THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 748/2019

In the matter between:

PELHAM STEPHANUS BOTHMA	**FIRST APPELLANT**
S BOTHMA & SEUN TRANSPORT (EDMS) BEPERK	**SECOND APPELLANT**
MERINO BOERDERY BELANGE (EDMS) BEPERK	**THIRD APPELLANT**
PELHAM STEPHANUS BOTHMA N.O	**FOURTH APPELLANT**
JOHANNA ELIZABETH BOTHMA N.O	**FIFTH APPELLANT**
JAN FW BASSON N.O	**SIXTH APPELLANT**
LOUIS BOTHMA (JUNIOR) N.O	**SEVENTH APPELLANT**
JAN FW BASSON N.O	**EIGHTH APPELLANT**
PELHAM STEPHANUS BOTHMA N.O	**NINTH APPELLANT**
MAVIS CILLIERS N.O	**TENTH APPELLANT**

And

TERTIUS BOTHMA N.O	**FIRST RESPONDENT**
CARINE BOTHMA N.O	**SECOND RESPONDENT**

Neutral citation: *Pelham Stephanus Bothma & Others v Tertius Bothma N.O & Another* (case no 748/2019) [2021] ZASCA 46 (15 April 2021)

Coram: DAMBUZA, SCHIPPERS, PLASKET JJA, GOOSEN and POYO-DLWATI AJJA

Heard: 16 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 15 April 2021.

Summary: Law of Contract – principles on interpretation of legal documents restated – only admissible evidence of context may be led.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Rampai ADJP) sitting as court of first instance:

1. The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Dambuza JA (Schippers, Plasket JJA, Goosen and Poyo-Dlwati AJJA concurring)

Introduction

[1] This appeal concerns the interpretation of the terms of a settlement agreement which was made an order of court. The appeal is against an order of the Free State Division of the High Court, Bloemfontein (Rampai ADJP, High Court), in terms of which the appellants were ordered to pay the respondents an amount of R15 million pursuant to their breach of the terms of the settlement agreement. The appeal is with leave of the high court (Naidoo ADJP).

Background

[2] The appellants and respondents are close family. The first appellant, Mr Tertius Bothma, and the first respondent, Mr Pelham Bothma, are brothers. They

are married to the second respondent Ms Carine Bothma and fifth appellant, Ms Johanna Bothma, respectively.

[3] For the 33 years leading up to 2005 the brothers conducted a sand mining and distribution business together. The business was started by their father in the 1950's. In 2005 the brothers parted ways. An agreement (skeidingsooreenkoms) concluded at their separation provided that Mr Pelham Bothma and his group of businesses (the appellants) would take all the business equipment and machinery.[1] They then had to bear the responsibility, including the cost, of rehabilitating a mining site on Portion 3 of Farm 442 Londondale, on which mining activities had been previously conducted over an extended period. In terms of the separation arrangement, Portion 3, including all the mining and mineral rights attaching thereto, was granted to Mr Tertius Bothma and Ms Carine Bothma (respondents).

[4] A dispute arose when the respondents became dissatisfied with the manner in which the rehabilitation was progressing. The matter was referred to arbitration before Judge Eloff (retired). The resultant arbitral award which was made an order of court on 20 September 2007, provided that the second appellant, S Bothma en Seuns Transport, of which Mr Pelham Bothma was a director, had to rehabilitate the land according to a rehabilitation plan (mynplan).

[1] The main business of the appellants was conducted through the second appellant, S Bothma en Seun Transport. The associated entities were the Pelham Bothma Investment (beleggings), Trust of which Mr Pelham Bothma and his wife were trustees. There was also the Louis Bothma Investment Trust of which the seventh appellant, Mr Louis Bothma (son of a deceased brother), together with Mr Pelham Bothma, Mr Jan Basson, (eighth appellant), and Ms Mavis Cilliers, (tenth appellant), were trustees.

[5] By 2011 the rehabilitation had still not been completed. Furthermore the attempts at rehabilitation were far from satisfactory. The respondents, representing the Tertius Bothma Investment Trust, instituted proceedings against the appellants in the High Court, claiming payment of R99 047 190.00 as fair and reasonable costs for the rehabilitation of Portion 3.[2]

[6] On the first day of trial the court held an inspection in loco of Portion 3. A few days thereafter, on 21 November 2014, the parties concluded a settlement agreement which was made an order of court (per Jordaan J) on the same day.

