



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: ☒

Date: **6th September 2018** Signature: _____

APPEAL CASE NO: A3001/2018

COURT A QUO CASE NO: 3605/2015

DATE: 6th September 2018

In the matter between:

PETIT BOARD WHOLESALERS

Appellant

- and -

LIVINGSTON CHRICHTON ATTORNEYS

Respondent

JUDGMENT

ADAMS J:

[1]. Central to this appeal is the question whether, if regard is had to the common cause facts in the matter, the surrounding circumstances and the communications between the parties, a contract came into existence between the appellant and the respondent in terms of which contract the appellant had sold to the respondent certain goods at an agreed purchase price. A further issue is what the terms and conditions of the agreement were between the parties.

[2]. The appeal is against the judgment and the order of the Benoni Magistrates Court (Magistrate V P Mweli), handed down on the 27th of September 2017, in terms whereof judgment was granted against the appellant, who was the defendant in the court *a quo*, in favour of the respondent, who was the plaintiff, for payment of the sum of R101 450, together with interest thereon and cost of suit.

[3]. It is the respondent's case that the appellant, a supplier of wood and related materials, was contracted to supply to it (the respondent) wood and other materials which would have been utilised by a third party, one Ingo Eichner ('Eichner'), to fit cabinets and other fixtures to a house, which also doubled as a home office, at the special instance and request of the respondent. Pursuant to this contract the appellant had issued an invoice on the 21st of April 2015 addressed to the respondent, confirming that the appellant would supply to the respondent 'cabinetry services' at an agreed price of R101 450. This amount was paid by the respondent to the appellant by way of an electronic funds transfer directly into the business banking account of the appellant. Notwithstanding payment having made by the respondent pursuant to the aforesaid agreement, so the respondent alleges, the appellant failed to deliver the materials ordered, which entitled the respondent to cancel the

agreement, as it did, and to claim a refund of the amount of R101 450 from the appellant.

[4]. The appellant defended the action against it by the respondent for repayment of the said amount on the basis that there was no agreement between it (the appellant) and the respondent. The appellant denies that the invoice was rendered pursuant to the said agreement between the parties for the supply of material.

[5]. It is the appellant's case that there was an agreement between the respondent and Eichner, who the respondent had employed as a carpenter to provide carpentry services at the house of the respondent, that the appellant would render an invoice to the respondent and that the monies received in respect thereof would be in reduction of Eichner's account with the appellant. This invoice, so we understand the case of the appellant, was a simulation and did not reflect the true facts of the matter and the actual agreement reached between the parties. The fact that the appellant had no explanation for the manner in which this simulated transaction was recorded in the books of account of the appellant, according to the appellant, is of no significance.

[6]. This version is disputed by the respondent, who claims that the agreement was that Eichner would purchase, on behalf of the respondent, the wood and related materials from the appellant and that the respondent would pay the appellant directly for the material to be supplied for the respondent's project. It was never the intention of the respondent to pay to the appellant the said amount for the benefit and on account of the appellant.

[7]. In this appeal the appellant has, as it did in the Magistrates Court, raised a number of preliminary points *in limine*. There is no merit in any of these legal points. I will deal with those points *in limine* shortly.

[8]. The facts in this matter are as follows: On the 21st of April 2015 the respondent and Eichner entered into an agreement in terms of which Eichner would provide carpentry and joinery services to respondent, represented by Mr Crichton ('Crichton'), a partner in the respondent, for the manufacture of cabinetry and similar items in the kitchen, bar and wine cellar at the residence of Crichton. It was suggested by Eichner that the respondent purchase the necessary wood and related materials for the project directly from the respondent. After receiving payment on the invoice from the respondent, the appellant allocated the funds received to Eichner's account and thereafter refused to deliver any wood and related material or to refund the monies received to the respondent.

[9]. The respondent's case is based to a large extent on the fact that an invoice was issued to it for the amount of R101 450 and the evidence of Crichton that his understanding was that the respondent was buying the material from the appellant directly.

[10]. The case of the appellant was based on the evidence of its owner and that of Eichner, which was to the effect that the understanding between all concerned was that the amount paid to the appellant was in fact paid by the respondent to the appellant on behalf of Eichner. In other words, so it is alleged by the appellant, when it received payment of the R101 450, it acted as agent for Eichner, who in the normal course of business would have received that amount as part of the deposit payable in terms of his contract with the respondent. This is the crux of the dispute between the parties.

