REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between: Case No: 3123/1999

GERHARD GOOSEN Plaintiff

And

BERNARDUS PIETER VAN BLERK N.O Defendant

Coram: **Chetty J**

Date Heard: **16 May 2013**

Date Delivered: **11 June 2013**

Summary: ***Contract*** *– Rectification – Onus – Party seeking rectification not establishing prior agreement on balance of probabilities – Action dismissed – Counterclaim – Defective workmanship – Claim upheld*

JUDGMENT

Chetty, J

Introduction

[1] This matter has a long and checkered history. It commenced in November 1999 when the plaintiff instituted action against one *J.S Ferreira* (the deceased) in which he claimed payment, *ex contractu*, and other ancillary relief. The plaintiff's cause of action was founded upon a written agreement concluded between them. The agreement, signed by the parties, recorded the following: -

> "Kliënt
> Mr J.S. Ferreira
> Stilwerus
> Humansdorp
>
> Kontrakteur
> Triple "G" Grondwerke
> 9 Koningstraat
> Jeffreysbaai
>
> DD 04/02/99
>
> Dambou en Aanvullende Grondwerke Ooreenkoms
>
> Hiermee kom bo-genoemde kliënt: J S Ferreira en kontrakteur Triple "G" Grondwerke as volg ooreen in verband met die volgende werk.
>
> 1. Dam van ± 160 000m³ volgens SABS standaarde (1:3 Helling waterkant 1:2 Helling droë kant)
> 2. Skoonmaak van 'n pompgat van ±4000m³
> 3. Grawe van pypsloot van dam tot by pivot (centre)
> 4. Lewering van vulmateriaal vanaf dam terrain na Nowestall
> 5. Afbreek en wegruim van twee volkshuise
>
> Die bedrag vir bogenoemde werk is R280, 000.00 (Twee Honderd en Tagtig Duisend Rand) en sluit brandstof in. Die bedrag sluit nie BTW in nie. Betaling sal maandeliks geskied en die finale betaling sal nie later as 30 dae na voltooiing wees nie"

[2] It wil be gleaned from the aforegoing that the material terms of the contract, of relevance herein, obligated the plaintiff to construct a dam in conformity with SABS standards - the reservoir and forepart of the embankment at an angle of inclination of 1:3 and 1:2 respectively, and a capacity of 160 000 cubic meters.

[3] The deceased died on 8 February 2000. Four (4) years later, in January 2004, a plea, incorporating two special pleas[1] emerged. Therein, the defendant, the executor in the deceased estate, admitted the terms of the agreement but denied the breach and contended that the plaintiff had breached the contract by initially building a dam with a capacity of 87 000m³, and, although its volume was subsequently increased to 124 500m³, it was still substantially less than the 160 000 cubage as per the agreement[2]. It pleaded further that the work had been performed in an unprofessional and slovenly manner and provided details of the defective manner in which the dam had been constructed. He furthermore annexed a report from a firm of consulting engineers, *Ninham Shand*, dated 20 November 2000, which, *inter alia*, highlighted the structural deficiencies in the construction of the dam and the projected cost of repairs. Simultaneously therewith, the defendant filed a counterclaim, mirroring the allegations in his plea, and sought damages in the sum of R252 000.00. The action once more entered a state of hibernation. In March 2011, after a further hiatus of approximately

[1] Prescription and undue delay in effecting the amendment.
[2] The remaining breach is not relevant for the purposes of this judgment.

seven years, it awoke from its slumber by the filing of a notice of intention to amend the particulars of claim, which was duly effected in due course.

The amended particulars

[4] In the amended particulars of claim, the plaintiff alleged that during the negotiations which preceded the written agreement, the parties jointly paced the proposed site and agreed that the plaintiff would construct a five (5) meter high embankment wall, which, they erroneously concluded, would yield a dam capacity of 160 000m³. He further alleged that by virtue of a common mistake, the written agreement merely recorded certain of the specifications, viz a capacity of 160 000m³, whereas the true agreement envisaged the construction of a dam, the embankment wall of which would be five (5) metres high. Consequently, and by virtue of what he contends was a material omission, to wit, a term relating to the five (5) meter high embankment wall, he seeks rectification of the written agreement to record the true contract. The plea for rectification is resisted by the defendant who steadfastly maintains that the written agreement records all its material terms. He can understandably provide no direct evidence to substantiate his claim given the death of the deceased on 8 February 2000, but, as I shall in due course elucidate, the deceased's untimely death provided the catalyst for the plea for rectification.

