

SOUTH AFRICA / JUDGMENT

RMH Agencies CC t/a Midlands Mica Hardware v Pharazyn and Another (AR 169/10) [2010] ZAKZPHC 51 (2 September 2010)

[2010] ZAKZPHC 51

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

K Swain, E Steyn

CASE / FILE NUMBER

AR 169/10

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO. AR 169/10

In the matter between:

R M H AGENCIES CC

T/a MIDLANDS MICA HARDWARE APPELLANT

and

N G PHARAZYN FIRST RESPONDENT

REINER BARFORD SECOND RESPONDENT

APPEAL JUDGMENT Delivered on 02 September 2010

SWAIN J

- [1] The appellant (plaintiff in the Court a quo) originally claimed payment of the sum of R67,242.24 in respect of goods and materials which it alleged had been sold and delivered by the appellant to the defendant.
- [2] This claim was met by a special plea filed on behalf of the defendant, in which it was alleged that the defendant at all times contracted with the plaintiff, as agent on behalf of one Reiner Barford. The response of the appellant was to join Reiner Barford as the second defendant, alleging that the goods and materials were supplied and delivered by the appellant “to the first defendant and/or second defendant at their special instance and request”.

[3] The defence of the second defendant (second respondent on appeal) as pleaded was to deny that he contracted with the appellant, to allege that the first defendant (first respondent on appeal) was not authorised to act as his agent and that the contract upon which the appellant relied was concluded between the appellant and the first respondent. That defence was however amended at a later stage, to allege that in the event of it being held that the first respondent was authorised to act as the second respondent's agent and the agreement was therefore concluded between the appellant and the second respondent, then and in that event:

[3.1] It was a term of the contract that the signature of any employee or agent of the second respondent, appearing on the appellant's official delivery note, would constitute evidence of delivery to the second respondent of the goods purchased.

[3.2] The documents furnished by the appellant to the second respondent, did not afford proof of delivery of goods to the value of R67,242.24 by the appellant to the second respondent.

[3.3] The second respondent did not admit that goods to the value of R67,242.24 were supplied and delivered and remained unpaid for.

[4] By the time of the trial in the Court a quo the second respondent however no longer denied the authority of the first respondent to bind the second respondent, and in addition the dispute between the appellant and the first respondent appears to have been resolved, because the appellant called the first respondent to give evidence in support of its claim against the second respondent.

[5] At the close of the appellant's case the second respondent closed his case, without leading evidence and in due course the Magistrate delivered judgment, dismissing the plaintiff's claim with costs, finding that

"The plaintiff is unable to prove delivery of the goods and therefore cannot succeed with his (sic) claim".

[6] The appellant does not appeal against the Judgment dismissing its claim against the first respondent, but appeals against the decision dismissing its claim against the second respondent, on the basis that the Magistrate erred in finding that the appellant failed to prove delivery of the goods, for which payment was claimed.

[7] It is common cause that the second respondent admitted his indebtedness for all invoices which were substantiated with a signed delivery note and had made payment to the appellant in respect of such invoices.

[8] It is also common cause that the issue before us upon which the appeal turns, is whether the appellant discharged the onus of proving delivery of those goods contained in invoices for which the appellant was unable to produce delivery notes, which were signed by an employee or agent of the second respondent. The dispute did not turn on whether the signature appearing on a delivery note was that of an employee or agent of the second respondent, because the delivery notes in dispute contained no signatures upon them

whatsoever.

[9] Mr. Oliff, who appeared for the second respondent in the Court a quo and on appeal, submitted that in the absence of the production of delivery notes which were signed by an employee or agent of the second respondent, the appellant had failed to prove delivery of the goods in question. I did not understand him to submit that this was the only manner in which the appellant would be able to prove delivery of the goods, because it is clear that the object of this provision in the agreement was to facilitate proof of delivery by the appellant, and not to hamper its proof.

[10] Indeed, Mr. van Rooyen, who appeared for the appellant, submitted in his heads of argument that the appellant had proved delivery of the goods to the second respondent, on the following grounds:

[10.1] The appellant only had to establish a prima facie case, because of the absence of any countervailing evidence by the second respondent.

[10.2] The evidence of Mr. Driemeyer, on behalf of the appellant, established prima facie, that goods to the value of R207,980.36 were invoiced to the second respondent.

[10.3] The evidence of the first respondent established that if the goods, for which there were no delivery notes, had not been delivered to the site, the second respondent would not have had occupation of the building.

[11] In argument before us, Mr. van Rooyen conceded that it was incorrect that the appellant only had to establish prima facie delivery of the balance of the materials for which the second respondent had not made payment.

