G.P.-S.43575—1969-70—2,000

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In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Provincial Division)
(APPELLATE Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

TAR RESIDUALS S.A. (PTY) LTD. *Appellant,*

versus

J. B. H. EMGELBRECHT & SONS *Respondent*

Appellant's Attorney
Prokureur vir Appellant v.d.Wall,L.P.& C.

Respondent's Attorney
Prokureur vir Respondent

Appellant's Advocate
Advokaat vir Appellant

Respondent's Advocate
Advokaat vir Respondent

Set down for hearing on
Op die rol geplaas vir verhoor op

(N. P. D.)

Writ issued Lasbrief uitgereik	Bills Taxed—Kosterekenings Getakseer		
	Date Datum	Amount Bedrag	Initials Paraaf
Date and initials Datum en paraaf			

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

TAR RESIDUALS (S.A.)
(PTY) LIMITED ..... Appellant

AND

J.B.H. ENGELBRECHT & SONS ..... Respondent

CORAM: OGILVIE THOMPSON, C.J., BOTHA, WESSELS, POTGIETER et TROLLIP, JJ.A.

HEARD: 5th November, 1971. DELIVERED: 15 November 1971

J U D G M E N T

WESSELS, J.A. :

The Appellant appeals against a judgment of James, J.P., in the Natal Provincial Division, in terms of which it was ordered to pay to respondent the sum of R18,000.00, being an agreed amount, to compensate respondent for damages sustained in the circumstances hereinafter set out.

At all material times until about September, 1968, appellant and George Beaumont Butler

jointly owned the farm Leliefontein No. 1052, situate in the County of Pietermaritzburg. The farm was approximately 899 acres in extent. The relationship between appellant and Butler was governed by a partnership agreement, the terms of which were not regarded as relevant to the issues raised in the pleadings. I shall refer to the partnership as the Tarbut Syndicate.

During October 1955 the Tarbut Syndicate and respondent (a partnership) executed a written agreement in terms of which an area of approximately 500 acres of the aforesaid farm was to be used for the purpose of establishing thereon a wattle tree plantation "for the general benefit" of the contracting parties. It appears from the evidence that respondent had considerable experience in the establishment, maintenance and exploitation of wattle plantations. The exploitation consisted, firstly, in the marketing of bark stripped from mature trees and, secondly, in the sale of the timber of trees that had been previously stripped.

In terms of the agreement, respondent undertook to complete the establishment of the plantation within a period of three years calculated from 1 November

1953. The reference to a date earlier than that of the written agreement appears to indicate that there was some prior agreement between the parties. However that might be, it is common cause that the establishment of the plantation was completed by November 1956. In terms of the agreement, this was done at the expense of respondent. After the completion of this stage, respondent was required by the terms of the agreement to attend to the maintenance of the plantation until the trees reached maturity, i.e., for a period of approximately 8 - 9 years. Having regard to the fact that the trees were not all planted during the same season, and to certain other circumstances (which need not be detailed here), stripping operations only commenced during the summer of 1964, notwithstanding the fact that some trees had reached maturity during the year 1963. It is common cause that by the summer of 1965 all the trees had matured. It appears from the evidence that stripping is undertaken during the summer, but is only possible ~~where~~ when there has been an adequate rainfall.

It is an appropriate stage to refer to

circumstances which had a material bearing upon the time within which it was reasonably possible to complete the stripping of all the trees in the plantation. It is common cause that by about 1959 the supply of bark by far exceeded the demands of the industry, and it was sought, initially upon a voluntary basis, to limit the supply by the introduction of a quota system. During 1960 legislation was introduced to regulate the disposal of bark by growers to manufacturers or millers for processing (vide section 4 of Act No. 23 of 1960). Respondent, who had been granted quotas in respect of other farms, desired to use them in order to expedite stripping operations on Leliefontein. To that end, respondent sought the consent of the Tarbut Syndicate to proceed to the division of the plantation in accordance with clause 16 of the agreement, which contemplated such a division and the allocation of ~~a~~ specific areas for ~~exploitation to each of the two contracting parties.~~ On the area so allocated to any party, that party would at its own expense, and according to its own discretion, undertake

stripping operations and the disposal of timber. Respondent planned to use its own quotas in this regard, intending that the full quota granted in respect of Leliefontein be made available to the Tarbut Syndicate to be used for stripping operations on the area to be allocated to it. The Tarbut Syndicate would, however, not agree to this, and suggested that respondent's available quotas be used for the purpose of stripping the plantation as a whole. The Syndicate was not prepared to make any payment to respondent for the use of its quotas, and the matter was resolved by an agreement that stripping operations should proceed on the basis of the annual quota granted in respect of Leliefontein. In the result, no division of the plantation took place, and respondent proceeded, by agreement, to undertake stripping operations both on its own behalf and on behalf of Tarbut Syndicate. During the period 1964 to 1968, 240 acres of the plantation had been stripped and cut, thus leaving 260 acres for later exploitation. During or about September 1968, appellant acquired sole ownership of the farm and also took over all the rights and obligations of the Tarbut Syndicate under

the agreement in question.

