



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**EX TEMPORE JUDGMENT**

Case no: I 1222/2014

In the matter between:

**HAKKIESDOORN ESTATE (PTY) LTD**

**PLAINTIFF**

and

**WESSELS FARMING CC**

**DEFENDANT**

**Neutral citation:** *Hakkiesdoorn Estate (Pty) Ltd vs Wessels Farming CC* (I 1222/2014) [2017] NAHCMD 240 (23 August 2017)

**Coram:** MILLER AJ

**Heard:** 1 & 2 AUGUST 2017

**Delivered:** 2 AUGUST 2017

**Released:** 23 AUGUST 2017

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**ORDER**

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Having heard both counsel for the plaintiff/applicant and the defendant/respondent –

IT IS ORDERED THAT:

1. The application of the absolution from the instance is dismissed.

2. The defendant to pay the plaintiff's costs for the application, which costs will include the costs of one instructing and one instructed counsel.
3. Defendant indicated its intention to appeal the outcome.
4. The matter is postponed to Monday, 11 September 2017 at 14h00 for a status hearing in order for the defendant to comply with all procedures and to bring the necessary application.

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## JUDGMENT

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MILLER AJ:

[1] This judgement concerns an application for absolution brought by the Defendant at the close of the Plaintiff's case. I heard argument on the application during the course of yesterday morning and the argument extended until the afternoon by which I mean past twelve o'clock. I indicated to the parties in chambers at the conclusion of the arguments that I would provide an ex tempore judgement this morning. I would normally have preferred a bit more time to prepare the judgement but as I had already indicated previously I am somewhat concerned by the duration of this trial and I decided to deliver this judgement at the soonest available opportunity and in the limited opportunity that is available to me as the Presiding Judge to try and expedite the finalisation of the trial, in the interest not only of the parties but also in the interest of the administration of justice in this Court as a whole. If as a consequence the judgement is phrased in rather broad terms those are the reasons for it. I am encouraged by the fact that I have in the time available been able to come to some firm conclusions regarding the issues raised although it involved the burning of some midnight oil. In a sense that is the nature of the beast and that is what Judges must live with and we must just accept it and get on with it.

[2] The Defendant's attack if I may call it that on the Plaintiff's case which it contends entitles it to apply for absolution from the instance was argued on a broad

front in the sense that several issues were raised, either inter related or self-standing as the case may be. I am indebted to Mr Van Heerden who appears on behalf of the Defendant for the trouble he took to prepare Heads of Argument. In saying so I do not intend any criticism of the Plaintiff and its Counsel for their failure to do so. I accept that the application for absolution from the instance was brought on short notice.

[3] I had nonetheless had regard to the submissions made by Counsel for the Plaintiff and the Defendant. If I do not deal with the issues in the order in which they were raised in the Defendant's Heads of Argument, that follows naturally from the approach I adopted in preparing the judgement. Much is in dispute in this trial, but I am happy to say that there is at least one aspect upon which the parties seem to find some agreement. That concerns the approach this Court has to adopt legally in determining the issue. The correct approach was formulated in the case of Claude Neon Lights SA Limited –V- Daniel a South African judgment reported as 1976 Volume 4 SA(4) Appellate Division. It was incorporated into our law by the Supreme Court of Namibia in the judgement of Stier -V- Henke which is reported as 2012 Volume 1 NR370 SC.

[4] I am guided by the principles formulated in those judgments and my judgment proceeds on that basis. I highlight the following principles appearing from the judgements. Firstly, that the test to be applied is not whether the evidence led by the Plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court applying its mind reasonably to such evidence could and might (not should or ought to) find for the Plaintiff.

[5] It is apparent from some other judgments that this statement is sometimes equated with the notion that the Plaintiff has to establish a *prima facie* case. Whether there is in substance any difference between the two is a matter I need not deal with at this stage, although I am aware that in some judgments some distinction is said to be drawn between the two. I am content to proceed on the basis simply that whether or not one calls it a *prima facie* case, the test in its true sense means simply no more than that the Plaintiff should provide and produce evidence upon which a Court could at the end of the day find in favour of the Plaintiff, as opposed to whether it should or not.

[6] A matter of particular importance in this regard is the fact that any views are expressed during course of his judgment should not be regarded as the final word on the topic. The final determination of the issues between the Plaintiff and the Defendant, are issues which are to be determined at the conclusion of the trial and not at this stage. To put it somewhat differently, perhaps my findings are in that sense “provisional” for lack of a better word. At the basis of the issues between the parties lies the allegation made by the Plaintiff that it had entered into an oral agreement with the Defendant, on or about May 2013.