[12] This concession was correctly made as the tendency has been to move away from “this piecemeal form of reasoning” and the proper approach

“.....is to look at all the facts at the end of the case, including, if it be one of the facts, the absence of an explanation. But the fundamental question is still whether the party who bears the onus has discharged it, the absence of an explanation being no more than a circumstance to be taken into account in arriving at a conclusion”

New Zealand Construction (Pty) Ltd. v Carpet Craft

1976 (1) SA 345 (N) at 349 A

R v Sacco 1958 (2) SA 349 (N) at 352

Norwich Union Fire Insurance Society Ltd. v Tutt

1962 (3) SA 993 (A)

[13] “It does not follow that an adverse inference should or may be drawn against a party who fails to testify or call evidence in refutation of a weak or improbable case against him”

Putter v Provincial Insurance Co. Ltd. & another

1963 (3) SA 145 (W) at 150 C – D

A failure by a defendant to testify “cannot justify a verdict for the plaintiff unless there is enough evidence to enable the court to say that, having regard to the absence of an explanation, the plaintiff’s version is more probable than not”.

The S A Law of Evidence – Zeffert et al pg 129

At the end of the day what has to be decided is whether the party who bears the onus has discharged it. In other words, has the appellant proved on a balance of probabilities that the goods in respect of which there are unsigned delivery notes, were delivered to the second respondent.

[14] As pointed out above, Mr. van Rooyen submitted that the evidence of Mr. Driemeyer established prima facie, that goods to the value of R207,980.36 were invoiced to the second respondent. According to Mr. Driemeyer, his file containing a complete set of invoices for the entire project generated by the appellant, together with proof of delivery was lost and despite

diligent search, could not be found. I agree with the submission of Mr. van Rooyen that the evidence of Mr. Driemeyer as to the “data” generated by the computer of the appellant, regarding the invoices in question, constitutes admissible evidence of and rebuttable proof of, the facts contained therein. This is on the basis that Mr. Driemeyer, in his capacity as the manager of the appellant, was “an officer in the service” of the appellant and certified the data retrieved from the computer to be correct and stated that the data stored in the computer, had been made by him in the ordinary course of business of the appellant, in accordance with Section 15 (4) of the Electronic Communications and Transactions Act No. 25 of 2002 (the E C T Act).

[15] Regard being had to the provisions of Section 15 (3) of the E C T Act I am satisfied that due weight must be given to this evidence, with the result that the appellant proved that goods to the value of R207,980.36 were invoiced to the second respondent.

[16] Whether the appellant however also proved that all of the goods contained in these invoices, were delivered to the second respondent, remains the crucial issue.

[17] The resolution of this issue turns upon an assessment of the evidence of the first respondent, who the second respondent appointed to design the house and oversee its construction as a project manager. A crucial aspect of his evidence reads as follows’

“Let’s deal with those two separate categories. Insofar as those documents for which you had delivery slips, were you satisfied that the goods reflected in the invoices from Mica that were related to those had been delivered? -- Correct.

And insofar as the invoices that weren't vouched for, what is the status of that? Do you accept that those goods were delivered to site or were they not? ---- Well, all I can say is that if those goods were not delivered to site, Mr. Barford would not have had complete occupation of that building"

[18] The first respondent also had the following to say

"Or Richard's signature. In fact that is what the contract provides, that on any signed invoice, but I'm going to put to you that you cannot possibly recall each and every item that has been supposedly delivered.....-----I totally agree with you. Going back how many years it is now, I quite agree with you.

So then you cannot categorically say that these items were delivered if you can't recall individual items. ----- I agree with you.

And the importance of keeping records is to prevent anybody having to recall, on Tuesday there were seven bags of cement and on Thursday seven years ago, there were eight bags of cement. It's an impossible (indistinct). ----- Correct.

So we are then faced with a situation that you don't have independent – other than where you can see that that's your signature or a signature of somebody you recognise. ----- That I recognise, ja.

You are not certain whether or not those goods were delivered. ----- Good point.

And since we're not able to fight on specific invoices but rather on the entire globular invoices, the entire collection, we've then just got to consider what we can categorically say independently from the documentation has been delivered. ----- Yes.

With those amounts as opposed to what has been paid by the defendant. ----- Correct.

And what we're left with at the end is an unsubstantiated allegation that these materials were delivered. You will agree with me? ----- Yes"

[19] The cornerstone of Mr. van Rooyen's argument was that the statement by the first respondent, that the second respondent would "not have had complete occupation of that building" if all of the goods had not been delivered, was a statement of fact, sufficient to discharge the onus resting upon the appellant, of proving delivery of the goods for which there were no signed delivery notes, on a balance of probabilities.

