

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A58/11

In the matter between:-

TSELISO ROBIN KOMETSI

1st Applicant

MORWESI ALETTA KOMETSI

2nd Applicant

and

MELLET CONSTRUCTION

Respondent

CORAM:

RAMPAL, AJP *et* EBRAHIM, J

HEARD ON:

10 OCTOBER 2011

JUDGMENT BY:

RAMPAL, AJP

DELIVERED ON:

2 FEBRUARY 2012

[1] This is an appeal. The appellants, *qua* defendants in the court *a quo*, were aggrieved by the judgment of the Bloemfontein District Court which was delivered on 7 October 2007. On that day the district court magistrate granted judgment in favour of the respondent, as the plaintiff, for the payment of the amount of R60 206,00 interest thereon and costs of the action.

- [2] The respondent alleged in his particulars of claim that the parties entered into a written agreement in Bloemfontein on 28 August 2003. The respondent was obliged to build a double storey residential unit for the appellants at Goodale Place commonly known as 21A Whites Road, Waverley, Bloemfontein. The appellants were obliged to pay R495 000,00 in respect of building costs to the respondent as well as R225 000,00 in respect of the purchase price of the erf. Therefore the sum total was R720 000,00. The building contract was subject to certain conditions and specifications relative to the work schedules. Those schedules formed part and parcel of the written building contract – annexure “a” to the summons.
- [3] Firstly, it was a condition of the aforesaid agreement that the residential unit would be erected in accordance with building plans and specifications tabled before and approved by the local authority, in other words, Mangaung Local Municipality. Similarly, it was also a further condition that the residential unit would likewise be erected in accordance with the building contract and specifications tabled before and approved by the same local authority. There was no

suggestion that such formal processes were not followed. The condition was accordingly fulfilled.

[4] Secondly, it was also a further explicit, tacit or implicit condition of the agreement that should there be any agreed deviations from the original schedules and specifications, the appellants would be liable to the respondent for the payment of the additional building costs occasioned by such deviations or additions. Certain deviations from the contract were agreed upon and certain alterations accordingly effected.

[5] Thirdly, it was a further condition of the agreement that the appellants would apply to a financial institution for a homeloan to secure the purchase price of the residential stand and the building costs of the residential unit thereon in the sum of R720 000,00. The homeloan in the amount of R720 000,00 was secured and a substantial portion of the total sum was paid over to the respondent by the bank on behalf of the appellants.

[6] The foregoing is a synopsis of undisputed facts as well as

facts, which though denied, cannot be seriously disputed.

[7] Now I turn to the disputed factual matrix of the pleadings. In its particulars of claim the respondent alleged that the agreement contained an explicit, alternatively a tacit or implicit term, that the appellants would be liable for the additional building costs if they should deviate from the original work schedules and specification list – *vide* paragraph 8.

[8] In their plea, the appellants denied the foregoing allegation. They specifically averred that the parties had agreed that the construction would be in terms of the original building contract and that any additions or deviations would first be mutually agreed upon before they would be effected – *vide* paragraph 5.

[9] In its particulars of claim the respondent further alleged that it carried out its contractual obligations. Firstly, it alleged that it duly erected the residential unit in accordance with the aforesaid building plans and specifications as per annexure “a”. Secondly, the respondent also alleged that it performed

extra work, completed the erection of the house and delivered a complete residential unit to the appellants. The extra work was done according to the additional work schedule as per annexure “b” – *vide* paragraph 9.

[10] In their plea the appellants denied the foregoing allegations. Their pleaded defence reads:

“6.1 Except to admit all the items in Annexure ‘B’ which have been effected in terms of the contract, Defendants deny all the additions which are alleged to have been effected as per agreement between the parties, alternatively, they deny that they failed to pay for additional work agreed upon between the parties, and put the Plaintiff to the proof thereof.”

[11] The respondent also alleged in the particulars of claim that the additional building costs were brought about by the deviations from the original contract and specifications (as per annexure “a”). The respondent alleged that the costs of additional work (as per annexure “b”) amounted to R54 545,42. Therefore the total costs of the building only increased to R549 545,42 – *vide* paragraph 10.

