

SOUTH AFRICA / JUDGMENT

# Van Loggerensberg v Manny's Timber & Hardware (Pty) Ltd and Others (56164/2012) [2017] ZAGPPHC 823 (23 June 2017)

**[2017] ZAGPPHC 823****COURT**

North Gauteng High Court, Pretoria

**BEFORE**

N.M MAVUNDLA

**CASE / FILE NUMBER**

56164/2012

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**Source record****IN THE NORTH GAUTENG HIGH****COURT, PRETORIA****(REPUBLIC****OF SOUTH AFRICA)****CASE****NUMBER: 56164/2012****NOT****REPORTABLE****NOT****OF INTEREST TO OTHER JUDGES****NOT****REVISED****In****the matter between:**

VAN

LOGGERENSBURG

F PLAINTIFF

And

MANNYS

TIMBER&amp; HARDWARE (PTY)

LTD 1ST

DEFENDANT

MANNYS

HARDWARE SUPPLIERS (PTY) LTD 2ND

DEFENDANT

MANNYS

PROJECTS (PTY)

LTD 3RD

## DEFENDANT

## JUDGMENT

MAVUNDLA, J.

[1] The plaintiff claimed from the defendants jointly and severally, the one paying the other to be absolved, payment of an amount of R299

426. 05 being an amount allegedly the defendants were overpaid alternatively unlawfully enriched with.

[2] The plaintiff in his particulars of claim, as amended, alleged as follows:

"6'

61. The plaintiff employed a contractor, Mr Andy Farmer, to erect a dwelling at stand 337, Serengeti Golf Estate.

6.2 The plaintiff paid the abovementioned contractor, by handing over 2 cheques drawn in favour of the Defendants, a sum of R480 000.

00, which cheques were dated 12 October 2010 and 12 November 2010, respectively. Copies of the front and revers sides of these cheques are annexed hereto marked as annexure "A" and "B" respectively.

6.3 The aforesaid amount was paid by plaintiff to the contractor for the exclusive purposes to purchase building material/s required for the above-mentioned building project.

## CAUSE OF ACTION-MAIN CLAIM

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7.1 Plaintiff's contractor presented the aforesaid cheques to the defendants, which cheques were drawn by the Plaintiff in favour of the defendants at the contractor's request.

7.2 Plaintiff's contractor only received, on behalf of the Plaintiff, building material and related items totaling the sum of R180, 573, 95.

7.3 The only performance therefore rendered by the Defendants in connection with the receipt of the money in question was for the building material/sand /or related products referred to in paragraph 7.2 supra.

7.4 The balance (R480

000. 00-R180 573. 95) of R299 426. 05 was neither due nor owing by the Plaintiff to the Defendants at any time whatsoever.

7.5 The sum of R299, 426. 05 was paid in error to the Defendants.

7.6 In the premises the Defendants were enriched unjustly by R299, 426. 05 at the expense of the Plaintiff, resulting in the Plaintiff being impoverished by the same amount.

#### ALTERNATIVE CLAIM

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8.1 During or about October 2011, Plaintiff entered into a verbal agreement with a building contractor, Mr Andy Farmer. In terms of the verbal agreement, the Plaintiff would make payment for building material/sand related items directly to the contractor's supplier/s.

8.2 In the bona fide and reasonable belief that the contractor ordered the building material and related items from the Defendants as the suppliers, the Plaintiff issued the 2 cheques, (copies of the front and revers sides of these cheques are annexed hereto and marked as annexure "A" and "B") in favour of the Defendants, which were handed over to the Defendants by the contractor.

8.3 The amount of R299, 426. 05 was not owing to the Defendants seeing as:

8.3.1 The Defendants received, as is reflected in annexure "A" and "B", an amount of R480, 000. 00 from the Plaintiff, and

8.3.2 The Defendants delivered to the Plaintiff's contractor building material and related items totalling the sum of R180, 573. 95;

8.4 The Defendants nevertheless appropriated the outstanding amount of R299, 426. 05 which amount, was neither due or owing by the Plaintiff to the Defendants.

8.5 In the premises the Plaintiff made payment to the Defendants in mistaken belief that the payment was owing, consequent upon which

the Defendants were enriched at the expense of the Plaintiff.

