

SOUTH AFRICA / JUDGMENT

Van der Merwe v Hendrik Fielies t/a Komeng Building & Related Services (CA & R 73/2016) [2018] ZANCHC 11 (9 February 2018)

[2018] ZANCHC 11**COURT**

Northern Cape High Court, Kimberley

BEFORE

Phatshoane, Snyders

CASE / FILE NUMBER

CA & R 73/2016

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**IN THE HIGH COURT OF
SOUTH AFRICA,
NORTHERN CAPE DIVISION, KIMBERLEY**

Case**no: CA & R 73/2016****Not****reportable****In the****matter between:**

C VAN DER
MERWE APPELLANT
and
HENDRIK FIELIES t/a
KOMENG
BUILDING & RELATED
SERVICES RESPONDENT

Heard:

18 September 2017

Delivered:

09 February 2018

Corum:

Phatshoane ADJP and Snyders AJ

JUDGMENT

Phatshoane ADJP

- [1] This is an appeal by Mr Cornelius van der Merwe, the appellant, against the judgment and part of the order dated 27 November 2015 issued by Ms A.I. Venter, the Regional Magistrate of De Aar, in which she dismissed his claim of R243 114.00 with costs.
- [2] The appellant instituted action against Mr Hendrik Fielies t/a Komeng Building & Related Services, the respondent, in which he claimed payment of an amount of R297 354.00 together with interest and costs arising out of an oral agreement concluded between them for the re-surfacing of the 6.6 km Remhoogte gravel road number 3023 situated in Prieska and the 3.7 km Niekerkshoop gravel road number P69/01 situated in Niekerkshoop. Included in this claim is an amount of R54 240.00 for the additional work performed by the appellant. The latter claim is not in dispute and judgment was granted in respect thereof.
- [3] The appellant's main contention is that around May 2014 he concluded an oral agreement with the respondent in terms of which he was subcontracted to re-gravel the two roads in issue at an agreed contract price of R75 000.00 per km plus VAT. He forwarded an invoice to the respondent for the payment of a total amount of R880 650.00 computed as follows: an amount of R495 000.00 in respect of 6.6 km road and R277 800.00 for the 3.7 km road plus VAT in the amount of R108 150.00. The respondent made two payments of R300 000.00 and R337 536.00, respectively, to the appellant in respect of the two road

works. The difference in the payment, in the amount of R297 354.00, is in issue in this litigation.

The factual

background:

- [4] Around November 2013 the respondent, an inexperienced emerging contractor, was awarded a tender by the Department of Roads and Public Works, Northern Cape Province ("the department"), to resurface the 6.6 km Remhoogte gravel road and 3.7 km Niekerkshoop gravel road. It is not clear from the evidence what the actual tender price was. From an internal memo dated 12 March 2014 drafted by the acting director legal services of the department, handed in evidence during the trial, it would appear that the value of the tender was in the order of R1 543 367.26. This amount was not clarified in evidence apart from the fact that the respondent testified that he tendered for an amount of approximately R1.6 million. He then subcontracted the work to the appellant, an earthmoving contractor, on the advice of Mr Hendrik Petrus Greeff ("Mr Greeff"), an engineer in the employ of the department at the time, who was appointed as a project manager for the two mentioned road works.

[5] The appellant quoted to the respondent an amount R75 000.00 per km on each of the resurfaced road plus VAT. He says that the respondent was uncertain of the price he quoted and constantly telephoned his attorney to verify the figures. The appellant convinced him to contact Mr Greeff. He says that, the respondent knew of the R75 000.00 per km quotation for the works and its affordability. He further intimated that when he gave him this quotation he did not know of the price the respondent had quoted to the department for the resurfacing of the two roads. After the respondent had spoken to Mr Greeff, the appellant says, he gave him the green light to carry out the works with an understanding that he would pay him R75 000.00 per km.

