

SOUTH AFRICA / JUDGMENT

Daddy Tee Builders CC v Smith (CA 128/2020) [2021] ZAECHGC 37 (13 April 2021)

[2021] ZAECHGC 37

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Rugunanan, Nglangulela

CASE / FILE NUMBER

CA 128/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE

DIVISION,

GRAHAMSTOWN

CASE

NO. CA 128/2020

Date

heard:

19 March 2021

Date

delivered: 13 April 2021

In

the matter between:

DADDY

TEE

BUILDERS

CC

Applicant

and

MARIA

SOPHIA

SMITH

Respondent

JUDGMENT

RUGUNANAN, J

- [1] The appellant appeals against a judgment of the King William's Town Regional Court Magistrate, in which his claim for payment of monies based on the performance of an orally concluded building contract for work done on the respondent's property was dismissed with costs. The work entailed the construction of an outbuilding comprising of a double garage integrating a servant's quarter (hereinafter "the extension"). In dismissing the appellant's claim, the magistrate found the appellant liable on the respondent's counterclaim for defective workmanship even though, to an extent, the evidence was presented as an amalgam between remedial work and completion work which to a degree traversed aspects pertaining to quantum.
- [2] Although adequately defining the ambit of the appeal on the main claim, the notice of appeal in a limited sense asserts that the magistrate misdirected himself in not finding that the appellant was entitled to an order dismissing the counterclaim.
- [3] A party's argument on appeal is bound by the grounds set out in the notice of appeal.[1] Its purpose is to define the ambit of the appeal for the benefit of the appellate court and the respondent. The court needs to know what issues arising from the judgment of the court a quo it is called upon to determine and the respondent needs to be informed of what it has to address in argument.[2] This purpose is not served if the findings of fact or rulings of law appealed against are not specified.[3]
- [4] In argument, Ms Watt, who appeared for the appellant, correctly conceded that the notice of appeal lacked detailing concise grounds of appeal against the counterclaim. To be noted is that the appellant's heads of argument did not address issues pertaining to the counterclaim to give substance to the notice of appeal.[4] The counterclaim therefore is not in issue on appeal.
- [5] At the commencement of argument the appellant sought condonation for the late noting of the appeal. The application was not opposed by the respondent. On good cause being shown, we granted condonation.

THE PLEADINGS AND THE ISSUES

- [6] Eliminating surplusage, the case pleaded by the respondent is summarised thus:
- (i) On 18 June 2014, the parties entered into a part written and part oral contract. The appellant undertook to construct certain works (the extension) measuring 72 square meters in accordance with a plan provided by the defendant (Annexure "B" to the particulars of claim) for the amount of R350 000 excluding value added tax (VAT). The amount was to be paid by the respondent according to a series of sequentially structured payments.

(ii) Following receipt by the appellant of a deposit of R70 000 paid by the respondent, he commenced plotting demarcations of the plan on the respondent's property. She then informed him that she required a larger structure because the extent of the extension was too small.

(iii) The appellant presented the respondent with a revised plan (Annexure "C" to the particulars of claim). It reflected an extension of a 112,3 square meters at a cost of R450 000 plus an additional R50 000 for the construction of a ramp, exclusive of VAT.

(iv) On 26 June 2014, and following submission of the aforesaid plan for a larger extension, the parties concluded an oral contract. This substituted their previous written contract.

(v) The respondent made periodic payments to the appellant for the total amount of R350 000 and has short paid the appellant under the oral contract.

[7] In essence, the respondent pleaded as follows:

(i) The appellant provided her with an initial quotation of R454 858 on 9 May 2014. She could not afford this amount.

(ii) A new plan with a smaller extension at a cost of R350 000 (inclusive of R50 000 for a driveway and VAT) was prepared. She accepted it on 18 June 2014 in terms of the written contract concluded between her and the appellant.

(iii) She denied that she concluded an oral contract with the appellant on 26 June 2014 in terms of which the size of the extension and its cost was increased .

[8] On the pleadings it is common cause that the parties concluded a written contract on 18 June 2014. In the trial court the parties agreed to separate the issues of liability and quantum (this included the counterclaim). Although the transcript reflects a muddling of the minutiae relevant to these issues with apparent

uncertainty in the minds of the parties legal representatives as to what evidence was required, the issue on appeal, barring the evidence on quantum of their respective claims, is whether an oral contract was entered into. Fundamental to the standing of that contract is the question of the precise plan that was to be utilised for measuring the size of the extension and the agreed price for its erection.

THE EVIDENCE

[9] Terrence Fritz is the sole member of the appellant and testified on its behalf. He is hereinafter for convenience be referred to as the appellant. In summa ry, his evidence was that he initially quoted the respondent an amount of R454 858, excluding VAT, for an extension approximating 100 square meters. This measurement was telephonically conveyed to him by the respondent. When she did so, she did not provide him with a plan. Since the amount quoted was unaffordable for the respondent, she subsequently provided him with a plan for a freestanding extension based on a smaller measurement of 72 square meters and for which he then quoted her R300 000 for the extension plus R50 000 for a

driveway. The total quote amounted to R350 000, excluding VAT. He confirmed that the plan provided by the respondent for the smaller extension is attached to the particulars of claim as Annexure "B". On 18 June 2014 the parties concluded a written contract for the construction of a freestanding extension (and driveway) in the amount of R350 000 based on the size specification of 72 square meters.

