

SOUTH AFRICA / JUDGMENT

Alpha Pest Control CC v Minister of Public Works (2830/10) [2013]

ZANWHC 82 (21 November 2013)

[2013] ZANWHC 82

COURT

North West High Court, Mafikeng

BEFORE

O.K. Chwaro

CASE / FILE NUMBER

2830/10

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IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 2830/10

In the matter between:-

ALPHA PEST CONTROL CC.....Plaintiff

and

THE MINISTER OF PUBLIC WORKS.....Defendant

DATE OF HEARING : 24 OCTOBER 2013

DATE OF JUDGMENT: 21 NOVEMBER 2013

JUDGMENT

CHWARO AJ:

Introduction:-

- [1] This is an action for payment of an amount of R2 238 390-00 allegedly representing outstanding debt for fumigation and pest control services rendered by the plaintiff at Losperfontein Prison on behalf of the defendant.
- [2] The defendant has denied its liability towards the plaintiff in the amount claimed or for any other amount, hence the latter issued summons on or about the 26 November 2010 to seek relief from this court.

The pleadings

- [3] The plaintiff, a close corporation rendering fumigation and pest control services, sued the defendant, the Minister of Public Works, in his nominal capacity as the executing authority of the national Department of Public Works, seeking payment of an amount of R2 238 390-00 with interest thereon from date of demand to date of payment and costs of suit. The alleged express, alternatively tacit, further alternatively implied terms of that agreement are reproduced hereunder:

“5.1 The plaintiff would attend to the fumigation of the prison facilities against all insects;

5.2 The plaintiff would attend to the fumigation of the houses on the prison facilities against termites;

5.3 The plaintiff would inspect the surface of the ground and treat all termite nests found;

5.4 The plaintiff would perform all these services at a rate of R3, 50 (Three Rand Fifty Cents) per square meter;

5.5 Payment would be effected to the plaintiff within 5 (five) days of delivery of the plaintiff's invoices to the defendant”

- [4] Plaintiff avers further that its previous invoices for services rendered were duly honoured and paid by the defendant except the payment is in respect of an invoice marked as annexure “F” to the particulars of claim which was initially in the amount of R2 242 643-34 but later amended to R2 238 390-00 representing work done on a surface area covering 56,1 hectares in extent.

- [5] The defendant filed a plea dated 18 February 2011 in terms of which it denied any indebtedness to the plaintiff as claimed. The genesis of the defendant's defence is contained in paragraph 4 of the plea, which is reproduced in full hereunder:

“4. Ad paragraphs 4 and 5, including the subparagraphs

4.1. On or about 17 October 2009, Alpha Pest Control (plaintiff) was nominated on an emergency basis by the Department of Public Works (defendant) to render fumigation services at Losperfontein prison.

4.2. The area to be covered and/or treated by the plaintiff was approximately 22, 867m².

4.3. Subsequently, the plaintiff submitted its invoices in respect of the work done.

4.4. The defendant pleads that the payments made to the plaintiff were on the strength of the work done and the verbal agreement between the parties.

4.5. It was a term of the agreement that the plaintiff would perform the fumigation services at a rate not to exceed R3.50 per square meter and that the size of the area to be fumigated was approximately 22,867m².

4.6. The defendant pleads that he has fulfilled all his contractual obligations in that he has paid the plaintiff in full for all the amounts that were due and payable in respect of the verbal agreement and the work done.

4.7. Save as aforesaid, the contents of these paragraphs are denied”.

[6] In essence, the defendant’s defence hinges on the fact that the surface area which was to be fumigated by the plaintiff and as allegedly agreed upon, was a surface area of approximately 22,867m² and the plaintiff was duly paid in full for such services in accordance with the agreement entered into between the parties.

The issue

[7] On a proper analysis of the pleadings, it becomes apparent that the issue for determination is whether the agreement between the parties provided for the treatment and fumigation of termite nests at Losperfontein Prison on the surface area covering 56,1 hectares as alleged by plaintiff or 22, 867m² as alleged by the defendant.