[12] The appellants denied the foregoing allegations. They denied all the alleged additions. They denied the alleged subsequent agreement to effect such additions. Moreover, they denied the allegation that they were contractually obliged to pay for additional work which was never mutually agreed upon – *vide* paragraph 6.

[13] The respondent finally alleged that the appellants paid the sum of R489 338,72 in respect of the building costs – *vide* paragraph 11.

[14] The appellants denied that they were also liable to the respondents for the shortfall of R5 661,28 between the amount of R495 000,00 being the agreed amount of the building costs and the amount of R489 338,72 being the sum of all payments received from the bank concerned for that purpose – *vide* paragraph 7.

[15] Those then were the facts in dispute. The respondents prayed for judgment in the sum of R60 206,71 plus interest as well as the costs of the action whereas the appellants

prayed for the dismissal of such claim with costs. The trial magistrate found in favour of the respondents.

[16] The 24 grounds of appeal may be expediently condensed as follows:

- that the court *a quo* erred in finding that the plaintiff, now the respondent, had proved the quantum of its claim;
- that the court *a quo* erred in its analysis of the evidence;
- that the court *a quo* erred in its evaluation of the witnesses;
- that the court *a quo* erred in finding that the appellants had deviated from the original contract by seeking certain additions;
- that the court *a quo* erred in finding that the respondent had performed additional work by mutual agreement;
- that the court *a quo* misdirect itself by failing to consider certain facts which should have been considered because they were relevant and by considering certain facts which should have been

disregarded because they were irrelevant.

[17] The version of the respondent was narrated by Mr. Marcelle Hamman Mellet. He was the only witness for the respondent. He testified that he was the sole member of the business enterprise called Mellet Construction CC. At the request of the appellants, he stated: there were certain deviations from the original building contract. Some things were omitted while others were added. Besides the omissions and additions there were things that were altered.

[18] While the practical effect of the omissions was the reduction of the building costs; the practical effects of the additions was the increase thereof. So was the practical effect of the alterations. He captured the deviations as more fully set out in annexure "b". The cash value of the additions (debits) exceeded that of the deductions (credits). According to him the total costs of the additions amounted to the sum of R151 696,20 and the total costs of the omissions to the sum of R97 150,80. The difference was R54 545,42 and it represented the amount due to him by the appellants. The respondent sued for the recovery of the sum of R60 206,71.

[19] The version of the appellants was narrated by two witnesses, namely Mr. Tseliso Robin Kometsi and Ms Morwesi Aletta Kometsi, the first and the second appellants respectively. In the court *a quo* the first appellant's evidence was that the complete work performed by the respondent was done according to the initial specifications schedule; that there were no later deviations from the original specifications schedule; that all the finishings as itemised in the final finishings schedule were included in the original specifications schedule.

[20] He complained that the respondent breached the original building contract by charging them additional costs in connection with the erection of two fencing walls whose costs were already included in the general capital of R495 000,00; that the respondent tried to cheat them by paving with inferior and broken bricks instead of proper paving cobbles; that, they exceeded the budgetary provision according to the original specifications schedule in respect of the sanitary finishings and the bathroom finishings, but averred that they made a direct payment of R10 000,00 to

CTM in respect of such additional sanitary finishings; that they also exceeded the budgetary provision according to the original specifications schedule in respect of the excess of the electrical fittings, in other words, lamps and accessories but again averred that they made a direct payment of R2 837,80 to Herholdt's Interior Designers in order to cover the extra costs of such lamps, bulbs and accessories.

[21] Finally, he admitted that the respondent received the sum of R489 000,00 only instead of the total of R495 000,00 as contractually agreed. However, he asserted that the difference of about R6 000,00 represented bank interest which was quite correctly deducted from the agreed capital earmarked for paying the respondent on account of the respondent's failure to complete the work within the period as stipulated in the contract. He insisted that they gave the respondent no further instructions over and above the original instructions as set out in the original work schedule annexed to the original building contract other than the extra finishings they admittedly chose at the aforesaid two service providers and paid for. He, therefore, denied that the respondent's final account was correct and maintained that

they were not at all indebted to the respondent in the amount of R60 206,00.

