

SOUTH AFRICA / JUDGMENT

Van Wyk and Others v Topaz Sky Trading 146 (Pty) Ltd and Others (21669/2014) [2016] ZAGPPHC 146 (16 February 2016) [2016] ZAGPPHC 146

COURT

North Gauteng High Court, Pretoria

BEFORE

Olivier

CASE / FILE NUMBER

21669/2014

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 21669/2014

DATE OF HEARING: 10 & 11 November 2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

NECRON PROPERTIES (PTY) LTD

Plaintiff

and

AVSONS HOLDINGS (PTY) LTD

Defendant

J U D G M E N T

OLIVIER, AJ

INTRODUCTION

- [1] Both the plaintiff and the defendant are private companies registered and incorporated in terms of the laws of South Africa.

- [2] The plaintiff, represented by Dr Henk Buytendorp, and the defendant, represented by Mr Ahmed Vadia, concluded a verbal agreement ('the agreement') during or about May 2013 for certain building and renovation work at erf 295 Kempton Park, a property belonging to the Defendant ('the property'). The precise terms of this agreement are in dispute.
- [3] The agreed price for the initial construction project was R 1 million rand, excluding extra work or materials. Sometime during the building and renovation work, the parties agreed to the performance of extra work and rendering of extra materials. The cost of this was R 567 400. This was admitted in defendant's plea. '
- [4] Sometime during July 2013 a building inspector accompanied by the SAPS stopped construction on two occasions due to the absence of approved building plans. No further construction has taken place since then.
- [5] The plaintiff claims payment of R 232 000 from the defendant, which is the amount still owing for the work rendered, according to the plaintiff.
- [6] The defendant counterclaims for specific performance - procurement of building plans and the completion of the building works; in the alternative, it prays for cancellation of the contract and payment of R 390 500, which defendant claims is the amount by which it overpaid, plus interest; and further, special damages for loss of rental income from 1 September 2013 amounting to R 3,276 million, which amount excludes escalations, levies and additional amounts.
- [7] The parties agree that the total payments made by the defendant to the plaintiff is R 1 250 000, and that the rebate given by the plaintiff for work included in the original contract but not performed is R 85 400.
- [8] The essential issues in dispute are:
- (a) the content of the initial agreement, specifically whether it was agreed from the outset that the plaintiff should divide the larger building into smaller shops; or whether the parties had only agreed on the repair of the building, which had been damaged in a fire at some stage prior to the agreement. Plaintiff says it is the former, and that the subdivision was agreed on only in July 2013 and therefore was not part of the initial agreement. Defendant contends that it was part of the initial agreement.
 - (b) Whether or not the plaintiff knew how much rent could be secured from the letting of the shops, once the building had been subdivided. This is of importance in respect of the claim for special damages.
 - (c) Who was responsible for procuring the approved building plans for the subdivision. The defendant claims it was plaintiff's responsibility. The plaintiff contends that the question of building plans arose only in July 2013 when the additional building work was stopped by the building inspector. Plaintiff contends he then 'facilitated' the appointment of Mr Nothnagel to procure the building plans.

CALCULATION OF PLAINTIFF'S CLAIM

- [9] The outstanding balance payable to the plaintiff according to its records is R 232 000, calculated as follows:

R 1m + R 482 000 (extras) - R 1250 000 (payments by defendant) = R 232 000.

The R 482 000 is calculated as follows: R 567 400 - R 85 400. A more detailed breakdown of the R 567 000 is given in a cost and payment summary in Annexure A to the Pleadings Bundle on p.7.

CALCULATION OF DEFENDANT'S COUNTERCLAIM FOR LOSS OF RENTAL INCOME

- [10] The amount of the damages claimed for loss of future rental income is calculated as follows: R 126 000 per month (28 units @ R 4500) since September 2013. Defendant claims this amounts to R 3,276 million.