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#### DEMAND

Notwithstanding due demand in writing, addressed to the Defendants for repayment of the claimed amount of R299, 426. 05 on 7 August 2012, the Defendants have neglected and /or refused to repay the aforesaid amount."

[3] The defendants pleaded that:

3.1 during or about October 2010 a customer of the first and second defendants, namely Andrew Farmer Projects CC [Farmer], known to the first and second defendants as a registered builder and registered engineer, presented to the first and second defendants as part payment of the accounts of the said Farmer with the first and second defendants, two cheques drawn by the plaintiff payable to the first and second defendants.

3.2 the first and second defendants had no agreement with the plaintiff, held no instructions on behalf of the plaintiff to earmark and allocate any funds paid, or transferred to the defendants towards any specific invoice for the materials dispatched, delivered or supplied by the first and second defendants to the said Farmer and or the plaintiff. The defendants, further pleaded that they supplied to the said Farmer materials in the sum of R1 018 693. 39, which remained outstanding on the death of Farmer, who was the sole member of Andrew Farmer Projects CC, for which the first and second defendants were not paid by Farmer."

- [4] The plaintiff testified in this matter, thereafter closed his case without calling any other witness. The defendants closed their case without taking the stand or calling any witness.
- [5] In my view, the plaintiff's case both in the main or the alternative should be dismissed with costs, for the reasons set out herein below.
- [6] The plaintiff's case is that he employed a contractor Mr Andy Farmer, to erect a dwelling at stand 337, Serengeti Golf Estate. In terms of an oral agreement concluded by the plaintiff and the contractor, which oral agreement was never cancelled. Farmer was to erect a dwelling at the aforementioned stand, within a year alternatively a reasonable time. Plaintiff would make payment of deposits for the building material by drawing cheques in favour of suppliers, such as the defendants; alternatively make direct payments to such suppliers. For all other material, plaintiff would either pay the suppliers or Farmer. Building material ordered by Farmer from suppliers in respect whereof plaintiff made payments thereof as aforesaid, was to be used exclusively for the building project in question. Plaintiff would pay Farmer a profit on top of Farmer's costing of the building material, in respect of the building services so rendered by Farmer. The plaintiff and Farmer would meet weekly, alternatively twice a month to reconcile all payments in respect of building material ordered and or delivered.
- [7] The plaintiff in his testimony confirmed the aforesaid terms of the oral agreement concluded between himself and the contractor. The plaintiff further testified that he paid the above contractor by handing over 2 cheques drawn in favour of the defendants, a sum of R480, 000. 00, which cheques were dated 12 October 2010 and 12 November 2010 and marked as annexure "A" and "B" respectively. After the contractor committed suicide in 2010, the plaintiff conducted an audit and realised that the contractor only received, on behalf of the plaintiff, building material and related items totalling the sum of R180 573. 95. He testified that the balance (R480 000. 00-R180 573. 95) of the sum of R299 426. 05 was neither due nor owing by the plaintiff to the defendants at any time whatsoever, and it is this amount he claims from the defendants jointly or severally, the one paying the other to be absolved, alternatively, the defendants were unduly enriched with the aforesaid amount. The plaintiff alleged that the amount he claims was mistakenly paid and the defendants were unduly enriched thereby.

- [8] In respect of the main claim, the plaintiff's case is that the amount of R299 426.05 was neither due nor owing by the Plaintiff to the Defendants at any time whatsoever and was paid in error to the Defendants who were enriched unjustly by the said sum at the expense of the Plaintiff, resulting in the Plaintiff being impoverished by the same amount.
- [9] In respect of the alternative claim the plaintiff's case is that the payments were made in in the bona fide and reasonable mistaken belief that the payment was owing, consequent upon which the Defendants were enriched at the expense of the Plaintiff.
- [10] It is trite that dictates of equity demand that "no one should be enriched to the detriment of another." Vide Digesta 50.17. 206; Daniel Visser: Unjust Enrichment Juta 2008 p7. However, who so ever wants to claim from the alleged beneficiary of undue enrichment, still bears the onus of proving such undue enrichment; vide Senwes Ltd and others v Jan van Heerden & Sons and others
- [2007] 3 ALL SA 24 (SCA) at para [35] where Brand JA held that: "According to established principle, the point of departure in enrichment case is that the onus rests on the plaintiff in respect of every element of the cause of action relied upon (see Willis Faber Enthhoven (Pty) Ltd v The Receiver of Revenue 1992 (4) SA 2012 (A) at 224H-I).
- [11] Under cross examination, the defendants' plea was put to the plaintiff and he could not gainsay say same. The plaintiff made

several significant concessions. It is common cause that the plaintiff, over and above the oral agreement, concluded on 4 February

