

SOUTH AFRICA / JUDGMENT

Lattimore Construction CC v Nile Property Enterprises CC (6639/2002) [2008] ZAKZHC 97 (17 December 2008) [2008] ZAKZHC 97

COURT

High Courts - Kwazulu Natal

BEFORE

Swain

CASE / FILE NUMBER

6639/2002

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IN THE HIGH COURT OF SOUTH AFRICA

DURBAN & COAST LOCAL DIVISION CASE NO. 6639/2002

In the matter between:

Lattimore Construction C C PLAINTIFF

and

NILE PROPERTY ENTERPRISES CC DEFENDANT

JUDGMENT Delivered on 17 December 2008

SWAIN J

[1] The protagonists in the present building dispute are Mr. Robert Kemp (Kemp) the sole member of Lattimore Constuction cc (the plaintiff)

and Mr. Arthur Wilmans (Wilmans) likewise the sole member of Nile Properties cc (the defendant). At the commencement of the present

proceedings the defendant was a limited liability company, but by the time of trial, had been converted to a close corporation, under the name Nile Property Enterprises cc. Mr. Combrinck, who appeared for the plaintiff, applied for the substitution of the defendant by the close corporation in terms of Rule 15 (2), which was granted without opposition.

- [2] During the course of the trial I prevailed upon Counsel to define the issues that were in dispute, because it appeared to me that insufficient attention had been devoted to limiting and defining the numerous issues that arose on the pleadings. As a result I was handed a document by Counsel for the parties headed “Issues to be dealt with by Trial Court”. This document defined the issues which arose both in respect of the plaintiff’s claim and the defendant’s counter-claim. An amended list was attached to the plaintiff’s heads of argument as Annexure D. As will become apparent in this Judgment, certain of these issues fell away during the course of the trial and in respect of certain others, no real dispute relevant to the relief claimed by either of the parties arose.
- [3] In regard to the disputed issues, there exists a direct conflict of fact between the evidence of Kemp and Wilmans, who were respectively the only witnesses to testify on behalf of the plaintiff and the defendant.
- [4] The correct approach in deciding whether the onus has been discharged by the party on whom such an onus lies, where there are two mutually destructive stories, is contained in the dictum of the Full Bench of the Eastern Cape Division in the case of

National Employers General Insurance v Jagers

1984 (4) 437 (E) at 440 D – G

“In a civil case, the onus is obviously not as heavy as it is 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 a 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.”

- [5] At the heart of the dispute between the parties lies the issue of whether the parties agreed upon a fixed contract price of R180,000.00 for the plaintiff to construct the “site” works which included the guard houses, gates and front wall at the development known as Audley Gardens (of which the defendant was the developer), or whether the quote by the plaintiff, which was accepted by the defendant, did not include the provision of the gates, and was as follows:

Guard Houses R55,386.76

Front Wall R185,412.20

Total R240,798.96

- [6] There can be no room for a misunderstanding between the parties in this regard, because the defendant's version was that the contract price was orally agreed upon by Kemp and Wilmans and sealed with a handshake. The plaintiff's version is that no such agreement was reached in this manner. It is therefore clear that either Kemp, or Wilmans, is being dishonest on this issue.
- [7] Wilmans, in support of his contention, relies upon Exhibit B4 which it is common cause was produced by Kemp. Under the heading "Site Establishment" appears an item described as "front wall, gates and guardhouses" with the amount of R180,000.00 alongside it. Kemp's version is that this was purely a budget figure produced by him to assist

Wilmans in determining the overall cost of the development, to enable Wilmans to price the ten individual units comprising the development.

- [8] It was common cause that another document (Exhibit B1 and B2) was produced by Kemp headed "Highgate Budget Unit 2" which contained the identical item "front wall, gates and guardhouses" with the amount of R150,000.00 alongside it.
- [9] The case for the defendant in this regard, which was put to Kemp by Mr. van Heerden, S.C., who appeared for the defendant, was as follows:

"Okay, then we now know that B1 was a document that was already compiled. It was budget negotiations, as you rightly say, at the time of B1 it was a budget -- Correct"

Record Page 173 Lines 19 – 25

- [10] Exhibit B1 is dated 08 November 2001 being the same date as site discussions took place, as recorded on Exhibit A1, and in regard to this date Mr. van Heerden, S.C. put the following to Kemp:

"Okay. And at that stage there was no contract price in existence at all ? --Correct."