PLAINTIFF'S VERSION

- [11] The version advanced by the plaintiff is essentially as follows. The initial agreement was for the repair and renovation of the building earlier damaged in a fire. There was no agreement that the plaintiff would procure any building plans. There was no need for building plans at that stage as there were no alterations to the structure of the building.
- [12] Near the completion of the renovations the defendant approached the plaintiff to subdivide the property into smaller shops. Securing building plans was the responsibility of the defendant. When construction stopped due to the absence of building plans, the plaintiff facilitated the appointment of Mr Nothnagel on behalf of the defendant to draft and get approval for the building plans.
- [13] The plaintiff was unaware of the amount that the defendant would have received from rental income.

DEFENDANT'S VERSION

- [14] The version put forward by the defendant is essentially as follows. The initial agreement was for the subdivision of the building into 26 smaller shops. It was later agreed to add an additional 2 shops and to make some other changes to the building
- splitting up electricity points, paving and expanding the toilets.
- [15] It was agreed that the plaintiff would procure building plans. Mr Vadia, the defendant's representative, was a person with no experience in the building industry who was looking for a "one stop shop". Thus, the plaintiff was contracted to provide all services, including the procurement of building plans.
- [16] The agreed-upon finalisation date and handover would be around middle August; the plan was for the units to be let from 1 September 2013. The plaintiff knew this. (This is not in dispute.)

- [17] Construction was commenced without approved building plans during May 2013, but it was only when construction ceased that the defendant became aware that building had commenced illegally without building plans. The defendant paid R 44 000 to plaintiff, which was paid over to Mr Nothnagel for the building plans, "which was dealt with and negotiated by the plaintiff as part of the initial agreement". In an attempt to mitigate its loss following the termination of construction, the defendant started negotiating with Mr Nothnagel directly in an attempt to procure the building plans.
- [18] The plaintiff acted mala fide in starting the construction without the requisite approval from the local authority. The construction was stopped due to plaintiff's negligence. The Plaintiff thus failed to fulfil its contractual obligations towards the defendant.
- [19] The defendant never queried or rejected invoices until building was stopped. The plaintiff never informed Mr Vadia of the need for plans.

PLAINTIFF'S WITNESSES

- [20] Two witnesses testified on behalf of the plaintiff: Dr Buytendorp and Mr Nothnagel.

Dr Buytendorp

- [21] Dr Henk Buytendorp is the CEO, and a shareholder, of the plaintiff, who has been in the building industry for 40 years. He testified that the original agreement was for the restoration of a portion of a building that had been damaged in a fire, at a cost of R 1 million, for which no building plans were required as the structure would not have been altered. This work entailed among others, demolishing walls, redoing the roof, and so on. This phase ('phase 1') took about 3 months to complete. It was only about 80% into that project that he was asked to subdivide the building into 28 smaller shop units ('phase 2'). The idea was to create a so-called 'China mall'. This work commenced in July 2013. The extra work included putting in shop fronts (aluminium panels with glass and doors), electricity points, tiled floors, plumbing, suspended ceilings. He was asked to put in separate electricity boxes, and used brick for dividing walls, not dry wall. However, the work came to a standstill when a building inspector intervened and put a stop to it due to the absence of building plans.
- [22] Regarding the building plans, Dr Buytendorp testified it was never agreed that he would procure the building plans. During cross-examination, however, he conceded that most clients do not know the difference between a Site Development Plan and a building plan, unless they were in the commercial sector; and that, in building Without a plan, a fine can be incurred.
- [23] According to Dr Buytendorp, after the building work came to a halt, there was agreement between Mr Vadia and himself that an architect would be employed on Mr Vadia's behalf. Dr Buytendorp testified that, on behalf of Mr Vadia, he then facilitated the appointment of Mr Nothnagel to procure the building plans. Mr Nothnagel was never a subcontractor of Dr Buytendorp. A quote was received on 6 July 2013. It was agreed with the Defendant that Mr Nothnagel would be paid by Dr Buytendorp. An amount of R 44 000 was received by Dr

Buytendorp from Mr Vadia and transferred to Mr Nothnagel.