[7] The relevant terms of the agreement were set out by the Plaintiff in paragraphs 5.1 to 5.3 of the amended particulars of claim. They read as follows and I quote:

‘5.1. The Plaintiff would supply electricity to the Defendant at the property preferred to as farm (indistinct), (herein after referred to as the premises).

5.2. The Plaintiff will supply such electricity for an indefinite period commencing on 1 May 2013 and terminating upon either party terminating the agreement unnoticed to the other party.

5.3. The Defendant shall pay the Plaintiff for all electricity supplied to the premises and consumed by the Defendant as well as all related charges on a monthly basis and at the normal and usual rated charged by the Plaintiff in respect of same (and in accordance with the Electricity Act 4/2007, inter alia Section 36 thereof) and upon receipt of an invoice from the Plaintiff setting out same.’

[8] I pause to indicate at this stage, that the reference in the pleadings to Section 36 of the Electricity Act, is curious. Section 36 of the Electricity Act deals with supply of electricity by Local Authorities and Regional Councils. It is undisputedly clear that the Plaintiff is not one of those. So any reference to Section 36 is irrelevant. I will accept, however that the Plaintiff alleges that it undertook to fulfil its obligations in accordance with the Electricity Act.

[9] The use of the words or the phrase. “The Electricity Act 4 of 2007”, is the spring board upon which Mr Van Heerden based an argument that in terms of the agreement between the parties as pleaded, the Plaintiff had assumed not only the

conditions and obligations imposed by the Electricity Act, but also the obligations which emanate from all subsidiary legislation, regulations or other instruments in writing.

[10] At least that is how I understood the argument to be, as it was advanced before me yesterday. These would include, inter alia, so the argument ran the obligation mentioned in Rule 10 of the Technical Rules to the Act, which were published in Government Gazette 5950 of Namibian Government Gazettes. The argument continues, that the Plaintiff had failed to prove that it had complied with all these obligations and for that reason it had not made out a case, that it is entitled to rely on the agreement. To use the words of Mr Van Heerden, for those reasons the agreement had become unenforceable.

[11] In my view, there are several answers to the question. The first deals with the interpretation of the agreement concluded between the parties as alleged. I, indicated that it is common cause that some agreement was concluded between the Plaintiff and the Defendant. The approach of the Court when interpreting an agreement concerns itself primarily with the intention of the parties. The wording used to give expression to the intention of the parties is a fact that it is relevant to determine what the intention of the parties is, but it is not always conclusive. What is also relevant and this applies in law as it stands to both written and oral contracts, are the circumstances sometimes called surrounding circumstances which prevailed at the time, and which in some sense or another indicate the manner in which the parties negotiated and what their intention was as to what the agreement should be and not be.

[12] It may well be that there is an argument that in the end “in accordance with the Electricity Act”, bears the meaning relied upon by Mr Van Heerden where it may be said that the use of the phrase cast the net somewhat wider than what the parties actually intended. The point in this case is that the use of the words should be construed only in so far as they correctly reflect the intention of the parties. We know from the facts and from the evidence advanced by the Plaintiff that the Plaintiff had for some period of time prior to the conclusion of this agreement entered into other agreements with other parties in terms similar to the terms contained in the agreement, it concluded with the Defendant in the present case.

[13] When I consider the evidence of Plaintiff's witnesses in its totality it is apparent to me that the intention of the Plaintiff when it entered into the agreement amounted to no more than an undertaking to supply electricity to the Defendant in terms of a license or licenses to distribute or supply electricity, and as it stands no further than an undertaking to fulfil the obligations imposed by the license itself. If that is indeed the case then the use of the words "and in accordance with the Electricity Act" go beyond what the parties actually intended to agree upon. I draw some support from this, from the fact that most of the disputes which were ventilated during the course of the hearing concerned themselves with the compliance or non-compliance by the Plaintiff with the terms and conditions imposed by the license or licenses.

[14] Very little, if anything was referenced to the other documents or instruments relied upon by the Defendant, including for instance Rule 10 of the Technical Rules. One would also have expected that if the parties had intended to make the provisions of the Technical Rules of the Act part of their agreement, they would have in the first place been aware of what they were and one would expect that there would have been some discussion between the parties as to whether it should apply or not, and if they do apply to what extent they should apply.