The evidence

[8] In an effort to discharge the onus placed on it, the plaintiff led evidence of two witnesses. The first witness, Mr Adriaan Gerhardus Badenhorst (“Badenhorst”) testified that he is the sole member of the plaintiff. He testified that during or about October 2009 he met with Lernfort Mntanywa (“Mntanywa”), an official from the defendant’s department and Stephan Samuel de Beer (“de Beer”), an officer from the department of Correctional Services based at Losperfontein Prison. At that meeting, the plaintiff was appointed by the defendant’s official, Mntanywa, to treat and fumigate the termite nests at Losperfontein Prison at the rate of R3, 50 per m².

[9] He was shown around the area to be fumigated by the said officials and indicated to them that there were tunnels underground and that fumigation need to be done on an extended scope but was never given the actual size of the total area to be fumigated. He further testified that there were termite nests around the residential area within the Losperfontein Prison and others beyond the said area. It took him about three to four weeks to complete the fumigation of termite nests at all areas where he could find the said nests.

[10] He testified further that the plaintiff had to pay some service providers at some stage during the fumigation engagement and to that effect, plaintiff submitted an invoice in the amount of R513 720-00 to the defendant for what he described as part payment in that the said amount was for an area of 128 000 m² and not the entire area. This amount was duly paid by the defendant. He submitted an invoice for the remaining portion of the area that the plaintiff fumigated, which is attached to the particulars of claim as annexure “F” but same was never paid to date.

- [11] He testified that prior to submitting the said invoice, he used a wheel measurement to determine the exact extent of the area which the plaintiff fumigated but later engaged the services of a land surveyor, one Jacques Theron (“Theron”) whose measurement revealed that the extent of the surface area covered was 56,1 hectares. It was on the basis of the calculations received from Theron that the plaintiff’s invoice was subsequently amended and submitted for payment. The revised invoice remains unpaid by the defendant despite lawful demand having been made to the defendant.
- [12] Under cross examination he stated that payment in the amount of R91 239-33 which the plaintiff received was in respect of the fumigation of pests and/or insects at the prison itself and not for termite nests. He further stated that plaintiff fumigated the entire area where termite nests were visible, including the areas around the residential houses in accordance with the agreement entered into between the parties.
- [13] The plaintiff’s second witness, Jacques Theron testified that he was a professional land surveyor with 33 years experience. That during June 2011 he was engaged by Badenhorst, on behalf of the plaintiff, to measure the area allegedly fumigated by the plaintiff at Losperfontein Prison. He used GPS coordinates to measure the area that was indicated to him by Badenhorst’s son and his calculations of the entire surface area covered by the plaintiff was 56,1 hectares which is equal to 561 000m². He further estimated the entire area constituting Losperfontein Prison farm as being between 150 to 200 hectares in extent. His evidence concluded the case for the plaintiff.
- [14] The defendant then called its first witness, Lernfort Linduxolo Mntanywa who testified that he was employed by the defendant’s
- department for the last ten years and based at its Mmabatho Regional Office. He further testified that he received a query from
- Losperfontein Prison about termites which were destroying woodwork at the premises. He then discussed the matter with management thereafter an approval was granted by the department’s supply chain management unit that the plaintiff be appointed to do the job on an emergency basis as it was a locally based supplier.
- [15] He then met with the plaintiff’s representative, Badenhorst and de Beer at Losperfontein Prison whereat a verbal agreement was entered into between him, acting in his representative capacity on behalf of the defendant and Badenhorst, who was then acting on behalf of the plaintiff, to the effect that the plaintiff was to charge per square metre at a rate not exceeding R3, 50 per m² and that the plaintiff was to fumigate the demarcated area only, which was an area around the residential houses.
- [16] Mntanywa further testified that no measurements were taken by either of the parties to the agreement relating to the area to be fumigated. To that effect, he testified that the defendant’s department expected de Beer to provide it with the exact square metres of the surface area to be fumigated for termite nests by the plaintiff.