[7] The short settlement agreement provided that:

'1 Die Verweerders [appellants in this appeal], gesamentlik en afsonderlik sal 100 000m^3 (EENHODERD DUISEND KUBIEKE METER) skoon sand (bolaag uitgesluit) aan die Eisers [respondents in this appeal] lewer deur dit op te hoop op die myn area, wat gelee is? langs die weegbrug op die plaas Boschbank 12 in die Parys-distrik, te Sasolburg;

2 Die Verweeders sal voormelde sand lewer binne 6 (SES) maande vanaf ondertekening hiervan. Lewering sal vooltooi wees wanneer die Eisers en die Verweerders se opmeters skriftelik sertifiseer dat voormeelde hoeveelheid sand opgehoop is, waarna die gebied afgebaken en omheim sal word deur die Verweerders en uitsluitlike toegang van die gebied aan die Eisers oorhandig sal word

3 Die Eisers sal voormelde sand op eie koste vanaf die voormelde gebied verwyder binne 36 (SES-EN-DERTIG) maande vanaf datum van lewering soos in paragraaf 2 vermeld.

4 Die Eisers stem hiermee toe tot die uitreiking van `n mynsluitingsertifikaat, met betrekking tot die mynlisensie uitgereik onder verwysingsnommer 4/2004.

[2] Case No 12311/2011

5 Die Verweerders trek hiermee alle besware terug teen die Eisers se voorgenome vestiging van `n visteelplaas op Gedeelte 3 en/of 4 van die plaas Londondale 442 distrik Sasolburg.

6 Die Verweerders trek hiermee alle besware terug teen die Eisers se voorgenome vestiging van 'n stoortenk op Gedeelte 3 en/of 4 van die plaas Londondale 442, distrik Sasolburg'.

[8] The accepted translation of paragraphs 1 and 2 of the settlement agreement was this:

'1 The defendants, jointly and severally, shall deliver 100 000m^3 (one hundred thousand cubic metres) of clean sand (topsoil excluded) to the Plaintiffs by stockpiling it in the mine area situated next to the weighbridge on the farm Boschbank 12 in the Parys- district in Sasolburg;

2 The defendants shall deliver the aforesaid sand within six (6) months from the date of the signing hereof. Delivery shall be completed when the plaintiffs' and defendants' surveyors certify in writing that the abovementioned quality of sand has been stockpiled, whereafter the area will be cordoned off and fenced by the defendants and sole access to the area will be handed to the plaintiffs'.

Those proceedings were therefore finalised with the appellants undertaking to deliver 100 000m^3 of clean sand to the respondents within six months from the date of the conclusion of the agreement and stockpiling it near the weighbridge located at Farm Boschbank 12 in Parys. This, however, did not quite happen.

Before the court a quo

[9] In 2018 the respondents instituted further proceedings against the appellants alleging that they had failed to meet their obligations under the settlement agreement. At the heart of the dispute was the interpretation of the first two clauses of the settlement agreement.

The pleadings

[10] The respondents alleged that the material delivered by the appellant was not clean sand as specified in the agreement; and that substantial portions thereof comprised lumpy, clay enriched loamy soil with no commercial value. They contended that the material was not homogeneous, and that some of it had been dumped on sludge and became contaminated. As a result, although the total volume of the material delivered was 102 110m^3 when purified, it would yield only 65 455m^3 of clean sand.

[11] The second breach that was alleged was that the material was scattered in heaps over a wide area, on top of vegetation and sludge, rather than being stockpiled near the weighbridge. The respondents alleged that they would not be able to transport the material as efficiently as they would have done had it been heaped as specified in the agreement. It was also alleged that delivery was effected in July 2015, outside the specified six month period which expired on 21 May 2015.

[12] The respondents then sought an order for delivery of 100 000m^3 clean sand plus interest calculated on the value thereof, alternatively, payment of R15 000 000.00, alternatively the tendered material plus payment of R6 875 000.00 together with a further 34 545m^3 of clean sand (or its value of R5 181 750).

