



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable: YES/NO Of Interest to other Judges: YES/NO Circulate to Magistrates: YES/NO
--

Case number: A39/2022

In the matter between:

SONJA BRUWER

Appellant

and

FREE STATE CURTAIN PARLOUR CC

Respondent

CORAM:

C REINDERS, J *et* N KHOOE, AJ

JUDGMENT BY:

C REINDERS, J

HEARD ON:

21 NOVEMBER 2022

DELIVERED ON:

17 FEBRUARY 2023

[1] The appellant was the defendant in the trial court with the respondent as plaintiff. It is convenient to refer to the parties as cited in the court a quo.

- [2] The plaintiff instituted an action in the Magistrate's Court against the defendant based on various verbal agreements which boils down thereto that defendant purchased curtains from the plaintiff in the amount of R 175 017.00. It is averred in paragraph 6 of the particulars of claim that plaintiff duly complied with the terms of the agreement(*sic*) in that the curtains were manufactured and delivered to the defendant. It is further alleged that defendant has paid an amount of R 130 017.00 and that an amount of R 45 000.00 remains outstanding. Judgment is therefore sought against defendant for payment of the aforesaid amount together with interest *a tempora morae* and cost of suit.
- [3] Defendant filed a plea which included a special plea of *lis pendens*. More relevant for purposes of the appeal defendant pleaded in respect of paragraph 6 of the particulars of claim: "Safe (*sic*) to specifically plead that any and all work were done by the Plaintiff, was not done in a workman satisfactory manner, the remainder of this paragraph is denied and is the Plaintiff put to the proof thereof."
- [4] A request for further particulars was filed wherein plaintiff requested the following:

"1.

AD PARAGRAPH 6 THEREOF

- 1.1 Precisely which work was done by the Plaintiff?
- 1.2 On which date was the aforementioned work done by the Plaintiff?
- 1.3 Was the aforementioned work done by Plaintiff in terms of an agreement?
- 1.4 Was the aforementioned agreement in writing or verbal. If in writing a copy thereof is requested and if, verbal the following particulars of such verbal agreement:
 - 1.4.1 Where and on what date was the verbal agreement entered into?
 - 1.4.2 Who acted on behalf of Plaintiff when the agreement was entered into?
 - 1.4.3 Who acted on behalf of Defendant when the agreement was entered into?

1.4.4 What were the terms of the agreement?

1.4.5 What was the agreed contract price?

1.5 Precisely which work was not done in a workman satisfactory manner. Full details are required.”

[5] The defendant did not respond to the request for further particulars. Plaintiff’s attorney of record through a letter dated 18 December 2020 requested an answer but to no avail. This prompted plaintiff to apply for an order to compel delivery of an answer resulting in the defendant serving a reply stating that the sought particulars are not necessary for purposes of preparing for trial alternatively being a matter of evidence.

[6] Plaintiff not being satisfied with this response filed an application to compel defendant to adequately reply. When this application was to be heard defendant’s legal representative appeared at court and indicated that only a point of law would be argued where after the matter was postponed to the opposed motion court roll.

[7] The defendant filed a notice of intention to amend her plea.

7.1 The plea suggests the defendant wishes to amend her plea by deleting her original denial that agreements have been entered into and replacing same with the following:

“ **5.**

AD PARAGRAPH 5 THEREOF:

5.1 The contents hereof are denied and the Plaintiff is put to the proof thereof.

5.2 In amplification of such denial the Defendant pleads that the express alternatively tacit further alternatively implied terms of the agreements entered into with the entity trading as Free State Curtain Parlour and Décor were as follows:

5.2.1 The entity trading as Free State Curtain Parlour and Décor will procure, deliver and install the items listed in Annexures “P1” and “P2” at the premises of 101 Waverley Weg, Waverley, Bloemfontein;

5.2.2 The entity trading as Free State Curtain Parlour and Décor will carry out all services in a proper and workmanlike manner;

5.2.3 The Defendant shall pay a deposit of 60% of the quoted amount;

5.2.3 The Defendant shall pay the balance upon delivery and installation of the goods and services to be rendered.”

7.2 In respect of paragraph 6 of the plea, the plea is to be amended to now read that the content thereof is denied and plaintiff put to the proof thereof. This prompted a notice of objection complaining thereof that defendant attempts to withdraw the admission in the previous plea that work was done by the plaintiff with the defence that the work was not done “in a workman satisfactory manner”, whilst no explanation is furnished why the admission is withdrawn. This prompted a formal application by defendant to amend.

