

SOUTH AFRICA / JUDGMENT

Thomas v Davids (2014/23478)

[2017] ZAGPJHC 223 (3 August 2017)

[2017] ZAGPJHC 223

COURT

South Gauteng High Court, Johannesburg

BEFORE

L Adams

CASE / FILE NUMBER

2014/23478

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IN THE HIGH COURT OF SOUTH
AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NO: 2014/23478

DATE:

3rd
AUGUST 2017
NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
REVISED.
3
AUGUST 2017
In

the matter between:

THOMAS,
GREGORY
OWEN Plaintiff
and
DAVIDS,
KIM
LESLIE Defendant

JUDGMENT**ADAMS J:**

[1]. In this action the plaintiff claims payment from the defendant of the sums of R21 000 and R100 000, together with mora interest thereon and cost of suit. The action is founded on an alleged oral agreement ('the agreement') between the parties concluded at Eldorado Park during or about September 2008. The plaintiff alleges that, in terms of the agreement, he was required to effect improvements to the defendant's immovable property in Cosmo City and to build thereon certain outbuildings, for which he would have been reimbursed the actual cost of such improvements and building cost if and when the immovable property would be sold. In addition, so the plaintiff claims, he would have become entitled to the rental paid by any and / or all tenants installed in the outbuildings, which during the existence of the agreement consisted of three backrooms. The defendant denies the

existence of the alleged oral agreement. She has also instituted a counterclaim against the plaintiff claiming the sums of R80 000

and R14 681.06 on the basis of what she alleges were the terms and conditions of the oral agreement between the parties.

[2]. Before me Mr Winterton appeared on behalf of the plaintiff and the defendant appeared in person.

[3]. The very crisp issue which I need to decide is a factual one relating to whether or not an oral agreement was concluded between the parties and, if so, what were the terms and conditions of such agreement.

[4]. Plaintiff alleges and testified at the trial that 'during or about September 2008' he and the defendant, who was his step – daughter at the time, agreed that she would purchase a property in Cosmo City ('the property'), which would be registered into her name and therefore be owned by her. The idea, according to the plaintiff, was that this would be an investment by the two of them, and the opportunity had come to plaintiff's attention by virtue of his involvement in the construction industry. The purchase price of the property was to be secured by a mortgage bond by the defendant over the property in favour of First National Bank. After the defendant had so acquired the property, the plaintiff would, so he alleges, effect certain improvements to the property and build thereon outbuildings, for which he would be reimbursed in respect of the actual cost of the improvements and the erection of the outbuildings in the event of the sale of the property by the defendant. In terms of this agreement, so it is alleged by the plaintiff, he would be entitled to any and / or all of the rental paid by tenants placed in the outbuildings, which consisted of three backrooms.

[5]. Pursuant to the agreement, the plaintiff confirms that he effected the improvements, notably he installed security measures and laid tiles, and built the three backrooms, which were let out by them at a monthly rental of R3600 per month. In accordance with the agreement, the plaintiff received rental totalling R144 000 for the period from 2009 to 2013. He did however not receive the rental for the period January 2014 to June 2014, amounting in total to R21 600, which amount was in fact appropriated by the defendant. During or about 2014 the plaintiff sold and transferred the property to a third party and in breach of the contract, according to the plaintiff, did not pay him from the proceeds of the sale the cost of the improvements and the erection of the outbuildings, which came to an amount of R129 318.94. Defendant therefore owed him, as per the plaintiff, an amount of R121 600, after rounding off the claim relating to the building costs to R100 000.

[6]. The defendant denies the existence of the oral agreement as alleged by the plaintiff. Her version is that she bought the house in Cosmo City for herself as suggested by the plaintiff, who was married to her mother at the time and had so been married for approximately 15 years. At the time she had a very close father – daughter relationship with plaintiff, who advised and guided her with regard to issues such as the buying of property and other investments, as he did in this case. The plaintiff took transfer of the property on the 10th of November 2008. She moved into the house during that time, and remained in occupation until during 2010, whereafter she rented out the house main house for her own account. She denies that they ever set down around a table and specifically agreed to the terms and conditions of a contract as per the plaintiff's case. She bought the property, on advice from the plaintiff, she paid the bond and was the registered and common law owner. There was no agreement to refund the cost of the building improvements. She understood that the improvements, including the building of the outbuildings, were affected by the plaintiff who had at heart the interest of her as his daughter. Her understanding relating to the plaintiff collecting the rental from the backrooms, although this was never discussed and specifically agreed upon, was that the plaintiff would be allowed to recoup his outlay relative to the improvements by collecting rental from the tenants.