[15] My conclusion on this aspect of the case is that the facts and its surrounding circumstances, if they were to correctly reflect the intention of the Plaintiff and the Defendant, according to the Plaintiff amounts to no more as I have indicated the obligation to supply electricity in terms of the license and the conditions which pertained to it and which are contained in the license. If I were to assume that my finding in this regard is wrong, I bear in mind that in pursuing its cause of action, the Plaintiff is obliged only to prove those allegations, it is obliged to allege and prove which are relevant to the determination of the dispute between the parties.

[16] If there are other obligations which arise from the agreement for instance obligations arising from Rule 10 they should only be alleged and pleaded if they are relevant to the issues at hand. A further consideration is that it is, in given circumstances permissible for a Plaintiff who has partially performed in terms of the agreement to recover compensation in respect of those obligations, which it had in

fact performed. What I have in mind is the notion that obligations may be separated from others or to put it conversely, that there has been partial performance in respect of some of the obligations and not others. I mention as an example and it is no more than that the fact that the obligation to supply electricity and the reciprocal obligation on the part of the Defendant to pay for the electricity it had consumed can be separated from the right to charge a levy and the obligation of the Defendant to pay it. They are separate issues which do not relate to one another and in my view can be separated.

[17] In such circumstances, the claim of the Plaintiff may be diminished but it will not be extinguished. Whether or not at the end of the day the Court finds that the levy charged by the Plaintiff which is 5% is sustainable or correct, is a matter which will best be dealt with at the conclusion of the trial. There is some dispute at this stage between the parties as to whether the 5% levy was applicable at the time, and by that I mean the relevant time being the period October to November 2013. I need say no more than that on the evidence of the Plaintiff, the Court may find that the 5% levy was still applicable, partly because the new levies had not been published or that the Plaintiff had been permitted by the Electricity Control Board to continue to charge the levy. As I have indicated earlier my finding in this regard is not final and must be determined at the conclusion of the trial once the Defendant has produced evidence, if it wishes to, to the contrary.

[18] A further issue raised in the support of the application for absolution, is the allegation that the particulars of claim even after that the amendment still remain excipiable. The argument was that once particulars of claim are excipiable, no cause of action was established. What this relates to in fact, is the document that was attached to the Plaintiff's particulars of claim and when I referred to the particulars of claim, I refer to the amended particulars of claim. One knows from the papers that what was attached was not the full supply license as such but simply the specific conditions which pertained to the license as contained in appendix 1 to that license.

[19] It was submitted before me, that the Rules required that where a party when pleading, relies on a contract it must state whether the contract is written or oral and when, where and by whom it was concluded and if the contract written, is written a true copy thereof or the parts relied on in the pleading, must be annexed to the

pleading. The relevant rule is Rule 45(7) of the current Rules of the High Court. I remind myself, that in its amended particulars of claim the Plaintiff, relies on an oral contract and it sets out the terms of the contract. On the pleadings as they stand Rule 45(7) does not apply. The attachment which I have referred to which is appendix 1 to the supply license appears in paragraph 3 of the particulars of claim, which do not relate to the terms of the contract itself. It simply states that the Plaintiff is the holder of an electricity license.

[20] Again, assuming that I am wrong and that it should have been attached there will be sufficient compliance with the Rules if what is attached is the part of the document upon which the Plaintiff relies, if not the whole document in itself. It has become common cause, before me during the course of the trial that the Plaintiff was at the relevant time, in possession of a valid distribution license and a valid supply license. In that sense the issue before me on that score had become moot.

[21] My task as the presiding Judge in this matter is confined to determining the real issues in dispute between the parties, and not to express myself on matters which are in essence common cause. To concern myself at this stage with whether there has been strict compliance with Rule 45 of the Rules of the High Court relating to the matter, is an exercise which is academic in nature and lacks substance. The Rules of the High Court state as its overriding objective that the Court shall determine the real issues between the parties. It follows that once an issue has ceased to exist, there is no obligation upon the Court to determine it. Not only does it make sense as it is contained in the Rules, it also makes plain common sense. The fact that it is an overriding objective must always be borne in mind when one considers the Rules that follow in the wake of that particular overriding principle.

