

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL PIETERMARITZBURG**

APPEAL NO. AR 498/08

In the matter between:

R. WASSENAAR

APPELLANT

and

ALUPICKET CC

FIRST RESPONDENT

F.A. SHARMAN CC

SECOND RESPONDENT

APPEAL JUDGMENT Delivered on 31 March 2009

SWAIN J

[1] The appellant raised two defences in the Court *a quo* to resist a claim for payment of the sum of R10,130.00 by the second respondent, for the supply and installation of aluminium lattices, at the home of the appellant, namely :

- a) The lattices did not conform to the agreement concluded between the appellant and the second respondent and
- b) the lattices were not properly secured and installed.

[2] The Magistrate upheld the claim of the respondents, granted judgment in their favour for the amount claimed, resulting in the present appeal.

[3] It was common cause that the installation was not properly done. The case of the second respondent was that it had tendered to rectify the defective installation, which tender was rejected by the appellant. A great deal of evidence was directed in the Court *a quo* to establishing whether, and if so what, had been tendered by the respondents to rectify the defective installation, and whether the appellant was justified in rejecting such tender.

[4] In the light of the conclusion I have reached however, on the primary issue raised, namely what the terms of the contract between the parties were and the performance by the second respondent of such terms, I do not intend entering this debate. This is so because the remedial work proposed by the second respondent, to bring the lattices into conformity with what the appellant alleges was agreed as to their shape and size, was to be done at an extra cost to the appellant of R2,360.00. In other words, if the lattices supplied did not conform to the agreement in these respects, a tender by the second respondent to render them so, at an additional cost to the appellant, would constitute a repudiation entitling the appellant to cancel the agreement. In such an event, the second respondent would not have been entitled to payment and judgment ought to have been entered in favour of appellant, in the Court *a quo*.

[5] The dispute between the parties was whether terms of the agreement were that the lattices:

- a) should extend from the floor to the ceiling of the verandah situated at the appellant's home and
- b) should be constructed with cut away concave corners in conformity with the so-called "Mount Edgecombe style".

[6] The second respondent who sought to enforce the agreement against the appellant, bore the onus of proving the terms of the agreement it sought to enforce

McWilliams v First Consolidated Holdings (Pty) Ltd.
1982 (2) SA 1 (A)

which may involve proving a negative, namely, that the parties did not agree on the additional terms alleged by the appellant.

Kriegler v Minitzer 1949 (4) SA 821 (A)

[7] Mr. Shepstone, who appeared for the respondents on appeal, submitted that the contract concluded between the parties, was evidenced by the quotation dated 05 May 2005. This constituted the offer made by the second respondent, which was accepted by the appellant.

[8] He submitted that the appellant in pleading that the disputed terms formed part of the agreement, sought to deny that the quotation formed the contract. The argument then proceeded that these terms which the appellant sought to be incorporated into the contract, were irreconcilable with the specifications contained therein and consequently, could not form part of the contract. The appellant had accepted the quotation and was bound by its contents, on the basis of the doctrine of *quasi-mutual assent*.

[9] In the case of

Goldblatt v Freemantle 1920 AD 123 at 128 – 129

the Appellate Division adopted the principle that the burden of proof is on the party who asserts that an informal contract was not intended to be binding until reduced to writing, in the following words

“Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the Court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract.”

[10] On the evidence it is clear that the type of screens to be installed, their location at the appellant’s house, and their purpose, were discussed between the appellant and Mr. Garrard of the second respondent, on at least two occasions. After the first discussions, the second respondent submitted the quotation dated

12 April 2005, which set out the measurements of the lattices to be supplied, their cost, as well as the delivery time. After a further visit to the site, to cater for a change the appellant required in the location of the lattices on the verandah, a second quote dated 05 May 2005, was submitted to the appellant. In this quote the dimensions of the lattices and their costs were varied.

[11] In neither quote is any mention made of the precise location of the lattices to be installed, save that in the second quote the following is stated:

“Further to our meeting regarding amending your requirements to protection one corner of the stoep”.

[12] It is self evident that it was not the parties’ intention that the second quotation should embody the whole of their contract. The object of submitting a quote was simply to reach agreement as to the price. The purpose for which the lattices were to be installed, their precise location and their appearance had previously been negotiated between the appellant and Mr. Garrard. The agreement quite clearly consisted of the oral terms, being the antecedent discussions, together with the written terms, being the written quotation. The specifications contained in the quotation simply constituted a translation into physical dimensions of the requirements of the appellant, which had been discussed and agreed upon. Whether the physical dimensions accurately reflected what was agreed upon, depends upon a determination of whether the terms contended for by the appellant, as referred to in paragraph 5 *supra*, formed part of the agreement, or not.