[7]. Defendant's counterclaim is in fact based on this understating, which she elevates in her papers to an oral agreement. She also claims loss of profit as a result of the plaintiff not providing approved municipal plans in respect of the outbuildings. How this cause of action is founded is not altogether clear. Also, the defendant placed no evidence before me in support of this counterclaim and same therefore stands to be dismissed without further ado.

[8]. It is instructive to note that the plaintiff alleges in his particulars of claim that it was one of the terms of the agreement concluded during September 2008 that the main house would be let out, and the defendant would be entitled to the monthly rental. This allegation,

which in my view is an important part of the plaintiff's claim and the background as sketched by him to the oral agreement, is belied by the fact that it is common cause that the defendant herself occupied the property after she bought it. It was only later during 2011 that she moved out and rented out the main house. It was also during 2011 that the plaintiff and the defendant's mother got divorced. The importance of this is that it lends credence to the version of the defendant that she bought the property for herself as her sole and exclusive asset.

[9]. When giving evidence, the plaintiff attached considerable weight to an 'affidavit' signed by the defendant on the 15th January 2010 at the Douglasdale Police Station. The plaintiff was present when this document was signed by the defendant, and he

interprets this document as supporting his version that there was an agreement in place between the parties as alleged by him. The document read as follows:

'I recognise Greg Owen Thomas as being a participant in the improvement and alterations made on the above mentioned property. That should any legal matter (eg divorce between my parents) occur, I remain the sole beneficiary of my property in that case, but that compensation should be made to Greg Owen Thomas for any improvements, alterations made to the above mentioned property.'

[10]. The defendant explained that her understanding was that the contents of this document in fact supported her version to the effect that the plaintiff would have been reimbursed for the expenses incurred by him in respect of the improvements to the property by collecting the rental from the tenants in the backrooms. This in fact happened, according to the defendant, in that the plaintiff had since 2010 to 2013 collected in total from the tenants an amount of R144 000, which was in excess of the total cost of the improvements to the building, which means that the plaintiff had been over – compensated for effecting the improvements to her property.

[11]. I am of the view that this document is not of much assistance in this matter. I do not agree with the submissions made on behalf of the plaintiff that the affidavit can and should be interpreted to mean that, in the event of the property being sold, the plaintiff would be reimbursed from the proceeds of the sale in respect of the actual cost of the building renovations and improvements. The document itself does not say so. It is as compatible with the defendant's version as with his. If anything, the mere fact that the plaintiff considered it necessary to have the document drawn up is, in my judgment, corroboration for the defendant's version that there was no definitive agreement between the parties concluded during 2008.

[12]. The 'affidavit' was signed after the backrooms had been completed. Occupation of the backrooms occurred during March 2010.

[13]. The Defendant failed to lead evidence in support of her counterclaim. In particular the Defendant denied any oral agreement whatsoever. As a consequence of this denial she denied the oral agreement pleaded in her counterclaim, the agreement upon which she relied for the repayment of rental monies received by the Plaintiff. This aspect of the Defendant's counterclaim is thus not supported by evidence and must fail.

[14]. In as far as the defendant's claim for loss of profit is concerned, the defendant failed to present any evidence that would support her claim that she had lost a profit of R80 000.00 on the sale of the property due to there being no approved plans. No expert evidence was lead in this regard. The defendant has therefore failed to lead sufficient evidence to support her claim for loss of profit. This claim too must fail.

[15]. As indicated supra the plaintiff alleges an oral agreement concluded between the parties during September 2008 with fairly detailed terms and conditions. It is common cause that at the time that the alleged contract was concluded the relationship between the plaintiff and the defendant

was one of father and daughter, the plaintiff having been married to the defendant's mother for a period of approximately 15 years. In this context, the defendant denies that they ever sat down and agreed specifically on aspects relative to the defendant's

property. As happens in a family milieu, so the defendant testified, the plaintiff identified an investment opportunity for his children and advised them to buy houses in Cosmo City, which the defendant did. Subsequently, and again in the context of a family relationship the defendant, being her father, assisted the plaintiff, his daughter, to secure and improve the property, which she was occupying at that stage. This he did, according to the defendant, out of concern for her safety and out of a sense of family. There was no talk of a contract being concluded.

The Law

[16]. The dispute between the plaintiff and the defendant is a factual one, and to a certain degree a matter of interpretation of the foregoing affidavit insofar as it may be necessary.

[17]. It is trite that the principles applicable to the interpretation of written documents finds application, namely that the primary meaning of the document must be determined from the language in accordance with the well-known rules of interpretation.

[18]. I have before me two mutually destructive versions relating to the existence or not of a contractual relationship between the plaintiff and the defendant. The plaintiff says there was a legally enforceable agreement in place between them, which provided for a number of terms and conditions which regulated the relationship between them and the defendant's immovable property. The defendant says that there was no such contract in place.