[5] As adumbrated, on completion, the capacity of the dam was substantially less than the agreement stipulated, and, despite certain remedial work performed by the plaintiff, its volume was substantially below 160 000m³. It is not in issue that once the additional work to increase the dam capacity had been effected[3], the deceased paid an amount of R191 456, 41 to the plaintiff. Aggrieved at what he considered to be underpayment, and a breach of the agreement, the plaintiff's attorney, on 23 July 1999, addressed a letter of demand to the deceased wherein payment of the balance of the contract price was demanded.

[6] The terms of the letter are important, both, for its content, and omissions. Its reads as follows: -

> "Ons rig die skrywe namens mnr G Goosen h.a. Triple "G" Grondwerke van Koningstraat 9, Jeffreysbaai. Dit is ons opdrag dat ons kliënt die begin van Februarie 1999 'n ooreenkoms met u gesluit het. In terme van die ooreenkoms sou ons kliënt sekere konstruksiewerke verrig teen die ooreengekome bedrag van R280 000.00 wat BTW uitsluit. Die werke wat onder andere verrig sou word, was die bou van 'n gronddam met 'n kapasitieit van ongeveer 160 000m² (*sic*), die skoonmaak van 'n pompgat van ongeveer 40 000m² (*sic*) en die grawe van 'n pypsloot vanaf die dam tot by die "pivot".
>
> Dit is ons opdrag dat na sluit van die ooreenkoms ons kliënt met die konstruksiewerke in terme van die ooreenkoms begin het. Verder, na sluit van die ooreenkoms, het die partye ooreengekom dat die pompgat nie 'n wal sou kry nie, maar sou ons kliënt ekstra skoonmaakwerk aan die rivierbedding by die pompgat verrig.

[3] The plaintiff contended that he carried out the additional work at his own cost.

> Ons kliënt het die konstruksiewerk in terme van die ooreenkoms, soos gewysig, die einde van April 1999 voltooi. In terme van die ooreenkoms sou u ook maandeliks betalings gemaak het, met ‘n finale betaling nie later as 30 dae na voltooiing van die konstruksiewerk nie. Soos voormeld, het ons kliënt sy verpligtinge einde April 1999 voltooi. U het in total egter R191 456,14 betaal.
>
> Dit is ons opdrag dat u die balans van R88 543.86 plus BTW aan ons kliënt veskuldig is, welke bedrag betaalbaar en opeisbaar is. Aangesien u gemelde bedrag op die laaste einde Mei 1999 moes betaal het, is u teenoor ons kliënt aanspreeklik vir betaling van rente op gemelde uitstaande bedrag.
>
> Tensy gemelde bedrag binne (14) veertien dae na datum hiervan aan ons kliënt betaal is, het ons opdrag om voort te gaan met die instel van regstappe vir die invordering van gemelde bedrag, tesame met rentes en kostes.”

[7] It will be gleaned from the aforegoing that the letter merely records the terms of the written agreement. The deceased’s response, encapsulated in a letter from his attorneys, was that the plaintiff had breached the terms of the written agreement. It recorded the following: -

> “Ons tree op namens Mnr J Ferreira, wie u skrywe van 23 Junie 1999 aan ons oorhandig het met die opdrag om daarop te antwoord.
>
> Ons instruksies is dat ons kliënt die terme van die ooreenkoms erken. Ons kliënt ontken egter dat u kliënt sy verpligtinge in terme van die ooreenkoms nagekom het.

In terme van die ooreekoms, moes u kliënt:

1. ‘n Gronddam met ‘n kapasitieit van ongeveer 160 000 kubieke meter bou. Volgens ‘n onafhanklike deskundige opinie deur ons kliënt ingewin is die kapasiteit van die dam slegs 124 500 kubieke meter, inaggenome 1 meter vir vryboord.
2. ‘n Pompgat met ‘n kapasitiet van ongeveer 40 000 kubieke meter bou. Die kapasitiet van die pompgat is egter slegs ongeveer 10 000 kubieke meter.
3. Die dam moes verder voldoen aan SABS standaarde, wat huidiglik ook nie die geval is nie.

Ons vesuim on volledig met ‘n iedere en elke bewering in u skrywe te handel, moet nie beskou word as ‘n erkenning van sodanige bewerings nie. Ons kliënt se reg om op ‘n latere stadium volledig met sodanige bewerings te handel, word voorbehou.

Uit hoofde van voorafgaande, ontken ons kliënt dat hy enige bedrae aan u kliënt verskuldig is. Ons instruksies is dat die bedrag, reeds deur ons kliënt betaal, meer as die billike vergoeding vir die werk deur u kliënt verrig, behels.