Record Page 174 Lines 4

- 5

- [11] It was common cause that at the site discussions Kemp was given certain drawings of the guardhouses and of the front wall and the following was then put to Kemp, by Mr. van Heerden, S.C.

"I see that after you had been given the drawings of the guardhouses and the front wall, that initial budget discussion which you had with the defendant about the price for the front wall, gates and guardhouses went up from R150,000.00 to R180,000.00 --- It's still not a quotation, Mr. van Heerden. This is still a budget."

Record Page 174 Line 24 to Page 175 Line 3

[12] The following was also put by Mr. van Heerden, S.C. to Kemp:

“And after you were given the drawings of the front wall and the guardhouses, you went back again and you came back with this figure of R180,000.00 and that is the figure you reached agreement on. --- No, sir. No, sir, definitely not. That is still a budget. It is the same as your previous one, it’s a work in progress, a working document.”

Record Page 175 Lines 13 – 17.

The following was also put:

“No, we understand that Mr. Kemp, I am in agreement with you, that neither B1 nor B4 purport to be a quotation and it is also not the defendant’s version that it is a quotation. So, make peace with that aspect. – Right.”

Record Page 193 Lines 22 – 24

and finally the defendant’s case was put as follows:

Now, it is the defendant’s version, Mr. Kemp, that this document, B4, was compiled after 8 November, after you had been given the drawings and after you had reconsidered the position of the R150,000 for the front wall, gates and guardhouses which was R150,000. Now, if I can point to that maybe just for the sake of the Court. If one looks at B1 under the site establishment column, you will see there the last item is front wall, gates and guardhouses R150,000. After that, after 8 November and after you had been given the drawings, you reassessed the position and then you increased that to R180,000. That you can see on B4 in the same line and that was the price. – No, sir.”

Just bear me out and listen me out please. And that was the price that you and the defendant had agreed upon, shaken hands on. – No, sir.”

Record Page 194 Line 15 to Page 195 Line 1

[13] However when Wilmans gave evidence he stated initially that Exhibit B1 was a preliminary exercise, to give a rough guideline as to what was going to happen.

Record Page 314 Lines 17 – 21

and that after the drawings were given to Kemp, he was able to see whether they would have “an effect on his budget figures which he had previously discussed with us”.

Record Page 317 Lines 12

- 16

and that

“So he had received these drawings and he was now able to have more accurate costing. So he upped the price from R150,000 to R180,000 and I accepted it.”

Record Page 318 Lines 8 – 11

and also Record Page 327 Lines 12 – 13

[14] When asked about the presence of a question mark and the amount of “R150,000” written next to the amount of R180,000.00 on Exhibit B4, Wilmans replied that he had made these inscriptions and agreed that in doing so, he had queried the amount of R180,000.00. When Mr. Combrinck suggested to him that the existence of the question mark placed in dispute his assertion that agreement had been reached on the amount of R180,000.00 he replied as follows:

“No, it doesn’t at all. We had agreed R150,000 initially. The final drawings came out on 8 November. Mr. Kemp came to see me and said to me there are aspects of the wall which he had no (sic) accounted for. I had a look at it and I agreed with him.

Okay. Why did you put the question mark there then? – Because before I saw him, he had previously quoted R150,000, it was now R180,000. I wanted to know why he was changing the budget and he motivated that to me that he felt it was necessary to increase the price and I agreed with him.

Page 396 Line 24 to Page 397 Line 6

[15] When asked why he had written the amount of “R150,000.00 (inc gates!)” on Exhibit B6 and not R180,000.00 as he had received it after Exhibit B4, and after the amount of R180,000.00 had allegedly been agreed upon as the contract price, he replied as follows:

“Why I didn’t put it was very simply that I was protesting as an internal document, I was protesting that Mr. Kemp was trying to milk us. That’s what that’s all about. He started at 150, he came to me for an increase to 180. I agreed to 180. Then he comes and he wants to add another R30,000 and now all of a sudden the gates disappear from the equation. Hence I made the comment.”

Record Page 407 Lines 6 – 11

[16] In this regard Wilmans also had the following to say:

“No, you are forgetting about the fact that we’d provisionally agreed on R150,000. That was the starting contract price . When Mr. Kemp came back to me after 8 November and motivated an increase because he has now been placed in possession of the drawing which I’d earlier referred to, he motivated an increase in the price of R30,000 which I agreed to. There’s nothing sinister about this. He started at R150,000, showed me that he hadn’t provided for certain claims, I agreed to an increase of R30,000 and that was it.”