[13] The appellants pleaded that they had fully complied with their obligations under the settlement agreement. They contended that the material delivered was clean sand which was suitable for its intended use in the rehabilitation of Portion

3. They also asserted that although they had no obligation to deliver building sand or sand with commercial value, they, in fact, delivered material of commercial value. They insisted, furthermore, that the clean sand delivered by them was stockpiled on the mine area near the specified weighbridge, and was weighed (gemeet) and certified by their land surveyor (landmeter).

[14] In a counterclaim the appellants sought a declaratory order that they delivered 100 000m^3 clean sand in accordance with the settlement agreement. They re-iterated their contention that the sand was intended for rehabilitation of Portion 3.

The evidence

[15] Extensive evidence was led before the court a quo, including evidence on the background leading to the conclusion of the settlement agreement in the proceedings before Jordaan J, the nature or quality of the material delivered by the appellants, the purpose for which the clean sand was to be used, and whether the tendered material was clean sand. Mr Tertius Bothma, and three experts: Dr Johan Van der Waals, a soil scientist, Ms Manjini Mestry, an employee of the respondents,[3] and Mr Morkel Fourie, whose expertise lay in sand processing and sales, testified on behalf of the respondents. Mr Jacobus Burger (Mr Pelham Bothma's son in law), who was the Chief Executive Officer at S Bothma en Seun Transport at the relevant time, testified on behalf of the appellants, together with Mr Shane Jeffrey, a civil engineer, Mr Deon Juckers, a director of operations at RadioLab, the entity which did soil testing for the appellants, together with Mr

[3] Ms Mestry's evidence related to the failed attempts to identify, together with the appellants' representatives, a suitable sand stockpiling spot and method.

Leornard Tshabalala, Mr Jorret Mogalaka, Ms Doris Makhubo and Mr Elphus Mlotshwa, all employees of RadioLab during the relevant period.

Judgment of the Court a quo

[17] The court a quo found, among other things, that the contention by the appellants that the agreement was concluded in the course of settling the respondents' claim for rehabilitation of Portion 3 was misconceived. The court found that: 'the action heard by Jordaan J had nothing to do with rehabilitation of the mining site, but everything to do with payment of money instead'. It rejected the evidence of Mr Jacobus Burger, on behalf of the appellants, that the term 'clean sand' was intended by the parties to mean 'sand without rubble'. The court upheld the respondents' contention that, in the building industry, clean sand was understood to have commercial value, and was sand which could be used in the construction industry. It found that the appellants had failed to deliver clean sand to the respondents, that the material was delivered outside the six month period specified in the agreement, and that it was not stockpiled as specified therein.

Issues on appeal

[18] In their Heads of Argument the appellants strongly took issue with the liberal use by the court a quo in its judgment of submissions made in the respondents' Heads of Argument. The suggestion was that there was uncritical acceptance, in large measure, by the court a quo, of the submissions made on behalf of the respondents, whilst the appellants' submissions were ignored. I can only say that, even if Rampai ADJP invoked portions of the respondent's Heads of Argument in his 99 page judgment it does not appear that he did not bring an independent mind to bear on the assessment of the evidence and issues raised at

the trial.[4] The extensive examination of case law and the reasoning in the judgment of the High Court was rather suggestive of an exercise of the judge's own analytical and assessment skills than the blanket acceptance of submissions suggested by the appellants.

[19] As to the merits, the contention was that the appellants had met their obligations under the agreement by delivering clean sand to the respondents within the specified period and at the specified location. The appellants contended that the court a quo erred in interpreting clean sand as consisting of a homogenous soil type, and having commercial value. The argument was that this interpretation was an undue extension of the meaning of clean sand. The appellants also persisted in their argument that the meaning of clean sand had to be determined within the context that the respondents had intended to use it for rehabilitation of Portion 3. It was submitted that the court a quo erred in disregarding Mr Burger's evidence of that context and consequently attributed an incorrect meaning to the words.