- [17] He indicated that the plaintiff was paid for services rendered in the amount of R513 720-00 for 22 867m² after submitting an invoice which was accompanied by a duly signed job card signed and verified by de Beer and which is attached as annexure “C” to the plaintiff’s particulars of claim. He testified further that annexure “B” to the plaintiff’s particulars of claim was paid after de Beer had provided the department of Public Works with the measurement of the area. He further testified that the invoice for treatment and fumigation of termites was in the amount of R513 720-00 whereas the other invoice, annexure “B”, was for fumigation of insects in the prison.
- [18] Mntanywa testified that an invoice indicated as Exhibit “A” was not paid by the defendant because firstly, it is not a legitimate claim as it was not accompanied by a job card, secondly that it was never submitted with others that were paid by the defendant and thirdly that the job reflected thereon was never done by the plaintiff. He indicated further that he was informed later that plaintiff appointed someone to do the measurements at the prison but insisted that the plaintiff was paid for work done.
- [19] Under cross examination, Mntanywa indicated that the discussions that ensued when the verbal agreement was entered into was to the effect that the work to be done by the plaintiff should not have exceeded an amount of R500 000-00 but upon being probed further, indicated that they never discussed the actual amount but only agreed that the rate should not exceed R3, 50 per m². He further testified that they agreed on the area to be fumigated, which according to him, were the areas where the nests were visible and around the residential area.
- [20] He testified further that according to his own measurements, the surface area to be fumigated for termite nests was 690 x 393 metres which amounts to 271,170m². He agreed that the plaintiff was paid an amount of R513 720-00. He further stated that he could not dispute the measurements taken by Theron as he, the witness, was not personally present when the measurement were taken and that the measurements were not for the entire surface area of Losperfontein prison farm.
- [21] The defendant’s second witness, Mr Stephan Samuel de Beer, testified that he was an employee of the Department of Correctional

Services based at Losperfontein Prison as a Section Head. He estimated the extent of the entire Losperfotein Prison farm to be

approximately 666 hectares. He testified that at the relevant date, he wrote a letter to the defendant’s department asking an urgent intervention in the treatment and fumigation of termite nests at Losperfontein Prison.

- [22] Following the said letter, he attended a briefing meeting with Badenhorst and Mntanywa where it was agreed that the plaintiff would fumigate what was at first only fifteen termite nests between the residential areas. However, when they went around inspecting the area, Badenhorst informed them that the nests are interlinked underground and therefore more

needed to be done. This was said in the presence of Mntanywa who did not object thereto. He indicated further that some nests were outside the parameter fence with others being outside the 200 metre radius.

- [23] De Beer indicated that it was not his responsibility to measure the surface area to be fumigated and that the termite nests fumigated by the plaintiff were many hence it took the plaintiff some two to three weeks to finalise the work.
- [24] Under cross examination, he confirmed that he was not responsible for the measurements of the area to be fumigated but did sign the job card thereby certifying that the work reflected thereon was done. He further testified that he was convinced that the work done was as agreed upon between the parties.

Brief exposition of the applicable law

- [25] In the matter of *Middleton v Carr* 1949 (2) SA 374 (A) at page 386 Schreiner JA reminded us as follows:

“Generally speaking the issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage or of avoiding a special order as to costs, on the court's readiness at the argument stage or on appeal to treat unpleaded issues as having been fully investigated.”

- [26] It is in line with the above dictum that the provisions of Rule 22(2) of the Uniform Rules of Court provide thus:

“(2) The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies.” (my emphasis)

- [27] The above provisions of the rule simply require of a defendant who denies a particular allegation in the particulars of claim, to provide the basis, through the elucidation of facts, upon which such an allegation is denied so as to afford the plaintiff an opportunity to know and appreciate the case it is expected to meet. In the matter of *FPS Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A) the Appellate Division, (as it then was) stated the following at page 542B-D:

*“A defendant must therefore give a fair and clear answer to every point of substance raised by a plaintiff in his declaration or particulars of claim, by frankly admitting or explicitly denying every material matter alleged against him..... The dictum of Solomon JA in *Neugebauer & Co Ltd v Bodiker & Co (SA)* 1925 AD 316 at 321 that '(t)he duty of the defendant then is to set forth his defence with sufficient precision to enable the plaintiff to ascertain what the defence is' “*

[28] On the other hand, as a rule of practice which has been recognised through various court decisions, a defendant cannot rely on a defence which is not pleaded or which is not incorporated into the plea as an amendment. A defendant is therefore barred from directing the plaintiff to one issue in the pleadings and then resort to another at trial. The defendant must stand or fall by its plea during trial.