[22] I am mindful of the fact that the Defendant argues that the manner in which the case was pleaded creates some prejudice for the Defendant which it cannot overcome. That argument cannot be sustained. It is apparent from the papers that the Defendant was in possession of the full license if not prior to the commencement of the hearing then at least at the stage when the hearing commenced. I say so because the full license is contained in the bundle of documents which the Defendant handed up at the commencement of the trial. It follows that the license in



its full form was available and known to the Defendant when the hearing commenced and in those circumstances no prejudice can arise.

[23] I may add that if subsequent to the amendment the Defendant considered that it was still prejudiced because the pleadings remained expiable there were other avenues which it could have explored at that stage. I have in mind an exception to the pleadings possibly and in the worst case scenario an appeal against my ruling that the pleadings should be amended. It is common cause that neither of these remedies were pursued by the Defendant, even though they were available at the time. It appears to me in any event as I had indicated that there is a complete absence of prejudice in view of the facts which I had mentioned. It follows that the argument falls away. I have already expressed myself on the application or otherwise of non-compliance and particularly Rule 16(5) and Rule 10 thereof.

[24] They are contained under paragraph F of the Defendant's Heads of Arguments and do not require further consideration apart from what I have already stated. I also mention paragraph E of the Defendant's Heads of Argument which was likewise dealt with by me earlier. A further argument advanced was that the Plaintiff had failed to prove the quantum of its claim. This was elaborated upon in the Heads of Argument and during the course of argument before me yesterday. Whatever merit it has or does not have, is a matter I need not concern myself at the moment. Further evidence on that aspect may well be required on the part of the Defendant and the issue should finally be determined at the conclusion of the trial and not at this stage.

[25] It is sufficient for me to say at this stage that on the evidence presented a reasonable Court may find or could find to use the correct word that the meter readings taken were correct. I have some difficulty understanding the further argument raised in respect of the deposit. Apart from anything else a deposit is simply that and by that I mean it is some form of security that a debt which arises will be settled. If an agreement requires that a deposit should be paid it demands no more than the utilisation of the deposit in cases where the party in default has failed to meet its obligations. In those events the innocent party may utilise the deposit to either fully or partly settle an outstanding amount.

[26] It is therefore understandable that the Plaintiff adopted the attitude that whether or not to refund the deposit will ultimately depend on the determination of the issues now before me. Once they had been determined that will also determine whether the Plaintiff will be entitled to utilise the deposit to settle the outstanding amount. It should be paid back to the Defendant if nothing is owing or a lesser amount is owed in the circumstances. A further argument raised was that the Plaintiff had failed to prove what is called the chain of events. This relates to if I may call it for want of a better word the paper trail which commenced when the readings were taken and the time when the invoice as to what must be paid was forwarded to the Defendant.

[26] If one looks at the invoice one will see that the invoice repeats the meter readings and correctly so. Why in these circumstances it becomes necessary to prove what happened in between I do not understand and in my view does not need to be established. A further argument was advanced that the meter readings may have been influenced and I am talking about the meter readings taken at the termination of the agreement by the fact that the line between the Defendant and Eskom may have been connected at a stage earlier than the disconnection and the meter readings taken by Mr Van Zyl on the 18<sup>th</sup> of November if my memory serves me correctly.

[27] The argument if I understood it correctly is that it is incumbent upon the Plaintiff to prove that the meter readings were not influenced by the sequence of this connection and the disconnection as the case may be. All I need to say is that the argument is primarily based on speculation and not fact. I take the view that a reasonable Court may or could at the end of the proceedings find that the meter readings taken by Mr Van Zyl on the 18<sup>th</sup> of November are correct. Whether or not the Court should so find that at the end of the proceedings is a matter I need not deal with at this stage.

[28] It follows for the reasons that I have indicated that the application for absolution from the instance must be dismissed and it is so dismissed. There remains the question of costs in so far as they relate to the application. No argument in specific terms was advanced before me by either of the parties. The view I take of the matter is simply that the costs should follow the results.

[29] As a consequence the following orders were issued:

1. The application of the absolution from the instance is dismissed.
2. The defendant to pay the plaintiff's costs for the application, which costs will include the costs of one instructing and one instructed counsel.
3. Defendant indicated its intention to appeal the outcome.
4. The matter is postponed to Monday, 11 September 2017 at 14h00 for a status hearing in order for the defendant to comply with all procedures and to bring the necessary application.

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K Miller  
Acting Judge

## APPEARANCES

APPLICANT: Ms Van der Westhuizen  
Instructed by Etzold-Duvenhage

RESPONDENTS: Mr Van Heerden  
Instructed by Koep & Partners