

IN THE HIGH COURT OF SOUTH AFRICA



(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES/ NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED YES/NO
7/12/2016

[Signature]

CASE NO: 35841/2012

In the matter between:

8/12/2016

HENCOREL & PARTNERS

PLAINTIFF

and

GALE CONSULTING

DEFENDANT

JUDGMENT

Carelse J:

[1] The plaintiff seeks payment in the sum of R1, 863,814.50 ('the main claim') and in the alternative, payment of R 2,485,086.00 ('the alternative claim') and (b) an amount of R183.996.00.

[2] At the outset of the hearing the plaintiff and the defendant sought a separation of the main claim from the alternative claim and all other claims. If the plaintiff is successful in proving the main claim the alternative claim becomes irrelevant. I accordingly granted an order in terms of R33 (4) of the Uniform Rules of Court separating the main claim from all other claims. All other claims were postponed *sine die*.

[3] The main claim involves the interpretation of Annexure C to the particulars of claim.¹ Initially the plaintiff claimed a higher amount (alternative claim). The plaintiff only seeks judgment in the main claim which is based on an agreement to reduce the amount, indicated in Annexure C.

[4] The facts are largely common cause and are set out herein below.

¹ Exhibit A page 18.

1. During December 2010, the plaintiff represented by Mr Janse van Rensburg and the defendant represented by Ms Mogamisi entered into an oral agreement on 6 June 2011 wherein the plaintiff would provide and execute certain services at the Intermediary School site. The defendant was contracted to the Department of Education of the North West ('the employer')². The plaintiff in turn was contracted to the defendant. The defendant was the main contractor and the plaintiff was the subcontractor.
2. The terms of the contract *inter alia* were that the defendant would pay the plaintiff for services rendered on presentation of the invoice by the plaintiff. Payment would be made within a reasonable period of time.³ Some of the terms were reduced to writing set out in Annexure C.
3. The defendant made payment to the plaintiff on some invoices.
4. The further oral terms were that the plaintiff would discount the amount of R2, 485 086, 00⁴ by 25%. This discount is reflected in the plaintiff's tax invoice which was signed by Ms. Mogamisi on behalf of the defendant.⁵

[5] The only issue I am required to determine in this matter is whether the plaintiff and the defendant entered into a settlement agreement to the extent that the amount of

² Pleadings bundle page 18 par 3.4

³ Pleadings bundle page 18 par 4.5

⁴ Annexure A particulars of claim exhibit A page 17.

⁵ Exhibit A page 18; Annexure C

R2,485 086, 00 would be settled⁶ in full and final settlement for a lesser amount of R 1 863, 814, 15⁷.

[6] To determine this issue the plaintiff called Mr Janse van Rensburg, the sole proprietor of the plaintiff and the defendant called Ms Mogamisi, a 60% member of the defendant.

Plaintiff's evidence Mr Janse van Rensburg

[7] The defendant was awarded a contract to build a school at Oskraal. Ms Mogamisi on behalf of the defendant requested a quotation from the plaintiff to provide civil works. On the school site was an existing vacant building.

[8] Initially he provided quotations but that changed as the works progressed. The first quotation⁸ was to demolish the existing school buildings, remove the rubble to the dump site and prepare the school for a new building. Ms Mogamisi required a detailed break - down of the first quotation to reflect the cubic metres which he did.⁹

⁶ Annexure A to the particulars of claim p 17 Exhibit A

⁷ Annexure C to the particulars of claim p18 Exhibit A

⁸ Exhibit A p 6

⁹ Exhibit A p7

[9] The defendant required the plaintiff to provide additional works that included *inter alia* the excavation of pit toilets.¹⁰ He provided the quotation. The scope of the work changed again, such changes are reflected in a further quotation.¹¹ The plaintiff had to redirect its work because water was found during the execution of the works. This resulted in a further quotation¹², where 19 metres was deducted from a previous quotation.¹³

[10] More earthworks were requested which is borne out by addendum 1, 2, and 3 of the employer's engineer. This extra work is reflected in a quotation provided by the plaintiff.¹⁴

[11] Again the scope of the work changed. The plaintiff was required to provide a further quotation.¹⁵ The extra work changed again. The plaintiff had to provide another quotation¹⁶. This turned out to be the last quotation because it became most impractical to submit quotations on a daily basis. Mr Janse van Rensburg explained that the accepted industry practice is to measure all the works done at the end in order to determine the amount of work done, so that he could be paid. This was not disputed.