Record Page 420 Lines 10 – 17

Later in his evidence he agreed that what he had said was that a contract price of R150,000.00 had been agreed:

Record Page 422 Lines 7 – 8

but when it was suggested to him that R150,000.00 was not an agreed contract price he said the following:

“The finality of the agreement in my view is on the day it is given and accepted, so initially it was R150,000 and the R150,000 was changed when Mr. Kemp had sight of the drawings which were issued on the 8 November, at which time he had an opportunity to change the operation by motivating an increase in the price to me, to which I agreed, and that became the final situation.”

Record Page 422 Lines 10 – 15

and when he was reminded of his previous evidence that the amount of R150,000.00 was part of the negotiations and was not final, because Kemp had not had sight of the drawings, he agreed that it could not be a final price.

Record Page 422 Lines 16

- 19

[17] What emerges from the evidence of Wilmans is he alleges that:

[17.1] Kemp and he initially agreed upon a price of R150,000.00

[17.2] Kemp, after seeing the drawings, motivated an increase of R180,000.00, to which he agreed.

[17.3] Although Wilmans refers to the amount of R150,000.00 as the provisional agreement, or starting contract price and that it could not be a final price because Kemp had not had sight of the drawings, he nevertheless maintained that the amount of R150,000.00 was final “on the day it is given and accepted so initially it was R150,000”.

[18] It is readily apparent that Wilmans’ evidence as to the status of the amount of R150,000.00 varies markedly during the course of his evidence and also differs from the case put to Kemp by Mr. van Heerden, S.C. In the latter scenario the amount of R150,000.00 is purely a budgetary figure and is the basis for further discussion between the parties. On Wilmans’ view however the amount of R150,000.00 was final on the day it was given and accepted, subject however to Kemp being afforded an opportunity, after examining the plans, to motivate an increase to which he agreed. On this basis Wilmans stated that they had “provisionally agreed” upon R150,000.00 or this was “the starting contract price”.

[19] In my view the difference is not merely one of semantics. On the evidence of Wilmans, the amount of R150,000.00 assumes far greater significance than merely a budget figure for discussion. This is illustrated by the fact that Wilmans wrote the amount of R150,000.00 on Exhibit B6, after he says the amount of R180,000.00 had been agreed. His evidence to explain his conduct illustrates the point

“He started at R150,000, he came to me for an increase of R180,000. I agreed to the R180.....”

Record Page 407 Lines 8 – 9

The idea of Kemp having to motivate an increase, on the ground that Kemp had not included certain aspects in the price for the construction of the site works, to which Wilmans then agreed, is totally foreign to the concept of budget discussions which were aimed at pricing the entire project.

[20] A similar type of discrepancy arises in regard to the case pleaded on behalf of the defendant by the defendant's previous Counsel, Advocate Camp, and the evidence of Wilmans. The case initially pleaded on behalf of the defendant was that the work to be done in respect of the guardhouses, front wall and gates was done as a result of agreements which were concluded by the defendant "orally accepting written quotations submitted by the plaintiff". Wilmans stated that he did not dispute these were his instructions, but that Advocate Camp must have been referring to Exhibit B4. In other words that Exhibit B4 was the written quotation. However, Wilmans had previously stated that it was a verbal quotation for R180,000.00

Record Page 410 Lines 7 – 8

and Kemp had said to him R180,000.00 for the front wall, gates and guardhouses when he gave Exhibit B4 to him.

Record Page 392 Lines 9 – 15

and as pointed out above, Mr. van Heerden, S.C. had put to Kemp, that it was not the defendant's version that Exhibit B4 was a quotation.

[21] A more significant discrepancy however arises with regard to the fact that Advocate Camp never alleged that the agreement for the erection of the guardhouses, gates and front wall was the amount of R180,000.00. What was alleged was that it was agreed that the total contract price for the erection of the guardhouses, gates, front wall, additional wall and Unit 7 wall was R235,000.00. In the light of the fact that the defendant at trial conceded that the accepted quote for the Unit 7 alone was R187,386,73, it could never have been Wilmans' instructions to Advocate Camp that the agreed contract price for the erection of the guardhouses, gates and front wall was R180,000.00.