[11]. The first point *in limine* raised by the appellant was that the respondent has failed to prove that it has the necessary *locus standi in iudicio* to bring this action against the appellant. The evidence of Mr Crichton was that he is the senior partner of the respondent. At all material times he was the only equity partner of the firm. He has one 'salaried partner' and he also described her as his junior partner. On the evidence, we are persuaded that the respondent has been proven to exist and that it has the necessary standing to have instituted the proceedings in the Magistrates Court. Therefore, this legal point stands to be rejected.

[12]. The second point is that, according to the appellant, there was no contract concluded between the appellant and the respondent. The basis for this assertion by the appellant is the fact that Crichton was not able to say with certainty, as is the requirement in the context of a purchase and sale agreement, exactly what goods the respondent had purchased from the appellant. This point, we assume, relates to the element that in a purchase and sale agreement the *merx* needs to be identified. *In casu*, so the argument goes on behalf of the appellant, that was not done and therefore no purchase and sale agreement came into existence. The fallacy in this argument is apparent. The 'thing' which was being bought by the respondent was the wood and other material which would be required for the project which had been clearly identified in the plans prepared by Eichner and which is capable of being objectively identified. This preliminary point therefore also stands to be rejected.

[13]. As regards the main dispute between the parties, that being whether there was an agreement between the respondent and the appellant for the supply of material, this would be a matter of interpretation based on the factual matrix in the matter.

[14]. Crichton's evidence was that Eichner had suggested to him that he buys the material for the project directly from the appellant. The reason for that being that this would have entitled the respondent to a reduction in the purchase price due to the respondent ultimately receiving a benefit as a VAT Vendor. Additionally, so the evidence went on behalf the respondent, Eichner owed the appellant such a large sum of money that any payments from him (Eichner) would be 'swallowed up' by his historical debt to the appellant. This, so Crichton's evidence went, was the rationale behind the contract between the appellant and the respondent. There is no doubt in my mind that this was Crichton's understanding of the arrangement, and this was probably also the understanding between the respondent and Eichner. The question is whether that understanding was communicated to the respondent by Eichner in his dealings with the appellant, bearing in mind that at no stage did the respondent have any direct communication with the appellant.

[15]. Eichner himself gave evidence on behalf of the appellant and testified that he required a deposit from the respondent equal to fifty percent of the contract price. A portion of the deposit, that being the R101 450, Eichner required to be paid to the appellant and the balance of R126 152.50 was to be paid to him personally. The evidence of Eichner was to the effect that his understanding of the arrangement was that the amount of the R101 450 was to be paid to him (Eichner) via the agency of the appellant. Eichner was somewhat equivocal when giving evidence as to whether he had expressly spelt it out to Crichton that, when making payment of the said amount, he would in fact be paying it on behalf of Eichner. Eichner furthermore testified that he did not attend at the store of the appellant to purchase the requisite material for and on behalf of the respondent.

[16]. It is clear that no matter what the arrangement was between the appellant and Eichner, the respondent and Crichton would probably not have been aware of such an arrangement. There can also be very little doubt that the

respondent would have been misled by the issue of the invoice by the appellant and by the request that the respondent pays the invoice amount directly to the appellant.

[17]. The question is this: on the probabilities was an agreement concluded between the respondent and the appellant as contended for by the respondent? This is a finding that can be made only if the evidence of Eichner on this point is rejected outright. That is a factual issue which the Magistrates Court was required to adjudicate. The Magistrate found in favour of the respondent on this factual issue.

[18]. Wessels JA in *South African Railways & Harbours v National Bank of South Africa Ltd*, 1924 AD 704 at 715 – 16 said this:

‘Although the minds of the parties come together, courts of law can only judge from external facts whether this has or has not occurred. In practice, therefore, it is the manifestation of their wills and not the unexpressed will which is of importance...

.... the law does not concern itself with the working of the minds of the parties to a contract but with the external manifestations of their minds if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement.’

[19]. This pronouncement by the AD is a helpful guide in resolving conflicts of evidence on the existence or the terms of a contract. As was stated by the author of *Christies: The Law of Contract in South Africa*, 6th Ed, by RH Christie:

'... in order to decide whether a contract exists one looks first for the true agreement of two or more parties and because such agreement can only be revealed by external manifestations one's approach must of necessity be generally objective'.

[20]. I find myself in agreement with this enunciation of the applicable legal principles. The point is this: notwithstanding the evidence to the contrary on behalf of the appellant, the objective facts seem to support the claim by the respondent that a contract for the purchase and sale of material was concluded between it (the respondent) and the appellant for an agreed purchase price of R101 450. How else, I ask rhetorically, does one explain the invoice from the appellant to the respondent for that amount. Also, why else would the respondent pay such a large amount of money to the appellant, and most importantly why would the respondent pay to the appellant an amount of money on behalf of Eichner, with whom it had no relationship until shortly before they concluded their agreement.