¹⁰ Exhibit A p8

¹¹ Exhibit A p9

¹² Exhibit A p10

¹³ Exhibit A p7

¹⁴ Exhibit A p11.

¹⁵ Exhibit A p12

¹⁶ Exhibit A p13

[12] On 6 April 2011, all the works done by the plaintiff was measured by the quantity surveyor of both the employer and the defendant. That defendant was represented by its own quantity surveyor is vigorously disputed by Ms Mogamisi. On 8 April 2011 the plaintiff submitted an invoice to the defendant for an amount of R2 458,086.00. The defendant failed to make payment for this amount. With that the defendant sought a meeting. On 6 June 2011, the defendant and the plaintiff met at the plaintiff's offices to discuss the defendant's failure to pay. Mr Janse van Rensburg said that at the meeting all previous invoices and quotations were reconciled and Ms Mogamisi was satisfied that the amount of R2,458, 086.00 was due and payable, but sought a discount. He agreed to give the defendant a 25% discount on condition that:

"NB! This invoice which has a discount of 25% will replace the previous invoice 11/03 only if the total payments of all the invoices due on the project are received successfully."

[13] The discount has the effect of reducing the rate of R100 per m³ to R75.00 per m³. Immediately below the words, Ms Mogamisi signed the tax invoice under the words; "By agreement" for the reduced amount of R1, 863, 814,50. The defendant did not pay this reduced amount.

[14] He said that both of them attended a meeting at the IDT offices. At the meeting he explained the basis for the invoices and left. With no resolution in sight, the defendant refused to pay and told the plaintiff to sue her. Whilst he was on the phone

with Ms Mogamisi he switched off the machines because of non-payment. Ms Mogamisi begged him to continue with the work and promised that he would be paid. He resumed work on this basis. He denied that Ms Mogamisi said she would pay if the employer paid. He would never settle on this basis.

[15] Under cross-examination the plaintiff categorically denied that he told Ms Mogamisi that he reached an agreement with the defendant's employer to pay the outstanding amounts. He further denied that he told Ms Mogamisi that if she took the invoice to the employer, the employer would pay the outstanding amount.

[16] He denied that the meeting on 6 June 2011 related to the invoice reflecting an amount of R1, 240.696,20¹⁷. This invoice was paid in full. Therefore there was no dispute in so far as this amount is concerned. He insisted that while he was talking to Ms Mogamisi on the telephone he stopped the machines because of non-payment. He denied that the only time the machines were switched off was when water was discovered. He said that the tax invoice was a settlement agreement. He did not need to sign the invoice because the invoice was directed to the defendant.

[17] That concluded the evidence for the plaintiff.

¹⁷ Exhibit A page 16

Defendant's evidence – Ms Mogamisi

[18] She said that she asked Mr van Rensburg for quotations and only paid what was set out in the invoices. She requested quotations to see if it was less than the amount that she billed the employer for. No quotations were attached to the invoices reflecting an amount of R2,485,086¹⁸ and R1, 863, 814, 50. Therefore she was not liable for these amounts. She is only aware of four quotations. She effected a total payment of R 1, 240, 696, 20. When she received the invoice reflecting an amount of R 2, 485, 086, 00 she did not owe the plaintiff any money. Therefore this amount was not owed to the plaintiff. She was surprised when she received the invoice with an amount of R2 485,086.00.

