Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No.: 1463/2011
Date Delivered: 31 March 2023

In the matter between:

SA SOUTWERKE (PTY) LTD Appellant

and

SAAMWERK SOUTWERKE (PTY) LTD Respondent

Coram: Tlaletsi JP *et* Mamosebo J *et* Nxumalo J

JUDGMENT

Tlaletsi JP

[1] This appeal is about whether the respondent had succeeded to prove the quantum of the delictual damages in the form of loss of profit emanating from the conduct of the appellant. The alleged loss suffered by the respondent was based on the fact that it was wrongfully and fraudulently prevented to mine salt at Vrysoutpan during the period 6 September 2008 to 25 June 2011.

[2] A brief history of the parties' litigation is necessary for a better understanding of the issues in this case. I briefly set out the origin of the dispute. The appellant had been mining salt on Vrysoutpan owned by the state for several years. During the switch in the legislative regime dealing with minerals, the appellant had to apply for a new mining permit.[1] The consent was granted for a limited duration. After several events that took place, the respondent applied and was granted the permit to mine salt at the same place that had been mined by the appellant at Vrysoutpan. This state of affairs resulted in the parties having competing claims to mine the place. In the meantime, the appellant continued with its mining operations. The parties appeared before the officials of the Department of Mineral and Energy (DME) in the Northern Cape province. The Director of the DME who was tasked with resolving the impasse had reservations about the authenticity of the documents presented by the appellant to support the claim that its permit was for an indefinite period of time. The appellant based its right to mine Vrysoutpan on the said documents.

[1] As from 1 May 2004 the Minerals Act 50 of 1991 was repealed and replaced by the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

[3] During 2007, the respondent issued an application in this Court seeking *inter-alia,* declaratory orders that it was entitled to mine on Vrysoutpan; and that the alleged mining right of the appellant was invalid. The respondent also sought appellant to be interdicted from conducting mining operations at Vrysoutpan. The respondent succeeded in its application.[2] The appellant after failing to obtain leave to appeal against the judgment and order of the court a *quo*, approached the Supreme Court of Appeal for leave to appeal. That process suspended the order of the court *a quo* and the appellant continued mining operations at Vrysoutpan. The Supreme Court of Appeal dismissed the appellant's appeal.[3]

[4] The respondent thereafter instituted an action in the court *a quo* alleging that the appellant was party to the creation of a fraudulent mining right and relied on that fraudulent right to prevent the respondent from mining salt at Vrysoutpan. The Minister of Mineral Resources was cited as the second defendant in the proceedings. The respondent alleged that as a result of the conduct of the appellant and the Minister, it had suffered damages in the form of pure economic loss. The merits and the quantum of the matter were separated. The trial court found that neither the appellant nor the Minister were liable to pay damages to the respondent and dismissed the respondent's claims. Aggrieved by the judgment, the respondent appealed to the Supreme Court of Appeal. Although the Supreme Court of Appeal dismissed the appeal

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[2] *Saamwerk Soutwerke (Edms) Bpk v Minister: Mineraal en Energiesake and Anders* (292/2007) [2010] ZANCHC 4 (29 January 2010)

[3] *SA Soutwerke v Saamwerke Ltd* [2011] 4 All SA 168 (SCA).

against the order of the trial court that dismissed the claim against the Minister, it found in favour of the respondent against the appellant. Relevant to these proceedings, the Supreme Court of Appeal ordered *inter alia*, that:

"It is declared that the [appellant] is liable to the [respondent] for payment of such damages as the [respondent] may prove, that it suffered as result of being unable to mine salt at Vrysoutpan during the period 6 September 2008[4] *to 25 June 2011."*

[5] The matter was thereafter remitted to the trial court for further adjudication. The matter proceeded on 26 August 2019. The trial court found in favour of the respondent and ordered that:

5.1 the appellant is to pay the respondent the amount of R11 931 575-00;

5.2 interest on the said sum at the rate determined under the provisions of section 2A(2)(a) of the *Prescribed Rate of Interest Act;* [5]

5.3 subject to any common-law principle which might be applicable in calculating or limiting the interest to be recovered, the said interest shall run from 1 October 2011 until the date of final payment; and

5.4 costs incurred by the respondent from the order of the Supreme Court of Appeal on the merits until judgment in the court a *quo*. Such costs to include the costs of two counsel where two counsel were employed, as well as the qualifying costs of the respondent's expert witness, Mr Leerkamp.