The Law

[20] The current approach to construction of legal documents has been explained in various judgments of this court and the Constitutional Court, including *KPMG Chartered Accountants (SA) v Securefin Limited and Another*,[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[6] and *City of Tshwane v Blair Atholl Homeowners Association.*[7] In *Endumeni* this court outlined the approach to the judicial interpretative exercise as the process of

[4] *Stuttafords Stores (Pty) Ltd and Others v Salt of the Earth Creations (Pty) Ltd* 2011 (1) SA 267 (CC).
[5] *KPMG Chartered Accountants (SA) v Securefin Limited and Another* 2009 (4) SA 399 (SCA).
[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
[7] *City of Tshwane v Blair Atholl Homeowners Association* [2019] 1 All SA 291 (SCA); 2019 (3) SA 398 (SCA).

attributing meaning to the words used in legal documents, taking into account the context in which they were used, 'by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence'.[8]

[21] The Constitutional Court endorsed this approach in *ACSA v Big Five*[9]. And in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport*[10] this court reinforced the approach thus:

'Whilst the starting point remains the words of the documents, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise".'

[22] The writer G B Bradfield, in *Christie's Law of Contract* describes this unitary approach to interpretation of documents as objective as 'it entails attributing meaning to the words used by the parties as they would be understood in context by a reasonable person'.[11]

[23] In light of the mutual accusations by the parties in this case regarding the presentation of inadmissible evidence, the warning sounded by this court in *Blair*

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[8] A departure from the previous description of the process given, for example, in *Coopers and Lybrand and Others v Bryant* 1995 (3) SA 761 (A) as a multi stage approach, the first stage being ascertainment of the literal meaning of the words and the next being consideration of the 'context and background circumstances', including application of extrinsic evidence of surrounding circumstances where there was ambiguity.

[9] *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* 2019 (5) SA 1 (CC). See also *Betterbridge (Pty) Ltd v Masilo and others NNO* 2015 (2) SA 396 (GP) at para [8].

[10] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA) para 12.

[11] G B Bradfied; *Christie's Law of Contract in South Africa;* 7th ed; at 241

Atholl is particularly relevant. In *Blair Atholl* this court repeated the warning previously raised about the increase in the incidence of the courts allowing inadmissible evidence on the meaning to be attributed to words in legal documents. In para [64] of *Blair Atholl* this court said:

'This court's more recent experience has shown increasingly that the written text is being relegated and extensive inadmissible evidence has been led. The pendulum has swung too far. It is necessary to reconsider the foundational principles set out in *KPMG Chartered Accountants (SA) v Securefin Ltd & Another*.'

[24] In *KPMG*[12] this court emphasized the centrality of the agreement to the interpretative process as follows:

'First the integration (or parol evidence) rule remains part of our law. However it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was meant to provide a complete memorial of a jural act extrinsic evidence may not contradict, add or modify its meaning (*Johnston v Leal 1980 (3) SA 927 (A) at 943B).*

Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) Phipson on Evidence (16 ed 2005) paragraphs 33-64)

Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent.

Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose, or for purpose of identification, one must use it as conservatively as possible.'

(Footnotes omitted)

[12] *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA).

[25] The interface between the words used by the parties in an agreement and the context thereof, including the parameters applicable to evidence of context is explained in *Christie*:

'Despite its difficulties, [the parol evidence rule] serves the important purpose of ensuring that where the parties have decided that their contract should be recorded in writing and that such contract shall be the sole, complete record of their agreement, their decision will be respected, and the resulting document or documents will be accepted as the sole evidence of the terms of the contract. As was expressed by Corbett JA in *Johnston v Leal:*

"It is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract . . .

To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered. "'.[13] (emphasis supplied)

[26] It is against this background that the words used by the parties in the settlement agreement in this case must be interpreted. As will become apparent in the paragraphs below, not all of the evidence tendered was admissible, and, because of the conclusion we reach on the meaning of clean sand, the evidence relating to whether the appellants delivered the material within the stipulated period and whether it was stockpiled as specified has become irrelevant.

[13] Bradfield GB; Christie's Law of Contract in South Africa; 7th ed; at 226. The difficulties referred to include the fact that when rigidly applied, by excluding evidence of what the parties really agreed on the rule can lead to injustice. The courts have therefore endeavoured to strike a balance between the liberal and conservative application of the rule.