[6] The appellant went on to say that Mr Greeff confirmed with him that he discussed the R75 000.00 quotation with the respondent and that the latter would be in a position to pay him. He then set about to resurface the road as orally agreed. He completed the first stretch and proceeded to the next. About three to four days before completion

of the second gravel road the respondent paid him R300 000.00 on the first 4.9 km of the first road. The appellant informed him of the shortfall of R118 000.00 on the first road to which he responded that he only received R330 000.00 from the department and that he needed R30 000.00 to pay his workers. At a later stage the respondent paid him R336 000.00 for the second road. The appellant enquired from him about the balance of the monies owed and he informed him that he would pay him R100 000.00 at the end of the next month. He later reneged alleging that he had not received any further payment from the department. At some stage the appellant received a letter dated 01 August 2014 from the respondent's attorneys indicative that he will not receive any further payment from the respondent.

[7] Mr Greeff confirmed having informed the respondent that he quoted the department less for the first road but more for the second road and that he would be able to afford the R75 000.00 tariff as quoted. The respondent agreed to pay the appellant. As a rule, Greet said, a contractor cannot subcontract more than 25% of his contract price. In respect of the first road he intimated that the respondent's tariffs did not show any profit in respect of works, however, with the resurfacing of the second road the respondent would have made a profit. The respondent denied that Mr Greeff advised him that if the quotations he submitted to the department for the two projects were taken together he would be able to afford the R75 000.00 tariff as quoted by the appellant.

[8] The respondent intimated that he obtained the appellant's contact numbers from Mr Greeff who said he must make use of his services because the appellant was an efficient earthmoving contractor. Although not certain, he said, there was a friendship of some sorts between the appellant and Mr Greeff. It was remarkable to him that when he called

the appellant he was knowledgeable of the project and was immediately available to inspect the roads. He confirmed that the appellant

quoted R75 000.00 per km for the works. He further says that the appellant informed him that he required direct payment from the

department. He in turn told him that he could not afford the amount in question because he quoted less than R60 00.00 to the department.

[9] The respondent categorically denied that there was an agreement that he would pay the appellant R75 000.00 per km for the works. He further intimated that he informed the appellant that there was a risk that

he could lose the contract with the department if he engaged a subcontractor. Out of this conversation, the respondent says, the

parties understanding was that the appellant would not do the work anymore. All of a sudden and to his amazement he saw the appellant

busy re-graveling the first road. Possibly, the respondent says, he may have discussed the matter with Mr Greeff. However, he intimated

having had no quibbles with the appellant carrying out the works.

[10] The respondent testified having received approximately R400 000.00 from the department, being the full payment for the first road, even though the work on that road was not yet completed. He then paid R300 000.00 to the appellant for that gravel road. He denied that he told the appellant that he received R330 000.00 from the department. He says the appellant merely called him regarding the difference in payment, in the amount of approximately R115 000.00, which he paid over to him when he effected the second payment for the second road. He worked out a payment of about R62 000.00 per km on the first road and paid same to the appellant. The appellant never provided him with a written quotation or an invoice. He only received the invoices by

e-mail after he had already effected the payments, when the project was already completed, and was taken aback.

[11] Under cross-examination the respondent revealed that the relationship between Mr Greeff and the appellant was long standing. He was placed in a precarious situation as an emerging contractor without any machinery or equipment to do the works. This was the first road that he was engaged to maintain and was not well-versed in road works.

The Magistrate's findings

[12] The Magistrate could not comprehend that the appellant concluded the contract described without putting it in writing. It was illogical to her that the appellant would make regular contact with Mr Hendrik Petrus Greeff, an engineer in the employ of the department, when he had concluded the contract with the respondent. She reasoned that the appellant was aware that the respondent quoted less for the first road and that one would have expected that he would obtain greater certainty on the terms of the agreement or at least put further

agreement in writing or secured the presence of an eyewitness which he did not do. The Magistrate was of the view that the alarm bells were ringing when the appellant was paid less for the first gravel road but nevertheless proceeded to resurface the second road. She held that the appellant did not discharge the onus to persuade her of his version. As already alluded to, she dismissed his claim save for the undisputed amount of R54 240.00 for the additional work and interest thereon at the mora rate of 9%. She also ordered the appellant to pay costs on party and party scale.

The appellant's grounds of appeal

[13] The grounds of appeal to this Court are that the Magistrate erred:-

13.1 in finding that the contradictions in the respondent's version were not material and that he was not truthful in his account.

13.2 in not finding that the payment of R300 000.00 was only effected approximately 30 days after the first portion of the 4.9 km stretch of the first gravel road was completed and that at that stage the appellant was almost finished with the re-surfacing of the second gravel road and that the work had to be completed for purposes of obtaining payment.. .

