Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. A 536/2014

Before: The Hon. Mr Justice Fourie
The Hon. Mr Justice Binns-Ward
The Hon. Mrs Justice Savage

Date of appeal hearing: 29 July 2015
Date of judgment: 4 August 2015

In the matter between:

LANCEWOOD HOLDINGS (PTY) LTD Appellant

And

BARRY REGINALD ROBERTSON First Respondent
AND TEN OTHERS Second to Eleventh Respondents

JUDGMENT

BINNS-WARD J:

[1] The appellant, Lancewood Holdings (Pty) Ltd, carries on business in the dairy industry. It makes various types of cheese. For that purpose it needs to buy milk in bulk. The respondents, who are dairy farmers in the Southern Cape, instituted action against the appellant in the Eastern Circuit Division at George for payment of the outstanding balances allegedly due for milk that they had supplied during the period July to December 2009 in terms of the contracts that they then had with the appellant.

[2] By agreement, a separation of issues for the purposes of trial was directed in terms of rule 33(4). The ruling was loosely worded and spoke only of a division of

the questions of 'liability' and 'quantum'. In the result it did not make it altogether explicit what precisely comprised the issues falling to be tried in a first stage hearing under the rubric of 'liability'. This was unfortunate because there were a number of pleaded issues that bore on 'liability', including the question of whether the alleged contractual term centrally in issue - the existence of which was in dispute - was, if established, legally enforceable. These considerations militated in favour of a more detailed framing of the ruling in terms of rule 33(4).[1] As matters transpired, however, the hearing proceeded, albeit somewhat untidily, on the basis that the sole question for determination in the first stage of the trial was whether the appellant had bound itself to pay to its milk suppliers a premium of at least three cents per litre above the price paid by the 'market leader', a company called Parmalat. The trial court held in favour of the respondents on this question. With the leave of the court a quo, the appellant has come on appeal to the full court against that decision. The court a quo directed that the costs of the application for leave to appeal were to be costs in the appeal.

[3] The sums claimed comprised the alleged differential between the amounts paid by the appellant to the respondents during the relevant six month period and the prices that the respondents calculated should have been paid had the aforementioned premium been applied. The particulars of claim (which were not a model of clarity) appeared to allege that the relevant term had been included in the pricing provisions of the contracts that had been concluded individually between the respective respondents and Lancewood Cheese (Pty) Ltd prior to an undisclosed date in 2008, when each of them allegedly consented to a temporary suspension of the agreed price regime until 1 January 2009. The pleaded claims were therefore, according to their tenor, for the performance of agreements concluded prior to October 2008.[2]

[4] The evidence, however, established that as at January 2009 the suppliers were uncertain as to the applicable pricing and payment scheduling arrangements going forward. A representative committee comprised of five of their number consequently held talks with the new management of the appellant in order to obtain clarity on these issues. The new management had been appointed as part of the restructuring of

[1] Compare *First National Bank - A Division of Firstrand Bank Limited v Clear Creek Trading 12 (Pty) Ltd and Another* [2015] ZASCA 6 (9 March 2015) at paras 8-14 and the other authority referred to there, notably *Absa Bank Ltd v Bernert* 2011 (3) SA 74 (SCA).

[2] The appellant was sued on the basis that during 2009 it had been substituted as the contracting party in the place of Lancewood Cheese (Pty) Ltd. The appellant did not dispute that it had been properly joined as the defendant. To assist the narrative I shall refer to both the Lancewood companies indistinguishably as 'the appellant'.

the appellant that had occurred in response to a financial crisis into which the company had been plunged in October 2008. Indeed, the aforementioned departure from the previously subsisting pricing arrangement had been part of the measures instituted in order to save the appellant from compulsory liquidation in mid-October 2008. It was common ground that the terms of the originally concluded milk supply agreements between the respondents and the appellant were not in effect during the height of the appellant's financial emergency in the period October to December 2008. This happened in terms of interim agreements made at that time. The character of the interim agreements - more particularly, whether they were of finitely limited duration and only a temporary suspension of the previously subsisting contracts, or a holding position pending new arrangements - was, however, very much in contention.