[22] Turning to consider the probabilities of the parties respective versions. It is common cause that the plaintiff sent, and the defendant received, the documents which are Exhibits B6, B7, B8 and B9 which contain quotations, inter alia, for the erection of the guardhouses and front wall differing markedly from an agreed price of R180,000.00. Wilmans stated that Exhibits B7 and B8 were budget negotiations, but that B9 was a quote which was rejected. Wilmans said that he told Kemp "to take a hike" and that these other figures that he was presenting him with were totally unacceptable as they had agreed the amount of R180,000.00.

He said that Kemp's response was as follows:

"He kept on bleating about lack of cash and he kept on manipulating figures and he kept on inundating us with all sorts of documents which have no flow to them, there is no consistency about them at all"

Record Page 331 Line 24 to Page 332 Line 2

and when I asked Wilmans what Kemp's reaction was to being told to "take a hike" he said the following:

"Well he told us to take out the additional retaining wall, which is not to be confused with the Unit 7 wall. You will see the figure there is R55,000 we said to him that he must not even be considered for that job"

Record Page 333 Lines 14

- 16

However the "additional retaining wall" never formed part of the work allegedly covered by the figure of R180,000.00. Such a response by Kemp would therefore be entirely illogical.

[23] Of significance is that Wilmans conceded that as far as Kemp went he did not agree that the contract price was R180,000.00.

Record Page 404 Line 24 to Page 405 Line 1

but that despite being aware of this, Wilmans never reduced his contention to writing that the contract price had been agreed at R180,000.

[24] Having had the benefit of observing Wilmans and Kemp giving evidence over a considerable period of time, it is quite clear to me that they are both astute and determined individuals, with considerable experience in the building industry. I find it grossly improbable that Kemp, who clearly never accepted that he was bound to a contract price of R180,000.00, would meekly accept being told "to take a hike", that he was bound to the price of R180,000.00 and nevertheless continue building for Wilmans. I find it equally improbable that Wilmans, appreciating that Kemp did not regard himself as bound to a contract price of R180,000.00, would not reduce his contentions to writing and simply allow Kemp to continue building.

[25] I also regard it as improbable that Exhibit B4, could have been regarded as a quotation for erecting the guardhouses, gates and front wall, or even served as the basis for Kemp to orally quote such an amount. This is because in respect of the other quotes furnished by Kemp, the figures are not rounded off, as in Exhibit B4 which Wilmans agreed with. In addition, the other quotes are far more detailed.

[26] Mr. Van Heerden, S.C. submits that it is improbable that the parties would not have agreed the price for the site works in early November 2001, and allow it to remain suspended until most of the work had been completed. As I understand the argument, if this is so, then credence is lent to the defendant's version that agreement was reached in the amount of R180,000.00 at this early stage. Such an argument however overlooks the inherent improbabilities in the version of the defendant I have set out above. Kemp stated that he had

been trying to finalise an agreement with Wilmans for a considerable period of time, which is even borne out by the documents which the defendant admits receiving. It is common cause that the guardhouses had to be erected as a matter of urgency to enable the sectional title register to be opened. In the light of the previous amicable relationship between the parties, where Kemp had built for Wilmans at Delamere Road, it is entirely plausible that Kemp, in order to get the project

running, by the opening of a sectional title register, commenced building before an agreement was in place.

[27] In my view, regard being had to the probabilities I have set out above, and the inconsistencies between the evidence of Wilmans and the defendant's case, as originally pleaded, as well as the case put to Kemp by Mr. van Heerden, S.C., I am satisfied on a preponderance of probabilities that the version of Kemp that no agreement was concluded at a contract price of R180,000.00, is true and accurate and therefore acceptable, and the version of Wilmans is false and falls to be rejected.

[28] Turning now to consider what was agreed between the parties in regard to the contract price to construct the front wall and guardhouses. The evidence of Kemp was that the quotation (Exhibit B11) was agreed.

Record Page 213 Lines 19 – 24

The version of Wilmans was that he received Exhibit B11 together with the supporting documents, Exhibits B12, B13 and B14, and rejected all of these quotations, except for Exhibit B13 in respect of the Unit 7 wall, which he accepted.

Record Page 335 Line 16 to Page 336 Line 19

The basis for his rejection of the remaining claims was that Kemp had agreed the price of R180,000.00 for the front wall, guardhouses and gates.