[13] I therefore do not agree with Mr. Shepstone's submission that the quotation dated 05 May 2005 constituted the exclusive memorial of the parties' agreement, or that the second respondent discharged the onus resting upon it to show that the prior oral agreement was not intended to be binding upon the parties.

[14] Turning to the issue of whether the second respondent discharged the onus of proving that the terms contended for by the appellant, did not form part of the agreement.

[15] Mr. Garrard conceded that the lattices were to perform the dual function of screening the verandha of the appellant visually, as well as from the effects of the wind. When asked whether he honestly thought that the lattices provided would provide protection in both respects he replied "certainly visually". When asked "but not from the wind?" he replied as follows:

"No, you asked for clarity and I am giving it you, certainly visual. In terms of the balance, because of those, as I recall there was some intention to put pots or such like underneath, yes, with hindsight it should have been lower".

[16] Garrard stated that he had no recollection of any specific discussion of the height requirements of the appellant and stated that

"My understanding was that there would be a small gap at the top and it would run down to approximately the slope of where it joins the timber, because both of those are approximates."

[17] A conspectus of the evidence of Garrard indicates that:

- a) His understanding was that there was to be a small gap between the top of the lattice and the ceiling.
- b) The bottom of the lattice was to reach to where the timber pillars ended on top of the brick pedestals.
- c) The bottom of the lattices supplied should have been lower and did not effectively provide protection against the wind, which was one of the two objectives to be achieved by installing the lattices.

[18] It is quite obvious that in order to effectively achieve the agreed practical objective of acting as windbreak, the lattice should stretch from the ceiling to the floor. It should not be necessary to screen the gap at the bottom with pot plants to achieve the desired objective. If Garrard believed that a narrow gap was needed at the top of the lattice to screen the wind, why was a much larger gap acceptable at the bottom of the lattice, which would effectively negate the need for the narrow gap at the top?

[19] The evidence of the appellant was however that he requested a lattice from the ceiling to the floor. This would obviously be the most effective way of screening out the wind.

[20] When the evidence of Garrard as set out above, is considered, I am satisfied that it does not discharge the onus of proving on a balance of probabilities that it was not a term of the agreement, that the lattices would extend from the floor to the ceiling. In reaching this conclusion I do not overlook the inherent improbability of the second respondent manufacturing a lattice, which did not extend from the ceiling to the floor, if this was specified by the appellant. Weighed against this improbability however is the equally inherent improbability of the appellant ordering a lattice of lesser dimension than this, which would not achieve the object he desired of effectively screening out the wind.

[21] This finding renders it unnecessary to consider the further issue of whether it was a term of the agreement that the lattices would be constructed with cut away concave corners in conformity with the so called "Mount Edgecombe style". This is so because the appellant was entitled to reject the performance tendered by the second respondent of the supply of lattices which did not extend from the ceiling to the floor, even if it was not a term of the agreement that they would be constructed with cut away concave corners. I will do so however, for the sake of completeness.

[22] The following evidence is relevant to an assessment of the inherent probabilities of this dispute. On the one hand, Garrard says that if this requirement was specified he would have walked away from the job, because it is impossible to manufacture aluminium lattices with such a feature. In this view he is supported by Steyn of the first respondent, who manufactures the lattices. On

the other hand, appellant says that he showed Garrard the lattice work on houses nearby “in the valley” and that he specifically told Garrard that he wanted cornices cut out of the trellisses in accordance with the “theme of the whole of Mount Edgecombe”. In response, Garrard said that he would go back to Steyn and discuss it with him.

[23] When regard is had to the evidence that Garrard was in need of work at the time and Steyn allowed him “to pick up” on the appellant’s enquiry, that when problems arose with the installation Garrard asked Steyn to assist by visiting the appellant because “there were elements involved in the discussion that required a sense of understanding of the product greater than my own” and this job was the first aluminium lattice he had ever installed, (although he had seen them in the shop and had some understanding of the manufacturing process), and maintained he had discussed this specific detail problem of concave mouldings on the corners of the lattice with Steyn before he did this job, I do not regard the appellant’s version as inherently improbable. This is because it would be a natural reaction on the part of Garrard when faced with such a request to say he would check with Steyn, to see whether it was at all possible rather than simply walk away from the job. It is clear that Garrard needed the work, because he had been retrenched from the engineering field and was looking to create a profession for himself and was offered this sub-contract work.