[22] The second appellant's direct evidence was very brief. She testified that the costs of erecting the two concrete walls to fence their residential property were included in the guaranteed capital according to the original specifications schedule annexed to the original building contract. She complained that the respondent's witness did not bring it to their attention that the costs of paving the premises exceeded the budgetary amount as provided for in the original specifications schedule. She was unaware of the exact number of the electrical fittings as per the original specifications schedule.

[23] According to the second appellant's knowledge there were no extras effected to the property by the respondent besides the electrical, sanitary and bathroom fittings. However, she admitted that they paid R10 000,00 to CTM in respect of the extra costs of the sanitary and bathroom fittings and R2 837,00 to Herholdt's in respect of the extra light fittings. She admitted that they made the payments because they had

exceeded the budgetary limits allowed according to the original specifications scheduled for such items.

[24] The court *a quo* rejected the evidence of the first appellant as false. The trial court magistrate found that there was a very big difference between a number of items as initially specified according to the original specifications schedule, annexure “a”, and as eventually provided according to the final finishings schedule, annexure “b”. On the one hand the court *a quo* rejected the common version of the appellants that there were no deviations, mutually agreed upon, from the original building contract. On the other hand the court *a quo* found that there were indeed deviations from the original building contract and that the additional work performed by the respondent was specified in the subsequent agreements collectively combined and evidenced by the final finishings schedule, annexure “b”.

[25] In the final analysis the court *a quo* concluded that the respondent had proved, on a balance of probabilities, that the respondent deviated from the original contract, performed additional works, altered the original

specifications schedule by downscaling and then crediting the account of the appellants accordingly. Similarly the court *a quo* concluded that the respondent established by means of documentary evidence that the respondent altered the original specifications schedule, by upgrading and then debiting the account of the appellants accordingly. It found that the respondent correctly reconciled and quantified the outstanding balance due by the appellants. With those findings I am unable to differ. An objective analysis of the evidence, coupled with an objective evaluation of the witnesses would not leave any room for findings different from those.

- [26] Perhaps it will serve a good purpose to deal with two or so of the main concerns of the appellants. In the first place the fencing. At stake here was the amount of R16 828,00 – *vide* item 1 annexure “b”. It is common cause that the vacant property or stand was partially fenced before the appellants purchased it from the respondent. The western and southern boundaries had concrete walls but the eastern and northern boundaries had none.

- [27] The evidence of the respondent's witness was that the respondent provided two walls in accordance with the original building contract. Those walls were on the western and southern boundaries of the plot. However, he averred that the price of those two walls was included in the general capital of R495 000,00, the original package.
- [28] The evidence of the appellants was that they needed two concrete walls since there were already two existing walls. They wanted to have their property completely fenced through the erection of two walls on the eastern and northern sides thereof. The costs of those two walls were included in the original specification schedule. The appellants disagreed.
- [29] The first appellant admitted, as did the second appellant, that the respondent had erected the wall on the eastern side of the property but averred that the respondent was obliged to do so in terms of the original building contract (annexure "a") and not the alleged subsequent deviation agreement (annexure "b").

[30] At par 21: 10 – 22:05 of part 4: the transcript, the following exchange between Mr. Edeling and the first appellant was captured:

“Good. Now tell his worship where on this contract does it show he must build an eastern wall? Tell his worship, show us. --- No, the thing is I, the wall that was supposed to have been built was already there. There was another wall at the south. Nothing was mentioned of it, so only one at the other side was mentioned. I was expecting to have two walls that were supposed to be built for me. So the one was already built which doesn’t even belong to me.

I am going to argue to his worship later that you are running away from my question. You are a professional man, please answer my question. --- I am answering as best I can sir.”

Indeed the witness was evasive.

[31] The appellants dismally failed to show that there was any provision made in the original specifications schedule for the erection of the wall on the eastern boundary of the property. The original specifications schedule specified that the respondent’s plot included a brick wall to the western

boundary and middle boundary. The latter obviously referred to the southern boundary – *vide* item 2 annexure “a” page 49 part 1: the pleadings.