[5] The committee representing the suppliers – which included Messrs Robertson and Reitz,[3] who testified at the trial in support of the respondents' claim - sought confirmation by the appellant that it would reinstate the system of monthly payments to the suppliers by the 10th of each month that had been in place prior to the financial emergency and also resume paying the three cents per litre premium on the Parmalat price for the milk supplied to it. The appellant had wanted to have the 20th of each month as the monthly payment date because that would ease the constraints on its cash flow. It was common cause at the trial that its representatives at the meeting, Messrs Anderson and Zietsman, had conceded the suppliers' demand for the reinstatement of the 10th as the payment date. The concession was confirmed in a letter subsequently sent by the appellant to producers, dated 14 January 2009. Notably, however, the letter contained nothing about any agreement on the pricing issue.

[6] Mr Anderson denied a proposition put by the respondents' counsel in cross-examination that the aforementioned letter of 14 January had preceded the meeting. The denial was supported by the inherent probabilities. Had the letter preceded the talks, there would have been no cause for a discussion about confirming the 10th as the monthly payment date and the respondents' witnesses' evidence that the appellant had made a concession on this point at the meeting would make no sense. The endeavour under cross-examination by Mr Reitz to resist this conclusion was

[3] Mr Robertson was the first plaintiff and Mr Reitz was the natural person behind the corporate personalities which were the sixth and eleventh plaintiffs, respectively.

singularly unconvincing. Furthermore, his evidence in chief that the talks must have occurred after the 20th because that was the date on which the appellant had settled all outstanding arrears is flatly contradicted by the statement in the letter of the 14th - confirmed in the oral evidence of the appellant's witnesses - that '*u sal merk dat u maandtjeks* [reeds] *inbetaal is*'. There was no suggestion that the letter had been falsely dated.

[7] It was in fact common cause that the appellant's representatives at the meeting had declined to agree to a reinstatement of the premium component in the calculation of the milk price it would pay. The evidence of Robertson and Reitz, which was consistent in this respect with that of Anderson and Zietsman, was that the matter had been debated for several hours. The respondents' witnesses were unable to give much by way of detail as to the content of the lengthy discussion. It was apparent from the evidence of Anderson and Zietsman, however, that a lot of time had been taken up with explanations of how the appellant's pricing structure needed to be altered in order to address the flaws in it that had materially contributed to the cash flow problem that had brought the company to the brink of liquidation. This entailed devising a pricing structure that would reward suppliers who provided milk with the peculiar qualities needed for the cheese products manufactured by the appellant. Suppliers who provided milk that complied more closely in character with the qualities needed to make the cheeses manufactured by the appellant would be paid comparably higher prices than suppliers whose milk fell short on such qualities. It was explained that the range of products manufactured by the appellant differed from that produced by Parmalat, and the price paid by the appellant for raw product (milk) had to sensibly relate to the prices the appellant was able to realise on *its* manufactured cheese products if its business were to be viable. The opinion of Anderson and Zietsman that the payment of a premium fixed with reference to the prices paid by Parmalat would involve the appellant in contravening the Competition Act was also conveyed to the committee at the meeting.

[8] The respondents' case, as it emerged in the evidence, was that after the meeting had ended without agreement on the issue of the premium the members of the committee had foregathered on the pathway below Mr Anderson's first storey office to discuss the impasse. According to Messrs Robertson and Reitz, Anderson had leaned out of his office window and told them not to worry, they could have their

wish on the payment of the premium. Anderson admitted that he had spoken to the committee members from his window, but denied that he had conceded the premium. He asserted that all he had done was to reiterate that the suppliers would be paid 'a competitive price' - a point he had made repeatedly during the course of the meeting. Anderson said it was known to the suppliers at this stage that the appellant was finalising a new pricing structure and that it intended to inform its suppliers of the content thereof shortly. Indeed, the aforementioned letter of 14 January 2009 invited the suppliers to an 'information meeting' (*Afr.* 'inligtingsvergadering') concerning the prospects for the year ahead to be held on 23 January 2009. Somewhat improbably in the circumstances, Robertson was unable to recall whether or not he had attended the meeting, but it was not in contention that it had in fact taken place. Reitz seemed to suggest that pricing was not discussed at the 23 January meeting, but that is inconsistent with the content of subsequent correspondence from the appellant to its suppliers to be described presently.