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[4]The Supreme Court of Appeal limited the period to commence from 6 September 2008 because the period preceding that date was affected by prescription.

[5] Act 55 of 1975. Section 2A(1)(a) provides:

*"**2A Interest on unliquidated debts***

Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 (Act 34 of 2005) the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier."

[6] Aggrieved by the judgment and order of the trial court, the appellant sought and was refused leave to appeal by the trial court on 31 March 2021. That court however, on the unopposed application by the respondent in terms of rule 42(1)(b)[6], amended its award from R 11 931 575-00 to R 9 176 726-00. Further aggrieved by the refusal of leave to appeal, the appellant approached the Supreme Court of Appeal for leave to appeal. On 25 June 2021, the Supreme Court of Appeal granted the appellant leave to appeal against the judgment and order of the trial court to the Full Court of this division. This judgment therefore relates to the appeal against the judgment and order of the trial court on quantum of damages allegedly suffered by the respondent due to the appellant's conduct.

[7] The above-quoted excerpt of the order of the Supreme Court of Appeal forms the basis for the current appeal. That order has settled the question of liability of the appellant to the respondent. The interpretation of the order however became the subject of debate in this Court. On behalf of the appellant, it was contended that the order only granted the respondent the right to mine salt at Vrysoutpan and no one else. That is also how I understand the order. It does however not preclude the respondent from outsourcing its business by getting someone else or any other entity to mine on its behalf. While accepting that the respondent was entitled to outsource its operations and employ someone

[6] Rule 42(1)(b) of the Uniform Rules provides that:

"(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

. . .

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission."

In *casu* the appellant contended that the court *a quo* made a *'patent clerical error'* in the calculation of the *quantum*.

else to mine salt on its behalf, the appellant contended that the respondent did not plead its case on that basis. I will deal with this aspect in due course.

[8] This case being an appeal against the findings and conclusions of the trial court, compliance with the applicable principles is peremptory. It is trite that a court of appeal will interfere with the award of the trial court only in circumscribed circumstances. In view of the advantages enjoyed by the trial court in seeing and observing the witnesses, the court of appeal is in general reluctant to disturb the findings of a trial court on questions of fact.[7] In *R v Dhlumayo and Another* [8] the court held:

1. "An appellant is entitled as of right to a rehearing, but with the limitations imposed by these principles; this right is a matter of law and must not be made illusory.
2. Those principles are in the main matters of common sense, flexible and such as not to hamper the Appellate Court in doing justice in the particular case before it.
3. The trial Judge has advantages — which the Appellate Court cannot have — in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.
4. Consequently, the Appellate Court is very reluctant to upset the findings of the trial Judge.
5. The mere fact that the trial Judge has not commented on the demeanour of the witnesses can hardly ever place the Appeal Court in as good a position as he was.
6. Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.
7. Sometimes, however, the Appellate Court may be in as good a position as the trial Judge to draw inferences, whether they are either drawn from admitted facts or from the facts as found by him.
8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the Appellate Court will only reverse it where it is convinced that it is wrong.

[7]For a comprehensive analysis of these principles see: Herbstein and Van Winsen: *The Civil Practice of the High Courts of South Africa and the Supreme Court of Appeal of South Africa*, Fifth Edition, Volume 2, pages 251 to 252.
[8]1948 (2) SA 677 (AD), At page 705-706; see also HAL *obo MML v MEC for Health, Free State 2022* (3) SA 571 (SCA); [2022] 1 All SA 28 (SCA), at para [72].