[32] According to item 3 annexure “a” the plot included a non-electronic entrance gate to Whites/Goodale. In other words, the front entrance gate was supposed to be erected on the eastern boundary which ran parallel to Whites Road. The provisional costs thereof were estimated to be R2 250,00. Since the original specifications schedule made this particular provision for the gate, the appellants understood the item to mean that the respondent was tacitly obliged to erect the wall on the eastern boundary not only to suspend the envisaged gate but also to fence off the plot. That was how they understood the contract.

[33] At par 6: 3 – 10 of part 4: transcript, the following exchange between Mr. Khang and the first appellant was recorded concerning the significance of the gate:

“He testified that those walls that he built were left out of the specification, one of the walls was not part of the specification, what is your comment to that? --- **It will be quite strange**

because the wall that was in the middle (indistinct) about it. **The wall at the front is where the gate was supposed to be attached. So if there was not going to be any wall I don't understand how the gate was going to be fixed on that wall, so I would not agree there.**"

[34] "Do you you think he will build a wall because he likes just to build walls?" Mr. Edeling posed the question.

At par 22: 11 – 12 thereof the first appellant answered Mr. Edeling as follows:

"... Because precisely the fact that he was actually allowing the gate for it as well, where it was going to be mounted on."

[35] It follows from the foregoing two quotations that the appellants assumed on the strength of the provision made for the front entrance gate that the respondent, by implication, also had to erect the wall to support such a gate. Their assumption was certainly wrong. They read a whole lot more in the particular item of the original specifications schedule than there really was to read. The original

specifications schedule expressly mentioned the western and southern brick walls and that was where it all ended.

[36] Since the original specifications schedule was completely silent as regards the eastern and northern boundaries, the most plausible of all the probable inferences that could be legitimately drawn from those objective facts was that the respondent was not contractually obliged to erect the eastern and southern brick walls in terms of the original building contract. The *expressio unius* rule of interpretation applies. The respondent was obliged to provide two brick walls and that is precisely what the respondent did. The appellants needed four brick walls. They had to pay extra money for the additional two.

[37] There was one more aspect which heavily tipped the balancing scale against the appellants in favour of the respondent – viz the estimated costs of R2 250,00 for the gate. It was ridiculous for any reasonable person to expect that such a modest amount could be quoted by a building contractor, a quantity surveyor at that, for two brick walls as well as an entrance gate for a motorcar.

[38] The first appellant and the second appellant denied that the respondent erected the disputed brick walls at their own request and special instance. However, they admitted that the respondent had in fact erected such brick walls to the east and north of the plot. Asked by counsel for the respondent as to why the respondent had built such a brick wall to the eastern boundary, the first appellant answered that he did not know. His evidence and that of his wife was that they, at no stage, gave any subsequent instructions to the respondent to erect such walls which was why they queried item 1 of annexure “b”, in other words R16 826,40 in respect of the perimeter brick fencing.

[39] It seems improbable that an experienced building contractor who was also a practising quantity surveyor such as Mr. Mellet, would have strayed off the scope of the agreed scope of the work in terms of the original building contract and on his own accord erected two additional perimeter brick walls. Such a huge deviation was unlikely to have just fallen out of the air.

[40] The first appellant admitted that he objected to the respondent's final finishings schedule dated 30 June 2004 by way of an e-mail but said that the respondent reply letter (exhibit "b") did not ring a bell. He admitted that he wanted a swimming pool and the respondent quoted R30 000,00 in connection with a swimming pool but denied that the respondent also quoted R29 000,00 in connection with the brick wall. The evidence of the respondent's witness was that the first appellant had indeed requested for a quotation for the two additional walls and that he reduced the amount from R29 000,00 to R16 828,40 because the appellants could not afford the wall of such superior quality.

[41] Now, the appellants wanted a swimming pool, but because they told the respondent that they could not afford it, the respondent did not go ahead to erect a swimming pool. This evidence showed that Mr. Mellet did not do as he pleased as the appellants would like the world to believe, but that he rather listened and carried out the instructions of those who had employed him. It seems to me that the evidence of the appellants that they did not ask for a quote and that the respondent did not supply a quote for the additional brick

walls was justifiably rejected.

