



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 922/2018

In the matter between:

**MIKE NESS AGENCIES CC t/a PROMECH
BOREHOLES**

APPELLANT

and

LOURENSFORD FRUIT COMPANY (PTY) LTD

RESPONDENT

Neutral citation: *Mike Ness Agencies CC t/a Promech Boreholes v Lourensford Fruit Company (Pty) Ltd* (922/2018) [2019] ZASCA 159 (28 November 2019)

Coram: Cachalia, Leach, Plasket and Dlodlo JJA and Gorven AJA

Heard: 5 November 2019

Delivered: 28 November 2019

Summary: Contract – terms agreed in writing – parol evidence rule – appellant having proved the terms of the contract and having satisfied its entitlement to be paid for sinking a borehole.

ORDER

On appeal from: The Western Cape Division of the High Court (Baartman and Samela JJ sitting as court of appeal):

- 1 The appeal is upheld, with costs.
- 2 The order of the high court is set aside and substituted with the following:
‘The appeal is dismissed, with costs.’

JUDGMENT

Leach JA (Cachalia, Plasket and Dlodlo JJA and Gorven AJA concurring)

[1] The appellant, a close corporation trading under the name of Promech Boreholes, carries on business as a drilling and borehole contractor. At the request of the respondent, the appellant gave the respondent a written quotation to drill a borehole for it on one of its Western Cape farms, known as the Lourensford Wine Estate (the farm). In its quotation, the appellant undertook ‘to guarantee water within 70 metres’ and that ‘if no water was found at 70 metres we will drill from 70 metres to 100 metres free of charge’. This quotation was accepted and led to the appellant drilling a borehole on the farm to a depth of a little more than 70 metres.

[2] It is common cause that this borehole yields approximately 4 000 litres of water per hour, something which would put a smile on the face of most farmers in this country. However, despite this and the respondent having subsequently installed a pump in the borehole and using its water to irrigate its fruit trees, it refused to pay the appellant the agreed contract price or any part thereof. Accordingly, the appellant sued for payment of its charges in the Bellville Magistrates' Court. Understandably, given the borehole's yield and the fact that it had been used by the respondent, the claim succeeded. Startlingly, given these facts, an appeal to the Western Cape Division of the High Court, Cape Town succeeded on the basis that the appellant had not discharged the onus of proving it had provided sufficient water to comply with its contractual obligations and was therefore not entitled to receive any payment at all. The appeal against that decision is with the special leave of this court.

[3] The principal witness called on behalf of the appellant at the trial was its sole member, Mr Mike Ness. An old hand in the borehole drilling trade, having carried on business in that capacity for more than 20 years, he described how he had been contacted by Mr Johan West, the environmental affairs manager of the respondent, who asked him for a quotation to provide a borehole on the farm. As a result, in March 2011 he went to the farm where he met Mr West who showed him where a borehole was required. He was told that the water from the borehole was going to be pumped into a storage facility and from there distributed to labourers' cottages on the farm. He was then left to his own devices and set about divining for water using two steel rods. Doing so, he felt that the place which had been pointed out to him was not suitable for a borehole and so he extended his search until he found a nearby site at which, in his opinion, there was a much better prospect of obtaining water. He then spoke to Mr West and told him that he was prepared to drill at that particular site on the basis of 'no water no pay',

that being the appellant's standard policy based on the confidence Mr Ness had in his water divining powers.

[4] It was pursuant to this and Mr West's request that, on 9 March 2011, the appellant forwarded by email a written quotation to the respondent. Being annexure 'POC 1' to the particulars of claim, it reads as follows:

'Further to your enquiry, we have the pleasure in detailing our quotation for drilling of borehole, supply and installation of pump.

1. Drilling of Borehole

Divine for water on premises

Establishment set up, etc.