Discussion

The meaning of clean sand

[27] In terms of the agreement the appellants, jointly and severally, had an obligation to deliver 100 000m^3 of 'clean sand' (excluding topsoil) to the specified location. As submitted on their behalf there was no suggestion by any of the parties that 'clean sand' was a term of art. The term had no specialised meaning. The dictionary meaning of sand is: 'soil containing 85 percent or more of sand and a maximum of 10 percent clay', [14] or 'a substance that looks like powder, and consists of extremely small pieces of stone',[15] or 'a loose granular substance, typically pale yellowish brown, resulting from the erosion of siliceous and other rocks and forming a major constituent of beaches, river beds, the seabed, and deserts'.[16] Clean sand therefore would be sand as defined, free of impurities.

[28] As to the context in which the agreement was concluded, much of it was apparent from the undisputed allegations made in the pleadings. Therein the appellants' persistent failure to fulfil their obligation to rehabilitate the mined area of Portion 3 was indisputable. It was also common cause on the pleadings that such failure culminated in a monetary claim instituted by the respondents against the appellants in 2011. Therein the respondents sought payment of R99 047 190.00 on the basis that: 'as gevolg van die onregmagtige optrede van die verweerders ly die eisers skade in die bedrag voormeld, synde die koste van die rehabilitasie van die eiendom, wat verweerders versuim om te doen'.

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[14] Merriam Webster Dictionary; See also the further definition: 'a loose granular material that results from disintegration of rocks, consists of particles smaller than gravel but coarser than slit, and is used in mortar, glass, abrasives, and foundry'.
[15] Collins Dictionary.
[16] From Oxford English Dictionaries

[29] It is only in that sense that the rehabilitation of Portion 3 was part of the background to the settlement agreement. However the rehabilitation had become a distant background to the settlement reached by the parties. The claim that resulted in the settlement agreement was a monetary claim for the costs of rehabilitation. It was therefore incorrect to describe those proceedings as a 'rehabilitation claim' as the appellants sought to brand them. Since 2005, when the business relationship between the parties broke down, the appellants had persistently failed to rehabilitate Portion 3. The respondents then resorted to seeking payment of money in order to cover the costs of the rehabilitation. The money claim was therefore the relevant context for the interpretation of the settlement agreement. The clean sand was accepted in lieu of payment of the money that had been claimed. The finding by the court a quo that the proceedings before Jordaan J had nothing to do with rehabilitation was therefore correctly made in this context.

[30] Furthermore, it was not in dispute that the stipulated rehabilitation process included removal of building rubble from Portion 3, landscape restoration, refilling of the 11 825m^3 mined area with subsoil and topsoil, and restoration of vegetation, natural ecosystems, and eroded slopes. As against this multifaceted process, the settlement agreement only provided for delivery of clean sand by the appellants. If the clean sand was intended for rehabilitation of the mined area, the respondents would have to bear the responsibility and cost of executing all the other aspects of the rehabilitation works, including obtaining topsoil which was expressly excluded in the agreement. That would not make any business sense.[17]

[17] See *Endumeni* supra at para 18. The court held that a 'sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document'.

[31] Mr Burger's explanation for the exclusion of the topsoil from the material that was to be delivered to the respondents made no sense. He testified that:

'. . . die bolaag in die mynarea wat ons myn, ons moet die bolaag wat gebere word, want as ons rehabilitasie doen dan word dit oor die grond gesprei. So ons mag nie van dit ontslae raak nie, dit moet bly op die myngebied en dit is hoekom ek pertinent gese het "bolaag uitgesluit".

[32] The exclusion of the topsoil simply gave the lie to the rehabilitation purpose theory. It would make no sense that the respondents, having quantified the cost of rectifying the breach, would then agree to a worthless settlement or to a settlement that would substantially fall short of that cost.

[33] Interestingly, despite insisting that the delivered material was clean sand of commercial value, Mr Burger asserted that he would never have agreed to delivery of building sand to the respondents as that would place them in direct competition with the respondents in the business of supply of sand. This argument only served to obfuscate the appellants' case even more rather than strengthen it.