9. In such a case, if the Appellate Court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.
10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.
11. The Appellate Court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.
12. An Appellate Court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.
13. Where the Appellate Court is constrained to decide the case purely on the record, the question of onus becomes all-important, whether in a civil or criminal case.
14. Subject to the difference as to onus, the same general principles will guide an Appellate Court both in civil and criminal cases.
15. In order to succeed, the appellant has not to satisfy an Appellate Court that there has been 'some miscarriage of justice or violation of some principle of law or procedure'.
16. The English practice in regard to 'concurrent findings of fact by two courts' has no application in South Africa."

[9] In *Road Accident Fund* v *Guedes*[9] the court summarised the principles applicable to appeal against award of damages thus:

"…the proper approach of an appeal court in appeals against awards of damages has often been set out, and the principles have been stated in different ways, some appearing to favour appellants, others respondents. Some of these principles that are of application in this matter are well summarised, again with reference to reported cases, by the learned authors in these succinct terms:

(c) Where the amount of damages is a matter of estimation and discretion, the appeal court is generally slow to interfere with the award of the trial court - an appellate tribunal cannot simply substitute its own award for that of the trial court. However, once it has concluded that interference is justified in terms of the principles set out in *(d)* below, the appeal court is entitled *and obliged* to interfere.

(d) The appeal court will interfere with the award of the trial court:

[9] 2006 (5) SA 583 (SCA) at para 8.

(i) where there has been an irregularity or misdirection (for example, the court considered irrelevant facts or ignored relevant ones; the court was too generous in making a contingency allowance; the decision was based on totally inadequate facts);
(ii) where the appeal court is of the opinion that no sound basis exists for the award made by the trial court;
(iii) where there is a substantial variation or a striking disparity between the award made by the trial court and the award that the appeal court considers ought to have been made. In order to determine whether the award is excessive or inadequate, the appeal court must make its own assessment of the damages. If, upon comparison with the award made by the trial court there appears to be a 'substantial variation' or a 'striking disparity', the appeal court will interfere".

[10] The appellant based its argument mainly on the respondent's pleaded case, contending that the respondent did not prove its pleaded case and that the court a *quo* misdirected itself in finding in favour of the respondent based on what was not pleaded. If what the appellant alleges is correct, this Court's interference with the finding of the court *a quo* will be justified. The essential averments in the respondent's amended particulars of claim loosely translated from Afrikaans are as hereunder. For the sake of convenience and to eliminate any confusion, I refer to the parties as they are cited in the pleadings in the court *a quo* in this part of the judgment.

[11] The plaintiff pleaded (as amended) that the defendant had wrongfully and fraudulently presented that it had a permit to mine salt at Vrysoutpan for an indefinite period from 28 April 2004 and refused to leave Vrysoutpan until 24 June 2011. And that the defendant's conduct contributed to the fact that the plaintiff could only start with mining operations in the exercise of its mining rights on 25 June 2011. And that:

11.1 Due to defendant's aforementioned unlawful and intentional or negligent act or default, the plaintiff suffered damages because the plaintiff from 1

January 2007 to 24 June 2011 could have mined salt on Vrysoutpan and could have generated a profit, was it not for the defendant's mentioned action and default.

11.2 The plaintiff's damages are the loss of profit over a 33 months' period from 6 September 2008 to 25 June 2011, being the amount of R106 700 935, calculated on 30 October 2017, using the following assumptions and methodology:

11.2.1 It is assumed that Plaintiff could have mined, processed and sold salt at the same cost and price as is depicted in the financial statements for the same period of the Kalkpoort Soutwerke, with regard to the mining of salt on the Eenzaamheid saltpan, further assuming the salt of Vrysoutpan would have been processed to 60% fine salt, 20% grade 1 coarse salt and 20% grade 2 coarse salt.