30 m mud drilling

30 m 177 mm steel casing

30 m steel installation

40 m percussion drilling

70 m 125 mm class 12 PVC casing

Drilling additive

70 bags gravel pack

Borehole development

Compressor and diesel usage

SUB TOTAL 73 350.00'

Below this, the costs of a borehole pump and electrical installation (totalling R28 500) as well as the provision of electrical boards (R5 500) were set out. Then followed a clause that for convenience I shall refer to as 'the deposit clause'. It read:

'A payment of 50 % of the total will be transferred to Promech's account as soon as a sufficient water supply has been found and the said water breaches the surface of the drilling site. The balance will be paid on completion . . . Promech has a **No water, No pay policy.**'

[5] Mr Ness explained that normally the appellant insisted upon payment of a deposit of 50% of the quoted contract price before commencing work, but that in the present case the respondent was not prepared to pay until it was shown that

water had been found. The deposit clause was therefore inserted at the respondent's insistence to extend to it the benefit of only paying the deposit on water being struck, something he was confident would occur. I shall return to this clause later.

[6] In any event, at the foot of 'POC 1' the appellant provided a space for the respondent to sign in acceptance of its terms and conditions. On 18 March 2011, a little over a week after it had been sent to the respondent, Mr West sent an email to Mr Ness asking him to particularise the individual drilling costs set out in 'POC 1' and to give a written guarantee that the appellant 'will go down to 100 metres free of charge in the event of not finding water at 70 metres' Mr Ness responded the same day by way of an email, annexure 'POC 2' to the appellant's particulars of claim, providing the necessary details and guarantee. It reads as follows:

'Hi Johan,

Drilling

30 m mud drilling	R250/m
40 m percussion drilling	R250/m

Casing:

30 m 177 mm steel casing	R395/m
30 m steel installation	R65/m
70 m 125 mm class 12 PVC casing	R250/m

Other:

Devine for water on premises	R3 000
Establishment set up, etc.	R5 000
Drilling additive	R5 000
70 bags gravel pack	R4 550
Borehole development	R3 000
Compressor and diesel usage	R4 000

Promech Boreholes will undertake to guarantee water within 70 m and undertakes if no water is found at 70 m we will drill from 70 m to 100 m free of charge.'

[7] Mr West had no authority to bind the respondent (he had been mandated solely to make enquiries and obtain quotations) and so he emailed both annexures 'POC 1' and 'POC 2' to the respondent's financial and managing directors, respectively Mr Jaco Avenant and Mr Philip du Plessis, who were authorised to contract on behalf of the respondent. He also passed on to them the quotations he had received from several other borehole contractors. After considering these competing quotations, they decided to accept that of the appellant. Mr Avenant indicated the respondent's acceptance by signing the quotation on its behalf at the space provided. He then returned the signed document to Mr West who subsequently also signed it, purportedly as a witness to Mr Avenant's signature.

[8] Within days of the respondent's acceptance of its quotation, the appellant moved its drilling rig and staff onto site on the farm and commenced drilling. At a depth of just over 20 metres, some water was struck. The appellant continued to drill deeper and at approximately 58 metres a break in the underlying granite was reached which provided considerable water. Despite this, as the appellant had undertaken to drill down to 70 metres, it continued to drill further. Eventually, at a depth of 76 metres, Mr Ness and Mr West agreed that drilling should stop.

[9] The casing itemised in the quotation was fitted as the borehole was drilled but, notwithstanding water having been struck, when Mr Ness asked if the appellant should go ahead and install the pump and other equipment mentioned in the quotation, he was told that the respondent would first like to do a yield test. This was done, but the results did not meet the respondent's approval. The opinion it obtained at that stage was that the yield was 1 600 litres per hour. The respondent thus refused to pay, claiming the borehole did not produce 'sufficient water' as envisaged by the deposit clause. The appellant contended it had done all that it had undertaken to do, and that 'sufficient water' had been struck which had breached the surface. And in due course, as already mentioned, when the

respondent persisted in refusing to pay, it instituted action claiming payment of the charges it had quoted for drilling the hole and fitting its casing.

[10] For present purposes it is unnecessary to analyse the evidence led in regard to the debate which raged at the trial concerning the quantity of water this borehole produced and the appropriate method by which the rate of production should properly be measured. Suffice it to say that the parties eventually accepted the evidence of one of the respondent's expert witnesses that it yielded some 4 000 litres per hour which, as I remarked at the outset, would probably have heartily satisfied most farmers.

