

SOUTH AFRICA / JUDGMENT

Werts v Tilink CC (CA 26/2011)

[2013] ZAECHGC 83 (15 August 2013)

[2013] ZAECHGC 83**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

Griffiths, Nepgen

CASE / FILE NUMBER

CA 26/2011

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IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION : GRAHAMSTOWN
CASE NO. CA 26/2011

In the matter between:

JULIAN WERTS

.....Appellant

and

TILINK CC

.....Respondent

JUDGMENT

GRIFFITHS, J.:

[1] The appellant in this matter has appealed against certain judgments granted against him by the magistrate, Humansdorp. When the matter was called we were informed by Mr. Nel, who appeared on behalf of the appellant, and that there was to be no appearance

for the respondent. We were further informed that the respondent's representative had indicated to him that he did not intend to pursue the matter and merely awaited the outcome. This was indeed foreshadowed by the fact that no heads of argument were delivered by the respondent.

[2] For the purposes of convenience, I shall in the remainder of this judgment refer to the appellant as "the defendant" and the respondent as "the plaintiff", in accordance with their designations in the court a quo.

[3] The plaintiff's cause of action was based on a so-called award made by a quantity surveyor pursuant to an informal arbitration between the parties regarding a dispute which had arisen from an oral building contract. Based hereon, the plaintiff claimed three separate amounts, the first two of which are not the subject of this appeal. The third claim related to retention monies as dealt

with in the award. It was claimed that the sum of R24,383.97 would become due on the last day of May 2007 subject to what was referred

to as "retention work" being completed. According to the plaintiff's particulars of claim in this regard, the defendant had denied the plaintiff access to the house with the intention of frustrating completion of this retention work and, on the basis of the doctrine of fictional fulfilment, it was accordingly entitled to payment of this sum.

[4] The defendant pleaded to this and set up three counterclaims, the first of which is not the subject of this appeal. The second counterclaim related to certain waterproofing which required attention as part of the aforementioned retention work. It was claimed that this work was not carried out and the defendant had accordingly been obliged to employ the services of a separate contractor to complete it, the reasonable and necessary costs of which were R7,923. The third counterclaim related to the negligent damaging of certain flooring in the residence, it being pleaded that the reasonable and necessary replacement cost thereof was the sum of

R8,200, both of which sums the defendant duly claimed from the plaintiff.

[5] The matter went to trial. Although it does not appear in so many words from the transcript of the proceedings, we were informed by Mr. Nel that the magistrate ruled, at the outset of the trial, that the issues of liability and quantum were to be separated and that only the question of liability would be determined at that stage. The plaintiff led the evidence of one Davie, the sole

member of the CC. He also led the evidence of the quantity surveyor which did not take the matter much further and the defendant was the sole witness to testify in his case. After hearing evidence and argument, the magistrate found in favour of the plaintiff on its claim three and dismissed the defendant's counterclaims two and three.

[6] There appears to be a commonly held misapprehension particularly in construction contract matters in the lower courts that the presiding officer will understand and know of all the relevant facts of the matter (which may well be known to the parties and their legal representatives) without the necessary evidence being placed before the court. It is normally essential in matters of this nature to place before the court proper evidence usually in the form of expert evidence foreshadowed by a report dealing fully with the construction issues in contention and incorporating, where necessary, plans, diagrams, photographs and the like and, where the case requires it, an inspection in loco. Unhappily, this did not happen in this case and the problem has been compounded on appeal as this

court is bound by the four corners of the record.

- [7] The evidence of the plaintiff on its claim three simply did not sustain the cause of action as pleaded. As indicated earlier this claim was based on the fact that it had been frustrated in completing the retention work required. In further particulars it

indicated that the "work to be completed" consisted of various items, including "Waterproofing of West Facing bedroom

window". Despite the obvious inference from this that it would be the plaintiff's cause of action that none of the retention work was indeed completed, it was Davie's evidence that all the retention work had been completed, including the waterproofing. However, during the course of cross examination and the evidence of the defendant it became reasonably clear that the question of waterproofing included two separate components which related to a double story portion of the building. Firstly, there was a question of a leaking pipe in the upstairs bathroom and, secondly, there was a question relating to waterproofing in and around the bedroom window situated underneath the bathroom. It became common cause during the course of evidence that the bathroom problem had been corrected but that the second problem had not. The plaintiff furthermore annexed a quote in this regard to his counterclaim for the repair of this problem in the sum of R4,300.00 excluding VAT.

- [8] According to Davie, he had in fact dealt with this problem by creating what he referred to as "weep holes" which, according to him, conformed to the industry norm in dealing with such a problem. However, it appears from the evidence of the plaintiff that this problem was never corrected and that the moisture continued to leak onto the window causing bubbling of the paint. Furthermore, the plaintiff was adamant that he had drawn this moisture problem to the attention of Davie during the course of the retention period.

