

380/82

N.v.H.

J S FOURIE / SYDNEY LEONG

MILLER, JA :-

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

J S FOURIE

Appellant

and

SYDNEY LEONG

Respondent

CORAM:

MILLER, CILLIé, JJA,
et GROSSKOPF, AJA

HEARD:

21 MAY 1984

DELIVERED: 29 MAY 1984

J U D G M E N T

MILLER, JA :_

The respondent successfully sued the
appellant in the Witwatersrand Local Division for payment

of /

damages suffered by reason of the appellant's repudiation of a building contract concluded by the parties for the erection of a dwelling for respondent, which repudiation the respondent accepted. In further particulars supplied at the appellant's request, the respondent explained that the damage suffered and claimed by him (R20 130) represented the difference between the contract price of the erection of the dwelling (R27 870) and the "fair and reasonable cost" of procuring the erection of such building (R48 000) after repudiation of the contract by the appellant. The trial Court (PHILIPS, AJ) entered judgment for the respondent in the sum of R17 780, with costs, and granted certain ancillary relief. The appellant appeals against the

whole of the order.

Two main grounds of appeal are relied on by the appellant: (1) that no valid or enforceable building contract between the parties came into being because there was no true "consensus", and (2) that in any event, the respondent failed to establish the quantum of any damage he may have suffered. The first of these grounds is startlingly at odds with the plea filed by the appellant in the Court a quo; a plea upon which the parties went to trial and which has at no time been amended. It is necessary to examine that plea in some detail.

Paragraph 2 of the plea contains an admission that appellant signed a printed building contract form

and /.....

and handed it to the respondent, and a statement that
prior thereto he, the appellant, had handed to the
respondent a written tender for the erection of a

dwelling on the respondent's land, a copy of which tender was annexed to the plea. Also annexed to the plea was a written "memorandum of agreement" between the appellant as "the contractor" and the respondent as "the owner", duly signed by both parties. It was alleged in para 2 of the plea that it had at all relevant times been the common purpose of the parties to enter into a written building contract in the event of the respondent accepting the appellant's written tender and that such contract would contain a clause to the effect that the building activities would commence within

sixty /

days of acceptance of the tender or of signing of the building contract. A further allegation in para 2 of the plea was that as a result of a common error the standard building contract signed by the appellant and thereafter handed to the respondent for signature, did not contain such clause. In consequence of all this, so it was pleaded, the appellant was entitled to rectification of the building contract annexed to the plea so that such contract would correctly reflect the agreement between the parties.

I pause here to observe that para 2 of the plea, the essential terms of which I have just described, if not in express terms then very clearly by implication admits the fundamental allegation in the respondent's

particulars /

particulars of claim that the parties entered into a building contract, in terms of which the appellant undertook to erect a dwelling on the respondent's property for an agreed price. The unequivocal assertion that the appellant is entitled to rectification of the building contract annexed to his plea signifies recognition and acceptance by the appellant that full "consensus" was reached by the parties.

In para 2 A of the plea, the appellant pleads that if the Court should find that he is not entitled to rectification of the agreement in the respect mentioned, then no valid or enforceable contract came into existence, by reason of the absence of consensus concerning each and every material term ("iedere en

elke /

wesenlike term") of the agreement. This para is said to be in the alternative to para 2. But in para 3, after denying that he repudiated the agreement ("die ooreenkoms") and pleading that the agreement fell away ("verval het") the appellant alleged in the alternative that if the building contract did not fall away, as alleged, then during May 1980 the parties verbally agreed to cancellation of their agreement ("dat die boukontrak by wyse van 'n mondelinge ooreenkoms tussen die partye gekanselleer is"). And finally, the plea concludes with a prayer (not in the alternative, but in the light of all that has preceded it) that the agreement be rectified in the respect mentioned earlier and that the respondent's claim be

dismissed /

dismissed with costs. To the very end of the pleading, therefore, the existence of a building contract between the parties is recognized.

That such an agreement was in fact concluded appears, however, not only from the pleadings but from the evidence led on behalf of the respondent. I do not think it necessary to refer in detail to the evidence, which was reasonably fully described in the judgment a quo. It is sufficient to say that the evidence reveals very clearly that after the signing of the written contract discussions took place between the respondent and representatives of the appellant, and that there was correspondence, all of which confirms beyond doubt the recognition by both parties of an existing /

.....