[34] The relevant context appears in the evidence of Mr Tertius Bothma. Although this was evidence of negotiations that preceded the settlement it was not intended to, and nor did it have the effect of, modifying or disputing the contents of the settlement agreement. Furthermore this evidence was not disputed. Mr Bothma's evidence was that the settlement agreement was concluded during the course of the trial before Jordaan J. A day into the trial an offer of delivery of 50 000m^3 ordinary sand was made to the respondents on behalf of S Bothma & Seun Transport. That offer was rejected. Three days later a further offer was made, this time for delivery of 82 000m^3 sand. This was met

with a counter-offer that washed sand (gewaste sand) would be accepted. At that stage the appellants made a counter-offer of 100 000.00m^3 clean sand which was accepted by the respondents, leading to the conclusion of the settlement agreement.

[35] The appellants' expert, Mr Jeffrey, did not do much to reinforce the appellant's case. He made much of the fact that the terms 'building sand' and 'plaster sand' were generally used in the building industry rather than clean sand. This evidence was irrelevant. The parties, with their vast experience in the sand mining and sales business, had chosen the term 'clean sand' in a specific context. The term and the agreement had to be construed accordingly.

[36] On the other hand, Mr Fourie described the sand processing procedure as entailing the sifting of mined sand to remove the lumps, stones, vegetation and other impurities before the sand is sold, whether as building or plaster sand. That evidence was not in dispute. In as far as Mr Jeffrey's evidence was intended to support the contention that the lumpy sand was suitable for the rehabilitation purpose, it did not assist the appellants. As already shown, that interpretation of the agreement was simply implausible.

[37] A further relevant objective fact was that the clean sand had to be delivered to the farm Boschbank 12 rather than Portion 3, and had to be offloaded near the weighbridge, with direct access to a nearby public road. This was consistent with the purpose of recouping the rehabilitation costs. All of this militated against the context advanced by the appellants, that the clean sand was intended for rehabilitation of the mined area.

[38] There was therefore no merit in the contention by the appellants that the definition of clean sand as having market value was an unduly extended description.

Did the appellants deliver clean sand?

[39] It was submitted on behalf of the appellants that the evidence of Dr Van Der Waals was impermissibly relied on for the meaning of clean sand. Indeed reference in Dr Van Der Waals' evidence to the attributes of clean sand as stipulated in the agreement was inadmissible. However the bulk of Dr Van Der Waals evidence essentially related to the material delivered by the appellants. With reference to photographs and samples taken from the delivered material he pointed to distinct colour variations of the soil. He also referred to the clumps or aggregations which were an incident of the high clay content in the soil. The high clay content in the delivered material was not in dispute. As an expert in soil science, his comparison of the delivered material, or portions thereof, with the properties of sand was not inadmissible. In that regard his evidence was that:

'. . . when the sand is dry I can make it, it is loose material, there is no aggregation to it and it runs, when piled in a heap it runs down, the typical sand heap. That material by definition may contain up to 10% of clay or 15% of silt, but it acts, and to the observer and to the person feeling it, the person working with it, it feels like sand, because the clay particles as I indicated yesterday, if this is a sand particle the clay particles are adhered to the sand particle. And because they are a thousand times smaller than the sand particle, it is impossible to distinguish them from this sand particle that there may be clay particles associated with it. So for the user that is the feel. It is the feel of sand, it feels like . . . And to the eye it looks like sand, in other words the sand run, it runs like sugar if I could make an analogy. . .'. P11421

[40] Dr Van Der Waals' expertise to testify on the quality of the delivered material and its possible use in the construction industry was sufficiently established with reference to his extensive experience in working with engineers in the building industry. His opinion that the tendered material or portions thereof could not be used for construction was admissible. The results of the tests done on the delivered material showed that it could not be used in the building industry.[18] Dr Van der Waals' evidence that cracks in a building are often an effect of using inconsistently constituted sand in the construction thereof illustrated the importance of homogeneity in the constitution of building sand.