See: *Kali v Incorporated General Insurance Ltd* 1976 (2) SA 179 (D) at page 182A; and *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA (D) at page 279B-D.

Evaluation and application of the law to the facts

[29] From an analysis of the evidence led, it is common cause that the parties entered into a verbal agreement for the fumigation of termite nests at Losperfontein for a rate of R3, 50 per square metre. The plaintiff was paid two amounts of R513 720-00 and R91 239-33 in respect of the work done. It is not disputed that the latter amount was for fumigation of pests and/or insects at the prison whereas the former was for the fumigation of termite nests.

[30] As indicated above, the only issue which remains in dispute is the question as to whether the surface area covered by the plaintiff in treating and fumigating termite nests at Losperfontein Prison was 56,1 hectares or 22, 867m².

[31] The two witnesses for the plaintiff gave their respective testimonies directly and satisfactorily without any attempt at concealing

facts

or fabricating their respective testimony. Badenhorst testified that he explained to Mntanywa and de Beer that the termite nests usually create a network underground and for that reason, the treatment must not only be limited to the area around the residential places. To this they agreed. He did not fumigate the entire area, as it was put to him during cross examination, but only a portion of the Losperfontein Prison farm. This version of Badenhorst is corroborated by de Beer.

[32] This very fact was further confirmed by Theron who testified that he was shown the surface area which was fumigated by the plaintiff and calculated it to be around 56, 1 hectares in extent. Under cross examination, he indicated that the entire farm area is more than 500 hectares in extent.

[33] I have no reason to doubt their evidence which was delivered clearly and spontaneously without any difficulties. In my view they were both credible and reliable witnesses.

[34] The evidence of the defendant's two witnesses also becomes relevant. Whereas Mntanywa testified that upon entering into an agreement with the plaintiff, the parties never took actual measurements of the surface area to be fumigated, he nonetheless

stated that the defendant's department was expecting de Beer to provide him with the actual measurements of the area to be fumigated. However, in his testimony, de Beer vehemently denied any responsibility in respect of providing the plaintiff or the

defendant's department with any measurements of the surface area to be fumigated. Instead, he confirmed the evidence of Badenhorst to the effect that upon inspection of the area, Badenhorst advised that a larger area than previously anticipated must be treated due to the underground tunnels created by the termite.

[35] He stated that this was not his responsibility and he only assisted the plaintiff to identify the area by providing him with a copy of an aerial map of the Losperfontein Prison. I need to mention that despite the court order of the 5 August 2013, which was granted by agreement between the parties hereto, the defendant did not deliver a Rule 36 notice and a copy of the said map for utilisation during trial.

[36] He further testified that he believed that the plaintiff fumigated the surface area as it alleges since he was not in a position to dispute the veracity of the measurements taken.

[37] The contradictory and mutually destructive evidence of the defendants' witnesses relating to the crucial issue for

determination

does not do any favour to the defendant's defence as pleaded. Suffice to state that none of the defendant's witnesses could objectively dispute the calculations done by Theron. An attempt by Mntanywa to claim that he at one stage did his own measurements through a measuring wheel without the involvement of the any of the plaintiff's representatives stands to be dismissed out rightly as highly improbable and an afterthought which was never pleaded but introduced during trial.

[38] As I have already outlined above, the law is trite that a defendant is at least expected to state the facts upon which it denies the allegations made by the plaintiff in its particulars of claim. A defendant cannot plead one case in its plea and another during trial. In its plea, the defendant based its defence on the fact that the plaintiff was paid in full for services rendered whereas at trial, the defence became completely different.