- [9] The final result of all this is that whilst the plaintiff maintained that all the retention work had indeed been done (in conflict with its pleadings), the defendant maintained that there was indeed outstanding work, that being the moisture problem relating to the downstairs window, which had been timeously drawn to the attention of the plaintiff.

- [10] The magistrate, in his reasons, recognized that the waterproofing problem related to the bedroom window only, and found that the plaintiff had, during the course of the retention period, satisfactorily corrected this problem by creating the aforementioned

weep holes. In his view, the moisture problem subsequently again reared its head after the retention period had duly run its course

and this was, accordingly, a latent defect which required the defendant to place the plaintiff in mora by way of a demand to rectify the problem. Because this was not done before the defendant had someone else rectify the problem, the magistrate reasoned that the defendant was not entitled to claim the costs of such rectification, the subject of the defendant's second counterclaim. The magistrate appears not to have made any credibility findings with regard to either of the material witnesses.

[11] In my view, the magistrate was wrong in his finding that the downstairs window problem only arose subsequent to the completion of the retention period. In this regard there is clear evidence from the plaintiff that it arose at an earlier stage and that he had raised it with Mr. Davie before the retention period had run its course. Although Davie denied this, the onus was on the plaintiff to establish what work was indeed done and completed before the end of the retention period and, there being no reason to prefer

the evidence of Davie over that of the plaintiff, and there being no real probability either way, the magistrate ought to have found that the plaintiff had not discharged the onus in this regard and that, therefore, the "retention work" had not been completed timeously. This is particularly so in view of the manner in which the plaintiff had pleaded its case as I have already dealt with.

[12] In view of this finding, it seems to me that the question of "fictional fulfilment" does not enter the picture as it is common cause that the only suggestion of a possible prevention of the plaintiff from performing the retention work arose some months after the end of May 2007 when the defendant went overseas, and when on his return the defendant refused the plaintiff

access to the premises sometime during 2008. There is no suggestion that the defendant refused the plaintiff access to the premises for the purposes of such repairs during the retention period.

[13] In the circumstances, my view is that the magistrate was incorrect in granting judgment for the plaintiff on claim three and that he ought to have granted absolution from the instance, with costs.

[14] As indicated earlier, the second counterclaim also relates to the very same water proofing problem. Mr. Nel candidly conceded that should we find in his client's favour on the plaintiff's claim three in the manner indicated above, then this counterclaim would fall away as to grant it would amount to a duplication.

[15] This finding, however, presents its own unique difficulties. There appears to have been no agreement as to the value of the work done during the retention period, and the value of the work outstanding, namely the repairs to the downstairs bedroom window. The only indication thereof is the quote referred to above which, with VAT, amounts to the sum of R4,902.00, which was not agreed. Mr. Nel's attitude in this regard was that the parties would act reasonably in an attempt to reach agreement as to how the retention monies ought to be apportioned. I believe this to be the proper approach.

[16] With regard to the third counterclaim, it appears to me that there is credible evidence from the defendant to the effect that the bamboo flooring was indeed damaged by employees of the plaintiff when they placed their scaffolding thereon. He was present when this occurred and observed it happening. Mr. Davie conceded that he was not present and could thus not counter this evidence. The plaintiff did not lead the evidence of such employees and thus, to my mind, the evidence of the defendant must stand. Whilst accepting this, the magistrate dismissed this claim solely on the basis that the plaintiff was not placed in mora. This being a claim in delict, I fail to understand why the plaintiff was required to be placed in mora. In my view, the defendant was accordingly entitled to judgment on this claim in reconvention. In view of the fact that the question of quantum was apparently separated from liability, the question of the quantum of the defendant's damages in this regard will have to be determined by the magistrate.

[17] In the result, the appeal with regard to the respondent's claim three and the appellant's third counterclaim succeeds and I accordingly make the following order:

The appeals with regard to the respondent's claim three and the appellant's third counterclaim are upheld;

The orders made by the magistrate in this regard are hereby set aside and substituted with the following:

"1. On claim three, the defendant is granted absolution from the instance with costs;

2. On the third counterclaim, it is ruled that the plaintiff is liable for any damages which the defendant may prove to have arisen from the damage caused to the bamboo flooring and the plaintiff is to pay the costs of this counterclaim up to this stage. In this regard, the matter is referred back to the magistrate for determination of quantum."

The respondent is ordered to pay the costs of this appeal.

JUDGE OF THE HIGH COURT

NEPGEN, J. : I agree

HEARD ON : 02 AUGUST 2013

DELIVERED ON : 15 AUGUST 2013

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