13.3 in finding that the appellant ought to have obtained more certainty on the terms of the oral agreement.

13.4 in not taking into account that the appellant became aware that the respondent quoted less for the first road at the stage when he had nearly completed the second road.

13.5 in not finding that the parties agreed that the respondent would pay the appellant R75 000.00 plus VAT per km of the re-gravelled road.

13.6 in finding that the appellant did not discharge the onus to prove that the respondent owed him an amount of R297 354.00..

The Analysis:

[14] The key issue arising for consideration in this appeal is whether the parties orally agreed to a contract fee of R75 000.00 per km of the resurfaced road plus VAT on the amount. There are disputes of fact on this aspect. As already alluded to, the respondent categorically denied that he agreed to this price. His version was that he quoted to the department an amount less than R60 000.00 for the road works and therefore he could not have agreed to the R75 000.00 tariff because this would not have redound to his benefit. The appellant's own witness, Mr Greeff, confirmed that the respondent quoted less than the R75 000.00 for the 6.6 km stretch.

[15] The legal principles applicable to the determination of disputes of fact where mutually destructive versions are presented to the Court are trite. The technique generally applied was laid down authoritatively as follows in *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others*[1]:

'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 probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent, an blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions,

(v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its 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 the 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 are equipoised probabilities prevail.'

[16] The following dictum in *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 4400- G is also apposite:

'It seems to me, with respect that in any civil case, as in any criminal case, the onus can ordinarily 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.'

[17] It is also trite that in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.[2] The Magistrate was of the view that all the witnesses were truthful in their account. Her findings were largely based on the probabilities. The onus rested on the appellant to prove that he was entitled to claim an amount of R75 000.00 per km from the respondent.

[18] In an attempt to demonstrate that the Magistrate misdirected herself in concluding as she did much store was placed on the letter dated 01 August 2014 which was forwarded to the appellant by the respondent's attorneys. The appellant criticized the Magistrate for not taking same into account. This letter, which forms the basis of the appellant's argument that he had concluded an oral agreement with the respondent for the payment of R75 000.00 per km, reads in part:

'It is our instruction that there was an agreement between you and our client that you will subcontract on both these sites for an amount of R75 000.00 p/km. Client advise, however, that the Department of Public works indicated that the amount payable to the subcontractor constitute more than 50% of the profit and that client ran the risk of losing the tender if that is the situation.

Client advise that you then agreed to a lesser amount and client [paid] you R415 000.00 on the Remhoogte project and R225 000.00 on the Niekerkshoop project. In total you received R640 000.00 from our client. It is, however, our instruction that you now claim an amount of R218 000.00 from our client and it is our instruction that client is not indebted to you [in] the said amount. In light of the above it is our instruction to bring it to your attention that our client is of the view that he fulfilled his obligation in terms of your agreement and any future action by you [will] be defended.'

[19] I am of the view that the aforesaid letter does not assist the appellant in proving that, he had concluded an oral agreement with the respondent for the payment of R75 000.00 per km because while it confirms that there was an agreement for the payment of an amount in issue it also expressly states that the parties agreed to an amount less than the R75 000.00.

[20] The appellant was aware, at least at the time when he issued summons against the respondent, that the department had paid the latter less than the amount he allegedly quoted for the construction of the 6.6 km road. This is what is reflected on the record:

'Kammies: Ja. Nou sien u hier die ander kotrakteur of die persoon met wie u gekotrakteur het betaal nou al klaar vir u halfpad sien u, gaan LI aan met daardie werk?---- Ek was nie so ·bekommerd daaroor gewees nie aangesien hy mos nou te min geld ontvang het op die eerste deel om my voluit te betaal. '

[21] The appellant, on his version, accepted the respondent's word that he received R330 000.00 from the department for the 6.6 km road works. How he could have, under these circumstances, expected more payment from the respondent for the 6.6 km road escapes me. He simply could not justify more payment from the respondent for the first road.

[22] Ms Siberhagen, for the appellant, contended that the respondent's version was improbable. She submitted that the respondent intimated having quoted less than R60 000.00 for the works and then testified that he paid R62 000.00 to the appellant. She argued that on the respondent's version, that he computed an amount of R62 000.00 per km, he ought to have paid the appellant an amount of R346 332.00 and not R300 000.00.

