant to an oral agreement between the parties. It is clear from the evidence that they regarded the notarial agreement as having been orally varied so as to alter the area in which sand could be won.

[8] On 12 September 1994 the Umhlali Beach Town Board resolved to accept an offer made to it by the appellant for the exchange of its property, Portion 43, for the appellant's property Portion 151. On 4 November 1994 the appellant wrote to the chief executive and town clerk and said that he had no objection to the Board's utilising Portion 151 prior to transfer but that he would require the Board to give him the same rights over Portion 43 prior to the transfer. It is clear from the evidence, although no letter to this effect appears to have been written, that the Board accepted the appellant's proposal in this regard.

[9] From February 1995 the appellant permitted the respondent to remove sand from Portion 43 as if the notarial agreement applied to that property also. The respondent continued to remove sand from Portion 43

until April 1996 when he ceased the sand winning operation. During the period from February 1995 to April 1996 he was invoiced for a total of 23 519 cubic metres of sand, for which he paid the appellant.

[10] The appellant's claim for payment for the sand which he said was taken but not paid for (which I shall in what follows call 'the extra sand') was based on a number of causes of action pleaded in the alternative, *viz:*

(1) payment in terms of the notarial agreement;

(2) payment in terms of an oral agreement relating to Portion 43 in terms of which the respondent bought the appellant's 'right, title and interest in and to sand' on Portion 43 at a price determined in accordance with the price structure in the notarial agreement;

(3) unjust enrichment.

(4) damages for fraudulent mispresentation.

[11] In his plea the respondent denied that there was any extra sand that he had not paid for and in respect of which he had made any misrepresentation. He also averred that all sand extracted from February 1995 came from a property other than Sub 28. It followed from this averment, if it was correct (which it was), that the appellant could not have any cause of action in respect of the extra sand based on the notarial agreement. The respondent pleaded further that the oral agreement relating to the sand on Portion 43 was invalid because the parties thereto

had not complied with the formalities prescribed for its execution by section 3(1) of the General Law Amendment Act 50 of 1956, the provisions of which are set out in para [19] below. In regard to the appellant's claim based on the alleged unjust enrichment of the respondent at his expense, the respondent pleaded that the sand on Portion 43 vested at all times material in the Town Board and that the appellant was accordingly unable to pursue any claim for compensation in respect of sand removed from the property. Finally the respondent denied all the appellant's allegations regarding the alleged fraudulent misrepresentation. (In summarising the respondent's defences at the trial I pass over without further mention a defence raised by the respondent in the trial court and not persisted in on appeal that if sand was taken, it was taken by his close corporation and not by him.)

[12] At the trial the respondent admitted that during the period from March 1992 to June 1996 a total volume of 100 000 cubic metres of sand was removed from Portion 43. Apart from an allegation regarding the activities of a firm of civil engineering contractors, Savage and Lovemore, with which I shall deal below, it was not suggested that any soil was removed from the property between March 1992 and February 1995 or between April 1996 and June 1996. The appellant's statement that he used 250 cubic metres himself was not challenged. In fact in computing his claim the appellant allowed for the use by himself of 500

cubic metres, ie, more than he had in fact used. This left at least 76 000 cubic metres unaccounted for. It followed that unless someone else removed it the respondent must have done so. The respondent alleged at the trial that Savage and Lovemore, who were constructing a freeway in the vicinity of the area where the respondent was 'winning' sand from January 1992 to December 1994 and had a batching plant on Portion 43 during that period, had removed soil from the site.

[13] In rebuttal of this allegation the appellant called three witnesses, two of whom worked for Savage and Lovemore at the time. All three testified that Savage and Lovemore removed no soil from the site. This evidence was accepted by the trial court and that of the respondent rejected. No basis was advanced before us for disagreeing with the trial court on this point.

[14] The trial court found that the respondent had removed the extra sand, but that the oral agreement in terms of which the appellant conferred on the respondent the right to extract that sand was invalid because it did not comply with section 3(1) of Act 50 of 1956. It upheld the appellant's claim based on unjust enrichment. In this regard it relied on evidence given by an official of the Town Board to the effect that the Board had no intention of instituting action for recovery of money for the extra soil as its attitude was that, in view of the arrangement between it and the appellant that pending the transfer he could use Portion 43 and it

could use Portion 151, the appellant, as the magistrate put it, 'bore the loss' to the property.

[15] The Natal Provincial Division as I have said, upheld the respondent's appeal. In his judgment Van der Reyden J, with whom Nicholson J concurred, found that the appellant's claim which had been upheld by the magistrate amounted to a *condictio indebiti* and that the magistrate erred in upholding this claim because, so it was held, the appellant had been grossly negligent in authorising the respondent to undertake sand-winning operations on Portion 43 without ensuring compliance with what were described as 'the peremptory legal formalities' imposed by section 3(1) of Act 50 of 1956.

[16] In view of the conclusion to which I have come that the appellant's first alternative cause of action, based on an oral agreement relating to Portion 43, was established at the trial it is not necessary to discuss the many interesting submissions made during the argument in this Court as to whether the judgment in favour of the appellant can be upheld if it is found that the oral agreement between the parties relating to Portion 43 was invalidated by the provisions of section 3(1) of Act 50 of 1956.

[17] Three issues are relevant in regard to the appellant's first alternative claim, viz:

(1) Did the respondent remove the extra sand?

(2) Did he pay for it?

(3) Was the oral agreement between the parties invalid because the formalities prescribed by s 3(1) were not complied with?