[9] It was common ground that historically pricing was the issue uppermost amongst the suppliers' concerns at any such meetings. Yet there was no indication in the evidence that confirmation was sought by anyone at the 23 January meeting of an undertaking by Anderson that the appellant would resume paying a premium on the Parmalat price. The trial court did not deal with this aspect of the facts in its assessment of the probabilities.

[10] The trial court held, unexceptionably, that the conflict between the evidence of Anderson and that of Robertson and Reitz fell to be approached on the basis expounded in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA), at para 5.[4] The learned judge a quo considered

[4] '*On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and*

that Robertson and Reitz had made a more favourable impression as witnesses than Anderson, and that the probabilities also supported the evidence of the former rather than the latter. He also made an adverse finding against the appellant based on the abandonment at the trial of certain points it had placed in issue on the pleadings. The judge held that Anderson's statement in the terms alleged by the respondents' witnesses gave rise to a contractual obligation on the part of the appellant to pay the premium on the Parmalat price and that, even if there had not been actual contractual consensus on the point, the appellant was nevertheless bound on the application of the doctrine of quasi-mutual assent; cf *Smith v Hughes* (1871) LR 6 QB 597 at 607 (per Blackburn J).[5]

[11] The court a quo did not explain why the doctrine of quasi-mutual assent fell to be applied if - as it found - Anderson had expressly undertaken that the appellant would pay the respondents a premium on the Parmalat price. If Anderson had given the alleged undertaking as explicitly as alleged, what possible grounds could there have been for error or misapprehension on his part as to its effect? He certainly did not claim any; and nor did the appellant. The reference to the doctrine in the court's judgment was therefore contextually quite incongruous.

[12] In holding for the respondents, the trial judge expressly found that a new contract was concluded pursuant to the window ledge exchange with Anderson. Thus, notwithstanding his statement to the contrary, the judge in point of fact did not uphold the claims pleaded by the respondents, which, as mentioned, had been founded on the contracts concluded on various occasions prior to October 2008. Instead, he allowed the claims on 'the merits' on the basis of a '*new contract*' that he found had been concluded in January 2009.

[13] It is evident upon a close consideration of the trial court's judgment that the finding in favour of the respondents was predicated essentially upon the learned

---

evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.' (Per Nienaber JA.)

[5] Cited in para 26 of the trial court's judgment. The learned judge in the same passage also - evidently due to a transcription error in the preparation of the judgment - appeared to attribute to Blackburn J the remarks of Harms AJA in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 239I – 240B.

judge's assessment of the probabilities. The assessment was based on the inferences the judge drew from the evidence.

[14] In matters like this, in which the result at trial was determined by the outcome of an evaluative exercise of the nature described in *Martell et Cie* supra loc cit, an appellate court '*must steer its way between the Scylla of interfering too readily with the judgment on facts of a judicial officer who has had the opportunity of seeing and hearing the witnesses, an opportunity which it itself unfortunately has not had, and the Charybdis of not interfering when, making due allowance for those advantages, it is satisfied that the evidence taken as a whole cannot support his conclusions*' (per Davis AJA in *R v Dhlumayo and Another* 1948 (2) SA 677 (A), at 699-700). The effect was described in a more recent judgment as follows: '*Although Courts of appeal are slow to disturb findings of credibility they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression* made *by a witness'* (sic) *demeanour but predominantly upon inferences from other facts and upon probabilities. In such a case a Court of appeal with the benefit of an overall conspectus of the full record may often be in a better position to draw inferences, particularly in regard to secondary facts*'.[6] Moreover, as noted by Nienaber JA in *Martell et Cie*, at para 6, if the trial court's estimation of the probabilities is shown to be suspect, that may call into question its conclusions on the witnesses' credibility.