[19] She did not call a meeting on 6 June 2011, it was Mr van Rensburg who called the meeting. She did not have any quotations relating to the disputed amount. Despite her not owing any money she signed the invoice¹⁹ because Mr van Rensburg reassured her that the engineers said they would pay if they received the invoice. Mr van Rensburg did not ask her to sign the invoice. She did so out of her own volition. She signed only to record that she would take the invoice reflecting the discounted amount, R1, 863, 814, 50 to the employer and only if she was paid by the employer would she then channel this money to the plaintiff. She took this invoice to the consultant who refused to pay.

¹⁸ Exhibit A page 17

¹⁹ Exhibit A page 18

[20] She denied that she asked for a discount. In fact she insisted that the 25% discount was a unilateral act by the plaintiff. It bears mentioning that nowhere during cross-examination was this put to the plaintiff. It was raised for the first time during her testimony. She was adamant that she did not attend the meeting between the plaintiff and the IDT. Neither did she believe that the plaintiff attended such a meeting.

[21] She said that she took the disputed invoice ²⁰to the employer because Mr van Rensburg did not have access to the employer. She conceded that the plaintiff did not enjoy any relationship with the employer. He subcontracted to the defendant and not the employer. She said that she has no idea whether the plaintiff did the extra work which formed the basis for the invoice which resulted in the reduced amount of R1, 863, 814, 50.

[22] She said that the plaintiff stopped working because of blasting in the area and not because of non-payment. She took the invoice to the consultant because she had no proof that the work had been done.

[23] Under cross-examination she insisted that she did not request a discount. She conceded that she did not have a mandate from the employer to negotiate a discount on its behalf.

²⁰ Exhibit A page 18

[24] Despite her evidence that the discount was a unilateral act on the part of the plaintiff she failed to explain her contradictory plea to the extent that the discount was by agreement between the two of them.

[25] She conceded after extensive cross-examination that she did not believe that the plaintiff did the extra work warranting payment. Pertinently she did not see the quotation.

[26] She was unable to explain why she did not record that she was not liable for the reduced amount. She said that the plaintiff did not ask her to sign the agreement. She did it out of her own. She could not explain why it was never put to the plaintiff that they were not present at the IDT meeting. Neither could she explain why it was not put to the plaintiff during cross-examination that there was no telephone conversation relating to work stoppage between the plaintiff and the defendant.

[27] That concluded the evidence for the defendant.

The Issue

[28] This case turns on two mutually destructive versions on the question of whether or not Exhibit A (annexure C) ²¹ is a settlement agreement to the extent that the defendant agreed to pay the reduced amount of R1 863, 814,50.

The Law

[29] The approach adopted by courts when faced with two mutually destructive versions has been laid down in the well-known case of Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others²² where the Supreme Court of Appeal held that;

"To come to a conclusion on the disputed issues a 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 about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candor and demeanor in the witness box, (ii) his bias, latent and blatant , (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 , (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had

²¹ Exhibit A p18

²² 2003(1) SA 11 SCA

to experience or 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 disputed issues. In 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, which will doubtless be the rare one, 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."

Evaluation of the Evidence

[30] The plaintiff was a good witness and did not contradict himself in any way. The defendant on the other hand did not impress the court. She contradicted herself materially in a number of aspects but the most pertinent was her evidence that the discount proffered by the plaintiff was taken unilaterally by the plaintiff. This flies in the face of her plea where she admitted that the discount was by agreement. Another difficulty for the defendant is her version that the discount was a unilateral act was mentioned for the first time during her evidence in chief. This was never put to the plaintiff during cross-examination. During the defendant's evidence she insisted that she did not call a meeting to discuss the invoice reflecting an amount of R 2 485, 086,00. This was never contested during the cross-examination of Mr van Rensburg.

Her failure to do so has consequences. The constitutional court has said in *President of Republic of South Africa v South Africa Rugby Football Union*,²³

"[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.

[62] The rule in *Browne v Dunn* is not merely of professional practice but is 'essential to fair play and fair dealing with witnesses'. It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny

²³ 2000 (1) SA 1 (CC) p36-37

the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.