[11] So why did the respondent refuse to pay? Its position on going to trial is somewhat confusing. First, in its plea, after alleging that the parties had agreed that the appellant would not be paid unless sufficient water was found, it further alleged that it had been agreed that 6 000 to 9 000 litres per hour would be sufficient water, and that the capacity of the borehole was a 'measly' 1 600 litres per hour which did not qualify as sufficient water. Secondly, however, and although it had not been pleaded, Mr West stated when testifying on behalf of the respondent that the borehole was not only a dry hole but that it had not been fitted with casing as Mr Ness claimed. This, he alleged, he had ascertained when he had inspected the borehole at about the time the summons was issued in 2011. He stated that the hole had been lined with no more than a short piece of PVC piping which, when he drew it out caused the hole to collapse. He marked the spot with a red pole. Photographs of the spot and the red pole were handed in during the course of the trial.

[12] The respondent was obliged to backtrack from both of these contentions during the course of the trial. First, on its own case it became clear that the contract had not been concluded on the basis of the yield pleaded in the particulars

of claim. Instead its case was that it had been agreed between Mr Ness and Mr West at the outset that the borehole would have to deliver 10 000 litres per hour, that being what it needed to provide the 100 or so labourers' cottages on the farm with water: and that it was only when it became apparent during the course of the drilling operations that such a yield was unlikely, that it told the appellant it would accept a lower yield of 6 000 to 9 000 litres per hour. Secondly, after an adjournment and an inspection on the farm held before Mr West had finished giving evidence, he was obliged to concede not only that the dry hole that he had marked with a red pole was not the borehole the appellant had drilled, but also that the appellant's borehole had since been equipped with a permanent pump and electrical installation and was gaily being used by the respondent to irrigate its orchards (albeit, so Mr West alleged, this had been done without his knowledge).

[13] The respondent's case thus morphed into a contention that the appellant had guaranteed to provide a minimum water supply of 10 000 litres and that, as it had not done so, the respondent was excused from paying any sum at all. Of course, as the appellant had indeed struck water and the borehole it drilled and encased was subsequently fitted with a pump and used by the respondent, the latter should have been held liable for at least a substantial portion of the appellant's claim even on its own version – as was held by this court in *Van Rensburg v Straughan*,¹ a decision of which both parties were for some reason blissfully unaware before it was raised with them in this appeal. After all, as is commonly said, there is no such thing as a free dinner.

[14] Leaving that aside for the moment, I turn to consider the validity of the respondent's defence to the claim, albeit not pleaded, relating to the quantity of the borehole's yield. As I understood its counsel, the respondent's case was that

¹ *Van Rensburg v Straughan* 1914 AD 317 – which despite its age was referred to with approval by this court in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) .

the appellant had guaranteed a borehole with a yield of 10 000 litres per hour and that as the hole did not deliver such a yield, it was not obliged to pay.

[15] The first and obvious answer to this is that this is not what the agreement says, and to find that there was agreement on such a guarantee would breach the rule of parol evidence which prescribes that where the parties to a contract have reduced their agreement to writing, it becomes the exclusive memorial of the transaction; and no evidence may be led to prove its terms other than the document itself, nor may the contents of the document be contradicted, altered, added to or varied by oral evidence. This is trite.² Thus in *National Board*³ this court referred with approval to the statement in Wigmore, *Evidence* (1940) 3 ed 2425:

‘In other words: when a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.’

[16] Thus the considerable volume of evidence led by both sides in regard to their negotiations and what their intention had been was all clearly inadmissible, even as part of the context in which the agreement was concluded – cf *Van Aardt v Galway* 2012 (2) SA 312 (SCA) para 9. Although the parol evidence rule is trite,⁴ it seems often to be ignored. That was noted by this court in *KPMG v Securefin*⁵ where Harms DP, in a passage which is also relevant to other issues that arise in the present matter, said:

‘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 intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning . . . Second, interpretation is a matter of law and not of fact and,

² *Johnston v Leal* 1980 (3) SA 927 (A) at 938 and 943.