[15] In the current matter, apart from on the crucial question of the content of Mr Anderson's utterance from the first floor window, there was no real dispute on the facts. The determination of the incidence of the probabilities was thus dependent on the contextual interpretation of common cause or essentially indisputable facts. Having regard to the onus - which burdened the respondents - the witnesses' demeanour and the impression they made in the witness box and the judge's adverse view of the pleaded denials abandoned by the appellant at the trial (none of which bore centrally on the crucial question in issue) do not weigh decisively in the balance if, on an overall conspectus of the facts, the probabilities do not support the allegation

[6] *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another* 2002 (4) SA 408 (SCA), at para 24. In the current case we are not concerned with determining 'secondary facts'. The question before us is whether the existence of an alleged primary fact had been proved on the probabilities. In the context of the parties' mutually contradictory versions on that issue, the exercise entailed in making the required determination is, however, essentially indistinguishable from that involved in making findings as to the existence of secondary facts because it involves a contextual assessment of the incidence of the probabilities with regard to facts that are common cause, or objectively indisputable.

that Anderson expressly undertook that the appellant would pay the respondents a defined premium on the Parmalat price. The success of the appeal therefore depends on whether we are persuaded that the learned judge was wrong in his interpretation of the effect of the facts.

[16] Necessarily implicit in the trial judge's finding that a '*new contract*' had been entered into in January 2009 was a determination that the pre-October 2008 agreements on which the respondents had relied in their particulars of claim had been terminated. In my judgment, for the reasons to be given presently, that conclusion was well-founded.

[17] The respondents were confronted with a hard choice by the financial crisis into which the appellant company was plunged in October 2008, when its banker froze its banking accounts and seized its movable assets preparatory to the institution of liquidation proceedings. The respondents could either buy into the 'turn-around strategy' devised for the appellant's business by compromising their thitherto contractual rights, or they could wave goodbye to any realistic prospect of recovering payment in terms of their accrued contractual rights for the milk they had supplied in September and early October. Unsurprisingly, they took the former course, even though it involved their having to accept reduced prices for the milk they would continue to supply and putting up with a painful dislocation of their own cash flows and credit arrangements. It was plain on the undisputed evidence that the respondents actually had no room for manoeuvre in deciding to support the rescue package, notwithstanding its adverse financial effect on them. None of the other bulk purchasers of milk, such as Parmalat, Clover or Nestlé, was willing to take up their milk because there was an over-supply of the product in the market at the time. The uncontroverted evidence was that the over-supply situation continued to obtain in January 2009.

[18] The respondents' witnesses testified that the contracts they entered into for the purpose of the rescue exercise were of only temporary effect and did not supplant the previously subsisting contractual arrangements. The documentary evidence lends some support to the notion that the arrangements made after mid-October 2008 were designed to be provisional. Having regard to the contextual exigencies, which demanded a restructuring of the appellant's business model, that was only to be expected. Nothing in the documented record, however, supports the contention that

the interim arrangements had provided for a resumption of the previously subsisting terms of contract after the end of December 2008. Indeed, the announcement, in a letter from the appellant to its producers, dated 15 December 2008, of a further price cut effective from 1 January 2009 carries the opposite implication.

[19] The fact that uncertainty prevailed about matters such as the payment of the premium and the monthly payment dates, and that discussions about them were considered necessary also goes against the notion pleaded in the particulars of claim and propounded by the respondents' witnesses in their evidence that the pre-October 2008 agreements were still in place, and that the suspension of the operation of the terms of payment thereunder had lapsed at the end of December 2008. On the contrary, it supports the evidence by the appellant's witnesses that the suppliers had been made aware in various meetings held during the acute phase of the financial crisis that the rescue of the appellant company from liquidation would, of necessity, herald changes to the way it would do business in the future.

[20] It was also significant in my view that neither of the respondents' witnesses suggested that the committee had adopted an approach during the talks that the respondents were in a position to enforce the previously subsisting agreements. They merely stated that a refusal by the appellant to concede their demands on the two points in issue would have meant that the suppliers might decide to deliver their milk elsewhere - to Parmalat, for example. They emphasised that it was critical for the respondents and their fellow suppliers to obtain clarity at that stage as to their position with the appellant as it would be difficult to transfer their business to alternative bulk purchasers of milk later in the year.