[8] The trial court hereafter made an order that the application to compel defendant to file an adequate response to the request for further particulars is postponed and the application for an amendment and the aforementioned application to compel is to be argued together. However, when the matter was to be heard on 13 May 2021, an order was granted compelling the defendant to deliver an adequate answer to the plaintiff’s request for further particulars dated 7 December 2020 within ten days of the court order being served on the defendant.

This prompted defendant to file answers to the request for further particulars as follows:

“ 2. **AD PARAGRAPHS 1.1 – 1.4 THEREOF:**

The Defendant abandons paragraph 6 of the Plea, as it presently stands, and aligns herself with the contents of paragraph 6 of her Notice of Intention to Amend her Plea dated 19 March 2021.

3. AD PARAGRAPHS 1.4.1 – 1.4.5 THEREOF:

The contents hereof are fully stated in paragraphs 4.2, 5.1 and 5.2 of the Defendant's Notice of Intention to Amend her Plea dated 19 March 2021. It is respectfully requested that the contents thereof be incorporated herein.

4. AD PARAGRAPH 2 THEREOF:

The Defendant does not intend on persisting with this part of her defence and abandons same. Furthermore, the Defendant aligns herself with the contents of her Notice of Intention to Amend her Plea dated 19 March 2021."

[9] The magistrate dismissed the application to amend and granted the application to strike out the plea for failure to supply an adequate answer to the request.

[10] An appeal was directed against the last order of the magistrate (dated 7 February 2022). No other orders were appealed against. It was submitted amongst others that the magistrate was misdirected by having regard to a without prejudice offer to settle that was made and finding that the reasons for the amendment were flimsy.

[11] On appeal counsel appearing on behalf of plaintiff strongly argued that no appeal was filed against the magistrate's order dated 13 May 2021 compelling defendant to deliver an adequate answer to the request. As that order stood, the magistrate could not revisit the aforementioned order as the magistrate was *functus officio* and was therefore only called upon to determine whether the defendant had complied with its obligations to respond sufficiently to plaintiff's request for further particulars. I find the aforementioned argument convincing. In my view the order of 13 May 2021

was still in full force and effect when the defendant attempted to amend her plea. This therefore meant that she had to comply with that order or ask that it be rescinded to enable her to amend her plea. This did not happen and as she did not comply with the aforementioned order, she could not amend her plea and in that manner circumvent the order. I have no doubt that defendant did not comply with the order and that the order to strike out the plea was the correct order. In any event, the plaintiff was entitled to request the further particulars to prepare for trial. Even if the application to amend defendant's plea was granted, the issues raised and in particular whether the services rendered was done in a proper and workman like fashion, would have remained alive.

[12] I am therefore not convinced that the magistrate erred in the conclusion and orders that were made save that I would have expected a separate order granting judgment in favour of the plaintiff for payment of the R 45 000-00 as well as interest and costs. This was not however addressed on appeal wherefore I am not of the view that the orders should be amended by this court and it is left to the plaintiff to approach the magistrate in this respect if need be.

[13] It follows that the appeal is unsuccessful. There is no reason why cost should not follow suit and the following order is made:

The appeal is dismissed with costs.

C. REINDERS, J

I concur.

N. KHOOE, AJ

On behalf of appellant:

Adv. MDJ Steenkamp

Instructed by:

Jacobs Fourie Attorneys

BLOEMFONTEIN

On behalf of respondent:

Adv. WA van Aswegen

Instructed by:

Symington De Kok Attorneys

BLOEMFONTEIN