³ *National Board (Pretoria) (Pty) Ltd & another v Estate Swanepoel* 1975 (3) SA 16 (A) at 26.

⁴ See further *City of Tshwane Metropolitan v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA); [2019] All SA 291 (SCA) paras 64-69.

⁵ *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA).

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 . . .).’⁶ (Authorities omitted.)

[17] As is self-evident, ‘POC 1’ contains no guarantee of the yield for the borehole. Its terms are clear and unambiguous. It did not make provision for payment only in the event of a minimum of 10 000 litres per hour being obtained. Instead it provided that the appellant would not charge for drilling if it was a dry hole. The obvious connotation is that if the hole was not dry there would be payment. Thus the ‘no water, no pay’ phrase in the deposit clause is wholly inconsistent with there being agreement on a specified yield and provides for the appellant becoming entitled to its charges, save in the event of no water being obtained. In the light of that clause, the ‘sufficient water’ requirement properly interpreted (which as pointed out in the passage in *KPMG* quoted above is a matter for the court, not witnesses) clearly means no more than sufficient water to avoid the borehole being regarded as a dry hole. And if there is ‘sufficient water’ for that to be the case, the appellant would be entitled to payment, no matter what the actual yield might be.

[18] In an attempt to meet this, and to overcome the parol evidence rule, it was argued on behalf of the respondent that the agreement was partly in writing and partly oral. In *Affirmative Portfolios v Transnet*⁷ this court held that where an agreement is partially written and partially oral, then the parol evidence rule ‘prevents the admission only of extrinsic evidence to contradict or vary the written portion without precluding proof of the additional or supplemental oral agreement. This is often referred to as the “partial integration” rule’. The respondent therefore contended that the rule did not exclude proof of what it alleged had been orally agreed between Mr Ness and Mr West when the former visited the farm before the quotation was prepared, namely, that the borehole

⁶ Ibid para 39.

⁷ *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 (1) SA 196 (SCA) para 14.

would have to provide 10 000 litres per hour and that was the ‘sufficient water’ referred to in ‘POC1’.

[19] This defence faces numerous difficulties. The first is that, as is set out in the passage from *Affirmative Portfolios v Transnet* quoted above, this evidence would only be admissible if it did not serve to contradict or vary the written terms of the agreement. And as I have just pointed out, the agreement clearly does not provide a guarantee as to a yield quantity and is merely to the effect that there would be no charge if the borehole should be dry. The oral portion contended for would thus vary or contradict the written agreement, and evidence thereof would accordingly offend the parol evidence rule and be inadmissible. On this basis alone there is no room for the operation of the alleged oral guarantee.

[20] Another difficulty facing the respondent is the fact that despite the appellant for some reason having admitted on the pleadings that Mr West was authorised to contract on behalf of the respondent, it was clear from the evidence both from Mr West himself, and of the respondent’s chief executive, Mr Philip du Plessis, that he was not. Indeed, this was the very reason why the quotations Mr West had obtained had to be forwarded to Messrs Avenant and Du Plessis for their consideration. Consequently, even if one was to accept that there had been an oral agreement concluded by Mr West, it could not bind the respondent.

[21] Furthermore, there is nothing to show that Mr Avenant, who concluded the agreement on behalf of the respondent, knew of any undertaking by Mr Ness to provide 10 000 litres per hour. For some reason he was not called to testify. Mr Du Plessis, who did testify, approved the appellant’s quotation and authorised Mr Avenant to sign it on behalf of the respondent. It appears from his evidence that he had informed Mr West when mandating him to obtain quotations that the respondent needed 10 000 litres per hour, but had not himself had any dealings

with Mr Ness until after water had been found. All he and Mr Avenant did was to discuss the quotations after they had been received from Mr West and take a decision on which should be accepted. But that does not mean that the desire to procure 10 000 litres per hour became incorporated into the parties' agreement. Mr Ness never offered to them to contract on any other basis than the terms in his quotation. The agreement contained the terms on which he had tendered to contract which, other than the no water, no pay provision, made no mention of any quantity of water. Thus irrespective of what may have been pleaded by the parties, the contract terms were solely contained in the appellant's quotation 'POC 1'.