[39] This is further borne out by the fact that Mntanywa could not even provide a credible explanation as to why the plaintiff was paid more money than the square metres that he alleged to have calculated himself. He even conceded that the defendant does not have any intention of claiming such alleged "overpayment" made to the plaintiff. In my view, there is no other explanation than to conclude that the defendant's representative acted in a short shrift manner in providing the exact measurements of the area to be fumigated by the plaintiff at Losperfontein. There were no specifications in the form of measurements for work to be done and no supervision from the defendant's department to ensure that the work is done in accordance with the agreement.

[40] The defendant has specifically pleaded that it has paid the plaintiff in full for services rendered on an area covering approximately

22,867m² in extent. However, it has been established through evidence that the payment effected for an area of 22, 867m² was for the treatment of insects and/or pests at the same prison which was an amount of R91 239-33. This effectively defeats the defendant's defence as contained in its plea.

[41] I am alive to the fact that the court may, on its own, entertain a matter that was never raised in the pleadings to avoid an apparent miscarriage of justice or enforcement of an illegal contract. So much was stated in the matter of Courtney-Clarke v Bassingthwaight 1991 (1) SA 684 (Nm) at page 690B-D where the court stated the following:

"These requirements in respect of pleadings are the very essence of the adversarial system. While a Judge is certainly not just an umpireand should make enquiries, his prime function is to hear evidence in terms of the pleadings, to hear argument and to give his decision accordingly. He should not descend into the arena and raise issues which the parties themselves have not pleaded. By so doing he may inadvertently choose sides and threaten the independence and objectivity expected from the Bench. The aforesaid notwithstanding, if ex facie a contract or from the evidence which has been placed before the Court, it appears that the contract relied on is as a fact

illegal, the Court cannot enforce such contract. In such circumstances, the Court will act mero motu even if the illegality is not pleaded and will refuse relief at the trial or on appeal"

(References omitted)

See also: Hallick and Another v Plumtree Motors CC 1997 (3) SA 703 (C) at page 710A

[42] It is equally the case that in certain instances, considerations of public policy may dictate that the court should not enforce an agreement duly entered into between the parties, especially where the contract offends against the rights of the vulnerable.

See: Uniting Reformed Church, De Doorns v President of the Republic of South Africa and Others 2013 (5) SA 205 (WCC); and Barkhuizen v Napier [2007] ZACC 5; 2007 (5) SA 323 (CC)

[43] On analysis of the issues at hand and the manner in which the defendant's representative managed the verbal agreement entered into with the plaintiff, I am of a firm view that it is only fair and just that the defendant must be held to his plea in dealing with the claim instituted by the plaintiff, especially where there is no allegation of impropriety in the form of fraud and/or any misrepresentation by the plaintiff.

Conclusion

[44] Consequently, I am of the view that the plaintiff has discharged its onus to establish that the total surface area fumigated by it was 56, 1 hectares or 560 100 square metres in extent and accordingly is entitled to payment on the basis of an agreed upon rate of R3, 50 per m².

[45] However, since the parties are in agreement that the plaintiff has received part payment in the amount of R513 720-00 in respect of the fumigation of termite nests, the said amount stands to be deducted from the total amount of the claim instituted by the plaintiff.

Costs

[46] In accordance with the general principle that a successful party must be awarded the costs, the plaintiff is accordingly awarded costs. In as far as the reserved costs of the trial set down for the 5-7 August 2013 are concerned, it is my view that each party must pay its own costs as the matter was not trial ready due to documentation still to be exchanged by both parties at that stage.

Order

[47] In the result, the following order is made:

1. The defendant is ordered to pay the plaintiff an amount of R1 724 670-00 (one million seven hundred and twenty four thousand six hundred and seventy rand) with interest thereon calculated at the rate of 15, 5% from the 30 August 2010 to date of payment;
2. Defendant is ordered to pay the costs of the action, with each party paying its own costs in respect of the costs occasioned by the postponement of the matter set down for the 5-7 August 2013.

O.K.CHWARO

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

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Prepared on 11 October 2026 · Esheria