

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, HELD AT PRETORIA)

CASE NO: A1063/10

DATE:12/04/2012

IN THE MATTER BETWEEN:

GANI OSMAN BUILDING SUPPLIES

APPELLANT

AND

L H A BRITS

FIRST RESPONDENT

JOHAN BRIST

SECOND RESPONDENT

ADELE BRITS

THIRD RESPONDENT

JUDGMENT

THE COURT:

[1] The appellant who is a supplier of building material, instituted an action against the respondents (first respondent and second respondent are married to each other and third respondent is their daughter) for building material they bought and which was not fully paid.

An amount of R76 350-60 is still outstanding according to appellant.

[2] The first and second respondents on the pleadings denied that they entered into any agreement with the appellant and alleged that they did not owe any money to appellant. Third respondent admitted buying building material from the appellant but denied that she owed appellant the amount claimed as he delivered wood, which didn't comply with SABS standards, contrary to the quotation that he gave. She also instituted a counter-claim for R48 000-00, as damages as she had to repair the roof after the building inspector refused to approve the use of black cross timber instead of SABS approved timber.

[3] The learned magistrate refused the claim by the appellant and granted the counter-claim. The appellant was ordered to pay the costs. The learned magistrate found that from the amount of R76 350.60 claimed by the plaintiff, the purchase amount in respect of the black cross wood should be deducted. This reduced the amount to R67 341.60. Furthermore he found that the third respondent had proved her counter claim in the amount of R48 000.00. The appellant was ordered to pay the costs.

[4] The appellant appeals against that order to this court.

[5] Evidence was led by Mr Joosub on behalf of the appellant that second and third respondent's approached him to open an account as they required certain building materials. The one dispute between the parties was who was liable for the payment of the account. Mr Joosub insisted that all three respondents were liable and the respondents insisted that only third respondent was liable. In the light of the conclusion that we came to we need not deal with that issue.

[6] It would seem that the third respondent wanted to build an old age home on first

respondent's property and was assisted in this venture both financially and by giving access to the property by both the first and second respondents. Be that as it may building material was required and appellant's quotation was accepted as it was the cheapest.

[7] It is common cause that the dispute in this matter pertaining to the building material deals exclusively with the type of timber that was bought and delivered. The quotation, which is common cause between the parties, clearly makes provision for SABS timber. Mr Joosub testified that he informed third respondent at a point that he did not have any SABS timber and she agreed to take the so-called black cross timber, which does not comply with SABS standards. The uncontested evidence of the third respondent is also that initially SABS timber was delivered and used. She adamantly denied ever having consented to accept black cross timber instead and testified that in any event she didn't know the difference and that she worked strictly from the quotation which was clear on that particular point. Third respondent only became aware of the problems with the timber when the building inspector pointed it out and her bank refused to grant a loan as a result.

[8] It is interesting to note from the evidence that only one of the invoices indicate that the timber delivered was black cross timber. The respondent stated that she worked exclusively with the quotation and that she trusted Mr Joosub to comply with the requirements set out in the quotation. Miss Gomgree, who is the secretary to Mr Joosub, testified that regarding this invoice the third respondent specifically ordered black cross timber. This is denied by the third respondent.

[9] It is uncontested that a building inspector would not approve the use of black cross timber. It follows that the respondent had no choice but to replace that with SABS timber and in the

process the roof had to be replaced. Evidence was also led that she obtained a quotation to fix the roof but that was too expensive, in the vicinity of R100 000-00 and in the end after cutting her costs she managed to replace the timber at a cost of R48 000-00. She personally testified about the expenses she incurred pertaining to this, and Mr Omar's contention that the evidence presented by her was hearsay evidence is not correct in my view. In any event she testified that the builder who assisted her died prior to the trial and therefore she led the best evidence available. It must be noted that it was never disputed that the builder did indeed die.

[10] All the witnesses testified that black cross timber is cheaper than SABS timber. According to Mr Joosub the price difference is in the vicinity of 10 to 15% less than that of SABS timber. It is however also the evidence of Mr Joosub that some of the invoices indicated the price of R19-50 per meter for SABS standard timber. It is interesting to note that invoice number 7 for black cross timber indicate the price as R20-42 per meter. Mr Joosub testified he had old stock SABS timber and new stock black cross timber and that would explain the discrepancy. This was denied by the witnesses of the respondent, I am also of the view that this explanation is highly unlikely when the actual prices charged are examined.

[11] All the witnesses testified that black cross timber is cheaper than SABS timber. According to Mr Joosub the price difference was in the vicinity of 10 to 15% less than that of SABS timber. Although some of the invoices indicated the price of R19.50 per meter for SABS standard timber, some of the invoices for black cross indicate that it was sold for a higher price than the SABS, at R20-42. The plaintiff did testify that he may have been influenced by price changes and third respondent conceded that she was informed of such fact.

[12] The appellant carries the onus to prove his claim on a preponderance of probabilities. In

this regard the following needs to be considered:

- a. the quotation clearly indicates that SABS timber is quoted;
- b. only one of the invoices refers to black cross timber; which amounted R9009-00.

[13] In the light of the aforesaid it cannot be accepted that the appellant succeeded in proving his claim on a preponderance of probabilities.

[14] The third respondent had to proof damages in order to succeed with her counter-claim. She led evidence, as already stated, that she investigated different possibilities, rejected the more expensive possibility and accepted a cheaper solution to problem. She also led evidence regarding the expenses she incurred and furthermore it must be noted that it is common cause at this stage that the bank did not accept the use of a lesser standard and that she had no choice but to replace the timber. In my view only factual evidence was led in this regard, and contrary to what Mr Omar suggested no expert evidence was required or tendered on behalf of the third respondent.

[15] In the light of all the facts, we are not convinced that the magistrate misdirected himself in his findings except that the order was not properly articulated to reflect that judgement was granted for the plaintiff in the amount of R9 341.60 and that the third respondent had proved her counter claim of R48 000.00, although that was the practical effect of the judgment.

[16] Consequently the appeal is dismissed with costs.

R G TOLMAY

JUDGE OF THE HIGH COURT

I AGREE:

V V TLHAPI

JUDGE OF THE HIGH COURT