[21]. It was also submitted by Ms Gray, Counsel for the respondent, that a contract may be formed between two persons by virtue of their conduct without any communication in language, where such conduct leads to the necessary inference that they are legally bound to each other by a contractual obligation. In that regard she referred us to: *Charles Velkes Mail Order 1973 (Pty) Ltd v Commissioner for Inland Revenue*, 1987 (3) SA 345 (A) at 357 – 358. So for example, Ms Gray contended, a contract of sale may be concluded where one person sends to another, goods on approval and the latter uses them or keeps them for an unreasonable amount of time without communicating to the sender. We find ourselves in agreement with these submissions and on the basis of this principle alone, the respondent has, in our judgment, proven the agreement for the purchase and sale of the material between it and the appellant.

[22]. The appellant's conduct in issuing the invoice to the respondent would have created in the mind of the respondent a belief that there was an agreement between Eichner and the respondent that Eichner had purchased the wood and related material for the project on behalf of the respondent and that Eichner had arranged that payment would be made by the respondent to appellant pursuant to that contract. The objective facts in the matter and the external manifestations portrayed by the appellant and Eichner to the respondent was to that effect. There came into existence an agreement between the respondent and the appellant for the purchase and sale of wood to be specified and described by Eichner.

[23]. Another approach to be adopted in the adjudication of the dispute between the parties is one based on the rules relating to the interpretation of documents. In the matter of *G4S Cash Solutions (SA) (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd and Another*, 2017(2) SA 24 (SCA), the following principle is enunciated at par [12]:

'Whilst the starting point is the words of the agreements, it has to be borne in mind, as emphasised by Lewis JA in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*, [2015] ZASCA 111; 2016 (1) SA 518 (SCA) para 27, that this court has consistently held that the interpretative process is one of ascertaining the intention of the parties — in this case, what they meant to achieve by incorporating clause 9.9 in the agreements. To this end the court has to examine all the circumstances surrounding the conclusion of the agreements, ie the factual matrix or context, including any relevant subsequent conduct of the parties.'

[24]. Also, in *Novartis SA v (Pty) Ltd v Maphil Trading (Pty) Ltd*, 2016(1) SA 518 (SCA), the court has this to say relative to the issue as to whether parties intended to bind themselves contractually:

'[35] The argument that the words of the document, signed by Van Jaarsveld and Van der Spuy on 14 October 2004, must be examined only linguistically, and that the genesis of the document, subsequent conduct and other facts relevant to the conclusion of the contract be ignored, is directly contrary to the decisions of this court cited above, and many others. But, as I have said, the issue here is not what the parties intended their contract to mean, but whether they intended to bind themselves contractually. That inevitably requires an examination of the factual matrix – all the facts proven that show what their intention was in respect of entering into a contract: the contemporaneous documents, their conduct in negotiating and communicating with each other, and, importantly, the steps taken to implement the contract.'

[25]. Applying these principles *in casu*, we find ourselves in agreement with the submissions on behalf of the respondent that the balance of probabilities favours the case of the respondent. In addition, the applicable legal principles support the conclusion that the contract was concluded as averred by the respondent.

[26]. The Magistrates Court was therefore, in our view correct in its conclusion that the agreement was concluded between the appellant and the respondent as alleged by the respondent.

[27]. In the view we take of the claim by the respondent based on contract, it is not necessary for us to deal with the claim based on enrichment, which was the respondent's alternative cause of action.

[28]. For these reasons, I am of the view that the court *a quo* was correct in granting judgment in favour of the respondent against the appellant.

[29]. Accordingly, the appeal stands to be dismissed.

Cost

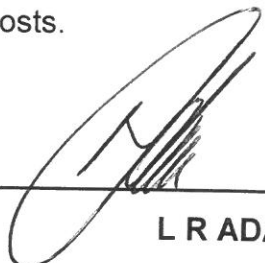
[30]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there be good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[31]. I can think of no reason why I should deviate from this general rule. The respondent should therefore be awarded the cost of the appeal.

Order

Accordingly, I make the following order:-

1. The appellant's appeal is dismissed with costs.



L R ADAMS J
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I agree,



P H MALUNGANA AJ

*Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg*

HEARD ON: 11th June 2018

JUDGMENT DATE: 6th September 2018

FOR THE APPELLANT Adv A P Bruwer

INSTRUCTED BY: Schalk Britz Incorporated

FOR THE RESPONDENT: Adv H Gray

INSTRUCTED BY: Livingston Crichton Attorneys