[19]. It must be decided whether, on all the evidence, the plaintiff's version is more probable than that of the defendant.

[20]. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others*, 2003 (1) SA 11 (SCA) at para 5, the Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain, as far as possible, where the truth lies between conflicting factual assertions:

‘To come to a conclusion on the disputed issues a court must make findings on:

- (a) the credibility of the various factual witnesses;
- (b) their reliability; and
- (c) the probability or improbability of each party's version on each of the disputed issues.

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

[21]. Also in *National Employers' General Insurance Co Ltd v Jager*, 1984 (4) SA 437 (ECD), at 440D-441A the court remarked as follows:

'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 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.

This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* (supra) and *African Eagle Assurance Co Ltd v Cainer* (supra). I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a court first to consider the question of credibility of the witnesses as the trial judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities'.

[22]. Also, in *Govan v Skidmore*, 1952 (1) SA 732 (N), the following principle was enunciated:

‘In finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on evidence ... by balancing probabilities select a conclusion which seems to be the more natural or plausible conclusion from amongst several conceivable ones, even though that conclusion may not be the only reasonable one.’

Applying the law in this matter

[23]. I reiterate that I have before me two mutually destructive versions. The version of the plaintiff is irreconcilable with that of the defendant. Accepting the one means of necessity a rejection of the other.

[24]. The one aspect of this matter which weighs heavily on my mind is an issue relating to the probabilities. I find it hard to believe that at the commencement of the whole process, in the context of a family set – up, a father and a daughter would have the presence of mind and the formalistic approach and to sit down and agree to terms and conditions which would regulate their affairs in the matter as suggested by the plaintiff. It seems so unnatural and artificial and therefore inherently improbable. I have also above alluded to the issue relating to the material discrepancy in the plaintiff’s version that the parties agreed that the main house would also be rented out. This fact is factually incorrect, which detracts in a material way from the reliability of the plaintiff’s story.

[25]. The defendant became the owner of the property. She paid the bond and occupied the house from 2008 to about 2010. No written agreement was ever concluded between the parties in terms of which the elaborate terms and conditions were reduced to writing.

[26]. I am furthermore of the view that, on the probabilities, the plaintiff saw an opportunity for his child and he wanted her to avail herself of same. It is highly unlikely that they would have concluded an agreement as alleged by the plaintiff.

[27]. The property was registered in the name of the defendant, and she paid the bond over the property. She was adamant that at no stage was there any agreement as alleged by the plaintiff. Her understanding relative to the backrooms was that the plaintiff, as her father, built these to assist her to maximise her income from her property. Again, I find her version to accord with the probabilities. A father and a daughter would probably conduct themselves as alleged by the defendant. It is unlikely that they, as family, would sit down and agree on terms and conditions.

[28]. Applying the principles in *National Employers' General Insurance Co Ltd v Jager* (supra), I am of the view that the probabilities in this matter favour the defendant. I say so for the above reasons.

[29]. In my view, and having regard to the above considerations and the probabilities in their totality, the version of the defendant is more probable than that of the defendant. Therefore, as per the dicta in the National Employers' General Insurance Co Ltd v Jagers matter (supra), I am satisfied that the defendant's evidence is true and that the plaintiff's version is false. At best for the plaintiff, I do not believe that he has discharged the onus on him to prove the existence of the agreement,

[30]. As far as the defendant's counterclaim is concerned, as I indicated above, no evidence has been placed before me in support of the counterclaim. Furthermore, the legal basis on which the defendant claims the amount of R80 000 is also not altogether clear from her counterclaim, which in any event she has not backed up with evidence. The counterclaim therefore stands to be dismissed.

[31]. I therefore intend dismissing both the plaintiff's claim and the defendant's counterclaim.

Costs

[32]. The defendant has been successful in her defence of the plaintiff's claim. This means that, applying the general rule, she is entitled to a cost order.

[33]. The plaintiff, on the other hand, was also successful in his defence of the defendant's counterclaim, which also entitles him to a costs order relative to the counterclaim. This cost order would however be cancelled out by the cost order to which the defendant is entitled in respect of the plaintiff's claim.

[34]. Accordingly, I am of the view that no order as to cost would be fair, reasonable and just to all concerned.

ORDER

In the circumstances I make the following order:

1. The plaintiff's claim is dismissed.
2. The defendant's counterclaim is dismissed.
3. Each party shall bear his / her own costs, including those cost which were previously reserved,

L ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 12th & 15th May 2017 JUDGMENT DATE: FOR THE PLAINTIFF: 3rd August 2017 Adv
D J Winterton INSTRUCTED BY: Smit & Marais Attorneys FOR THE DEFENDANT: In Person
INSTRUCTED BY: In Person

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