[23] Apparent from the record is that the respondent explained that he quoted less than R60 000.00 but further on during his examination-in-chief he expatiated:

'Kammies: ..Nou as u nou u berekeninge gemaak het by die betaling wat Mnr van der Merwe nou gesoek het op daardie Remhoogte projek, op watter bedrag het u uitgekóm---Ek het gekóm op die bedrag wat hy, wat ek horn gegee het, dit was die eindbedrag wat ek sou moes vir horn betaal het.

Kammies: wat was die bedrag gewees?--- Dit was R600 000.00 iets gewees, ek kan nou net nie die korrekte bedrag...(tussenbei)....

Kammies: Ja teen watter kilometer tarief ja? ---Ek het horn uitgewerk op, ek dink R62 000.00 Q volgens what hy ,na my gemaak het dat. Hendrik jy skuld my nog R115 000.00.'

The respondent went on to say that the R62 000.00 was the amount he could afford.

[24] In my view, whether the respondent's first payment of R300 000.00 to the appellant was for the 4.6 km of the 6.6 km gravel road, as the appellant sought to argue, does not take the issues any further because according to the respondent he received the full payment of R400 000.00 for the first 6.6 km road out of which he paid the appellant R300 000.00. At no stage was he ever informed that he will receive further payments from the department in respect of the first road and there is no evidence to the contrary. The difficulty with this case is that there is no documentary evidence in the form of Bid documents or the main service level agreement between the department and the respondent showing the actual amount of the tender or evincing the precise amounts the respondent received from the department or was entitled to receive. It was for the appellant to adduce this evidence or at the very least request the respondent to discover the necessary documentary evidence.

[25] The appellant took issue with the finding by the Magistrate that the alarm bells were ringing when he was paid less on the first gravel road but nevertheless proceeded to resurface the second road. It was contended on his behalf that the Magistrate erred in not finding that the payment of R300 000.00 was only effected approximately 30 days after the first portion of the 4.9 km stretch of the first gravel road was completed and that at that stage the appellant had almost finished re-surfacing of the second gravel road and that the work had to be completed for purposes of obtaining payment.

[26] The point the Magistrate made was that the appellant was paid less for the first road yet he proceeded to finalize the second road on behalf of the respondent whom he said was unable to comply with his contractual obligations. The Magistrate cannot be faulted in having remarked that one would have expected that the appellant would obtain greater certainty on the terms of the agreement or at the very least have a further agreement in writing with the respondent. In the appellant's say so the respondent defaulted in his contractual obligations. It does not matter that the appellant was left with two- or, three days to finish the second road or that 75% of the work had already been done on the second road at that stage. He ought to have

ceased any further road works. In truth, the appellant did not act like an aggrieved party.

[27] Having had the benefit of a careful study of the record I am of the view that none of the parties did exceptionally well in presenting their cases. In my view, the appellant fared badly under cross-examination on the aspect why he carried on with the work when he had already been underpaid. For instance he testified:

'Kammies: Nou toe u nou sien u is nou alreeds onderbetaal vir die eerste gedeelte van die werk, die Remhoogte werk, hoekom gaan u toe aan met daardie Niekerkshoop werk---Omdat Mnr Greeff vir my gese het die verskil in sy tender maak dit day hy sal my op die tweede werk kan die volle bedrag betaal...'

Later on he was questioned:

'Kammies: maar dit is wat ek glad nie verstaan nie Mnr van der Merwe u het 'n kontrak en dagvaar ons klient op sterkte van daardie kontrak, maar elke keer gaan maak u eers seker, kan die man betaal?----Nee ek het net daardie eenkeer vir Mnr Greeff gebel, dit is voor ek nog nie werk begin bou nie.'

On further probing he intimated:

"Nee, nee dit was al op die eerste werk se betaling, die eerste betaling met ander woorde dat ek vir Mnr Greeff geskakel en gese maar hy het my nou al soveel, hy het my soveel onderbetaal en hy het gese dat daar sal genoeg fondse wees om my te betaal.'

He later gave in and said he contacted Mr Greeff on two occasions. On the second occasion he had already received less payment for the first road and wanted to establish if he would be paid the balance due. What is strange about the appellant's responses is that he does not contact the respondent whom he clinched a deal with but contacts Mr Greeff.