Record Page 219 Lines 16 – 18

[29] In support of his contention that the quotation (Exhibit B11) was accepted, Kemp stated that the defendant paid on the basis set out in that quote for three months.

Record Page 214 Lines 7 – 8

If regard is had to the schedule of claims and payments, being Annexure D to the plaintiff's heads of argument, as well as the documents contained in Exhibit A on which it is based, together with the agreed schedule of payments made by the defendant, the contention of Kemp is supported. The defendant's answer to this is that a considerable number of the claims upon which the plaintiff's calculation is based, were never received and were only discovered late and on the eve of the trial. The allegation made by Wilmans is that the documents in question were manufactured for this trial.

Record Page 467 Lines 12 – 13

[30] Wilmans however stated that what led him to make this accusation was that they had only been discovered on the day before the trial, but if they had been discovered before that, he would have accepted them as documents that he had received.

Record Page 470 Lines 11 – 21

[31] As regards the late discovery and specifically with regard to Exhibit A5, Kemp said he did not know why he had not given it to his attorneys at an earlier stage, and he could not say when he had the documents in his possession.

Record Page 67 Line 18 to Page 68 Line 8

[32] In the absence of cogent evidence which illustrates that the documents were manufactured, ex post facto to support the plaintiff's case, I am unable to find that the documents were manufactured. Indeed it would be a remarkable feat for Kemp to manufacture such a large quantity of documents in such detail, several years later, without the presence of any glaring inconsistencies or contradictions.

The basis for the defendant's rejection of the plaintiff's claim for P & G's and a mark up on the construction of the guardhouses and the front wall was that he (Wilmans) was not going to pay the plaintiff to supervise itself, and the plaintiff was bound by the contract price of R180,000.00.

Record Page 324 Lines 16 – 21

However, later in his evidence he said that the plaintiff would be entitled to charge P & G's for work it was to do itself, as well as a mark up.

Record Page 435 Line 13 to Page 436 Line 24

His contention being that the plaintiff had agreed to a price of R180,000.00 and if the plaintiff had included P & G's in that quote, he would have been happy to pay it because what he did was to look at "the bottom line".

Record Page 438 Line 18 to page 439 Line 17

It is therefore clear that the defendant's only objection to paying P & G's and a mark up for the construction of the guardhouses and front wall was that the plaintiff was bound by the agreed contract price of R180,000.00. In the light of the conclusion I have reached on this issue, the whole basis for the defendant's refusal to pay these amounts falls away.

[33] In the light of the foregoing the plaintiff has in my view, established that the agreed contract price for the front wall and the guardhouses were respectively the amounts of R185,412.20 and R55,386.76 and that the plaintiff was not obliged to supply and install the gates.

[34] Turning to the following issues in dispute, as defined by the parties:

[34.1] Whether for all the works the plaintiff would be paid at the end of the month for work done, or whether payment for the site works was to be amortised and payment for Unit 2 would be in terms of paragraph 5 of the agreement.

[34.2] Whether the plaintiff requested premature payments in November 2001, because of financial constraints.

[34.3] Whether the parties agreed during December 2001/January 2002 for the plaintiff to be paid progress claims within a reasonable period of time.

[34.4] Whether the defendant failed to pay the amounts claimed by the plaintiff for work done during December, January, February and March.

[35] In my view, save and except for the alleged failure of the defendant to make payments timeously for work done during January, February and March 2002, the resolution of the remaining issues are not relevant to any of the relief claimed by either of the parties. This is because it is common cause that after January 2002, the plaintiff would be paid for work done on the site works, either by the end of the month or within a reasonable time. The plaintiff's case is that not only was payment not made by the end of the month, but also, that, in any event, payment was not made within a reasonable time. The defendant however contends that it was up to date with payments.

[36] Consequently, a resolution of the remaining issues set out above, can have no bearing upon the issue of which party repudiated the agreement, thereby entitling the other to cancel. These issues also have no bearing upon the quantification of the plaintiff's claim. In this regard the only remaining issue is whether the plaintiff was entitled to a reinforcement claim of R20,853.77 in respect of the Unit 7 wall. This is a consequence of the finding I have made as to the contract price for the construction of the guardhouses and front wall, as well as the concession by the defendant that its contentions with regard to the measure of work claimed by the plaintiff in respect of the reveals and bands around windows, timber door frames internally, as well as certain aspects of the front wall were abandoned.

