

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case number: 67835/2011

In the matter between : -

1/8/2013

ANTON LEONARD FOURIE Plaintiff

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
27.7.2013	<i>Janse van Nieuwenhuizen</i>
DATE	SIGNATURE

HEINRICH SCHMIDT

First Defendant

JOHANNES LODEWIKUS WYDEMAN

Second Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN AJ

[1] The plaintiff claims payment of an amount of R 200 000, 00 with interest and costs from the defendants on the basis that the defendants are personally liable for the debts of a close corporation of which they are the members.

[2] At the inception of the trial, Mr Levine, who appeared on behalf of the plaintiff, informed me that default judgment had already been taken

against the second defendant and as a consequence the trial will only proceed against the first defendant.

PLEADINGS:

[3] The following issues are common cause between the parties:

- a) the first defendant was, at the relevant time, a member of a close corporation known as Just Jade Trading ("Just Jade");
- b) the first defendant actively participated in the business of the corporation;
- c) Just Jade entered into a project investment agreement ("the agreement") with the plaintiff in terms of which the plaintiff would invest a sum of R 200 000, 00 in a project known as Erf 110 Buffelsdrift Nature Reserve ("the project"). I pause to mention that Just Jade did business in the building industry and the project referred to was in respect of the building of a residence on the property known as Erf 110 Buffelsdrift Nature Reserve;
- d) the amount of R 200 000, 00 was advanced to Just Jade;
- e) Just Jade did not finish the building project and did not receive a final payment from the bank;
- f) the final payment by the bank, was made to the owner of the property, Mr Hendricks.

ISSUES TO BE DECIDED

[4] The following issues are in dispute between the parties:

- a) the interpretation of clause 5 of the agreement that reads as follows:
"Just Jade agrees that it will utilize the funds so invested for the said purpose and upon receipt of the funds confirms that is indebted to the Investor for the said amount being due and payable once the final progress payment has been received from the bank."
- b) whether the building work was executed in a proper and workmanlike fashion;
- c) whether the first defendant's conduct resulted in the non-completion of the project and was reckless, grossly negligent or with the intent to defraud the plaintiff or was for any other fraudulent purpose as contemplated in section 64(1) of the Close Corporation Act, No 69 of 1984.

LEGAL PRINCIPLE

[5] Section 64(1) reads as follows:

"(1) If it at any time appears that any business of a corporation was or is being carried on reckless, with gross negligence or with intend to defraud any person of for any fraudulent purpose, a Court may on the application of the Master, or any creditor, member or liquidator of the corporation declare that any person who was knowingly a part to the carrying on of the business in any such manner, shall be personally liable for all or any of such defects or other liabilities of the Corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability."

- [6] Mr Levine readily conceded, that the plaintiff's claim is not based on fraudulent conduct, but rather on the reckless or grossly negligent conduct of the first defendant.

EVIDENCE

Plaintiff:

- [7] The plaintiff testified and called one further witness, to wit Mr Hendricks.
- [8] The plaintiff confirmed Just Jade's indebtedness to him and furthermore testified that he had not received any payment from the close corporation.

[9] The plaintiff stated that he demanded the money from the first defendant , but was told that Just Jade had been liquidated.

[10] During cross-examination, the plaintiff conceded that he does not have personal knowledge of the way in which the building work was executed. He stated that he relied solely on the evidence of Mr Hendricks in this regard.

Mr Hendricks

[11] Mr Hendricks testified that the building work had proceeded until roof height, when he decided not to make any further progress payments to Just Jade.

[12] He testified that he became increasingly dissatisfied with the quality of the building work and continually brought defects to the attention of the first defendant.

[13] At some stage he arranged a meeting at the building site with the first defendant and took his father along to the meeting. At the meeting he directed the first defendants attention to several defects in the building work. Notwithstanding the aforesaid, the first defendant failed to rectify the defects.

[14] According to Mr Hendricks, the defects were visible and consisted of, *inter alia*, the following:

- a) windowsills were skew;
- b) the walls were not built with a 90° angle;
- c) opposite doors were at different heights;
- d) the floor was uneven;
- e) bricks did not line up;
- f) walls inside the house that were built to form cupboards, could be pushed over;
- g) the drain outside the house was installed too close to the house, which resulted in damp problems.

[15] All the aforesaid defects were brought to the attention of the first defendant at the meeting attended by his father.

[16] Mr Hendricks appointed a mediator, a certain Mr Bolhuis, to facilitate the resolution of the dispute pertaining to the defective building work. Notwithstanding the aforesaid, the disputes could not be resolved. The first defendant thereafter, left the building site and Mr Hendricks appointed another building contractor to finalise the work.