2011 a written agreement with Andrew Farmer Projects C.C. The terms of the written agreement were, inter alia, that: "2(b) All suppliers paid directly by the Owner will be reconciled and deducted from payment due to the Contractor." From his testimony, there were no reconciliation conducted done, as required by the agreement; this he did only after Farmer committed suicide. He conceded that Farmer conducted his business through the CC. He conceded that he knew that a building contractor, to claim back VAT, had to be registered, and that Farmer was not registered but the CC was. He conceded that there was no contractual relationship between him and the defendants. He could not dispute that the contractor, Andrew Farmer Projects CC, was the defendants' client and had an account with the defendants, through which building material on credit were supplied and whatever payments were made on behalf of the contractor to the defendants were credited into the account. The probabilities are that the vat would have been claimed by the Farmer's CC as it was duly registered. This goes to strengthen the defendants' assertion that the account from which the building materials were supplied was in the name of the CC and not Farmer in his personal capacity. Besides, the oral agreement was between the plaintiff and Farmer in his personal capacity and not with the CC. In my view, in the absence of any agreement between the plaintiff and the defendants, there was no obligation on the part of the defendants, to ascertain what the relationship between the plaintiff and Farmer in his personal capacity, or even the CC, and having done so to understand the basis upon which the payments were made by the plaintiff on behalf of the CC.

[12] In my view, the payments made through the two cheques referred to in the particulars of claim, were not mistakenly or erroneously made. These were made towards purchase of material. The defendants supplied building material to the CC on account. They were justified to credit the said payments into the account of the CC. It needs to be borne in mind that the plaintiff only made reconciliation after the death of Farmer, whereas the payments were made much earlier. There was no communication between the plaintiff and the defendants with regard to the delivery address of the material supplied to the CC. This must have been done by Farmer. There was no evidence adduced to show that the latter was the agent of the plaintiff. The plaintiff, could not dispute the fact that building material were delivered at various addresses, in particular, on the Serengeti address, at 31 Watercombe Street Chartwell; at 486 Craig Street and also at Lilly Van Niekerk Projects. The plaintiff conceded that he was not always on site and would not know what material was delivered, when and where, on instruction of Farmer. In my view, if there was any shortfall of the building material at all, the blame can only be laid at the doorstep of the deceased Farmer.

[13] In the matter of Buzzart Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd & 'n Ander 1966 (4) SA 19 (AD) the Appellate Court held that: "The Plaintiff's action for undue enrichment cannot succeed because the Defendant was not

enriched, solely by way of the Plaintiff's allegations, because the Defendants had an agreement... with [the company]...and as the result of that agreement the Defendants were obliged by law to pay....[the company]... for all work including the work which as alleged done by the Plaintiff ." (my translation .)

[14] In casu, The Plaintiff's claim for undue enrichment cannot succeed, because the Defendants were not enriched, even on the Plaintiff's allegations, of the payment and or shortfall of the delivered material, because the Defendants had an agreement, not with the plaintiff, but with their client, Farmer CC, the latter who was obliged to pay for the material he took on credit from the defendants. Besides, Farmer's account with the defendants still remains in the negative. In my view, the plaintiff failed to prove any enrichment on the part of the defendants.

[15] Consequently, as indicated herein above, the plaintiff's claim, in the main and in the alternative must fail. It is trite that costs follow the event. Accordingly the costs in my view must be borne by the plaintiff.

[16] In the result, plaintiff's claim is dismissed with costs inclusive those of employing senior counsel.

N.M MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 23/06/2017

PLAINTIFF'S ADV : ADV. J. DE BEER

INSTRUCTED BY : MR L. J. OPPERMAN (ADAMS & ADAMS);

DEFENDANT'S ADV : ADV. H. F. JACOBS SC

INSTRUCTED BY : Mr W DE WET (VAN GREUNEN & ASSOCIATES INC

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