[37] Dealing with the reinforcement claim in respect of the Unit 7 wall. The evidence of Wilmans was that the plaintiff had been paid for the reinforcing by way of a cheque for R25,210.25 from Amod Adam.

Record Page 473 Lines 22 – 23

Wilmans conceded that he had received Exhibit A55 in which the plaintiff set out his reconciliation of how the amount was calculated, and this amount was included in the plaintiff's reconciliation of the amount owing in respect of the Unit 7 wall, as set out in Exhibit A62.

Record Page 465 Lines 7 – 23

He was not however sure whether he had received the latter document.

Record Page 468 Line 12

but conceded that the plaintiff must have created it at the time because it was accompanied by a covering letter.

Record Page 473 Line 3

and conceded that he had never challenged the reconciliation set out in Exhibit A55.

Record Page 473 Lines 22

- 23

[38] Wilmans conceded when referred to Exhibit G10, that the cheque by Amod Adam in the amount of R25,210.25 was made up of the amount of R19,100.25 reflected as a sub-total on the Unit 7 wall April claim, as well as an amount of R6,110.00 in respect of piling, and that it did not strictly relate to piling, but took care of the claim by the plaintiff for reinforcing.

Record Page 474 Lines 6 – 22

[39] In my view, the documentation as accepted by Wilmans, clearly establishes that the amount of R20,853.77 is due by the defendant to the plaintiff, in respect of the reinforcing for the Unit 7 wall.

[40] In the light of the foregoing and when regard is had to the schedule of claims and payments, being Annexure D to the plaintiff's heads of argument, as well as the documents on which it is based, together with the evidence given by Kemp in this regard, I am satisfied that the plaintiff has proved on a balance of probabilities that the amount of R135,053.74 is outstanding on the contract. Whether it is also due and payable by the defendant depends upon a resolution of the next issue, namely which of the parties repudiated the agreement, thereby entitling the other to cancel the agreement.

[41] This is because in the event of it being held that the defendant lawfully cancelled the contract, the plaintiff would be restricted to a claim based on unjust enrichment.

B K Tooling (Edms) Bpk v Scope Precision Engineering

1979 (1) SA 391 (A) at 422 – 425

In such a case the remuneration to be awarded to the plaintiff, would be based upon the value of the advantage derived therefrom by the employer. This would be calculated by reference to the contract price and the portion of the work that had been left undone

Amler Precedents of Pleadings

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[42] The plaintiff alleges a failure to pay amounts that were due as a ground for cancellation, whereas the defendant denies that it repudiated the agreement as alleged, and alleges that the plaintiff repudiated the agreement by resiling as it did. It should be noted that the defendant does not rely upon any allegations of late, or defective performance by the

plaintiff, as a ground for cancellation of the agreement. In other words the defendant's case is based upon the plaintiff unlawfully resiling from the agreement as justification for its cancellation.

[43] As pointed out above, I only regard the issue of whether amounts were outstanding by the defendant, as from the end of March 2002 as being of relevance. An examination of Annexure D to the plaintiff's heads of argument, together with the documents on which it is based, reveals an amount outstanding as at 07 April 2002 of R115,012.51.

[44] As a consequence the plaintiff wrote a letter dated 10 April 2002 (Exhibit A25) to the defendant, requesting immediate payment of all outstanding claims and stating the following:

"The current situation with payments is having a serious impact on the project and Lattimore Construction and is jeopardising the anticipated completion period as required in your contract with the client".

[45] On 12 April 2002 an amount of R30,000.00 was paid by the defendant, leaving a balance as at this date of R85,012.51.

[46] Wilmans admitted that he had received Exhibit A25 and did not reply to it because "we had been speaking to Mr. Kemp continually."

Record Page 442 Lines 1 – 21

and stated that the defendant was never in arrears

Record page 442 Line 23

and had been paid in accordance with the invoice the defendant had received

Record Page 444 Lines 5 – 13

but conceded that he did not respond to the letter and it may have been as a result of arrogance on his part.

Record Page 444 Line 20

[47] According to Annexure D, as at the end of April 2002 an amount of R82,614.31 was outstanding and as a consequence the plaintiff wrote a letter to the Defendant dated 03 May 2002 (Exhibit A32), which Wilmans acknowledged receiving.