[21] Any understanding that there would be a resumption of the previous regime would in any event be inherently improbable. The appellant had been brought to the brink of financial ruin in material part by virtue of the effects of the previously subsisting commercial arrangements it had with its suppliers. It is objectively unlikely in those circumstances that anyone concerned could realistically have believed that business could continue under the same terms as before. How could that fix what had gone wrong? On the contrary, the inherent probabilities support the evidence of the appellant's witnesses that the period November 2008 to January 2009 was characterised by an on-going process of engagement between the appellant's new management and the suppliers concerning the construction of a new business model

that would restore a viable cash flow to the appellant company. Mr Zietsman's detailed explanation of the unviable nature of the appellant's pricing structure as he found it when he joined the company in September 2008 was not attacked by the respondents' counsel in cross-examination. It is unlikely that Mr Anderson, who represented the outside investor that came to the appellant's rescue and was charged with getting the business back onto an even keel, would not have been keenly aware of the unviable nature of the appellant's pricing structure prior to October 2008 and its causative role in the financial crisis that befell the company. In those circumstances any finding that the previously subsisting contracts had remained in place after October 2008 would fly in the face of the overwhelming probabilities.

[22] The learned judge a quo therefore correctly considered that the question he had to decide was whether the new contracts entered into in January 2009 included a term that guaranteed the respondents a premium of not less than three cents above the Parmalat price. What falls to be scrutinised for the purpose of deciding the appeal are the judge's reasons for holding that the existence of such a term had been established by the respondents on the basis of what they alleged Mr Anderson to have undertaken when he spoke to the members of the committee from his office window.

[23] It was uncontentious that after the meeting the committee had with Anderson and Zietsman in early January 2009 the producers continued supplying milk to the appellant. The learned judge a quo remarked that it was common cause that during the first six months of the year the price paid by the appellant '*was more or less in line with the benchmark of* [Parmalat][7] *plus 3c per litre*'. He returned to this point later, saying *'…on the evidence of the plaintiffs, which was not seriously challenged on this aspect, they were in fact paid on the agreed basis, namely calculated on a premium of 3c/litre above Parmalat's price, during the first six months of 2009*'. He noted '*It was suggested on behalf of* [the appellant] *that this was fortuitous and not by design. In my view, however, the more probable inference from these facts is that this occurred pursuant to the agreement that had been concluded between the parties during January 2009. The subsequent conduct of the parties strengthens the plaintiffs' version of the terms of this agreement*'.

[24] The judge criticised Mr Anderson as having been evasive and argumentative in the witness box and unwilling to make concessions where these were called for.

[7] The judge actually said 'Lancewood', but that was clearly a slip of the pen.

He found that Anderson had been unable to give any coherent explanation as to why it had been necessary to speak to the committee members from his office window merely to reiterate a point he had already made in the meeting. He appeared to regard it as improbable that Anderson would have said anything if he had nothing to add to what he had told the committee previously. He also found that Anderson's professed concern that implementing a pricing structure directly related to the prices paid by Parmalat courted infringing the Competition Act was '*so highly improbable as not to be accepted as a valid reason for refusing to agree to the 3c premium*'. (Curiously, no criticism was addressed in respect of Mr Zietsman's evidence to precisely the same effect.)

[25] The learned judge noted that the committee represented the suppliers of 90% of the milk purchased by the appellant and that a loss of a substantial portion of these suppliers would have been '*devastating*' for the company. He reasoned that '*in* [those] *circumstances it is logical that Mr Anderson would have been keen to retain the producers, to the extent that he would have been prepared to walk the proverbial extra mile with them*'. He also attached significance to the fact that '*prior to the financial crisis of October 2008, there was an agreement in place between the producers and* [the appellant], *the terms of which were well known to the parties concerned. There was no evidence that this agreement had ever been cancelled or that it had ever been replaced by an agreement on different terms*'.

[26] Those, in summary, were the reasons given by the court a quo for holding that the respondents' version was the more probable one and deciding that they had discharged the onus of proving the incidence of 'the 3c premium' in their contracts with the appellant. In my respectful view, they do not withstand critical scrutiny.