[24] At the very least I cannot find that the version of Garrard on this issue is more probable than not and thereby reject the version

of the appellant, particularly as appellant wanted the lattices to conform to the objective standard of the “Mount Edgecombe theme”.

[25] The second respondent has accordingly failed to discharge the onus of proving that it was not a term of the contract that the lattices should be constructed with cut away concave corners, in conformity with the “Mount Edgecombe style”.

[26] It is apparent that the Magistrate approached these issues simply on the basis that it was improbable that the second respondent would construct the lattices in a manner which ignored the appellant’s requirements, without considering the other evidence, set out above, which was relevant to an assessment of the probabilities and without apparently appreciating that the second respondent bore the onus of showing that the terms contended for by the appellant, did not form part of the agreement.

[27] The Magistrate appears to have placed a great deal of emphasis on the demeanour of the witnesses when testifying, in coming to the conclusion that she did. She found that the manner of the representatives of the respondents “impressed the Court positively” whereas the appellant “was much too belligerent and unyielding in his account. His demeanour on the whole did not evoke any confidence that his version was a true account of events prior to his acceptance of the quotation”.

[28] It is however trite law that demeanour “that vague and indefinable

factor in estimating a witness's credibility"

R v Lekaota 1947 (4) SA 258 (O) at 263

can be most misleading.

S v Kelly 1980 (3) SA 301 (A) 308 B - G

The correct approach is that demeanour should be allowed only to reinforce a conclusion reached by an objective assessment of the probabilities, or possibly to turn the scale when the probabilities are evenly balanced.

Zeffert et al – The South African Law of Evidence page 141

[29] As pointed out above, the Magistrate failed to properly examine all of the evidence relevant to an assessment of the probabilities and placed undue weight upon her assessment of the demeanour of the witnesses. I find it difficult to understand why an assessment of the evidence of the appellant as "much too belligerent and unyielding in his account" should affect an assessment of his credibility. Surely, this could equally be interpreted as an indicator of a firm belief in his version. In making this remark I am acutely aware of the advantages the trial Court possessed in assessing the demeanour of the witnesses, but as stated by the Constitutional Court in the case of

President of the Republic of South Africa vs South African Rugby Football Union 2000 (1) SA 1 (CC) at paragraph 78

an over emphasis on the advantages of the trial court, can make an appellant's right of appeal "illusory" and the truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone, without regard to other factors, including, especially the probabilities.

[30] The Magistrate also rejected the contention of the appellant that he had contracted with the second respondent alone, on the basis that there was sufficient evidence that the second respondent was representing both respondents in the discussions that were held, as well as the quotations. The evidence however was clear that the first respondent was the manufacturer of the lattices and had no contractual *nexus* with the appellant. In addition, the quotes simply reflect the second respondent as being "in association with" the first respondent, which does not constitute the second respondent as a contracting party. Mr. Shepstone fairly conceded on appeal that the first respondent should not have been a party to the action, nor the appeal.

[31] As regards costs, Counsel representing the appellant in the Court *a quo* asked for an order that costs be awarded according to a reasonable fee on brief in respect of Counsels' fees and although the appellant did not call the expert, Mr. Ellis, the appellant should be awarded the preparation costs of this expert. I regard both of these submissions as reasonable and I will accede to them on appeal.

[32] The appeal record was not properly prepared, with the result that there was a great deal of confusion where reference was made to exhibits in the record. This was the responsibility of the appellant, and my displeasure will find expression in the costs order I make in this regard.

In the result the order I make is the following:

- A. The appeal succeeds and the first and second respondents are ordered to pay the appellant's costs of the appeal jointly and severally, save that the costs of preparing the record are not to form part of the costs of the appeal.
- B. The judgment of the Magistrate is altered to read as follows:

Judgment is granted in favour of the defendant and the first and second plaintiffs are ordered to pay the defendant's costs, jointly and severally, such costs to include the reasonable costs of employing Counsel on brief, as well as the preparation costs of the expert, Mr. Ellis.

SWAIN J.

I agree

MOTALA A J

Appearances: /**Appearances:**

For the Appellant : Adv. A. Stokes, S.C.

Instructed by : Knight Turner
c/o Tatham Wilkes Pietermaritzburg

For the Respondent : Adv. S.M. Shepstone

Instructed by : Macrae Bath & Batchelor
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Date of Hearing of Appeal : 13 March 2009

Date of Filing of Judgment : 31 March 2009