Enige aksie wat deur u kliënt ingestel mag word, sal verdedig word.”

[8] The letter elicited no response. Instead, six months later, the plaintiff issued summons out of this court in which he sought payment in the sum of R127 743, 86, being the balance of the contract price. In October 2001, the plaintiff’s attorneys addressed a letter to the deceased’s attorneys, ostensibly in an attempt to settle the dispute. It reads as follows: -

> "Bogenoemde aangeleentheid vewys.
>
> Voordat ons met enige verdere stappe moet voortgaan wil ons graag hierdie aanbod aan u kliënt maak.
>
> Ons kliënt is bereid om die damwal te kompakteer en te herstel soos oorspronklik tussen hom en u kliënt se vader ooreengekom. Die uitstaande balans aan hom verskuldig moet egter by u Trust inbetaal word voordat ons kliënt gaan begin met die werk of 'n waarborg gegee word dat die geld beskikbaar is. Sodra die nodige vondse wel beskikbaar is of beskikbaar gestel word en die werk voltooi is kan ons dan bymekaar kom en die nodige eksperts by om vas te stel of die werk na behore uitgevoer is. Indien hulle dan tevrede sou wees moet die geld wat by u inbetaal is dan aan ons kliënt oorbetaal word.
>
> Ons verneem dringend u kliënt se houding hieroor."

[9] In paragraph [6] hereinbefore I prefaced the introduction of the pre-litigation correspondence as part of the judgment with the remark that their terms were important, both as regards content, and omissions. Although the terms of the contract are extensively canvassed therein, there is no suggestion whatsoever, of any oral agreement pertaining to the five (5) meter high embankment wall. It first emerged, almost eleven (11) years later, by the filing of a notice in terms of Rule 28 of the Uniform Rules of Court to amend the plaintiff's particulars of claim. As I shall in due course advert to, the revelations encapsulated in the notice to amend went to the very root of the plaintiff's cause

of action. Its omission, not only in the original particulars, but more importantly, in the correspondence reproduced hereinbefore, is inexplicable. The probabilities are overwhelming that had the purported oral agreement in fact been concluded, its terms would, at the earliest opportunity, been divulged and not lain dormant for approximately eleven (11) years.

[10] It is trite law that the onus rests on the plaintiff to prove that the written agreement stands to be rectified. To discharge the onus the plaintiff relied primarily on his own testimony. The plaintiff is, by his own admission, an expert in dam construction and his evidence must accordingly be evaluated against the backdrop of his professed status. In terms of his notice filed pursuant to the provisions of Rule 36 (9) (a) and (b) of the Uniform Rules of Court, he vaunted his expertise as a dam builder, contending that he had been engaged in the industry for approximately twenty-seven (27) years during which he had constructed more than one hundred (100) dams. It seems meet therefore, to accept, that the deceased solicited those skills for the construction of the contemplated dam. The plaintiff's evidence in chief, tendered, to provide the evidential basis for the claim, that prior to the conclusion of the agreement, the parties had reached consensus that the dam wall would be five (5) meters high, was to the following effect: -

> "Ja wat gebeur het is dat Leon het my gevra om te kom help om vir hom 'n dam te bou van 'n sekere grootte wat dan nou wel dié grootte is en ons het gaan kyk vir 'n terrein om die dam dan nou te bou wat uit die pad uit sal wees van 'n "pivot"

> of enigiets anders dat hy die grond kan gebruik. Toe het ons hom uitgetree daar. Daar is ‘n pad wat oploop na die huis toe en dan is daar ‘n teerpad aan die onderkant, dan is daar ‘n “pivot” aan die onderkant, een van hierdie besproeiings-“pivots”. Dis basies al waar jy hom kon inpas. Daar was nie ander plek gewees nie en om by die kapasiteit te kom het ons hom uitgemeet, 250 meter lank en 150 meter wyd en met ‘n beperking van vyf meter walhoogte kon ons toe werk op ‘n gemiddelde diepte van water van 4,5 meter dat daar nog ‘n halwe meter vryboord is en soos ek kan sê, die dam is bo-op ‘n bult.
>
> U moet net bietjie stadiger. Sy Edele moet nota’s maak mnr Goosen. --- Goed. Die ding was bo-op ‘n bult gebou en daar word gepomp in hom in so hy is nie in ‘n kloof of iets nie en as ‘n mens 250 meter lengte vat en jy vat 150 meter breedte en jy vat ‘n 4,5 meter diepte dan gaan jy op 168 000 kubieke meter volume kom en dit is hoe ons die ding uitgemeet het en saam besluit het ons gaan hom so bou. Daar was in elk geval nie ‘n ander terrein wat gevestig of geskik sou wees vir die grootte van die dam nie.
>
> En verwys u na die hoogte van die damwal, wat het u ooreengekom? --- Nee ons het ooreengekom dat hy moet binne die wet wees en dit is vyf meter.” (my emphasis)

[11] It will be gleaned from the aforegoing response to the question concerning the specifications encapsulated in paragraph 1 of the written agreement that the answer provided failed to provide the evidential basis for the claim for rectification. It was immediately followed by the following question: -

> “En verwys u na die hoogte van die damwal, wat het u ooreengekom?”