Record Page 444 Line 25

[48] This letter contains the following statement:

"You undertook to settle the house 2 claim in full and told me that a payment would be made on the site works. This did not take place with the unit 2 claim being paid short and no payment being received for site works"

Wilmans stated that he could not recall giving such an undertaking but it was possible he did and agreed that he must have received the plaintiff's April claims

Record Page 445 Line 24 to Page 446 Line 5

but that he did not respond to the letter, although the plaintiff (according to Wilmans) at that stage was being obstructive, was not on site, was not working properly and was claiming for monies which were not due.

Record page 448 Line 22 to Page 449 Line 17

but Wilmans was unable to say why he did not reply.

[49] Wilmans agreed that three further payments were made after this letter, including the payment by Amod Adam during May 2002 because, as he put it "have got to clear the books".

Record Page 450 Lines 11 -13

[50] According to Annexure D as at 09 May 2002 and after these payments were made, an amount of R41,261.95 was outstanding. Exhibit A38 was a summary of claims for May 2008 which were received by the defendant and which were not challenged by the defendant, because according to Wilmans they had taken a decision not to "humour" Mr. Kemp any further by this correspondence that was flowing back and forth on a continuing basis.

Record Page 450 Lines 18 – 20

[51] When asked about his reference to such "correspondence", Wilmans agreed that as far as the defendant being up to date with payments, there was not any letter until right at the end placing on record the Defendant's position.

Record Page 451 Line 9

[52] I find it incomprehensible that an astute businessman such as Wilmans, when faced with these claims for payment by the plaintiff, as well as the letters setting out the plaintiff's dissatisfaction with the defendant's non-payment, would not commit the defendant's contentions to writing. It was obviously vital that if as the defendant contends, it was not in arrears with payments, and the plaintiff was mistaken, that it set out its contentions in a clear form in order to resolve the dispute. That it did not until the bitter end, leads to a reasonable inference that the defendant was intentionally delaying matters.

[53] In my view, the plaintiff has established on a balance of probabilities that as at 07 June 2002 the outstanding amount which was due and payable by the defendant was an amount of R114,433.14, as reflected on Annexure D.

[54] Wilmans concedes that Kemp telephoned him on the morning of 10 June 2002 and said that he needed to be paid.

Record Page 452 Line 8

In response Wilmans gave Mr. Habr instructions to place an ultimatum on the plaintiff to speed up work.

Record Page 452 Line 10

These discussions were recorded in the letter by Kemp to Wilmans dated 10 June 2002, being Exhibit A44.

[55] Wilmans in reply sent a letter signed by Habr (Exhibit A45) in which he complained about the quality of the plaintiff's workmanship and the "remedying of certain works". Wilmans agreed that this was the first time these issues had been raised in writing by the defendant.

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but maintained these issues had been raised at site meetings.

[56] In this letter the defendant demanded that the plaintiff accelerate the work rate. It appears the plaintiff said it was unwilling to do so because of an unwillingness to commit additional resources in the absence of payment. The defendant then added "unless you were able to comply you should consider moving off the site".

Exhibit A 45

[57] It is clear that the common intention of the parties was that there should be an exchange of performances, i.e. the plaintiff would perform building work during a calendar month and the defendant would pay for that work at the end of the month. The obligations were reciprocal, with the result that neither was entitled to enforce the contract unless he had performed, or was ready to perform his own obligations.

Wolpert v Steenkamp 1917 AD 493 at 499

[58] Consequently, the defendant was not entitled to issue an ultimatum to the plaintiff to expedite the works, in the absence of payment, or a tender of payment of the outstanding amount. The very reason why the plaintiff was not prepared to commit additional resources to expedite construction, was because of the defendant's failure to pay outstanding amounts timeously. In this regard the plaintiff was entitled to withhold such performance until the defendant had performed its obligation to make payment. In addition this was combined with the statement that unless the plaintiff was able to comply it "should consider moving off the site".

Exhibit A45

[59] What was clearly conveyed by the defendant to the plaintiff was that unless the plaintiff was agreeable to the defendant's demand, it should not continue with the contract. In my view, what this means is that in such an event, i.e. the plaintiff failing to expedite matters, the defendant no longer considers itself bound by the contract. The fact that the defendant may have believed it had complied with its obligations matters not, because its refusal to perform a vital provision of the agreement would still constitute a repudiation. This is because in

such a case a subjective intention to terminate the agreement is not required.

Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou

1978 (2) SA 835 (A) at 845 – 846

[60] The plaintiff was therefore entitled to accept the defendants repudiation, cancel the agreement and leave the site.

[61] The plaintiff is accordingly entitled to payment of the amount of

R135,053.74. By virtue of the fact that the plaintiff's final accounts were rendered in June 2002, the amount was due and payable by 01 July 2002. The plaintiff is accordingly entitled to interest a tempore mora on this amount from 01 July 2002 to date of payment.

[62] Turning to the defendant's counter-claim. The defendant, during the trial, abandoned a large portion of the counter-claim and Mr. van Heerden, S.C. states that the defendant only persists with the following counter claims:

[62.1] Payment in the sum of R30,808.50 in respect of rectifying the rising damp in the basement of Unit 2.

[62.2] Payment in the sum of R56,000.00 for penalties it incurred in respect of the contract it concluded with Dr. Knights-Rayson for having delivered Unit 2 too late.

[62.3] Overpayment by the defendant to the plaintiff of the sum of R154,376.99 on the defendant's version of what the agreement was, alternatively, the sum of R136,11 on what the plaintiff alleges the agreements were.

[63] As regards the issue of the alleged overpayment, Mr. van Heerden, S.C. concedes that the validity of this counter-claim depends upon a finding that the plaintiff repudiated the agreement, entitling the defendant to cancel the agreement. In the light of the conclusion I have reached in this regard, this aspect of the defendant's counter-claim need not detain me any further.

[64] I am of the view that the claim for penalties due to the alleged late delivery of Unit 2, by the defendant to the purchaser, must suffer a similar fate for the same reason. The reason is that it was the defendant's repudiation of the agreement which brought the contract to an end, causing the plaintiff to cease work on Unit 2. It was therefore the conduct of the defendant which prevented the plaintiff from completing Unit 2 either timeously, or otherwise. Even if it is assumed that the construction of Unit 2 was behind schedule, when the plaintiff stopped work this matters not. To find otherwise, would be to permit the defendant to benefit from its own repudiation of the agreement.

[65] The claim for damages to rectify the rising damp in Unit 2 is however distinguishable, in that the allegedly defective work was completed before the termination of the contract and consequently, any right on the part of the defendant to claim that the work be rectified had already accrued. In addition, the plaintiff has at all times denied that it is liable in respect of this claim. In other words, the termination of the agreement did not frustrate the plaintiff in any endeavour to rectify the allegedly defective work.

[66] It is quite clear that Wilmans conceded that the plans had been drawn by the engineer he had employed, these plans did not reflect an overlap of DPC on the inside of the basement as suggested by Wilmans and that the level of the DPC was checked by the defendant's foreman and confirmed as correct.

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Wilmans conceded that it was checked and accepted on his behalf.

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[67] Despite the foregoing, Wilmans contends that Kemp should have installed the waterproofing in the manner as suggested by Wilmans. I do not agree. The plaintiff was contracted to construct Unit 2 in accordance with the plans supplied by the defendant and where, as in the present case, the waterproofing was inspected and approved of by the defendant's authorised representative, no blame can be laid at the door of the plaintiff.

[68] The counter-claim accordingly falls to be dismissed.

[69] As regards the issue of costs, this matter was adjourned on a number of occasions for differing reasons, one of which included strike action. Neither Counsel submitted that there was any basis for departing from the rule that costs should follow the event, in respect of any of these adjournments.

I accordingly grant Judgment in favour of the plaintiff as follows:

Payment of the sum of R135,053.74.

Interest on the sum of R135,053.74 at the rate of 15.5% per annum a tempore mora from 01 July 2002 to date of payment.

The defendant's counter-claim is dismissed.

The defendant is to pay the plaintiff's costs, such costs to include the plaintiff's costs of opposing the defendant's counter claim.

SWAIN, J

Appearances /

Appearances:

Counsel for the Plaintiff : MR. P. COMBRINCK

Instructed by Peacock, Liebenberg & Dickinson Pinetown, Durban

Counsel for the Defendant : MR. I.J.B. VAN HEERDEN, S.C.

Instructed by : A.G. Clulow & Co.

Westville, Durban

Date of Hearing : 19 March 2007/ 11 June 2007/

17, 18, 19 September 2007

12, 13, 14 March 2008 and

27 June 2008

Date of Judgment : 17 December 2008

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Prepared on 10 October 2026 · Esheria