[17] During cross-examination it was put to Mr Hendricks that the first defendant denies that any of the defects referred to in his testimony, existed at the time the first defendant left the building site. Mr Hendricks responded by referring to a host of e-mails that was forwarded to the first defendant in respect of the defects. He could, however, not produce a single e-mail in court.

[18] Mr Hendricks admitted that Just Jade issued summons against him for the balance of the building contract price. He testified that he received advice not to defend the matter and admitted that default judgment was granted against him.

[19] Mr Hendricks was visibly upset and emotional during his testimony and at one stage during cross-examination became argumentative. His emotional state is understandable, if one takes into account that he was very excited about his new house and disgruntled with the turn that events took.

[20] His emotional state unfortunately influenced the quality of his evidence and he was unnecessary hostile during cross-examination.

First defendant:

- [21] After the plaintiff closed his case, Mr Keet applied for absolution from the instance. I did not grant the application.
- [22] The first defendant testified and did not call any further witnesses.
- [23] I must, at the outset, state that the first defendant was an impressive witness. He was at ease and gave his testimony in a logical and clear manner. He remained at ease during cross-examination and answered questions without difficulty.
- [24] The first defendant denied that the defects, referred to by Mr Hendricks, existed. He testified that he has been in the building industry for a considerable period of time and the fact that owners, during the course of the building operations, point out defects is not uncommon. These defects are attended to as and when it is pointed out.
- [25] He denied receiving any e-mails from Mr Hendricks in respect of alleged defects and stated that the e-mails that were exchanged pertained to the color of paint, the type of finishings, etc.
- [26] He testified that the house was 85% - 90% completed when Mr Hendricks refused to make further progress payments.

[27] The first defendant admitted that he had a meeting with Mr Hendricks and his father at the building site. He testified that general defects were pointed out, for instance the shower floor that was not to the liking of Mr Hendricks. He denied that the defects referred to by Mr Hendricks in his evidence, were pointed out to him during the meeting.

[28] The first defendant testified that the dispute with Mr Hendricks arose when he requested a further progress payment. Mr Hendricks apparently completed the necessary forms to be submitted to the bank. The bank's inspector inspected the site and approved the progress payment.

[29] The payment was, however, not forthcoming and upon enquiry Mr Hendricks informed him to speak to his representative, Mr Mike Bolhuis. He made an appointment with Mr Bolhuis and was simply told to leave the building premises. He was also warned not to bother Mr Hendricks and his family in future.

[30] The first defendant testified that the builders were at that stage busy with rectifying the defects pointed out by Mr Hendricks. His team was, however, shortly after the meeting with Mr Bolhuis, denied access to the premises and consequently Just Jade was not afforded an opportunity to finish the project

[31] The first defendant could not recall that he forwarded an sms to the plaintiff informing him that Just Jade had been liquidated. He testified that he could not imagine why he would have sent such a message, as Just Jade was still operational at that stage and has never been liquidated.

[32] Just Jade thereupon issued summons against Mr Hendricks claiming payment of the outstanding amount of R 354 896, 00 in terms of the building contract. Although Just Jade obtained default judgment against Mr Hendricks, the judgment could not be executed because Mr Hendricks applied for the voluntary surrender of his estate.

[33] The first defendant, further, testified that the money due to the plaintiff was not paid by Just Jade, because Just Jade did not receive the full contract price from Mr Hendricks.

[34] The first defendant dealt fully with each and every defect referred to in evidence by Mr Hendricks and in each instance gave a plausible explanation as to why such defect could not and did not exist when he was still busy with the building project.

AMOUNT DUE AND PAYABLE?

- [35] First of all and before the conduct of the first defendant is examined, it is necessary to determine whether the monies in terms of the agreement was due and payable to the plaintiff.

- [36] It is common cause that the plaintiff elected not to institute action against Just Jade for the contract amount. The Plaintiff did not provide any proof that Just Jade has in fact been liquidated and the failure to institute action against Just Jade remains a mystery.

- [37] Be that as it may, it is clear from the first defendant's evidence that the payment would in any event not have been made due to the fact that the full contract price was not received from Mr Hendricks.

- [38] The important question is, however, whether the payment was due at all.

- [39] Clause 5 of the agreement referred to earlier, stipulates that payment of the contract amount is *"due and payable once the final progress payment has been received from the bank."*

- [40] The clause does not state to whom the final payment should have been made.

[41] Mr Levine argued that the only possible interpretation of the clause could be that a final payment from the bank triggers the obligation to pay. Whether Just Jade in fact received the payment or not is, according to him, not relevant.

[42] If a clause in a contract is vague and the parties thereto disagree on the meaning of an express provision, the nature, purpose and context of the contract should first of all be examined. [See: *Swart en 'n ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 A.]