- [10] When he subsequently went onto the respondent's property and plotted the structure based on the plan submitted by her, she informed him that the extension was too small, that she required it to be slightly bigger, and that she wanted the extension attached to her main residence. Parenthetically, Mr Bester who appeared for the respondent correctly conceded that she could not escape these facts were this court to weigh them in its overall assessment of the probabilities. Following the respondent's approach, the appellant then obtained from Glenda Parish, an architect, a revised plan for a larger extension approximating 112,3 square meters (Annexure "C" to the particulars of claim). In respect of this plan, the additional cost of the extension was R150 000 more than what was previously quoted on the plan for the smaller extension.
- [11] In terms of the revised plan, the size of the extension was increased by approximately 50% more than quoted for on Annexure "B" and amounted to R450 000. This costing was based on size per square metre. Although the amount of R450 000 for a larger extension was orally agreed upon on 26 June 2014, the agreement was not reduced to writing. This was because the respondent instructed him to proceed with the project on the premise that a contract will be drawn up in due course.
- [12] As the work progressed the respondent made periodic payments in accordance with the payment schedule in the parties' written agreement of 18 June 2014. The appellant raised no complaint about receiving these payments - but once the respondent ceased making payments beyond R350 000, his financial situation became precarious, having exhausted his overdraft facilities. On being approached for further payment and for formalising the agreement of 26 June 2014 in writing, the respondent refused to do so and maintained that the contract price was fixed at R350 000 because R450 000 was unaffordable.
- [13] In her evidence, the respondent denied that she sent the plan in Annexure "B" to the appellant. She stated that she had never seen it previously nor did she ask anyone to draft it. On her version, the plan which she presented to the appellant and which formed the basis of the initial quotation for R454 858 was drawn by one Jeff Mickle, an engineer by profession. This plan, although discovered, was not specifically identified or mentioned in her pleadings.
- [14] With regard to the revised sketch plan in Annexure "C", the respondent's evidence was that she had no knowledge of the size (in square meters) of the extension depicted in that plan, nor did she have knowledge of how the quote for R450 000 based on that plan was

calculated . Moreover, she had no idea why the appellant relied on an amount in excess of what was agreed to in the written contract of 18 June 2014. She denied ever having entered into an oral contract with the appellant for the amount of R450 000 for a larger extension. On her version once her payments achieved the total of R350 000 she was no longer obliged to pay the appellant anything more.

LEGAL PRINCIPLES

[15] It is apparent that the appeal in this matter is directed against the factual findings made by the trial magistrate. Courts of appeal, as a general rule, are reluctant to interfere with the factual findings made by trial courts unless they are convinced that those findings are clearly wrong. The principle is explained in *Santam Bpk v Biddulph*[5] as follows:

"Whilst a Court of appeal is generally reluctant to disturb findings which depended on credibility it is trite that it will do so where such findings were plainly wrong . . . This is especially so where the reasons given for the finding are seriously flawed. Overemphasis of the advantages which a trial Court enjoys is to be avoided, lest an appellant's right of appeal "becomes illusory"... It is equally true that findings of credibility cannot be judged in isolation, but require to be considered in the light of proven facts and the probabilities of the matter under consideration."

[16] The following dictum in *National Employers ' General Insurance Co Ltd v Jagers*[6] lays down the proper approach for determining the facts in a civil trial:

"It seems to me, with respect, that in any civil case, as in any criminal case the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the Plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with the consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

THE JUDGMENT A QUO

[17] The trial magistrate was confronted by two conflicting versions and had to decide which of them was probably true. In his judgment he was of the view that there could well have been an oral contract between the parties but in his assessment of the probabilities emanating from their

respective versions he found in favour of the respondent and was moved by her demeanour as a witness who impressed him.

[18] Respectfully, the judgment indicates that the magistrate did not adequately summarise the evidence and there appears to be insufficient

analysis

in terms of weighing up and testing their allegations against the general probabilities.