During the early part of the year 1969 a dispute arose between appellant and respondent regarding their respective rights and obligations under the agreement. It is not necessary to traverse this in detail. Suffice it to say that by September of that year it was appellant's attitude that the agreement had terminated, and that respondent accordingly had no rights in relation to the further exploitation of the remaining 260 acres of the plantation which, in terms of clause 25 thereof, were claimed to have become "the exclusive property" of appellant. Respondent was denied further access to the farm. Respondent regarded this as an unlawful repudiation of the agreement. A provision in the agreement (clause 26), requiring the settlement of disputes by arbitration, having been waived by appellant, respondent instituted an action in which an order for specific performance or, alternatively, ~~the payment of compensation for damages sustained,~~ was claimed. During the trial it emerged that the farm had been sold and transferred to a purchaser, and respondent accordingly limited ~~his~~ its claim to one for the payment of

damages, the quantum of which, as I have already indicated, was agreed upon. The trial Court held that appellant had unlawfully repudiated the agreement, and entered judgment in favour of respondent in the agreed amount with costs.

Against this background, I proceed to the consideration of the substantial issue arising for determination by this Court, which involves the interpretation of clause 22 of the agreement in question. It is in the following terms :

> "22. This Agreement shall operate as a Lease in favour of the Second Party of the area affected from time to time and until such time as all Wattles planted in terms hereof have been cut and the timber removed, and in the event of a dispute, for a period of NINE YEARS (9) ELEVEN MONTHS (11)."

In the agreement the "First Parties" refers to the Tarbut Syndicate, and the "Second Party" to respondent.

The clause in question cannot, of course, not be interpreted in isolation; regard is to be had to the scope of the agreement as a whole, and more particularly to those provisions which appear to relate more specifically to the rights and obligations of the parties which arise when

the trees are mature and ready for stripping, provided that they are then at least eight years old.

It is convenient to set out herein the various clauses which appear to be relevant to the interpretation of clause 22. They are the following :

"16. Whenever the trees on any portion of the land affected are matured, such area of matured trees shall be cut and the bark and timber sold and this said proceeds divided between the Parties equally. It is agreed that no trees shall be regarded as matured and no trees shall be cut until they are at least EIGHT YEARS (8) old. It is understood that upon an area of timber maturing that that area will be divided equally between the First and Second Parties for the purpose of cutting etc., (each Party to cut the timber etc., as set out in Paragraph 17 below, in that area allocated it at its own expense and according to its own discretion) but the eventual Net proceeds from the whole area will be divided equally between the First and Second Parties.

17. Upon the division of each area for the purpose of cutting by both Parties, the Second Party shall be entitled to enter upon the portions allocated to the Second Party and cut the trees, and remove the bark and timber in such portion. All such areas shall be completely cut and thereupon the brushwood shall be stacked in rows according to custom and thereupon the First Parties shall resume control of the portion so

cleared by the Second Party.

18. From the date of division of any defined area of the trees, the responsibility for Insurance, protection against fire and all risks pass to the Party to whom any particular portion is allocated in terms of the preceding clause. Should any loss or damage as aforesaid occur without the necessary Insurance having been affected, the Party responsible for such Insurance shall be obliged to make good such loss or damage.

21. This Agreement shall remain in force until all the trees planted and established have matured and the Second Party has cut one half (½) of the trees, and removed all bark, and is to be read in conjunction with Clause 24.

24. Should the market price of Wattle bark and/or timber be considered by the Second Party to be unduly low in price at the time when the Wattle trees are mature, the Second Party shall have a reasonable extension of the time within which to commence and complete the cutting and stripping. This extension of time shall be determined by Arbitration if necessary but in no case shall the period of such extension exceed SIX YEARS (6).

25. Upon the cutting of the Wattles upon any portion being completed, the land shall revert ~~to and fall under the control of the First~~ Parties. Any trees not cut within the period of this Agreement or any further extension shall be the exclusive property of the First Parties."