[41] The criticism of Dr Van der Waals' methodology of random sampling as not comprehensive was not justified. The tests conducted by him at a University of Pretoria laboratory on the samples obtained by him were not faulted. It was submitted on behalf of the appellants that at 86% sand, 4.16% silt and 9.66% clay, the average results of the tests done place the delivered material within the limits of acceptable soil constitution for sand. However, Dr Van Der Waals' explanation that the use of averages was unscientific was not disputed. In any event, it was common cause on the evidence that the material delivered was largely lumpy loamy sand. Indeed, in the photographs which formed part of the record, the inconsistency in colour and constitution of the material delivered by the appellants were visible.

[42] Mr Jeffery whose area of expertise was civil engineering, could not validly impugn the conclusions drawn by Dr Van Der Waals from his laboratory tests and the methodology used. Moreover Mr Jeffery's own opinion that the clay

[18] There were indications that some of the material could be of use in some applications in the building industry. However these results emanated from tests done by RadioLab which were shown to be unreliable.

content in the delivered material was acceptable for the material to qualify as sand was drawn from the discredited RadioLab tests.

[43] Part of Mr Jeffrey's criticism of Dr Van der Waals' methodology was that it was not prescribed by the South African National Standards (SANS). Yet the RadioLab tests were not conducted in conformity with the SANS prescriptions. Only ten percent of the number of samples prescribed by SANS were taken, because RadioLab wanted to save costs. During the cross-examination of Mr Juckers, the operational director at RadioLab, it was shown that a set of test results which were unfavourable to the appellants had never been discovered by the appellants. They only surfaced because Mr Juckers took the wrong file into the witness box. Furthermore Mr Juckers had instructed that the plasticity index results of the tests, which showed the high clay content in the tested material, be removed, thus altering the overall results of the tests. Other respects in which the RadioLab test were unreliable included errors in recording the readings of the hydrometer tests.

[44] The appellants did not discount the inconsistent constitution of the material delivered by them. The essence of their case was that the loamy sand delivered was suitable for rehabilitation of Portion 3 and therefore they had fulfilled their obligation in delivering clean sand. That argument was then modified to the effect that the material delivered could be used in the building industry based on the RadioLab results. The court a quo found the evidence relied upon by the appellants was unreliable. There is no basis for us to upset that finding.

[45] Consequently the conclusion by the court a quo that the appellants had failed to deliver clean sand as provided in the settlement agreement was correct.

A material breach of the agreement had thus been established. That being the case, it was not necessary to determine whether the delivered material was stockpiled as provided in the agreement and whether it was delivered within the specified six months period.

The quantum of the respondents' claim

[46] Exercising its discretion the court a quo considered Mr Fourie's evidence on this issue. Mr Tertius Bothma also had extensive experience in the business of supply of sand to the building industry. The court a quo awarded compensatory damages against the appellants at R150.00 per $m^{3.}$ It was submitted on behalf of the appellants that the court a quo failed to consider the difference in the evidence relating to price and in accepting Mr Bothma's price of R150 per m^3 of building sand when Mr Fourie had distinguished between the price of plaster sand (R150.00 per m3) and building sand (R125.00 per m^3). The argument was that that it was never the respondents' case that the appellants were to deliver plaster sand to them.

[47] It is trite that damages awarded in breach of contract are intended to place the plaintiff in the same position she would have been if the contract had been properly performed.[19] In this case, if the appellants had not breached their obligations under the settlement agreement the respondents would have been able to sell the sand delivered to them at their normal price. On Mr Bothma's evidence they would have sold the sand for R150.00 per m^3. The fact that another sand supplier, such as Mr Fourie, would have sold it for R25.00 less per m^3 does not render the respondents' price unreasonable. There can be no argument that the

[19] Bradfield; *supra;* at 642 (including the authorities cited therein).

respondents were over-compensated. There is therefore no valid basis to interfere with the conclusions reached by the court a quo.

[48] For these reasons the appeal is dismissed with costs including the costs of two counsel.

N DAMBUZA
JUDGE OF APPEAL

Appearances:

For the Appellants:	A Subel SC with C Acker
Instructed by:	Philip Coetzer Inc, Centurion & Tersia Basson Attorneys, Vereeniging.
	Bezuidenhoutz Inc, Bloemfontein.
For the Respondents:	A Joubert SC with P Leeuwner
Instructed by:	Van Heereden & Platt Attorneys, Johannesburg.
	Rosendorff Reitz Barry Attorneys, Bloemfotein.