[42] It should be accepted therefore, that the respondent replied the first appellant's e-mail by way of a letter (exhibit "b") and gave the appellants an explanation of the amount R16 826,40 and that the appellants failed to rebut such an unfavourable letter. From their failure to set the record straight of a process which they had initiated, we on appeal, are entitled to draw an adverse inference.

[43] The appellants purchased a piece of land from the respondent for residential purposes. There were already two existing brick walls. It would appear that the appellants laboured under the wrong impression that reference to the two perimeter brick walls included in the plot was reference to two perimeter brick walls still to be erected. They were badly mistaken. Those walls constituted useful improvements to the plot. The appellants did not get free benefit of those walls like manna from heaven. Although it was not separately specified, the price of the pre-existing walls was included in the capital of R495 000,00.

[44] The remaining main aspects of the appeal concerned, among others, certain items of annexure “b”, sanitary fittings (item 7), electrical fittings (item 4), bathroom fittings (item 9), the garage floor painting (item 3), wooden cupboards (item 2), paving (item 11), tiles and carpets (item 10). The version of the respondent was more probable, credible and reliable than that of the appellants as regards everyone of these aspects. For that reason it was correctly preferred by the court *a quo*. The findings of the court *a quo* in connection with these matters cannot be faltered.

[45] The alleged shortfall of R5 661,29 was a very serious bone of contention both at the trial and on appeal. It will be recalled that the agreed capital for the building costs was R495 000,00. The amount was guaranteed by the Standard Bank. It was common knowledge between the parties that the respondent did not receive the full benefit of the guarantee. What was then the deficit between the guaranteed capital and the capital eventually received from the bank? At the trial it was wrongly accepted by all concerned that the respondent received approximately R6 000,00 (R5 661,29 to be precise) less from the Standard

Bank. Consider the statement of account below.

[46] But for the additions, the appellants' account in the respondent's books would have looked like this:

	Debit	Credit
To: Capital agreed upon	720000.00	
By: Payment received from bank 28.01.2004		470800.00
By: Payment received from bank 05.03.2004		143500.00
By: Payment received from bank 25.05.2004		89712.54
Per balance		15987.46
		<u>720000.00</u> <u>720000.00</u>
Amount of the shortfall	15987.46	

[47] The foregoing represents the state of the account of the appellants in the respondent's books had there being no additions. It follows from the foregoing that the respondent actually received from the Standard Bank R704 012,54 (R720 000,00 – R15 987,46) instead of the full capital as was guaranteed. To put it differently R720 000,00 less R704 012,54 equals R15 987,46. It can, therefore, be seen that the respondent drew R704 012,54 and not R720 000,00 on

the appellants' bank account.

[48] During cross-examination the first appellant complained that by 31 December 2003 the bank had already debited his bond account or homeloan account by about R15 000,00 interest. Between him and Mr. Edeling the exchange went like this:

“Let's put it the end of December. --- The bank debited me on the capital amount to an amount of R15 000.

For interest? --- For interest.

I understand. --- So at the end of the day I was sitting with an amount of 720 that I still owed the bank.

Capital? --- Capital.”

Could this have been transfer costs, or the quantity surveyor's fees or the conveyancer's fees or the bank interest or the collective total of all these? Possibly. For any of these the appellants were contractually responsible and liable.

[49] Let us also consider the following statement of account assuming that there were no disputed alterations and

additions and that the costs were correctly quantified.

To: Costs of additions	54545.42	
By: Cash received from the Kometsis		10226.25
Per balance	<u>44319.17</u>	
	<u>54545.42</u>	<u>54545.42</u>
Outstanding balance due by the Kometsis	44319.17	

[50] Now the sum of the balance as per the final finishings schedule plus the balance as per the original specifications schedule is R60 306,63, in other words, R44 319,17 plus R15 987,46. The former deficit was attributable to an insufficient payment by the bank and the latter by the Kometsis. However, the homeowner is held legally responsible to the builder for the payments of both. This is so because the builder did not personally contract with the bank. In this case the appellants were contractually obliged to see to it that at the end of it all the respondent received R720 000,00 according to the original agreement.

[51] The final reconciliation of the account can be drawn as follows, taking into account the costs relative to the final

finishings schedule.