11.2.2 The calculation is based on the quantity of salt the plaintiff mined on Vrysoutpan, for the period (70 months) June 2011 to March 2017, which includes a 12-month rehabilitation period (3/25 acres).

11.3 The following assumptions are used for purposes of the calculations:

11.3.1 all expenses as well as the quantity of salt mined have been equally distributed over that period;

11.3.2 the salt was processed at optimum capacity;

11.3.3 the information includes equal (quarterly) distribution of royalties in respect of sales, salaries and wages;

11.3.4 the next income and expense variables in respect of production (tons) should be calculated: tons sold; yield of sales; expenses in respect of fuel and

lubricants; salaries; transport; royalties; paraffin; water & electricity at the processing plants; and packaging.

11.3.5 the next expense will be fixed costs that will not change according to production in tons, usage of water on the pan, rent, maintenance on the pan and plants, and wages at the plants;

8.3.6 the forfeited profit will be invested annually (be it internally in the plaintiff's business, or externally in alternative investment instruments) with a 4% return of investment above the applicable consumer price index (as calculated by SA Statistics);

8.4 In the alternative, and as an alternative method of calculation of the plaintiff's damages, it is assumed that the plaintiff should have mined, processed and sold salt in the same quantities and at the same prices as contained in the royalty returns declared by the second defendant (appellant), submitted to the Department of Minerals for the relevant period, while the same assumptions are made as set out in para 11.2 in order to calculate the profit of the second defendant made on 30 October 2017, thus being R83 358 150.

[12] To these averments, the defendant's (appellant) plea as translated amounts to the following:

12.1 The defendant denies each and every averment made by the plaintiff. In elaboration of the aforesaid denial, the defendant specifically denies the following: -

12.1.1 that the plaintiff suffered any damages whatsoever, be it as pleaded or otherwise;

12.1.2 that the plaintiff was legally authorised to mine, be it from 1 January 2007 as averred in paragraph 11 of the Particulars of Claim, or 6 September 2008, as averred in the Particulars of Claim, insofar as the plaintiff was not the holder of:

12.1.2.1 an unconditional mining right in terms of section 23(1) read with section 5(4) of the Act;

12.1.2.2 an approved Environmental Management Plan in terms of section 39(4) read with section 5(4) of the Act; and

12.1.2.3 a water consumers licence which authorised the plaintiff to draw water from the water source as described in the National Water Act, No. 36 of 1998 read with section 5(3)(d) of the Mineral Resources Act;

12.1.3 that the plaintiff's mining right and environmental management plan was only approved on 7 June 2011;

12.1.4 that the plaintiff does not make the necessary averments as pertaining to the date upon which the approved water consumers licence was allocated to it in terms of the National Water Act;

12.2 That each and every assumption as set out in the plaintiff's particulars of claim forms part of the averments which the plaintiff must prove in order to justify the conclusion that it indeed suffered any damages whatsoever, which is denied;

12.3 The defendant further denies that the activities and trade results of Kalkpoort Soutwerke are in any way relevant in terms of the alleged damages suffered by the plaintiff and submits that the plaintiff makes

no averment that the so-called activities or trade results have any relevance with regard to the plaintiff's alleged damages;

12.4 The applicability and correctness of each and every assumption as set out in the particulars of claim are expressly denied.

12.5 In the premise, the defendant denies that it owes anything to the plaintiff.

[13] During the trial, the respondent presented the evidence of Mr Burger Du Toit, the respondent's Operational Mine Manager; Mr Harry Van Zyl, the respondent's General Manager and Mr Leerkamp, an actuary. The appellant presented the evidence of Mr Sabbagh, a forensic auditor.