existing and enforceable building agreement for the erection by appellant of a dwelling on the respondent's property. There was clearly consensus regarding the essential terms of the contract. It also emerges very clearly from such discussions that the appellant discovered that the price for which he had agreed to erect the dwelling was inadequate; he was not prepared to carry out his undertaking for that price. The respondent, though not obliged to do so, was prepared to meet the appellant to an extent by accepting liability for an increased price but such offer was unacceptable to the appellant who clearly repudiated the contract by refusing to execute the work he had undertaken to do. There was no refutation of respondent's evidence in those

respects /

respects, for the appellant, after unsuccessfully applying for absolution from the instance at the close of the respondent's case, closed his case without giving or leading any evidence at all. The allegations in the plea relating to the falling away of the agreement, or its cancellation by the oral agreement of the parties, therefore remain empty shells and are of no avail. There is no substance in the argument that the respondent failed to establish the agreement pleaded by him and it is very clear that the appellant is liable to the respondent for such loss or damage as the latter sustained by reason of the appellant's repudiation of the agreement. This brings me, then, to the second of the grounds upon which it was contended on behalf of the appellant

that /

that the respondent ought to have been non-suited, i.e.,
the ground that respondent failed adequately to
establish the quantum of his alleged loss or damage.

In the main, the evidence relied upon for
determination of the quantum of the damage suffered by
the respondent was that of Mr Schloss. He is a qualified
and registered quantity surveyor and at the time of giving
evidence was head of the department of building management
in the University of the Witwatersrand and also practised
as a quantity surveyor in a consultant capacity. He was
also the editor of a publication known as the "Builders
Pricing Manual". He was engaged by the respondent to
assess "the fair and reasonable market

cost /

of erecting a dwelling such as the appellant had undertaken to erect for the respondent. He explained that in order to arrive at such cost he carried out an inspection of the site, took measurements and prepared a schedule of "all the finishes to the various rooms". He measured the plan of the building on a "rough quantity system" and then priced the quantities required at the average rates pertaining to the building industry at the particular time. He had considerable personal knowledge of the prices of building materials from the exercise of his profession and where he was uncertain he made inquiries in order to establish as nearly as possible the average prices of materials.

He /

He prepared a rough bill of quantities consisting of thirty pages which was available for inspection by the appellant and his advisers. The cost at which the witness arrived was R46 000 but he deducted therefrom the sum of R350 when an error of one metre in regard to the length of a wall was brought to his notice, thus leaving a total sum of R45 650.

Included in the total sum were provisional sums in respect of kitchen cupboards, light fittings and floor coverings. The items were as taken from the original contract and specifications but the prices were taken at their "escalated" market cost at the time of his survey. What were not included in his total estimate were professional fees and allied costs, any special foundations, excavations in hard or soft rock and

municipal /

.....

municipal fees.

The appellant's main criticism of the evidence of Schloss was that he had not made his cost determination strictly upon the basis of the original specifications. The respondent had engaged other contractors to build the desired dwelling for him and such dwelling was said to have differed in certain respects from the dwelling which was the subject of the building contract and specifications signed by the parties. Schloss admitted in evidence that there were "slight modifications" of the original plans and specifications in the house that was later built but said that when estimating the "fair and reasonable market cost", which he was engaged to do, he "ignored the changes" /.....

changes" in the newly-constructed house and based his estimates on the contract drawing in his possession and the original specification and the schedule of finishes. Such deviations as there might have been from the initial specifications or plans were relatively minor, and would have no significant bearing on the costs. And where in the newly-built house there were more expensive materials than had originally been specified (e.g. Harvey tiles instead of ordinary tiles), the price of the materials originally specified was taken into consideration for purposes of estimating the cost of the dwelling. Schloss also explained that in arriving at the total cost of construction he had allowed for a profit-margin for the contractor of between 10%

and /

and 15%; i.e., the lower percentage in respect of certain items and the higher in respect of other items.

I am satisfied that the evidence of Schloss was more than adequate to enable the Court to make a proper assessment of the quantum of the damage suffered by the respondent. It must be remembered that although many of the items going towards the determination of the total cost of construction might permit of accurate calculation (e.g. the quantity and price of materials), there are inevitably imponderables in the assessment of the total cost, which can at best be estimated, not minutely calculated. I have in mind, for example, the duration of the building operations and how this might be affected by delays in the supply of materials

or by /

inclement weather or other factors; the emergence of unforeseen contingencies in excavations, the encountering of rock, and so on. It is noteworthy that such provisional items were not taken into account in the estimation of final cost. If occasional variations of the original schedules might have caused some slight additional cost, this would probably have been over-compensated by the omission to take into account at all other provisional items. But, however that may be, it appears to me that in the light of the detailed and unrefuted evidence of Schloss, it cannot be said that the trial Court was not entitled to accept the determination made by Schloss and to make an award accordingly.

The /

8 The appeal is dismissed with costs.

S MILLER JUDGE
OF APPEAL

CILLIÉ JA)
GROSSKOPF, AJA) CONCUR