

LETETE WHICH IN THE NORTH-WESTERN HIGH COURT, PRETORIA

REPORTABLE: YES/NO.

OF INTEREST TO OTHER JUDGES: YES/NO.

REVISED.

16/2/2010

DATE

In the matter between:

SIGNATURE

delivered:
Date heard: 16 February 2010
Case Number: A 627/07

M.D SEBOTHOMA

APPELLANT

and

A B SITHOLE

RESPONDENT

JUDGMENT

LOUW J

The appellant appeals the decision of the magistrate for the district of Mokerong, Mahwelereng given on 21 July 2006.

It is common cause that there was an oral contract between the appellant and the respondent. In terms of this contract the respondent would have performed building work, including renovation of class rooms, at Phahlaphahla secondary school.

The appellant, on completion of the work, would pay the respondent the amount of R 110 000.

The respondent alleged in his summons that there was in fact a further agreement, namely that the appellant instructed him to do additional work for which an amount of R 40 000 was agreed upon. The respondent further alleged that he had so far been paid the amount of R 70 000. Thus, on the respondent version the total of the contract amount plus the additional work amounted to R 150 000. Deducting the alleged payment of R 70 000 that would leave a balance of R 80 000.

The plaintiff further alleged in paragraph 7 of his summons that the appellant in fact paid his labourers the amount of R 13 257. This left a balance in the amount of R 66 743 which was the amount claimed in the summons.

The magistrate gave a well - reasoned judgment which found the following:

1. That no additional work was agreed upon and that the total contract prize was therefore R 110 000.
2. That in fact the amount of R 80 000 was paid by the appellant and not R 70 000 as alleged by the respondent.
3. Thus the court granted judgment in favour of the respondent in the amount of R 30 000.

It is further common cause that before the completion of the work, namely on 7 March 2003 the respondent as well his assistant Ramuru were seriously injured in a motor vehicle accident and were hospitalised. The work was completed a few days later also during March 2003.

In the light of the respondents injury the appellant pleaded that there was a "supervening impossibility" of performance. He, the appellant, therefore had to complete the work himself and it is pleaded that therefore the respondent was not entitled to any payment at all. At no stage did the appellant cancel the contract.

It can be accepted that due to the respondent's hospitalisation the appellant had to take a more active roll in the construction project. He alleged that he made payments to workers during the respondent's absence. He was however not sure what amount he had paid. On a question as to how much did he pay, his answer was as follows:

"I cannot remember, because I paid them twice. It can be about R 26 000."

Thus evidence is obviously not reliable as the appellant was not sure what amount he had paid.

In the light of the respondent's own version it can therefore be accepted that appellant paid R 13 257. The magistrate found that the latter payment was "*neither here nor there*".

I cannot agree with the latter finding of the magistrate. Otherwise the magistrate's judgment cannot be faulted.

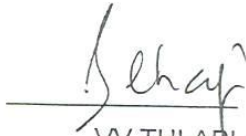
The work contracted for was completed, albeit not under the personal supervision of the respondent. This does not matter as this was not the kind of contract where personal performance was required. In the light hereof the balance of the contract prize namely R 30 000 was payable. From this has to be deducted the amount of R 13 257. This leaves a balance of R 16 743. This is the amount that the magistrate should have found was due to the respondent. Interest has to run from the date of issue of the summons namely 4 February 2004.

I therefore find as follows:

1. The appeal succeeds with costs.
2. The order of the court below is substituted with the following:
 - 2.1 The defendant is ordered to pay the plaintiff the amount of R 16 743.
 - 2.2 The defendant is ordered to pay interest on the aforesaid amount at the rate of 15,5% per annum from 4 February 2004 until date of payment.


AA LOUW
JUDGE OF THE HIGH COURT

I agree


VV THLAPI
JUDGE OF THE HIGH COURT