ASSESSMENT

- [19] A starting point begins with the plan in Annexure "B" which the respondent denies having any knowledge . Her cross-examination by the appellant's legal representative incontrovertibly exposed the existence of the plan since 2013 -well before both she and the appellant started dealing with each other. Indubitably, the appellant could not have procured the plan on his own. Its existence in the period before the parties commenced dealing with each other, renders her denial improbable. Its prior existence also postulates that the respondent knew that the plan was for a free standing extension and, more importantly, that it measured 72 square meters; a size specification which she obviously comprehended since she telephonically requested the appellant to provide a quote for a larger extension of 100 square meters. By testifying that she knows nothing of "metres and square metres and all of that", the probabilities suggest that she sought to portray a scenario in which the appellant unscrupulously increased the size of the extension without consultation and disclosure - a scenario which is rendered improbable in the extreme.
- [20] Moreover, according to the appellant, once the ground area of the plan in Annexure "B" was plotted, the respondent realised that the extension was too small and wanted a larger extension. Evidence by the appellant indicated that the freestanding extension measuring 72 square meters would be located behind the main residence and would render the garage inaccessible. This was communicated to the respondent and undoubtedly influenced her decision for a larger extension attached to the main residence. This aspect of the evidence was not disputed when the appellant was cross-examined. When the respondent was confronted by this evidence in cross-examination, she stated that "Mr Fritz never told me that it is bigger". Clearly, this response is evasive and it effectively leaves the appellant's evidence on these aspects being left undisputed.
- [21] This brings us to consider the plan by the architect Glenda Parish. A telling aspect of the respondent's evidence (overlooked by the magistrate), is her statement that "we had agreed on Miss Glenda's plan." On the probabilities, this evidence does not render the appellant's version of an oral contract improbable. The size specification of the plan drawn by Ms Parish exceeded the initial quote for an extension that measured 72 square meters. If the respondent could not have afforded a bigger extension costing more than R350 000, it beggars belief that she presently has an extension measuring 107,65 square meters, a measurement confirmed by the witness Adrian Knickelbein, a contractor who testified as an

expert on her behalf.

- [22] Considered in the overall scheme of the probabilities, Mr Knicklebein's evidence of the size of the extension lends credence to the appellant's assertion that there was an oral contract for a larger extension. The respondent's ostensible ignorance of the size of the extension which she attributes to not knowing anything about "metres and square metres and all of that" impacts negatively on her credibility. What emerges from the respondent's denial of the oral contract is that she put off formalising the oral contract in writing and hid behind the initial price of R350 000 in an attempt to avoid payment of the increased price of R450 000 for the larger extension which she now has. The magistrate appears to have given no consideration to this evidence which emerged during cross-examination of the respondent.
- [23] A cumulative assessment of the considerations aforementioned is that they demonstrate the inherent improbabilities in the version of the respondent. She could not justifiably be said to have been a good and credible witness. In these circumstances the trial magistrate erred in his assessment of the evidence and in concluding that the probabilities favoured her. He ought to have found that the probabilities favoured the version of the appellant.
- [24] In the result, the appellant has discharged the onus of establishing his case on a balance of probabilities and the appeal must succeed.
- [25] The following order is made:
- (a) Condonation is granted for the late filing of the appellant's notice of appeal.
 - (b) The costs in the application for condonation shall be borne by the appellant.
 - (c) The appeal is upheld with costs.
 - (d) The order of the court below in respect of the main claim is set aside with costs.
 - (e) It is declared that:
 - (i) the parties' contract for the erection of a building structure on the defendant's property based on the plan attached to the particulars of claim as Annexure "C" was orally concluded on 26 June 2014;
 - (ii) the agreed contract sum to be paid by the respondent to the appellant was:
 - (aa) R450 000 exclusive of value added tax (VAT) for the structure contemplated in Annexure "C"; and
 - (bb) R50 000 exclusive of VAT for the construction of a ramp to the garage incorporated in the aforementioned structure .
 - (f) The respondent's payment of the amount of R350 000 shall operate as payment on the oral contract.

- (g) The matter is referred to the trial court for determining the quantum of the appellant's claim which arose from the oral agreement concluded on 26 June 2014.
- (h) The trial court shall simultaneously with the order in paragraph (g) above determine the quantum of the respondent's counterclaim.

S. RUGUNANAN

JUDGE OF THE HIGH COURT

I agree.

Z. NGLANGULELA

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This judgment was handed down electronically by circulation to the abovementioned legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 14h15 on 13 April 2021.

- [1] Sentrale Kunsmis Korporasie (Edms) Bpk v N.K.P Kunsmisverspreiders (Edms (Bpk) 1970 (3) SA 367 (A) at 395F-H
- [2] Hing and Others v Road Accident Fund 2014 (3) SA 350 (WCC) at 354E; Songongo v Minister of Law and Order 1996 (4) SA 384 (E); and Xayimpi v Chairman Judge White Commission (formerly known as the Browde Commission) and Others [2006] 2 All SA 442 (E)
- [3] As required by Magistrates' Court Rule 51(7)
- [4] Leeuw v FNB 2010 (3) SA 410 SCA at 413F
- [5] 2004
- (5) SA 586 (SCA) paragraph [5]
- [6] 1984
- (4) SA 437 (E) at 440D-G. See too Mabona & another v Minister of Law and Order & others 1988 (2) SA 654 (SE) at 662C-F; Stellenbosch Farmers ' Winery Group Ltd & another v Martell et Cie & others 2003 (1) SA 11 (SCA) para 5; Dreyer & another NNO v AXZS Industries (Pty) Ltd 2006 (5) SA 548 (SCA) para 30.

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