[24] After removal from site, the plaintiff sent a statement of account for extras to the defendant. Credits were given to the defendant for work not completed, eg only half of electrical boxes were completed.

[25] He conceded that he had laid bricks and started building without a plan, but only because Messrs Vadia and Nothnagel were working on securing the plan. He was doing it for a friend (Mr Vadia), he said, and therefore continued without a building plan. He said that he had expressly informed Mr Vadia that a building plan was needed, who said that the plan was coming.

[26] He testified that he would be willing to complete the building work if the plan is obtained.

[27] The prospective rental was never discussed with him.

Mr Nothnagel

[28] Mr Pierre Nothnagel has 28 years' experience in architecture as an 'argitekstegnoloog'. He testified that no plans are needed for renovations, provided there are no alterations to the structure of the building. However, when the structure is altered, building plans are required. He also conceded that it is unlawful to commence with building work without plans.

[29] His first contact with the project was when he was contacted by Dr Buytendorp. He had no relationship with the plaintiff prior to July

2013. The mandate given to him was for the drafting of a site development plan and thereafter building

plans. The mandate was from the owner, although he was initially approached by Dr Buytendorp. He was paid for his services by the plaintiff.

[30] Mr Nothnagel's quotation of 6 July 2013 did not specify the name of the owner, the reason being that the name of the owner was unknown at the time. This was not unusual.

[31] Mr Nothnagel testified that it is the owner's responsibility to get building plans approved. It is a long process for approval of first, the site development plan and then, the building plans. An occupation certificate would be granted only at the end of this process after a final inspection by a building inspector. This, according to Mr Nothnagel, was explained to Mr Vadia, especially the difference between a building site plan and a building plan. E-mails to this effect are part of the trial bundle.

- [32] The site development plan was drafted in August 2013, submitted on 26 September 2013 (see copy of the application) but approved only at the end of 2014. The words "SITE DEVELOPMENT PLAN" are clearly visible on the face of the document. One reason for delay in approval is that the file had been lost and then found again. There was also a problem in respect of the lease agreement for the parking area.
- [33] At some stage Dr Buytendorp withdrew from this process and Mr Nothnagel then started dealing directly with Mr Vadia, from whom he received a power of attorney to act on his (Mr Vadia's) behalf with the local authority.
- [34] Sometime later Mr Nothnagel's involvement came to an end. He indicated to Mr Vadia that he would be willing to assist with the building plan, but was not contacted by him again.
- [35] It was put to Mr Nothnagel during cross-examination that he had had only one meeting with the defendant. This was disputed by the witness, who said that he had had 3-4 meetings with the defendant, although he could not be sure of the exact number.

DEFENDANT'S WITNESSES

- [36] Two witnesses testified on behalf of the defendant: Mr Vadia and Mr Devy.

Mr Vadia

- [37] Mr Ahmed Vahdia was the defendant's only witness on the merits. He testified that it had been agreed from the outset that the plaintiff would be responsible for subdividing the building into smaller units; and also for procuring the building plans for this subdivision.
- [38] According to him, the initial plan was to revamp the building and to put in 26 shops for R 1 million. (Later on during cross-examination

The idea to divide the property into smaller units emanated from Dr Buytendorp, and that on this basis the Defendant proceeded in good faith.

- [39] The extra work consisted only of splitting up electricity points, some paving, the addition of two shops (to bring it to 28), and more toilets. The insurance had paid out R350-400K only, and that he would therefore never have paid R 1 million simply for renovations and repairs. He denied that the extra costs came from his instruction to sub-divide the building into smaller shop units, as claimed by the plaintiff.
- [40] He claimed that Dr Buytendorp had indicated to him even before building work had commenced that the plans had been procured. He said that the building plans were shown to him (Mr Vadia) and that he had approved them. During cross-examination, he backtracked on this after some more questions, saying that he wasn't sure anymore. Mr Vadia testified that the ground plan was the plan originally

presented to him. (Bundle A p 11.) The plaintiff had arranged for the building plans to be drafted. Thereafter, he represented to Mr Vadia that they had been approved. This was at the commencement of the construction.