[43] The purpose of the agreement between the plaintiff and Just Jade appears clearly from clause 2:

"The investment is specifically limited to the provision of bridging capital for a dwelling to be erected on the above stand where the owner has already obtained the necessary bond to finance the building of the dwelling."

[44] When confronted with the proposition that the clause should be interpreted to mean that Just Jade's obligation only arises upon receipt of the final progress payment from the bank, Mr Levine disagreed.

[45] Mr Levine contended that such an interpretation would lead to an absurd result, in that the plaintiff would never be able to enforce payment of the sum invested if Just Jade simply decides to abandon the building project.

[46] I do not agree. If Just Jade, through its own conduct, makes performance of the contract impossible, the plaintiff has contractual remedies to enforce payment.

[47] Should Mr Levine's submission be accepted, Just Jade would still have to pay the plaintiff, even if the owner refuses to make any payment in terms of the contract.

[48] In my view, the bridging finance was aimed at erecting a residence for Mr Hendricks on his property. Mr Hendricks, however, had to obtained finance for the bank for this purpose. This much is clearly stated in clause 2 of the agreement. The money advanced by the plaintiff would consequently be due and payable as soon as the project was completed and Just Jade had received the final progress payment from the bank.

[49] If this is not the case, reference in clause 2 of the agreement, to the finance obtained by Mr Hendricks from the bank, would not have made any sense.

[50] The parties did not foresee the eventuality that arose in this matter and consequently made no provision therefore. If the plaintiff intended to receive payment even if Just Jade did not receive any payment from Mr Hendricks, the agreement should have contained an express clause to that effect.

[51] In the premises, I am of the view that the amount owed to the plaintiff did not become due and payable.

RECKLESSNESS / GROSS NEGLIGENCE

[52] Even if I am wrong in this regard, I do not consider the first defendant's running of the business of Just Jade in relation to the building project, reckless or grossly negligent.

[53] The plaintiff bears the onus to establish on a balance of probabilities that the first defendant's running of the business of Just Jade was reckless and/or grossly negligent and that such conduct resulted in Just Jade's inability to satisfy the plaintiff's debt.

[54] The clear dispute in respect of the first defendant's conduct revolves around the quality of the building work on Mr. Hendricks' property.

- [55] In my view both the evidence and probabilities favour the first defendant. Insofar as the evidence of Mr Hendricks contradicts that of the first defendant, I accept the first defendant's version of events.
- [56] The visible defects Mr Hendricks testified to, were denied by the first defendant.
- [57] The most obvious witness to confirm Mr Hendricks's version of events, would have been his father, who visited the site with him, when he allegedly pointed out these serious defects to the first defendant.. His father was, however, not called nor was any explanation tendered for the failure to call him.
- [58] The next witness who would have been in a position to confirm the faulty work, was the building contractor who completed the building work. Similarly, he was not called to give evidence.
- [59] Furthermore, Mr Hendricks is apparently in possession of a valuator's report substantiating his version of events. Notwithstanding the aforesaid, the plaintiff elected not to call the valuator nor did the plaintiff tender any expert evidence to substantiate his version that the building work was so defective that the only reasonable conclusion to be drawn, is that the

first defendant was reckless and/or grossly negligent in completing the work.

[60] The fact that Just Jade issued summons against Mr Hendricks for the outstanding contract price, supports the first defendant's version that the defects in the work was minor and capable of rectification, should Just Jade have been afforded an opportunity to do so.

[61] I find Mr Hendricks' explanation in respect of his failure to oppose the action instituted by Just Jade unconvincing. Mr Hendricks testified that he had to incur substantial costs to rectify the defective building work. Notwithstanding the claim against him, he neither defended the action nor did he institute action against Just Jade to claim the alleged damages he suffered as a result of the defective work.

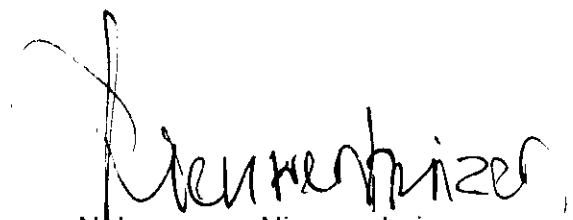
[62] There are portions of the first defendant's evidence that would have led to further probabilities in favour of the first defendant. This evidence was, however, not put to Mr Hendricks and I can consequently not take the evidence into consideration. [See: *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 CC at par. 63]

[63] In the end result, I am not satisfied that the plaintiff proved its case on a balance of probabilities and the action cannot succeed.

ORDER:

I make the following order:

The action against the first defendant is dismissed with costs, which costs include the costs reserved on 22 March 2013.



N Janse van Nieuwenhuizen
Acting Judge of the North Gauteng High Court, South Africa

Attorneys: Alan Levy attorneys – Counsel : Mr K Levine
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