[14] The appellant made the same contentions as it did in the court *a quo*, namely, that the respondent failed to prove that:

a. The respondent had the capacity and ability to mine salt at Vrysoutpan and that the respondent did not have the required operating capital, customer base, infrastructure, salt processing plant and facilities to mine and process salt and/or the necessary market to sell salt:

b. The respondent could and would have, but for the appellant's wrongful and unlawful conduct, mined salt at Vrysoutpan during the period 6 September 2008 to 25 June 2011; and

c. The respondent suffered damages as a result of it being unable to mine salt at Vrysoutpan for its own account during the period 6 September 2008 to 25 June 2011.

[15] In its judgment, the court *a quo* rejected the respondent's contention that it was implied in the Supreme Court of Appeal's judgment that it had found factual causation of the damages and as such, it was sufficient to establish that the respondent had established patrimonial loss. The court *a quo* held that the Supreme Court of Appeal did not determine the issue of factual causation, but merely assumed such damages for the purposes of determining the prescription issue. The court *a quo* held that in its view of the evidence in the matter, it was not necessary to decide whether the Supreme Court of Appeal in its judgment impliedly found that factual causation had been established. The court reasoned that the evidence of Du Toit, established that there were six to four-week cycles of production, depending on who was undertaking production of salt, that would fit within the term of the mining right of the respondent which is to endure for a period of 30 years. This, the court *a quo* held, was sufficient evidence to establish factual causation and patrimonial loss to the respondent's estate.

[16] It is clear from the appellant's plea that the respondent was challenged to prove that at the relevant time, it had the capacity to conduct mining operations at Vrysoutpan, but was prevented to do so because of the accepted wrongful and unlawful conduct of the appellant. The simple fact that the respondent lost cycles of production as a result of the appellant's conduct as found by the court *a quo*, does not, in my view, constitute patrimonial loss. The mere fact that cycles of production can be fitted within the relevant period is not sufficient to establish factual causation. More is required from the

respondent to show that it would have indeed mined salt at Vrysoutpan for the period claimed.

[17] The claim as pleaded is not for prospective loss but accrued loss of past damages. The order of the Supreme Court of Appeal creates liability to the respondent for payment of damages which the respondent may prove that it suffered as a result of it being unable to mine salt at Vrysoutpan, during the period 6 September 2008 until 24 June 2011. This means that the respondent must first establish that it suffered damages and secondly, how it computes the damages into monetary terms. In our law, it is incumbent on a plaintiff suing for damages to set them out in such a manner as will enable the defendant, reasonably to assess the quantum thereof. It does not matter whether the damages claimed are special or general.[10] The fact that the appellant through its fraudulent actions mined salt and that the respondent could not, does not on its own, prove that the respondent suffered damages.

[18] Mr Van Der Walt makes the point that according to the evidence of Van Zyl, for the period before August 2013, the respondent did not mine salt (nie gehandel nie). Furthermore, according to Van Zyl, from 25 June 2011 until August 2013, being the date when the salt agreement was concluded, mining was not done on behalf of the respondent.

[19] Mr Van der Walt contended further that the evidence, therefore, does not establish that the respondent itself had the capacity to mine salt even at the date of the salt agreement. The salt agreement gave the right to mine to

[10] Thompson V Barclays Bank 1965 (1) SA 365 (W).

Kalkpoort Soutwerke CC, and it had to take the responsibility for all production and transport costs.

[20] It is common cause that the respondent did not prepare any financial statements for its operations before August 2013. According to the court *a quo*, the fact that no financial statements were prepared for the period before August 2013, simply establishes that the respondent did not obey the law on financial records and financial reporting, as prescribed by the Companies Act and its regulations. It does not, the court *a quo* reasoned, establish that the respondent would not have mined the salt during the relevant period, nor does it establish that the respondent had not traded and did not mine prior to August 2013. The court *a quo* concluded that the probabilities show that the respondent utilised its mining right in a manner in which it was entitled to utilise such right long before it produced its first financial statements in August 2013. For this conclusion, the court *a quo* reasoned that it is a fact that the mining right was issued in the name of the respondent; it had to be utilised in terms of the MPRDA and on the probabilities had been utilised on behalf of the respondent; the DME110 returns were periodically filed on behalf of the respondent from at least June 2011.