	Debit	Credit
To: Agreed capital per original agreement	720000.00	
By: Cash received from customer 05.12.2003		10226.25
By: Cash received from bank 28.01.2004		470800.00
By: Cash received from bank 05.03.2004		143500.00
By: Cash received from bank 25.05.2004		89712.54
By: Extra costs of additions	54545.42	
Per balance		<u>60306.63</u>
	<u>774545.42</u>	<u>774545.42</u>
Outstanding balance due by customer	60306.63	

[52] I have earlier demonstrated that the shortfall in respect of the original specifications schedule was R15 987,46. When the direct payment of R10 226,25 made by the appellants to the respondent was allocated towards the reduction first, of the bank shortfall, such shortfall dropped to R5 761,21 (i.e. R15 987,46 – R10 226,25). The figure, R5 761,21 was approximately R6 000,00. This then is the figure which caused so much confusion at the trial and indeed on appeal. One may approach the matter from a different angle. When the R54 545,42 costs in respect of the final finishing

schedule is deducted from the composite balance of the end result is mathematically the same, viz R5 761,21. In the final analysis when the reduced shortfall from the bank, namely R5 761,21 is added to the unreduced costs of the alteration R54 545,42 the balance still owing by the appellants to the respondent is precisely R60 306,63 as the foregoing account clearly demonstrates. It can be seen, therefore, that it did not really matter where the appellants were credited for the direct payment they made.

[53] There was no substance in the contention of the appellants that they were exempted by their bank from paying any interest prior to the date on which they actually took occupation. Such a practice is foreign to the practice and customs of the banking industry. They did not refer to any particular clause in their homeloan agreement to substantiate their vehement assertion about that unusual practice. Moreover, they called no official from the bank to corroborate their version. Their evidence on this aspect was, therefore, hearsay and it was correctly rejected.

[54] But the appellants could even have discovered their

homeloan bank statements to prove their allegation, but they did not. He who alleges has to prove. In this instance the appellants failed to discharge the onus. On the contrary the first appellant himself testified that by 31 December 2003, approximately four months after the signing of the contract, the bank had already debited their bond account by R15 000,00. This materially corroborated the respondent's contention that the guaranteed capital was reduced possibly by the interest due to the bank attracted by the failure of the appellants to properly service their bond account. So much about the cash deficit.

- [55] Ordinarily a building contractor, such as the respondent, who fails to complete the work within the contract period becomes liable to the employer (appellants) in accordance with the agreed rate of penalty. The building agreement was signed in Bloemfontein on 28 August 2003. In this case the intended date of practical completion was 30 November 2003. It appeared that the respondent completed the work on or about 25 May 2004, being the date on which the appellants were seemingly given beneficial occupation of the property. The problem of the appellants was that they

signed away their right to claim compensation from the respondent for the delay, however long. The penalty amount in this case was zero per calendar day - *vide* clause 41.2.8 annexure “a”.

[56] I got the sad impression that the appellants, on their own, embarked upon an intricate project about which they virtually had no knowledge. It helps to have a lawyer on your side when it comes to big projects like this with huge financial implications. It was absurd for them to contend that the final finishings were included in the original specifications. As the word suggests, finishings are final touches or top-ups. Quite often they are luxurious and not essential items.

[57] There was no grain of truth in any of the denials of the appellants. In my view the appeal was groundless. There was no substance in any of the grounds of appeal relied upon. In the circumstances I am inclined to dismiss the appeal. I am not persuaded that the court *a quo* erred as alleged or in any other respects whatsoever. The appeal did not bring anything new to light. It is my considered view that the trial magistrate did not commit any appealable

misdirection as regards the facts or the law.

[58] Accordingly, I make the following order:

57.1 The appeal is dismissed.

57.2 The judgment of the court *a quo* delivered on 10 October 2007 is upheld.

57.3 The appellants are directed to pay the costs of the appeal jointly and severally the one paying the other to be absolved.

M. H. RAMPAL, AJP

I concur.

S. EBRAHIM, J

On behalf of appellants: Adv. M Khang
Instructed by:
Mphafi Khang Inc.
BLOEMFONTEIN

On behalf of respondent: Adv. W. J. Edeling
Instructed by:
Bezuidenhouts Inc.

BLOEMFONTEIN

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