THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable
Case No: 20474/2014

In the matter between:

AFGRI CORPORATION LIMITED **APPELLANT**

and

MATHYS IZAK ELOFF **FIRST RESPONDENT**

ELSABE ELOFF **SECOND RESPONDENT**

Neutral citation: *Afgri Corporation Ltd v Eloff* (20474/2014) [2016] ZASCA 141 (29 September 2016)

Coram: Maya DP, Bosielo, Theron and Van der Merwe JJA and Makgoka AJA

Heard: 25 August 2016

Delivered: 29 September 2016

Summary: Contract ─ acknowledgement of debt and undertaking to pay ─ evidence contradicting the terms of the agreement rendered inadmissible by the parol evidence rule ─ judgment granted in terms of the agreement.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes J sitting as court of first instance):

(a) The appeal is upheld with costs.

(b) The order of the court a quo is set aside and replaced with the following:

'Judgment is granted against the defendants jointly for payment of:

1 The amount of US$920 844.59;

2 Interest on the amount of US$920 844.59, compounded monthly and calculated at:

2.1 14 per cent per annum from 1 September 2007 to 18 February 2008;

2.2 13 per cent per annum from 19 February 2008 to 10 November 2008;

2.3 15 per cent per annum from 11 November 2008 to date of payment.

3 Costs of suit.'

JUDGMENT

Van der Merwe JA (Maya DP, Bosielo and Theron JJA and Makgoka AJA concurring):

[1] On 26 December 2007 Dumela Farms Limited (Dumela) and the respondents, Mr Mathys Isak Eloff and Ms Elsabe Eloff, signed an agreement entitled 'ACKNOWLEDGEMENT OF DEBT, SURETYSHIP, UNDERTAKING & CESSION' (the agreement). In terms thereof, Dumela acknowledged indebtedness to the appellant, Afgri Corporation Limited, in the amount of US$920 844.59. In terms of the agreement, the respondents bound themselves jointly and severally as sureties and co-principal debtors for the due payment of the amount of US$920 844.59 by Dumela to the appellant. The court a quo (Hughes J in the Gauteng Division, Pretoria) dismissed the appellant's claim against the respondents based on the agreement, but granted leave to appeal to this court. The central question in this appeal is

whether the court a quo should have held the respondents liable in terms of the agreement, for payment of the said amount to the appellant.

[2] The respondents are married to each other in community of property and are domiciled in the Republic of South Africa. They have, since 1992, conducted farming operations in the Republic of Zambia through Dumela, a company incorporated and registered in terms of the laws of Zambia. The respondents were shareholders of Dumela. Mr Eloff was a director of and the driving force behind Dumela. He signed the agreement on behalf of Dumela.

[3] Dumela mainly produced maize. Maize is planted during spring and harvested during autumn and winter of the following year. The appellant, which is also a Zambian company, had for some years provided producers' goods such as seeds, fertilizers, chemicals and fuel, to Dumela on credit. This was regulated by standard written agreements entitled 'PRODUCTION AGREEMENT AND AGRICULTURAL CHARGE' (production agreement), entered into between the appellant and Dumela in respect of each seasonal planting.

[4] In terms of such a production agreement the appellant made a credit facility in a specified amount available to Dumela for the purchase of producers' goods. The outstanding balance of the credit facility had to be settled by an agreed date after the harvest of the relevant crop, either by payment thereof or by delivery of a specified quantity of maize at a fixed price. As security for the repayment of the credit facility, Dumela granted an agricultural charge to the appellant in terms of the then Zambian Agricultural Credits Act 23 of 1995. For purposes of this judgment it is not necessary to say more than that an agricultural charge provides a creditor with security over moveable property and rights of its debtor similar to the security provided by a notarial bond in terms of South African law. (See 17(2) *Lawsa* 2ed (2008) para 399-405.)

[5] The last production agreement entered into between the appellant and Dumela pertained to the production of maize during the 2006/2007 season.