[27] When it considered the subsequent conduct of the parties, the trial court gave no attention to the general meeting on 23 January 2009 between the appellant and the whole body of its suppliers that had followed on the meeting with the committee. In my view this was a material oversight. If matters had transpired as the respondents' case would have it, I consider that the suppliers would have regarded the omission of any mention of Anderson's alleged belated concession on the premium question in his letter of the 14th with acute concern and would have sought confirmation of it at the meeting. Furthermore, no consideration was given in the judge's reasons to the fact that after that general meeting the appellant had sent letters to each supplier,

individually, indicating the price per litre the supplier in question might expect to realise for its milk for the month of January. The letters explained the indicated prices '*with reference to the new Lancewood pricing structure, as announced at the meeting 23 January 2009* (sic)'. In the result, the judge also gave no consideration to the absence of any evidence of any mention of the premium at the meeting. If Anderson had given the undertaking alleged by Robertson and Reitz, it is most improbable that Zietsman would not have heard about it; if not from Anderson himself, then certainly from the suppliers at the 23 January meeting. The trial court did not reject Zietsman's evidence that he had not been informed of the undertaking allegedly given by Anderson. Indeed, Zietsman was found to have been a satisfactory witness.

[28] It was obvious from the description of the new pricing structure, with its peculiar weighting of specific ingredients in the milk supplied by each individual supplier, that different prices per litre would be paid to each supplier, dependent on the peculiar character of the milk supplied by it. That was borne out by the 37c per litre differential in prices between the highest and lowest individual prices illustrated by the examples put in evidence of the letters sent by the appellant to its suppliers in late January 2009. The judge did not give any attention to how the three cents minimum premium could practically have operated in the context of the discrete pricing structures of the appellant and Parmalat. There was no evidence as to Parmalat's pricing structure. The appellant's new pricing structure was informed by the exigencies of the type of milk *it* needed for *its* product range and the open market prices *it* was able to realise for those products. Parmalat produced a wider range of products, some of which required milk of a different character to that needed by the appellant. The essence of the evidence of Anderson and Zietsman was that, quite apart from their Competition Act concerns, it would make no commercial sense to link the price that appellant could pay to its suppliers to that paid by a company whose milk requirements and retail product mix were materially different. Their evidence was cogently reasoned and uncontradicted, but the judge had no regard to its effect. It weighed heavily against the probability of Anderson having agreed to reinstate the previously subsisting premium payment arrangement. For the alleged premium arrangement to work, the appellant's new pricing structure introduced in January 2009 would have to replicate that of Parmalat. The weight of the evidence suggests that it probably did not.

[29] Moreover, it was in point of fact not common cause that the prices paid by the appellant in the first six months of the year gave effect to a premium on Parmalat's prices. The uncontroverted evidence of the appellant's witnesses was that they did not know what Parmalat's prices were. If the respondents had sought to establish that the appellant's conduct during the period January to June 2009 supported their allegation that the premium component had been incorporated in their supply agreements, it was for them to show what the Parmalat prices actually were and how they could be related for premium calculation purposes to those paid by the appellant. They did not adduce any such evidence. The mere say so of Robertson and Reitz that the prices paid to them exceeded what they would have obtained per litre for their milk from Parmalat did not detract from the evidence of Anderson and Zietsman that, if correct, that would have been entirely fortuitous. Having regard to the materially different market environments in which the two companies would have determined their respective price structures, the evidence of the appellant's witnesses in this respect was not only uncontroverted, but also inherently plausible, whereas that of Robertson and Reitz, by contrast, was entirely unsubstantiated. If the respondents had sought to make the point the trial judge took in their favour, they should have adduced evidence to illustrate precisely how the appellant's prices followed those of Parmalat and of how all, not just some, of the appellant's relevant suppliers were paid a premium on Parmalat's prices. There was no such evidence.