[41] Plaintiff's counsel showed Mr Vadia the 'ground storey plan', which the witness said is what Dr Buytendorp had shown him at the outset in May 2013. However, Mr Nothnagel's evidence testified that this plan was in fact the site development plan which was only drafted during August 2013.

[42] Mr Vadia testified that he thought that a building plan was the same as a site development plan. However, Mr Nothnagel testified that the difference had been made clear to Mr Vadia in e-mails, which were put before the court, as well as in person. This was denied by Mr Vadia.

[43] During cross-examination, Mr Vadia maintained that the plan on p 21 of the pre-trial bundle - the site development plan - was the building plan. He later conceded that the site development plan was different from a building plan, but insisted that he realised it only at that moment in court. He did not know this before.

[44] It was put to Mr Vadia that he knew that it is the owner's responsibility to procure building plans as he was building a private

property at the same time. This was denied by Mr Vadia, as he had employed an architect for that project.

[45] In respect of the building plans following the termination of the construction, Mr Vadia said that he had followed up in Dec/Jan 2014 to get an update, but that nothing happened. Eventually, it was he (Mr Vadia) and Azam, his brother in law whom he had employed as a 'runner', who finally got plans approved. The date of approval was 14 November 2014.

[46] Under cross-examination, Mr Vadia could not explain why the building plans were only asked for by the authorities in July, while construction had already started in May 2013. He testified that he would never have contracted with the plaintiff had he known that he would need to procure the building plan himself. Mr Vadia denied paying Mr Nothnagel, saying that the Plaintiff had paid him.

[47] Plaintiff's counsel asked Mr Vadia why he paid the plaintiff on 5 August, following the termination of the construction? Mr Vadia said that he thought that the plaintiff had matters under control, and that he had been satisfied with progress. He could not quite remember why he also paid the plaintiff on 6 September, but he supposed that Dr Buytendorp must have told him that things were under control. He wanted to get the job done. There probably was some communication between them during this time.

[48] Mr Vadia testified that the credits were not proportionate to what remains incomplete.

[49] He said that he would be prepared to pay the outstanding amount if the construction was completed by the plaintiff.

[50] Mr Vadia was expecting an income from 1 Sept 2013, which has not been forthcoming. He conceded during cross-examination that he has no occupation certificate, which is a requirement for letting out the shops.

Mr Rory Devy

[51] Mr Devy was called by the defendant as an expert witness to testify about the defendant's loss of rental income. He has 10 years' experience in the residential property sector, but only 2 years' experience in the commercial sector, having let commercial properties in the retail and industrial sector in the East Rand. It was revealed under cross-examination that he has no certification from the EAB certificate or any qualification in property valuation.

[52] He indicated that he had advertised the shops for letting on a board, even though they had not been completed. Eventually, he took down the board as the shops could not be rented out due to their non-completion.

[53] The units would be 16-25 sq metres each, which could be let out between R 4000-4500 per month depending on size. He based this on a comparison with other similar properties, but it was disputed under cross-examination that these were in fact comparable properties.

[54] He indicated that he had had interest and offers, but when questioned under cross-examination, he conceded that he had no written offers to lease, nor could he provide the names of prospective tenants.

[55] The defendant had also intended calling Mr Lebogang Kganyado as an expert witness to testify about the estimated cost to complete the building work, but he was not allowed to testify due to defendant's non-compliance with Rule 36(9) of the Uniform Rules of Court.

ASSESSMENT OF THE EVIDENCE

[56] To reconcile mutually destructive versions of the parties, the approach adopted in Stellenbosch Farmers Winery Group Ltd and Another v Martel Et CIE and Others 2003

(1) SA 11 (SCA) has to be followed. The approach requires the court to make a finding on the probabilities, having regard to the credibility and reliability of the parties' witnesses.