[20] His concern that this statement be regarded as one of fact and not of opinion, arose out of the failure by the appellant to give the requisite notice in terms of Rule 24 (9) of the Magistrates' Court Rules of its intention to call the first respondent as an expert. Mr. van Rooyen submitted that no objection was raised by the second respondent when this statement was made by the first respondent. The fact that no objection was raised does not of course necessarily imply consent on behalf of the second respondent, to its admission, particularly when regard is had to the fact that Mr. Oliff objected to the first respondent expressing such a view under cross-examination. In addition, the Magistrate was never called upon by the appellant, to grant leave to the first respondent to express such a view as

an opinion. There was also no evidence led when the first respondent was giving evidence, to prove that he was qualified to make such an assertion, other than that he was “a senior architectural technician”.

- [21] I agree with the authors Schwikkard and van der Merwe, that the following analysis of the meaning of opinion is accurate and useful:

“The word ‘opinion’ can be used in various senses. When one says, to take one meaning, ‘That is a matter of opinion’, one is saying that the point is open to question: it is a matter on which doubt can reasonably exist. When one prefaces an assertion with, ‘In my opinion’, one is indicating that it is a personal belief. Used in this sense, opinion is contrasted with fact – facts simply are, opinions are variable in that differing opinions on the same matter may without absurdity be held by different people. Quot homines tot sententiae. Opinion, in this sense, is inadmissible in evidence, not because of any exclusionary rule, but because it is irrelevant. Legal proceedings are concerned with facts, not with the beliefs of witnesses as to the existence of facts... In the opinion rule, ‘opinion’ carries another, special meaning. A fact in issue may be proved by the direct evidence of a witness with personal knowledge, or it may be proved by way of inference from other facts which tend logically to prove the fact in issue. As used in the law of evidence, ‘opinion’ has the meaning of an inference or conclusion of fact drawn from other facts”.

Principles of Evidence – Schwikkard & van der Merwe

3rd Ed pg 86 quoting

Nicholas “Some Aspects of Opinion Evidence” in

Kahn (ed) Fiat Justitia: Essays in Memory of Oliver Denys Schreiner (1983) 225

- [22] The fact that the first respondent maintained that he was making a statement of fact and not expressing an opinion, when he said that there would not have been enough bricks or cement to complete the house, if all of the materials had not been delivered, matters not.

- [23] A statement that the house could not have been completed, if the materials for which there were no signed delivery notes had not been delivered, requires proof of the following facts:

[23.1] Details of the quantity, nature and type of the materials referred to in the invoices for which there were no signed delivery notes.

[23.2] Details of the quantities of these particular materials whose delivery was proved by signed delivery notes.

[23.3] Details of the quantities of these particular materials required to complete the house.

[23.4] Evidence that the difference between the quantities of these materials whose delivery was proved, and the quantities of these materials required to complete the house, consists of the quantities of these materials evidenced by the unsigned delivery notes.

- [24] A conclusion that the house could not have been completed could only be drawn once these facts were established by evidence. Such a conclusion would be drawn from these facts and would be an opinion.
- [25] The statement by the first respondent that the house could not have been completed was therefore an opinion. In addition, it was not supported by proof of any of the facts set out above, and consequently even if the expression of such an opinion by the first respondent was admissible and the first respondent was duly qualified to express such an opinion, very little weight could be attached to it.
- [26] What was required was the expert opinion of a qualified quantity surveyor, based upon proof of the facts set out above, in order to prove the assertion that the house could not have been completed, without delivery of the goods for which no signed delivery notes were available.
- [27] I am therefore satisfied that the Magistrate was correct in his Judgment (albeit that it was unreasoned) that the appellant had failed to prove delivery of the goods, for which there were no signed delivery notes.

The order I make is the following:

- (a) The appeal is dismissed.

The appellant is ordered to pay the second respondent's costs of the appeal.

K Swain J

I agree

E Steyn J

Appearances /

Appearances:

For the Appellant : Mr. R. van Rooyen

Instructed by : Christopher Lee Attorney

C/o J Leslie Smith & Co. Inc.

Pietermaritzburg

For the 1st Respondent : No appearance

1st Respondent : N.G. Pharazyn

For the 2nd Respondent : Mr. M.A. Oliff

Instructed by : Deneys Reitz Incorporated

C/o Lister & Lister Attorneys

Date of Hearing : 30 August 2010

Date of Filing of Judgment : 02 September 2010

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAKZPHC/2010/51.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/rmh-agencies-cc-ta-midlands-mica-hardware-v-pharazyn-and-others-unknown-topic-akzphc-2010>

Prepared on 10 October 2026 · Esheria