It was contended on appellant's behalf

that, upon the proper construction of clause 22, the contracting parties intended that in any event the maximum period of operation of the agreement would be a period of nine years and eleven months calculated from the date of execution thereof, which was either 3 October 1955 (when it was signed by respondent) or some later date during October when it was signed on behalf of the Tarbut Syndicate. Ex facie the agreement, the latter signed the agreement during October, but the day of signature is not indicated. If clause 22 were to be given the meaning contended for on appellant's behalf, the agreement would have terminated by effluxion of time during September 1965. So to construe clause 22 would, in the first place, do violence to the language thereof, which in plain terms relates the period in question to a specified eventuality, i.e., the existence of a dispute. Quite apart from this, however, there are clear indications in the agreement itself that, whatever the true intention of the parties may have been, they could not have intended that it should have the meaning now contended for on appellant's behalf.

Clause 21 is, in my opinion, dominant both as to the purpose of the agreement and the period of operation thereof. This clause contemplates that a division in terms of clause 16 would have taken place, and that respondent would be stripping mature trees on the area allocated to him. It is provided that the agreement "shall remain in force until" respondent "has cut one half (½) of the trees, and removed all bark ...." It may, no doubt, be implied that respondent was required to perform these operations within a reasonable time. The time within which respondent had to cut and strip trees is, however, also affected by the provisions of clause 24, which contemplates a possible maximum extension of six years of the time within which respondent had to cut and strip the trees on any area allocated to him in terms of clause 16. Having regard to the fact that some of the trees only reached maturity during 1965, it would follow that if clause 22 were to be given the meaning contended for on appellant's behalf, the provisions of clause 21 (read with clause 24) would have been rendered substantially nugatory.

In my opinion the parties intended that

the period of nine years and eleven months should apply only in the circumstances referred to in the clause in question, i.e., where it was contemplated that the agreement should "operate as a Lease in favour of" respondent "of the area affected from time to time ....." The words which I have italicised cannot be understood as referring to the whole extent of the 500 acres planted to wattle trees. It can only refer to any area allocated to respondent from time to time pursuant to a division in terms of section 16. It appears from clause 17 that upon division, respondent became entitled "to enter upon" the area allocated to it for the purpose of cutting and stripping the trees in that area. After the completion of these operations, respondent was required to stack the brushwood in rows and thereupon the Tarbut Syndicate would "resume control of the portion so cleared." I take this to mean that such portion would thereafter not be included in the area to which the agreement applies.

In my opinion the provisions of clause 22 were intended to apply only to such areas as were, consequent upon division and allocation, from time to time

occupied by respondent for the purposes mentioned in clause 17. During such occupation, it was intended that respondent should, in respect of the area so occupied, enjoy the protection which an unregistered short lease affords a lessee. That is no doubt the reason for limiting the period to nine years and eleven months. I need hardly add that, despite the use of the word "lease", no lease was in fact constituted in the absence of any provision requiring that rent be paid for the occupation of any particular area. The respondent was entitled to remain in occupation of any area so allocated to it, "until such time" as all trees thereon "have been cut and the timber removed." In the event of a dispute, which could presumably only relate to the cutting and removal of timber on the "affected area", the period of occupation would be limited to nine years and eleven months.

It was not contended on appellant's behalf that the circumstances postulated for the coming into operation of clause 22 arose at any material time. No division and allocation of areas to respondent took place,

nor could it have taken place prior to 1963, when the first trees reached maturity. No dispute of the kind contemplated could have eventuated prior to that year. The contention on appellant's behalf as to the construction of clause 22 cannot be upheld. That being the only issue raised by counsel for appellant, it follows that the appeal cannot succeed.

At the trial a witness, Mr. C.S. Henderson, was called by respondent to give expert evidence on a matter in issue when the trial commenced. Counsel for the respondent informed this Court that, due to his inadvertence, James, J.P., was not requested to make the usual order in regard to the qualifying fees of this witness, and applied for an order by this Court in regard thereto. Counsel for appellant consented to such an order being made in the event of the appeal being dismissed.

In the result, it is ordered as follows :

1. The appeal is dismissed with costs.

2. By consent, the qualifying fees of Mr. C.S. Henderson, are to be included in the costs awarded to respondent by the Court a quo.

P.J. Howard.

OGILVIE THOMPSON, C.J.
BOTHA, J.A.
POTGIETER, J.A.
TROLLIP, J.A. } CONCUR