[22] Even if it was permissible to have regard to the negotiations between the parties prior to the signing of the appellant's quotation, there is no merit in the contention that Mr Ness in fact undertook to deliver a borehole that would provide the yield of 10 000 litres per hour. He flatly denied any suggestion of that having been the case. As I have said, he is an old hand in the borehole drilling game and, although he had faith in his own water divining abilities (and thus prepared to give an undertaking of no water, no pay), he stated that it was impossible to know exactly what was going on underground or what yield would be forthcoming. This evidence was accepted by the trial court who found him to have been a good and credible witness.

[23] An appeal court's powers to review findings of fact are necessarily restricted, the trial court having had the benefit of seeing the witnesses and thus being in a better position to judge their demeanour and credibility. Whilst because of this, deference must be paid to the trial court's findings on fact, this must not be over-emphasised, particularly where a finding of fact depends upon inferences from other facts and upon the probabilities.⁸ But in the present case the

⁸ *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd & another* 2002 (4) SA 408 (SCA) para 24.

probabilities are inherently in favour of Mr Ness on this issue. Not only is it simply a matter of common sense that a person cannot know with any precision what a borehole is likely to yield before it is drilled (particularly when called on to prognosticate in respect of so substantial a yield as 10 000 litres per hour) but Mr Ness was supported in this regard by the experts who were called in regard to the technology of boreholes and measurement of their yields. For example, Mr Conrad, a hydrogeologist called by the respondent, stated that in certain settings there might be some assurance of getting water but that to guarantee quantities is almost impossible.

[24] Moreover, as Mr Ness tellingly stated, if he had been informed that a yield of 10 000 litres per hour was a requirement, he would have put it in his quotation. There is no mention in the quotation of a yield, although he amended its terms in 'POC 2' at Mr West's request in the email of 18 March 2011, by undertaking to drill free of charge if needs be from 70 metres to 100 m to obtain sufficient water. Despite the initial quotation having failed to mention the required yield, no mention was made thereof in this email although a detailed breakdown of the appellant's charges was requested as well as. According to Mr West, this was done as the respondent required 'everything' to be in writing. If such a yield had been agreed as the respondent contends, and if the respondent required everything to be in writing, it is inexplicable that at that stage no request was made to amend the quotation to refer to the agreed yield. It is similarly inexplicable that the quotation would have been accepted without a yield being specified. The respondent's version in this regard is thus inherently improbable whilst that of the appellant, conversely, is inherently probable.

[25] Furthermore, but fatal to the respondent's case, is the fact that Mr West himself never stated that Mr Ness had guaranteed that the borehole would provide 10 000 litres per hour. The closest he came to this was a statement that he had

informed Mr Ness that the respondent had a reservoir which it required to fill with water in order to supply labourers cottages, and that it was seeking a minimum of 10 000 litres per hour to do so. But he never stated that Mr Ness had undertaken to provide that yield from the single borehole he was contracted to drill. There is substantial difference between what the respondent desired to have and what the appellant was contracted to provide. And of course what may have been said as to the respondent's intentions is irrelevant.

[26] Mr West was driven to concede that there was no documentation recording a requirement that the borehole had to provide 10 000 litres per hour or a guarantee that such a yield would be provided. Despite this, he stated that he was sure that that was what the respondent wanted and that was what Mr Ness was told. But even if during his inspection Mr Ness had said that he felt that he could get 10 000 litres per hour as Mr West testified that did not amount to a guarantee that such a yield would be provided nor an undertaking that if such a yield was not forthcoming no payment would have to be made. The simple truth of the matter is there is no evidence that Mr Ness ever gave such a guarantee, either verbally or in writing. And the quotation which he gave is wholly inconsistent with such a guarantee.

[27] In the light of all of this the trial court correctly concluded that the respondent's defence to the appellant's claim, namely that the appellant had guaranteed a yield of 10 000 litres per hour, could safely be dismissed. All the appellant had to provide was sufficient water for the borehole not to be regarded as being dry and that, clearly, it did. As Mr Weaver, a highly qualified and experienced hydrologist, commented 'every single household in Cape Town would love a borehole like this on their property' and that in certain areas it would be regarded as being a 'really good borehole'. The trial court therefore correctly concluded that the appellant was entitled to be paid its charges.

