IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case No: 5609/2000

In the matter between:

R&R CONSTRUCTION **Plaintiff**

and

NARSINGH GAYADEEN **First Defendant**

H. GAYADEEN aka H. NARSINGH **Second Defendant**

JUDGMENT

Delivered: 15 May 2012

MBATHA J

[1] It is common cause in this action that Plaintiff constructed a dwelling on the property owned by the First Defendant during 1994. At the time the Plaintiff concluded the agreement to construct the dwelling with Second Respondent who is the son of the First Defendant. First Defendant provided a written permission for the dwelling to be erected on the premises owned by him and it was anticipated that a sub-division of the property would be done in due course.

[2] Plaintiff erected the dwelling and it is common cause that he was only paid the sum of R1800.00. Mr Ronnie Sankar, the sole proprietor of the Plaintiff, testified that after completing the building he had problems obtaining payment from the Second

Defendant and it was agreed that the Plaintiff would be paid interest at the rate of 15.5% per annum on the outstanding amount. The excuse given was that the sub-division of the land could not be effected. Payment was never forthcoming despite a great deal of latitude granted by the Plaintiff. According to the Plaintiff's calculations by the time he issued summons in this matter the outstanding amount due including interest up to November 2000 amounted to the sum of R280 662.18 and in this action this is the amount that he claims from First and Second Defendants with interest on this amount at the rate of 15.5% per annum from 1 December 2000 to date of payment

[3] It became common cause during the trial that the dwelling was erected in accordance with the building plans and the only real issues in dispute are whether the First Defendant has attracted any liability as he was not a direct party to the agreement and secondly whether the claim has become prescribed as against both Defendants. It was also raised by the defence that the dwelling was erected on the specific understanding that the Plaintiff would arrange for the sub-division of the property and assist the Second Defendant to obtain a bond in order to fund the payment of the dwelling.

[4] It is trite law that in the absence of a sub-division of the land the owner of the land, in this case the First Defendant, would have become the lawful owner of the dwelling erected on his property and it is inconceivable that he would not have known this and realised since 1994 that he would be liable to the Plaintiff for the enrichment of his estate by the erection of the dwelling. I may say at this stage that I reject the evidence of the Second Plaintiff that there was this condition that the Plaintiff would be responsible for the sub-division of the land and instrumental in obtaining a bond. It is inconceivable that the Plaintiff would have gone to these

extremes to secure work and it is highly improbable that he would have agreed to such terms. Moreover the Plaintiff was a good witness and I have no hesitation in accepting his evidence where it appears to be in conflict with that of the Second Defendant.

[5] According to the Plaintiff the claim had not become prescribed as negotiations for payment by the Second Defendant continued and resulted in abortive payments by cheques that were never met during 1996. A further extension was later granted until 10 February 2000. Thereafter and during September 2000 Mr Ronnie Sankar was approached by Ms S J Bodasingh, the sister of the Second Defendant and the daughter of the First Defendant. According to the Plaintiff she was accompanied by her husband and explained that she had a mandate from both Defendants to secure a solution to the payment problem. Her husband then drafted an agreement which she signed. In a nutshell the agreement recorded that payment of R150 000.00 would be made by either the obtaining of a bond over the property or the payment of the sum of R150 000.00 in three (3) instalments of R50 000.00 each, failing which the amount claimable in this action would be pursued.

[6] Ms Bodasingh testified and denied that she had a mandate from either of the Defendants to enter into this agreement on their behalf. Her reasons were unconvincing and improbable. I accept as a fact that First Defendant accepted liability for payment of the dwelling during the course of the year 1998 as by then it would have been apparent to all that the Second Defendant was not going to be in a position to obtain a bond and the sub-division was not affected. The visit to Mr Sankar by Ms Bodasingh and her husband during September 2000 and the discussion about payment of the dwelling puts beyond doubt any suggestion by the

Defendants that payment was no longer thought to be due to the Plaintiff because the matter had become prescribed.

[7] I therefore find as a fact that the matter had not become prescribed and that the First Defendant is liable to the Plaintiff jointly and severally with Second Defendant, not because of any enrichment to his estate by the erection of the dwelling on his property, but because he had assumed liability for payment. In so far as any conflict of facts exist that I did not cater for in this judgment I need to say that I accept the evidence of the Plaintiff in all such areas of conflict and reject that of the Defendants.

[8] I therefore grant the following order:

(a) There will be judgment in favour of Plaintiff in the sum of R280 662.18 against First and Second Defendants jointly and severally, the one paying the other to be absolved.

(b) First and Second Defendants are ordered to pay the costs of this action jointly and severally the one paying the other to be absolved.

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MBATHA J

Date of hearing:	05 April 2011
Date of Judgment:	15 May 2012
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