[21] The conclusion reached by the court *a quo* on this aspect flies in the face of the direct evidence of Van Zyl, who is the respondent's general manager. He testified that the respondent first started trading in August 2013. One of the reasons he gave to support his version was that the financial statements could not be prepared before then. The management accounts that were subsequently produced were based upon the financial results of Kalkpoort

Soutwerke CC and were prepared solely for discovery purposes. These management accounts of Kalkpoort Soutwerke CC, were found to be hearsay and inadmissible by the court *a quo* since the correctness thereof was not proved. In addition, the respondent conceded that it had no financial statements, audited or unaudited, for 2013 and the period before then. It further conceded that there are no VAT returns and income tax returns for the period prior February 2014 for the respondent.

[22] The court *a quo* further held that the fact that the respondent failed to comply with the company laws in relation to the keeping of financial records is not the only inference that it did not trade prior August 2013. The court reasoned that it can be inferred that the respondent traded by utilising its mining right prior August 2013, although it did not comply with the company legislation. The following factors militate against this conclusion: The Companies Act[11] imposes a duty on a company to keep accurate and complete accounting records; to prepare annual financial statements within six months after the end of each financial year; the statements to be prepared are supposed to reflect fairly the state of affairs, business, assets, transactions and financial position of the business of the company and; to show the assets, liabilities and equity of the company.[12]

[23] The most plausible inference in the circumstances is that the respondent did not trade until at least September 2013 and on the evidence presented, the

[11]Act 71 of 2008.
[12]Sections 24-34, *ibid*.

respondent could not and would not have mined salt at Vrysoutpan *eo nominee* and for its own account during the period 6 September 2008 to 25 June 2011. What the respondent wants is that its failure to comply with the prescribed statutory obligations be used in its favour. That is something that should not be countenanced by the court through probabilities. It is also interesting to note that during this period, the respondent had the right to mine salt at Eenzaamheid, but did not do so even though there was no impediment preventing the respondent to mine. Mr Van Zyl confirmed that from 25 June 2011, salt mining at Vrysoutpan was undertaken by Kalkpoort Soutwerke CC, which took all the salt it mined to compensate for the debt owed to it for legal costs by the respondent. The DME110 returns submitted to the Department regarding the salt mined at Vrysoutpan also reflect that Kalkpoort Soutwerke CC, mined the salt and sold it to Kalkpoort Soutverpaking CC. The probabilities are that the respondent did not have the financial resources to conduct mining operations.

[24] Mr Duminy submitted that Van Zyl's evidence must be understood in context as it may not be entirely clear what he meant when he said the respondent only started trading during August 2013. Counsel suggested that Van Zyl may have understood the question to be relating to when the respondent commenced its activities and not necessarily when it commenced trading. In my view, Van Zyl understood the question quite well and his responses were consistent. He insisted that no financial statements were prepared because it was Kalkpoort Soutwerke CC that was mining and that the financial statements prepared were solely for discovery purposes.

[25] It is a fact as the appellant's expert witness, Sabbagh, has indicated in his report that in damages of the nature claimed by the respondent, most claimants have an existing operational infrastructure and the incremental revenues and costs can be assessed based on historic trading and performance. He correctly stated that damages in these instances should be calculated by first establishing the incremental revenues to be received from the lost sales and thereafter deduct therefrom, the incremental costs incurred in achieving such sales. The unfortunate hurdle that the respondent is having is that it never had the existing infrastructure or operations for one to quantify its damages. It is basically a business without any history.