If the appellant succeeded on these three issues then it would not matter that he had not yet acquired ownership or indeed any rights to Portion 43 because the oral agreement amounted in substance to a sale of sand and the fact that the *merx* was a *res aliena* would be of no consequence, as the respondent and his customers who bought the sand from him were not disturbed in the possession thereof.

[18] In view of the magistrate's finding, with which I agree, that Savage and Lovemore did not take the extra sand, it is clear that the magistrate's finding that it was the respondent who removed the extra sand must be accepted as correct. It is common cause that the extra sand was not paid for. In the circumstances it is only necessary to consider whether the oral agreement was invalidated by section 3(1) of Act 50 of 1956.

[19] Section 3(1) of Act 50 of 1956 provides as follows:

'(1) No lease of any rights to minerals in land and cession of such a lease shall be valid if executed after the commencement of this Act unless attested by a notary public …'

[20] The meaning of the expression 'lease of rights to minerals' as used in section 3(1) of Act 50 of 1956 was fully discussed by Corbett JA in *Wiseman v De Pinna and Others* 1986(1) SA 38(A) at 47E-48C, where it was pointed out that the use of the term 'lease' to describe this type of

contract was inappropriate.

[21] I shall assume in what follows, in favour of the respondent, that the oral agreement between the parties relating to Portion 43 contained all the terms set out in the *Wiseman* decision. Although Mr *Kemp,* who appeared on behalf of the appellant, submitted that the onus was on the respondent to prove that the sand which was the subject matter of the oral agreement between the parties was a 'mineral' to which s 3(1) applies, I shall also assume, in favour of the respondent, that it was for the appellant to prove that the sand in question was not a 'mineral'.

[22] In this regard there are two matters to be considered, viz:

(a) to what kind of sand did the oral agreement relate? And

(b) did Parliament, when it enacted s 3(1), intend the formalities prescribed therein to have to be complied with in a 'lease' relating to such material?

[23] The following evidence is relevant as regards the kind of sand to which the oral agreement related. The price in November 1991 of similar sand to be extracted from Sub 28 was R3-85 per cubic metre. After it was 'won' it was sold on site to the respondent's customers, who took delivery then and there. According to the appellant the 250 cubic metres he took were used 'to fill in certain dongas, certain roads and general farm usage'. The Savage and Lovemore witnesses said that the sand on the site was of no use in road building and one of them said it was plaster

sand. The sand to which the notarial agreement related, which on the evidence was similar to the sand taken under the oral agreement, was described as 'the sand (and more particularly the sand which is suitable for use in the building trade)'. No contractual warranties were given as to the quality of the sand, and no properties were specified or guaranteed. In all the circumstances I am satisfied that the sand in question was what may be described as ordinary sand, some of it at least suitable for use in the building trade but ordinary sand nonetheless.

[24] Did Parliament intend s 3(1) to apply to ordinary sand so that a 'lease' relating thereto has to be attested by a notary public? To answer this question it is necessary, because the Act does not define the expression 'mineral', to have regard to the normal meaning of the word in the context in which it is used. See, eg, *Jaga v Dönges NO : Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) 662G-66A, cited with approval many times since, for example in *University of Cape Town v Cape Bar Council* 1986 (4) SA 903(A) at 914 A-D.

[25] I dealt with the meaning of the expression 'mineral' in *Minister of Land Affairs v Rand Mines Ltd* 1998 (4) SA 303 (SCA). At 329 I-J, after considering South African cases on the point dating back to 1895 (to which may now usefully be added *Kameelfontein Boerdery CC v Worldwide Expo (Pty) Ltd* 2002 (3) SA 248(T)), I stated that the normal meaning of the term mineral' in South Africa does not include ordinary

clay, sand or stone. This was undoubtedly the position in 1956 when Act 50 of 1956 was passed. In the present case, which concerns what I have called ordinary sand, this means that unless there is something in the contextual scene which leads one to believe that Parliament intended ordinary sand to be covered, it must be accepted that 'lease' contracts relating to ordinary sand are not hit by the section.

[26] Is there anything in the contextual scene which indicates otherwise? I think not. On the contrary, as Mr *Kemp* submitted, if ordinary sand is to be regarded as a mineral under the Act, it would clearly lead to absurd results because sand would often be purchased, dug-up and loaded by a party in circumstances where the requirement and cost of a notarially executed 'lease' would exceed the value of the sand. He gave the following example:

'[I]f a pet shop owner wishes to augment his delivery of cat litter, which did not arrive, by buying and digging up a small bakkie-load of sand from a farmer, once a day for a week, this contract must be invalid unless in writing and notarially executed, which would probably cost 5 to 10 times the value of the sand.'

He submitted, correctly in my view, that that could never have been contemplated by the Legislature. It follows from what I have said that the oral agreement between the parties was not invalidated by s 3(1) of Act 50 of 1956.

[27] In the circumstances I am satisfied that the appellant succeeded in

establishing on the contractual basis pleaded in his first alternative claim that he was entitled to judgment against the respondent in the amount of R342 000. It follows that the court *a quo* erred in setting aside the judgment given by the magistrate.

[28] The following order is made:

1. The appeal succeeds with costs.

2. The following is substituted for the order made by the court *a quo:*

   'The appeal is dismissed with costs.'

……..
IG FARLAM
JUDGE OF APPEAL

CONCURRING:

NAVSA JA

CLOETE JA

SOUTHWOOD AJA

MLAMBO AJA