The anticipated answer was however not forthcoming, the reply merely being: -

> "Nee ons het ooreengekom dat hy moet binne die wet wees en dit is vyf meter."

[12] It is evident from the aforegoing that, save for the remark that the height of the embankment wall had to conform to legislative prescripts, the plaintiff omitted all reference to the alleged prior oral agreement relating thereto. Consequently, and to afford corroboration for the contention that a five (5) meter high embankment wall was a specific term of the oral agreement, the plaintiff was referred to the **National Water Act**[4] and the now repealed **Water Act**[5]. Recourse to the aforegoing legislation does not avail the plaintiff. Both section 117 of the **National Water Act** and its predecessor, section 9 (C) (1) of the **Water Act** define a ***"dam with a safety risk"*** as being one ***"which has a wall of a vertical height of more than five meters"***. The control measures delineated in section 118 of the **National Water Act** only apply to a dam wall of more than five (5) meters in height. On the plaintiff's own version the height of the dam wall did not exceed five (5) meters and there could consequently have been no reason whatever for any discussion thereanent and to include it as a term of the agreement.

[4] Act No, 36 of 1998
[5] Act No, 54 of 1956

[13] Under cross-examination the plaintiff was referred to his evidence in chief, in particular, the formula he had applied to construct a dam with a holding capacity of 160 000m³. He reiterated that, applying the formula, 250m x 150m x4.5m, the length, width and depth respectively, the dam would have a cubage of 168 750, approximating the deceased's requirements. He further testified that he thereafter sought the advice of a certain Mr *Arthur Olivier* to calculate the volume of the material which would have to be excavated, but was amazed that, on completion, the capacity was only 87 000m³. He was referred to the correspondence adverted to hereinbefore and in particular, the letters addressed to the deceased by his attorney, which omitted all reference to an embankment dam wall height of five (5) meters. The plaintiff could, understandably, proffer no explanation for such omission.

[14] As adumbrated hereinbefore, the plaintiff bears the onus to prove, on a balance of probabilities, that the common intention of the parties was that the plaintiff would build a five (5) meter high embankment wall. The fact that the applicable legislation contained such a prescript does not advance the plaintiff's case. The relevant correspondence omits all reference thereto and the plaintiff's own testimony moreover fails to provide the evidential basis for the claim for rectification. The evidence adduced is wholly insufficient to establish that the written agreement, through common mistake, incorrectly records the agreement which they intended to express. The plaintiff is not entitled to rectification and the application must therefore be refused. Consequently, the need to determine the

validity of either of the special pleas does not arise. It follows from the aforegoing that as the plaintiff failed to fulfill his contractual obligations, his cause of action can therefore not be sustained and is dismissed.

The counterclaim

[15] The counterclaim is predicated upon the unprofessional and slovenly manner in which the dam had been constructed. Apart from the substantial reduced cubage, the defendant alleged that erosion occurred as a result of defective compaction of the earth fill, the embankment was to steep and the crest width, only 0.5 meters, instead of three (3) meters. Particularity concerning the deficiencies in the construction of the dam appear from the *Ninham Shand* report referred to hereinbefore. During his cross-examination,

the plaintiff was referred thereto and was constrained to accept the findings, conclusions and recommendations therein. It follows that he is liable for the costs of repair, which the parties are agreed, amount to R250 000.00.

[16] In the result the following orders will issue:

1. The plaintiff's claim for rectification is refused and the action dismissed.

2. The counterclaim succeeds and the plaintiff is ordered to pay the defendant the sum of R250 000.00 together with interest thereon at the legal rate of 15.5% per annum a *tempore morae*.
3. The plaintiff is ordered to pay the defendant's costs of suit, together with interest thereon, at the rate of 15.5% per annum, from date of taxation to date of payment.
4. The costs are to include the reserved costs, the costs of the defendant's expert witness, Mr J Kritzinger and the costs of the pre-trial inspection *in loco*.

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D. CHETTY
JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Plaintiff: Adv B. Pretorius

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