[28] The appellant also conceded that he carried on working on the second road, the 3.7 stretch, while knowing that he had not been paid in full for the first road.

He reasoned "omdat Mnr Greeff vir my gese het die verskil in sy tender maak dit;iat dit hy..sal my .op die. tweede werk kan die vol/e. be drag.b etaal. It. was oot for Mr Greeff to make this kind of an arrangement with the appellant. The appellant was subcontracted by the respondent not Mr Greeff. When confronted that Mr Greeff was not his employer he intimated "nee dit is korrek maar hy het insae gehad en hulle twee het mos gekonsulteer oar die betaling."

- [29] It came out during the respondent's cross-examination that, absent any agreement on the payment of the R75 000.00, given that he remained liable to pay the appellant he should have evicted him from the site when he realized that he was carrying on with the works. That may well be. It is unfortunate that the respondent's educational qualification were not placed on record. One gathers from the appellant's evidence that when he told the respondent that his services were R75 0000.00 per km the latter was out of his depth calling his attorney constantly in an attempt to make calculations on the affordability of the quotation. One can infer from this that he was unsophisticated. What compounds his situation is his lack of knowledge on road construction.
- [30] The argument that it was improbable that the appellant would not have left Prieska to set up his machinery in Carnavon if there was no agreement that the respondent will effect the payment of the agreed price is sound. However, this should be viewed in context. As already alluded the respondent appeared not to be sophisticated. He also on many occasions during his evidence tried to paint a picture that the appellant and Mr Greeff had a relationship of some sort to the point that Mr Greeff advised him that his business entity could only use the appellant's services on the project. He says he had no quibbles when noticing the appellant busy on the site. As he puts it "Hy [the appellant] het dalk Mnr Greeff se woord gevat dit is hoekom hy op site gekom het."
- [31] The respondent's innuendo that there was some form of friendship between the appellant and Mr Greeff is not farfetched. I say this because it was not in dispute that the appellant and Mr Greeff knew each other. Mr Greeff directed a request to the department for the payment in respect of the works to be effected directly to the appellant, the subcontractor, although he says this was at the behest of the respondent. He did not inform the appellant that in terms of the memo dated 12 March 2014, in response to the direct payment, the department had this to say: "the contractor may not award more than. 25 % of the contract value to any other enterprise if that enterprise does not have a B-BBEE status equal or higher than [that of] the contractor." It was not in dispute that the appellant was a level 4 contributor whereas the respondent a level 3 contributor in terms of their BEE status. In addition, the appellant testified that Mr Greet certified the work as complete for purposes of issuing the payment certificates even though the 6.6 stretch was not completely resurfaced.
- [32] Mr Kammies, for the respondent, contended that it was improbable that the respondent would agree to an amount which would leave him with no benefit out of the contract. I agree that it would be absurd. In the end, it cannot be said that the respondent was mendacious to the extent that his version ought to have been out rightly rejected as false. It is plausible, as he says, that he could not have agreed to the R75 000.00 per km tariff if he had quoted less

than this amount to the department. Put differently, it is probable that the parties may have agreed on a tariff less than the R75 000.00 per km.

[33] I am driven to the conclusion that I cannot on the material before me come to the conclusion that the appellant discharged the onus to prove that he had an oral agreement with the respondent that his tariff for the earthworks would be an amount of R75 0000.00 per km plus VAT. That being the case, I do not find any basis to interfere with the conclusion reached by the Magistrate. On these conspectus the appeal falls to be dismissed with costs. In the result I make the following order.

Order:

1. The appeal is dismissed with costs.

MV Phatshoane ADJP

I agree

Snyders AJ

APPEARANCES:

FOR THE APPELLANT:

Adv A.S Sieberhagen

Instructed by Duncan & Rothman Attorneys

FOR THE RESPONDENT:

Adv EJP Kamies

Instructed by Fletcher's Attorneys

[1] 2003 (1) SA 11 (SCA) at 14 -15 para 5.

[2] S v Hadebe & Others 1997 (2) SACR 6 41 (SCA) at 645 e-f, Bernert v Absa Bank Ltd 2011 (3) SA 92 (CC) para 106,

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