[28] The reasoning of the court a quo, in concluding otherwise, is confusing to say the least. It held that at best for the appellant, ‘sufficient water’ meant sufficient for the labourers’ cottages; that Mr Weaver had said that the boreholes yield was insufficient for a 100 households; that the appellant had made no attempt to show the number of cottages involved and had failed to indicate the capacity of the dam or reservoir that was going to be used to store water for those cottages; and that, without doing so, it had simply not discharged its onus. However, Mr Weaver, whose evidence on this was undisputed, had in fact said the very opposite. On his evidence the borehole’s yield was more than sufficient for a 100 households, which would have required 60 000 litres per day (it yielded more than 90 000 litres a day) although he went on to state that he would not regard it as a sole source of water as a borehole’s yield may vary from time to time. On the evidence of the respondent’s chief executive officer, Mr du Plessis, water for about 80 cottages was needed. So the very issues the high court stated were not established were proved. But more importantly, it is clear from what I have said that even the respondent did not seek to advance a case that the appellant had contracted to supply water to a specific number of houses and that there was an obligation on its part to prove the number of cottages and the quantity of water they needed. Its case was simple; that an oral guarantee of 10 000 litres had been given. Not surprisingly, counsel for the respondent did not attempt to rely on the high court’s reasoning in this court.

[29] In any event, as appears from what I have said, the number of households the respondent wished to supply with water, the capacity of the storage dam or reservoir, and the actual yield of the borehole, were wholly irrelevant to the contractual obligation that rested upon the appellant, and which it had clearly discharged. The high court’s decision was clearly wrong and it had no reason to interfere with the trial magistrate’s careful analysis of the evidence and the

conclusion that court reached. The appeal to the high court ought therefore to have been dismissed.

[30] Unfortunately, it is necessary to say something about the manner in which the trial was conducted. It was a drawn-out affair, with issues being explored at great depth in evidence which was either wholly inadmissible or which was of no relevance to the true issues. The parol evidence rule was observed only in its breach, each side having led witnesses, and cross-examined those of the other, on the meaning of the words used in the appellant's quotation, all of which was both impermissible and irrelevant. There was a welter of evidence from experts on both sides in regard to the techniques to be used in testing borehole yields and what this particular borehole delivered. Much of this was contradictory. Indeed experts on both sides contradicted each other. Interesting though this may have been, it was mostly irrelevant to the determination of the matter. Furthermore, a whole day was devoted to an objection *in limine*, wholly without merit, relating to the identity of the appellant as the contracting party. Consequently, the trial lasted 9 court days with judgment being given on the 10th. It resulted in a record of almost 1 000 pages, and all for a small claim falling within the jurisdiction of the district magistrates' court which in truth ought to have been capable of being disposed of in one or two days at the most. It is the handling of litigation in such a way that gives the law and lawyers a bad name, especially in a case like this where the outcome was inevitable and on the defendant's own case it was clearly liable.

[31] What makes this all the more unfortunate is the fact already mentioned that the capacity of the borehole the appellant drilled was probably sufficient to supply the 80 or so labourers' cottages on the farm, which the respondent wished it to do. The entire trial was thus, to adopt Shakespeare's famous description, 'much ado about nothing'.

[32] Be that as it may, the appeal to this court must succeed and the magistrate's order reinstated in effect. That is reflected in the order below. Despite the entreaty of appellant's counsel, this is a straight forward matter which does not warrant the employment of two counsel.

[33] It is ordered

- 1 The appeal is upheld, with costs.
- 2 The order of the high court is set aside and substituted with the following:
'The appeal is dismissed, with costs.'

L E Leach
Judge of Appeal

Appearances

For the Appellants: J K Felix (with him H E Hansen)
Instructed by: C & A Friedlander Inc, Cape Town
Honey and Partners Inc, Bloemfontein

For the Respondents: A M Heunis
Instructed by: J P Joubert Attorneys, Strand
Symington & De Kok, Bloemfontein