[26] Mr Sabbagh, testified that from the financial statements discovered by the respondent, it is evident that the respondent was a small company with no experience or record in mining salt and that it lacked the infrastructure and experience in mining salt. He concluded that the respondent had no capacity to mine, process and market salt, meaning that the respondent has not established that it suffered damages. In dealing with this aspect, the court *a quo* held that the court cannot take a blinkered and narrow view of the respondent's corporate personality as well as its actions and of those related parties in its group of corporate entities. The court held that the respondent was part of a group and that it together with other entities acted as a group which shared and utilised the resources available to individual members of the group.

[27] The court *a quo* relied on the following factors in support of its conclusion that the respondent and other entities acted as a group: the financial statements discovered and made available to the court refer to Kalkpoort Soutwerke CC and certain of the transactions it entered into with the respondent as a related party transaction; Van Zyl is, at one and the same time, the manager of both the respondent and Kalkpoort Soutwerke CC; the respondent and Kalkpoort Soutwerke CC shared certain of their respective directors; between 25 June 2011 and August 2013 Kalkpoort Soutwerke CC paid the costs of mining on Vrysoutpan, including royalties, costs of production and transport costs; Kalkpoort Soutwerke CC took raw salt off Vrysoutpan and raw salt was processed, packaged and sold by one or both of the other entities.

[28] Mr Van Der Walt contended that the court *a quo* determined the material issue in dispute regarding whether the respondent suffered loss of profit, on a basis not pleaded or canvassed during the trial on quantum. Counsel argued that the respondent did not, in its pleadings, at the trial or in argument, rely upon the existence of a group of corporate entities to explain and /or establish its capacity and liability to mine salt at Vrysoutpan. He submitted that if the respondent intended to rely on the existence of a group of corporate entities, it should have pleaded as such or at least presented evidence to that effect, so that the appellant should have the opportunity to test such evidence. In *casu*, he submitted, the issue came for the first time in the judgment of the court *a quo* and the appellant, to its prejudice, never had the opportunity to ventilate the issues regarding a group of corporate entities, the relationship between

the relevant entities, the sharing and utilising of resources and the financial consequences of the sharing and utilising of resources at the trial.

[29] In response to the appellant's contention on this aspect, Mr Duminy, on behalf of the respondent submitted that it was not necessary to plead anything in respect of the respondent's capacity and resources or that it is part of a group of corporate entities, as those are matters of evidence *(facta probantia)* and not elements of the cause of action *(facta probanda).* Counsel submitted further that whether the respondent had the capacity to mine salt at Vrysoutpan is not decisive because, as the court *a quo* held, if the appellant's fraud decimated the respondent financially, causing it to be wound-up and unable to do any business at all, the respondent would still have had a valid claim for damages against the appellant, even though it never had the capacity to mine subsequently. He argued that in any event, the evidence established that the respondent had the necessary access to capacity and resources to mine salt at Vrysoutpan, as the court *a quo* found.

[30] The issue of the respondent's capacity and resources to have mined salt at the relevant time when it was prevented from doing so is central to the claim for loss of profit. What was to be determined was not merely the subjective value of the mining rights in question as submitted on behalf of the respondent. What had to be determined is profit which the respondent would have made had it not been prevented to mine during the relevant period.

[31] It is clear from the judgment of the court *a quo* that the capacity and resources of the respondent to have mined salt was determined on the basis that the capacity would have been provided by the group of companies related to the respondent. That however was not the basis on which the respondent pleaded and presented its case. The introduction of the related companies was not that they would have provided the capacity to the respondent. They were introduced to show their own operations and that would have been how the respondent would have operated had it not been prevented. There was no enquiry as to the financial consequences for the group or any of the companies if it provided the capacity and its resources to the respondent. Neither was an enquiry made as to the cost implications and operating costs involved to determine the profit that would have been made. The respondent was required to state the material facts upon which it relied in its pleadings.