This agreement provided for a credit facility for Dumela in the amount of US$647 520. The credit facility had to be settled by 30 September 2007, by payment or the delivery of 3 660 metric tons of maize. The value of the maize to be delivered was predetermined at US$160 per ton. Although this agreement was only signed on 19 July 2007, it is common cause that it was implemented since commencement of the planting season during 2006. The agricultural charge in the amount of US$647 520, envisaged in the production agreement, was registered on 20 July 2007, inter alia over 'all crops growing and otherwise to be grown in the 2006/7 season'. The respondents admitted that Dumela utilized the facility to the full and thus became indebted to the appellant in terms of this production agreement in the amount of US$647 520.

[6] The appellant subleased a portion of the land farmed by Dumela at Mukonchi, Zambia for purposes of a depot. It is common cause that Dumela delivered approximately 2 900 metric tons of white maize (the maize) to the appellant at this depot. In terms of the production agreement, the appellant therefore became entitled to utilize the maize to settle or reduce the outstanding balance on the credit facility.

[7] However, Dumela, represented by Mr Eloff, entered into negotiations with the appellant to prevent this outcome. Mr Eloff maintained that the low price of maize at the time would in future probably rise materially. He accordingly requested extension of time for settlement of the 2006/2007 production credit facility as well as other amounts owed by Dumela to the appellant at the time. The total amount owed was US$920 844.59. Mr Eloff also offered additional security for this debt. The appellant acceded to this request and these negotiations led to the signing of the agreement. During these negotiations and the entering into the agreement, Dumela and the respondents were assisted by an attorney.

[8] Clauses 3 and 4 of the agreement setting out the debt provided:

'3. **DUMELA FARMS** acknowledges that, excluding any amounts owing in respect of Instalment Sale Agreements, as at 31 October 2007 it is indebted to **AFGRI CORPORATION LIMITED** [ie the appellant], a company duly registered as

such under Registration Number 44914 in the Republic of Zambia, (hereinafter referred to as "**AFGRI CORPORATION**") [in] the following amounts:

3.1 An amount of US Dollar ("$")920 844.59 (NINE HUNDRED AND TWENTY THOUSAND EIGHT HUNDRED AND FORTY FOUR DOLLARS AND FIFTY NINE CENTES) in respect of goods sold and delivered, services rendered and credit facilities granted by AFGRI CORPORATION to DUMELA FARMS at the latter's special instance and request;

3.2 Interest on the amount of US$920 844.59 from the 1st day of November 2007 to date of payment, at a interest rate equal to the Base Rate charged from time to time by STANBIC in Zambia plus 3 percentage points and which interest will be compounded monthly. It is recorded that the aforementioned Base Rate is presently 11.5% per annum and the interest rate charged on the aforesaid amount is presently 14.5% per annum.

4.1 The amount mentioned in paragraph 3.1 above was payable by **DUMELA FARMS** to **AFGRI CORPORATION** before or on 31 August 2007, but was not paid;

4.2 **DUMELA FARMS** has requested an extention of time until 31 July 2008 for payment of the due amounts mentioned in 3.1 and 3.2 above.'

[9] Clauses 7 and 8 of the agreement dealt with the additional security provided. It essentially consisted of a cession by the respondents of their right, title and interest, up to the amount of US$1 million, in a first mortgage bond to be registered over certain land that had been sold by the respondents to a close corporation for purposes of development of a residential township. The respondents also undertook to pay an amount of R100 000 to the appellant upon transfer of each erf in the development to the purchaser thereof.

[10] Clause 9 provided:

'9.1 **DUMELA FARMS** consented to **AFGRI CORPORATION** registering certain Agricultural Charges against **DUMELA FARMS** in terms of the provisions of the Agricultural Credits Act (Act 23 of 1995) of the Republic of Zambia, which charges have been duly registered.

9.2 **DUMELA FARMS**, **MATHYS** and **ELSABE** acknowledged that the provisions of this document will in no way prejudice or vary the rights of **AFGRI CORPORATION** in terms of the Agricultural Charges registered in the Republic of Zambia by **AFGRI CORPORATION**, nor affect any other rights of **AFGRI**

CORPORATION to enforce any rights which it might have against **DUMELA FARMS** in terms of the laws of force in the Republic of Zambia or any agreements entered into between **DUMELA FARMS** and **AFGRI CORPORATION**.