[31] The defendant often tailored her evidence to suit the questions and found it difficult to answer simple questions.

[32] The defendant submitted during argument that the tax invoice which was only signed by the defendant below the words agreement, is not a settlement agreement because the plaintiff signature is not appended. This submission is ill conceived. Firstly, there are no prescribed formalities as to how settlements are to be concluded. Secondly, the defendant in fact pleaded that it entered into a settlement agreement. That the tax invoice is not a settlement agreement is contrary to its own pleadings. Thirdly, that there was never a meeting of the minds was also never pleaded. Again this is contrary to what was pleaded that a settlement agreement was concluded between the parties.²⁴ The defendant's submissions on the merits primarily revolve around the time prior to the settlement agreement, which in my view is irrelevant for the purposes of this judgment.

Probabilities and Improbabilities

²⁴ par 17 p23 pleadings bundle.

[33] It is highly probable that the defendant called for a meeting to deal with the invoice reflecting an outstanding amount of R2, 485, 086, 00 because she knew that she was indebted to the plaintiff and wanted a reduction. She did not have a mandate to negotiate a discount on behalf of the employer and therefore it is highly improbable that she did not seek a discount which would have had the effect of reducing her liability. It makes no sense whatsoever that Ms Mogamisi would sign the tax invoice which on the face of it makes her liable for a substantial amount of money, if she was not liable. Pertinently she was never asked to sign yet she did because in all probability she knew she was liable. On her own version after extensive cross-examination and questions by the court she believed that the plaintiff before and during the meeting was not owed a cent. Therefore it is highly improbable that she would agree to take an invoice to the employer if she knew nothing was owed. This would be tantamount to fraud. If she was merely the messenger, it is inexplicable why the plaintiff would discount the invoice by such a substantial amount.

[34] It is common cause that the employer had nothing to do with the plaintiff, therefore it is incomprehensible why the employer would commit to pay the plaintiff. Ms Mogamisi after extensive questioning insofar as the only role that she played was to deliver the 'tax invoice' was met with a lame excuse that the plaintiff did not have access to the employer.

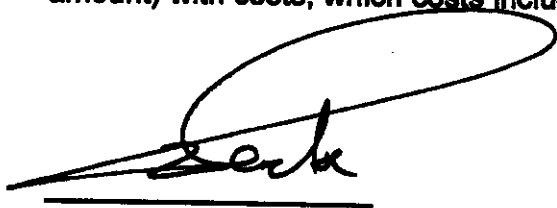
[35] The defendant was unable to explain why she wrote to the plaintiff indicating her concern that she may be liquidated. She did so in all probability because she knew that she owed the plaintiff the money. According to the defendant by 6 June 2011 everything was resolved therefore it is highly improbable that she would have harboured the fear that the plaintiff would sue her.

[36] It is undisputed that the nature and extent of the work kept changing. Therefore it was highly probable that it became difficult to produce quotations on a daily basis and the accepted practice which was not disputed, ie after completion of the work, the work would be measured and invoiced, is highly probable. It is undisputed that the disputed invoice amounts were not reflected in previous invoices and further supports the probability that the plaintiff did the extra work.

[37] In my view on the probabilities, I accept that the plaintiff entered into a settlement agreement with the plaintiff and negotiated a reduced amount which she signed liability for and I reject her version that despite her signature her only role was to submit to the employer and once the employer paid she would pay. In fact her version is so far-fetched that it must be rejected out of hand.

[38] In the result I make the following order:

1. The defendant is to pay the plaintiff an amount of R 1, 863,814.50 (settlement amount) with costs, which costs include the costs of senior counsel.

A handwritten signature in black ink, appearing to read 'Carelse', is written over a horizontal line.

CARELSE J

Judge of the High Court of The Republic of South Africa

APPEARANCES:

Counsel for Plaintiff: Adv T.A.L.L Potgieter SC

Instructed by: Andre Grobler Prokureurs

Attorney for Defendant: TS Lekokotla

Instructed by: Van Velden-Duffy I nc.