[30] In reasoning that it was probable that Anderson would have been prepared to go the '*proverbial extra mile*' and concede the suppliers' demand for the reinstatement of the premium arrangement, the learned judge a quo took no account of the evidence that it was the previously subsisting pricing structure that had resulted in the appellant company's milk acquisition costs exceeding the income that it was able to realise on its cheeses and caused the negative cash flow that had precipitated the financial crisis into which it had been plunged. With respect, he appears to have overlooked the effect of the evidence that there would have been no commercial point in the appellant retaining its suppliers on the same terms of business that had led it into bankruptcy. Retaining its suppliers was indeed critical - as candidly acknowledged by Anderson - but it would not serve any purpose if they were to be retained on a basis that would not allow the appellant to operate profitably. The evidence that the appellant could not achieve a positive cash flow if the previous

pricing structure was reinstated was unequivocal. The judgment of the court a quo did not give any weight to that fundamental fact. It also took no account of the evidence that the over-supply of milk in the market that had prevailed in October 2008, when none of the other bulk buyers of milk could take up the business of the appellant's suppliers, still persisted in January 2009. That would undoubtedly have inhibited the ability of suppliers to transfer their business freely to other dairy product manufacturers. Anderson would have known that he was dealing with suppliers whose business he would be able to retain if he paid market-related prices. He would also have known that the suppliers could not easily transfer their business elsewhere at that stage even if they wanted to. Why in all those circumstances should he have felt constrained to offer a premium?

[31] The finding that Anderson was unable to give a coherent explanation as to why he spoke to the members of the committee from his window if he had nothing to add to what he had already said during the meeting was unjustified in my respectful view. When the judge asked him '*Hoekom was dit nodig om dit te herhaal?*', Anderson responded '*Ek dink nie dit was nodig nie, ek dink dit was net op die ingewing van die oomblik het ek gedink ek bevestig dit net weer, u Edele.*' Anderson could obviously overhear the discussion below his window. It does not strike me as at all farfetched that he should have thought it appropriate in the circumstances to reiterate a reassurance to the committee members that the loss of the premium arrangement would not mean that the suppliers would not be paid a competitive price for their milk. That he was in earnest was borne out by the fact that the appellant cancelled the previously announced price reduction for January and in fact paid increased prices. The appellant also managed to increase the volume of milk it purchased during 2009 by 55 per cent over 2008 levels. It is inherently improbable that it could have achieved that if it had not been paying competitive prices to its suppliers. It also has to be borne in mind that at the date of the meeting with the committee the state of play was that the new pricing model had not been settled. To the knowledge of the committee members it was still being worked on.

[32] In the context of the judge's finding that the appellant's liability to the respondents arose from a 'new contract' concluded in January 2009, one cannot logically attach any significance to the absence of any evidence that the pre-October 2008 agreements had been cancelled. With respect, the judge's reliance on the point

manifested an internal inconsistency in his reasoning. There was in any event an abundance of evidence that supported the conclusion that the previously subsisting contracts had been abandoned or superseded. The process commenced with the unilateral reduction in the price paid by the appellant to its suppliers by 14c a litre in September 2008 and was confirmed in the ad hoc arrangements put in place from October 2008, which were continued into January 2009 pursuant to the letters sent by the appellant to its suppliers on 15 December 2008 and 7 January 2009. The letters sent to suppliers after the 23 January 2009 meeting testified to the introduction of a new price structure that was expressly stated to be 'dynamic' and subject to active review and management when needed. All of this was inconsistent with the continuance of the pre-October 2008 contractual regime.

[33] The trial judge was clearly unimpressed by Anderson's professed concern about any fixing of the appellant's prices with reference to that of a competitor giving rise to an infringement of the Competition Act. Indeed, during Anderson's evidence the judge exclaimed that Anderson's concern was beyond his understanding. The learned judge appeared to conceive that an infringement might occur only in the context of a price fixing agreement or collusion (*Afr*. 'sameswering') between Parmalat and the appellant. The ambit of the prohibition in terms of s 4(1) of the Competition Act 89 of 1998 actually goes wider than that. But that is beside the point. The trial court was in no position on the limited evidence before it to determine (and thus, nor can we) whether or not the premium payments had in fact manifested a prohibited practice in terms of the competition legislation. What the evidence did establish, however, was that Anderson had obtained legal advice which led him to believe that the practice was prohibited. It also established that in December 2008 the appellant had submitted to an administrative penalty for contravening the Competition Act. The admitted contravention involved an exchange of pricing information with, amongst others, Parmalat. Robertson and Reitz confirmed that Anderson had expressed concerns about the Competition Act at the time. It follows that it is probable that Anderson was indeed of the opinion, rightly or wrongly, that the premium payment arrangement was unlawful. It is a factor that the court a quo did not weigh appropriately in the balance when assessing the probabilities. It is a factor that should have counted against accepting the respondents' version.