[57] In that case Nienaber JA provided guidance in how to resolve such disputes. I quote in full from the headnote in the case, which

provides a useful summary of the approach:

'To come to a conclusion on the disputes issues the 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 of the veracity of the witness. That in turn will depend on a variety of subsidiary factors such as (i) the

witness' candour and demeanour in the witness-box, (ii) his bias, latent or patent, (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, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v), on (i) the opportunities he had to experience and 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 disputes 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 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."

- [58] First, the witnesses of the plaintiff are evaluated. Dr Buytendorp was a good witness. He came across as confident, truthful and honest in his evidence. The same goes for Mr Nothnagel. Both performed well under examination in chief and cross- examination, and there were no internal contradictions in their respective testimonies. Dr Buytendorp and Mr Nothnagel corroborated each other's testimonies, but without sounding rehearsed. In other words, there is consistency in the evidence they gave in court. Both conceded certain points put to them by the defendant's counsel, which is a positive factor to be considered in respect of the credibility of their respective testimonies. Ifind their evidence credible and reliable.
- [59] Mr Vadia's testimony was not as convincing as that of the plaintiff's witnesses. He appeared uncomfortable in answering some questions, particularly those posed during cross-examination. In many answers to direct questions on other issues, he would repeat his version that it was not his responsibility to procure the building plans, but that of Dr Buytendorp's.
- [60] Plaintiff's counsel argued during closing argument that because he was building his own private property around the same time, it makes it improbable that Mr Vadia would not have known that it was his responsibility as owner to procure building plans. It was further submitted that it is improbable that the Defendant would have paid R 1 million for 26 shops, and then later more than half of that initial amount - R567 400 - for only 2 more shops and some smaller renovations. The plaintiff's version - that the subdivision into the smaller shops was part of the second phase - is more probable, he said. Furthermore, in respect of the building plans, if it was agreed in May 2013 already that the plaintiff would obtain building plans, why would it have waited until July 2013 to ask for a quote from Mr Nothnagel?

- [61] Several payments were made by the defendant. In respect of the payments of 5 August 2013 (R 100 000) and 6 September 2013 (R 150 000), the plaintiff contended that it is improbable that the defendant would have made these payments if Dr Buytendorp had lied to him about procuring the building plans.
- [62] Mr Devy's testimony was of little assistance to the defendant. His expertise is also questionable. I do not attach much weight to his evidence.
- [63] I find the testimonies of the plaintiff's witnesses to be more credible and reliable than that of the defendant's. On balance, the plaintiff's version is also more probable.

THE COUNTERCLAIMS

- [64] The defendant failed to lay a proper foundation for any of its counterclaims. In light of my finding above, the defendant's

counterclaim for specific performance is dismissed, and so too is its alternative damages claim for R 390 500. No evidence was produced to prove this claim.

- [65] In respect of the additional counterclaim for loss of future rental income, the evidence produced was weak. In respect of the quantum of the claim, there was no real proof of the income that the defendant would have derived from the letting of the premises. It was purely speculative. Counsel for the defendant provided no South African authority on the issue of special damages for loss of rental income, referring only to a 1962 decision of the Ghana High Court.

CONCLUSION

- [66] My credibility, reliability and probabilities findings favour the plaintiff. It has discharged its onus of proof, and is entitled to the relief it seeks.

ORDER

- [67] In the circumstances I make the following order:

1. The plaintiff succeeds in its claim.
2. The counterclaims of the defendant are dismissed.
3. The defendant is ordered to pay the plaintiff the amount of R 232 000, plus interest on the aforementioned sum at 15,5% per annum from date of service of the summons to date of payment.
4. The defendant is ordered to pay the costs of the plaintiff.

ACTING JUDGE OF THE HIGH COURT

Representation for the Plaintiff

Counsel Adv F J Erasmus

Instructed by Van der Merwe Du Toit

Representation for Defendant:

Adv J Brenkman

Instructed by: Fayaaz Moosa Attorneys

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