9.3 **DUMELA FARMS** confirms that approximately 2 900 metric tons of white maize is presently being stored in bags on **DUMELA FARMS'** farm Mukonchi, Zambia. It is recorded that the total quantity of maize being stored on the farm is *inter alia* subject to the Agricultural Charge mentioned above.

9.4 **DUMELA FARMS** undertakes, at its cost, to take all necessary steps including, but not limited to, effective covering and regular fumigation as prescribed by **AFGRI CORPORATION**, so as to protect the bagged maize against any damage of whatever nature, including, but not limited to damage as a result of theft, destruction, fire, damage by water, inclement weather, storm, wind, pests and contamination.

9.5 It is recorded that approximately 1 500 metric tons of the aforementioned 2900 metric tons bagged maize had to date not been contracted for sale and **DUMELA FARMS** undertakes, subject to **AFGRI CORPORATION's** prior written consent and its rights in terms of the Agricultural Charge and other agreements entered into with **DUMELA FARMS**, to enter into the necessary contracts for the sale of the total quantity of 2 900 metric tons of maize before or on 25 July 2008. **DUMELA FARMS** confirms and acknowledges that in the event of **DUMELA FARMS** still being indebted in any amount to **AFGRI CORPORATION** at 25 July 2008 and it failing to enter into the necessary contracts of sale in respect of the total quantity of the stored bagged maize, or **DUMELA FARMS** failing to make payment of the total purchase price of such maize to **AFGRI CORPORATION** before or on 31 July 2008, **AFGRI CORPORATION** will be entitled, without any notice to **DUMELA FARMS**, to exercise all its rights in terms of the Agricultural Charge which has been registered in favour of **AFGRI CORPORATION** and which rights will include, but not be limited to seizure and the appointment of a receiver.'

[11] On 6 February 2008, however, Dumela was placed under receivership in terms of the laws of Zambia. As a result, the assets of Dumela were placed under the control of the appointed receivers. The duty of the receivers was to distribute the assets of Dumela amongst its creditors, in accordance with the ranking of their rights. Litigation in respect of the maize ensued in Zambia. It is not necessary to provide the particulars thereof. It suffices to say that the prior rights of another creditor of Dumela prevailed in respect of the maize. The

appellant consequently received no payment as envisaged in the agreement nor from any other source.

[12] The appellant accordingly issued a provisional sentence summons against the respondents for payment in terms of the agreement. By agreement between the parties, the matter went to trial. The court a quo *mero motu* held that the provisions of s 21(1) of the English Sale of Goods Act of 1893, applicable in Zambia, rendered the agreement invalid. The respondents rightly conceded that this finding was wrong and nothing more need be said about it.

[13] It is necessary to analyse the provisions of clause 9 of the agreement in context. Their meaning is plain. Dumela confirmed that the maize was stored in bags on its farm at Mukonchi. It undertook, at its cost, to take all steps necessary to protect the maize against any damage of whatsoever nature. Dumela acknowledged the provisions of the agricultural charge registered in favour of the appellant and that the maize was subject thereto. At its request, Dumela was granted the opportunity until 25 July 2008 to sell the maize to third parties in order to obtain a better price. The purchase price of the maize had to be paid to the appellant by 31 July 2008. In the event that no such sale took place, or if Dumela failed to make payment of the full purchase price of the maize to the appellant on or before 31 July 2008, the appellant would be entitled, without notice to Dumela, to exercise its rights in terms of the agricultural charge. It is clear that the parties to the agreement were ad idem that Dumela was the owner and in control of the maize, which was subject to the appellant's security consisting of the agricultural charge.

[14] The only defence proffered in the evidence of Mr Eloff, was raised in a second amended plea filed after Mr Eloff had completed his evidence in chief. Although his evidence in this regard was not clear and consistent, he attempted to convey that the maize became the property of the appellant when it was delivered to the appellant in the period up to 31 August 2007. The implication hereof was that Dumela's account with the appellant ought to have been credited with the value of the maize by 31 August 2007, that is before

the agreement was entered into. (In terms of the production agreement Dumela would in such event have been credited with only US$464 000 (2 900 tons x US$160 per ton)).