[32] A “group of companies” means a holding and all its subsidiaries. A “holding company” in relation to a subsidiary, means a juristic person that controls that subsidiary as a result of the circumstances contemplated in section 2 (2) (a) or section 3 (1) (a) of the Companies Act.[13] There is therefore merit in Mr Van der Walt’s argument that if the respondent intended to rely on the group of related companies to provide capacity and resources, it should have pleaded as such. That would have enabled the appellant to prepare for such a case and requested the relevant information which would include information relating to the group. These issues were not canvassed during the trial and

[13]Section 1, *ibid*.

was to the prejudice of the appellant. I did not understand Mr Duminy to claim that it had always been the case of the respondent that it was relying on the related group of companies. His contention was that it was not necessary to plead as such and that the court *a quo* was correct in finding on that basis based on the inferences and probabilities from the evidence presented.

[33] The object of the pleadings is to define the issues for determination at a trial. The parties are bound by their pleadings as they stand. Any departure from the pleading has the potential of causing prejudice to the other party as it would not have prepared for the un-pleaded case. Rule 18(4) of the Uniform Rules provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading with sufficient particularity to enable the opposite party to reply thereto. Specific to damages claims, rule 18(10) enjoins a party suing for damages to set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof.[14]

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[14]Rule 18(10) provides: "A plaintiff suing for damages shall set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof: Provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for —

(a) medical costs and hospital and other similar expenses and how these costs and expenses are made up;

(b) pain and suffering, stating whether temporary or permanent and which injuries caused it;

(c) disability in respect of —

[34] The appellant contended that it was prejudiced by the finding of the court *a quo* because it did not have the opportunity to ventilate the issues regarding a group of corporate entities, the relationship between the relevant entities, the sharing and utilisation of resources and the financial consequences of the sharing and utilisation of resources at the trial. The relevant issues regarding the existence of a group of corporate entities could not be ventilated because the respondent did not discover or provide the relevant financial statements of Kalkpoort Soutwerke CC which could have reflected the financial consequences of the arrangement, if any, between the respondent and Kalkpoort Soutwerke CC as well as the arrangement between Kalkpoort Soutwerke CC and Kalkpoort Soutverpaking CC regarding the respondent's alleged mining of salt at Vrysoutpan. This is a misdirection requiring interference by this court.

[35] Mr Duminy's submission that if the appellant's fraud decimated the respondent financially causing it to be wound up and unable to do any

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(i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);

(ii) the enjoyment of amenities of life (giving particulars); and stating whether the disability concerned is temporary or permanent; and

(d) disfigurement, with a full description thereof and stating whether it is temporary or permanent.

(11) A plaintiff suing for damages resulting from the death of another shall state the date of birth of the deceased as well as that of any person claiming damages as a result of the death".

business at all, the respondent would still have had a valid claim for damages against the appellant, even though it never had the capacity to mine subsequently is correct. However, the executor of the estate of the respondent would still have to prove that the respondent lost the profit it would have made during the period 6 September 2008 to 25 June 2011. It is trite law that a plaintiff must allege and prove the quantum of damages suffered because of the defendant's wrongful act.

[36] For the above reasons, I conclude that the respondent had failed to prove, on the evidence presented, that it had suffered damages as a result of being prevented from mining salt at Vrysoutpan by the appellant. Because of this finding, it shall not be necessary to deal with the calculation aspect of the damages. The appeal should therefore succeed and the order of the court *a quo* should be set aside. There is no reason why costs should not follow the result.

[37] In the result, the following order is made.

a) The appeal succeeds.

b) The order of the trial court is set aside and replaced with the following:

"1. Absolution from the instance is granted with costs in favour of the Defendant".

c) The respondent is to pay the costs in this court.

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L P TLALETSI

JUDGE PRESIDENT

I concur

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MC MAMOSEBO

JUDGE

I concur

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APS NXUMALO

JUDGE

On behalf of the Applicant:	**ADV D J VAN DER WALT SC**
	ADV H J BENADE
Instructed by:	Duncan and Rothman Inc.
On behalf of the Respondent:	**ADV W. DUMINY SC**
	ADV J TREDOUX
Instructed by:	Haarhoffs Inc.