[34] The court a quo did not give any specific instances to support its criticism of the general character of Anderson's evidence. I have been unable to identify anything that would support the finding that he was evasive or argumentative, or that he refused to make concessions that should have been made. It may be that something about Anderson's demeanour in the witness box gave the trial judge a poor impression of him. Certainly, a reading of parts of his evidence in chief suggests that he may well have come across as nervous, hyper-active and voluble. That could, understandably, have been off-putting. The probative quality of Anderson's evidence falls to be assessed, however, in the context of the judge's misdirections on the incidence of the probabilities. It was more important to the determination of the case for the judge to have had regard to what the witness said, rather than how he said it. The situation brings to mind the observation of Nienaber JA at para 6 of *Martell et Cie* mentioned earlier,[8] and also these remarks by Nugent JA in a later case: '*It has been said by this Court before, but it bears repeating, that an assessment of evidence on the basis of demeanour - the application of what has been referred to disparagingly as the "Pinocchio theory"* [9] *- without regard for the wider probabilities, constitutes a misdirection. Without a careful evaluation of the evidence that was given (as opposed to the manner in which it was delivered) against the underlying probabilities, which was absent in this case, little weight can be attached to the credibility findings of the Court a quo. Indeed, on many issues, the broad credibility findings, undifferentiated as they were in relation to the various issues, were clearly incorrect when viewed against the probabilities*' (footnotes partly omitted).[10]

[35] For all of these reasons I am constrained to hold that the trial court's determination that the respondents had established the contractual term on which their claims depended went against the probabilities in the case. The order that should have been made was one of absolution from the instance, with the respondents to pay the costs. The appeal will therefore be upheld. The appellants used only one counsel at trial. The matter does not warrant allowing the costs of two counsel on appeal.

---

[8] See para [12] above.

[9] Explained by Nugent JA in fn. 2 as follows: *'…according to which dishonesty on the part of a witness manifests itself in a fashion that does not appear on the record but is readily discernible by anyone physically present . . .*' see A M Gleeson QC 'Judging the Judges' 53 *Australian LJ* 338 at 344 quoted in Tom Bingham *The Business of Judging: Selected Essays and Speeches* (2000) Oxford University Press at 10,

[10] *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 (5) SA 339 (SCA), [2005] 4 All SA 16, at para 14

[36] Regrettably, it is necessary to criticise the preparation of the record. It contained a significant amount of unnecessary material, namely a transcription of the argument addressed to the trial court at the conclusion of the trial (40 pages) and the written submissions by both sides in respect of the application for leave to appeal (28 pages). It is ordinarily inappropriate to burden an appeal record with matter of that sort. It unnecessarily increases the costs of the litigation. Moreover, matter that should have been included in the record was omitted, namely the minute of the pre-trial conference, without which it was not possible in all respects to follow the transcript of the opening address by the respondents' counsel. In the circumstances it is fitting that the appellant should be entitled to recover on taxation only 80 per cent of the costs it would otherwise have been entitled to in respect of the preparation and perusal of the record.

[37] The following order is made:

1. The appeal is upheld.
2. The order of the court a quo is set aside and replaced with the following order:

   'The defendant is absolved from the instance with costs, such costs to be paid by the plaintiffs jointly and severally.'
3. The respondents shall be liable jointly and severally for the appellant's costs in the appeal, save that the appellant shall be entitled to recover on taxation only 80% of the costs incurred in respect of the preparation and perusal of the record.

A.G. BINNS-WARD
Judge of the High Court

We concur:

P.B. FOURIE
Judge of the High Court

K.M SAVAGE
Judge of the High Court