[15] Before us, counsel for the respondents recognised that in terms of the production agreement of 19 July 2007, the appellant had only obtained the security of the agricultural charge over the maize. He argued that it should be found that the appellant and Dumela had entered into a written purchase and repurchase agreement in respect of the maize. The appellant did from time to time in the past enter into such standard written agreements with Dumela. The essential effect of such agreement was that the appellant purchased the maize that was subject to a prior production agreement and the debtor obtained the right to repurchase the maize from the appellant by a specified date. On this basis, so it was argued, the appellant became the owner of the maize upon the delivery thereof, which was completed by 31 August 2007.

[16] The argument is devoid of any factual basis. Such agreement could only have been entered into after the production agreement of 19 July 2007. No such agreement was produced at any time. In his testimony Mr Eloff only tentatively referred to the possibility of such agreement and in any event explicitly said that his case was that the appellant had become the owner of the maize as a result of the production agreement. This evidence directly contradicted the contents of the agreement.

[17] In *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47 Watermeyer JA said:

‘Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence’.

This is referred to as the parol evidence or integration rule. The rule renders statements and negotiations leading up to the conclusion of a written contract

irrelevant and therefore inadmissible. Where a document that had not been signed by all the parties to the agreement, was accepted by them as their contract, the rule is of equal application. (See *Rielly v Seligson and Clare Ltd* 1977 (1) SA 626 (A) at 637C-H.) However, where the parties to an agreement reduced only part of the agreement into writing, the rule does not prevent the admission of extrinsic evidence in respect of the portion of the agreement that was not integrated in the document. (See *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* [2008] ZASCA 127; 2009 (1) SA 196 (SCA) para 14.)

[18] This led counsel for the respondents to argue, albeit faintly, that that was the case here. He was, however, unable to identify any portion of the agreement between the parties in respect of the debt in question that had not been integrated. In my judgment, the agreement embodied the whole of the arrangement of the parties in respect of the debt in question. This is clear from the negotiations that led to the agreement, the nature of the transaction and the contents of the agreement. This conclusion is particularly underscored by the provisions of clause 5 of the agreement. This clause was headed 'Possible claims not covered by Acknowledgement'. It provided that an alleged claim by the appellant against Dumela for damages in respect of delivery of wheat during the production season 2006/2007 and an alleged claim by Dumela against the appellant in respect of the sale of soya beans, were excluded from the operation of the agreement. The same applied to amounts owing in respect of instalment sale agreements, in terms of clause 3 of the agreement.

[19] Therefore, the evidence of Mr Eloff was inadmissible. This of course renders it unnecessary to consider whether the evidence was in any event acceptable on the general probabilities arising from the matter, which appears to be doubtful, to say the least. To the extent that Mr Eloff's evidence reflected an interpretation of the production agreement, the evidence was inadmissible on that ground too. (See *KPMG Chartered Accountants (SA) v Securefin Ltd & another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) para 39 at 409G-H).

[20] It follows that the court a quo should have granted judgment in favour of the appellant against the respondents as claimed. Clauses 10.3 and 10.4 of the agreement provided that all payments in terms thereof had to be made in US dollars. Judgment should be given in that currency. Our courts have the power to do so (see *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 774F-I).

[21] The following order is accordingly issued:

(a) The appeal is upheld with costs.

(b) The order of the court a quo is set aside and replaced with the following:

'Judgment is granted against the defendants jointly for payment of:

1 The amount of US$920 844.59;

2 Interest on the amount of US$920 844.59, compounded monthly and calculated at:

2.1 14 per cent per annum from 1 September 2007 to 18 February 2008;

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2.3 15 per cent per annum from 11 November 2008 to date of payment.

3 Costs of suit.'

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C H G van der Merwe

Judge of Appeal

APPEARANCES:

For Appellant:	J G Bergenthuin SC Instructed by: Ernst J V Penzhorn Attorneys, Pretoria Hill McHardy & Herbst Incorporated, Bloemfontein
For Respondents:	A Liversage Instructed by: Grosskopf Attorneys, Pretoria Spangenberg Zietsman & Bloem Attorneys, Bloemfontein