IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: 5394/2022

In the matter between:

WINNERS OF SUCCESS TRADING 7 CC — Plaintiff
(Registration number: 2006/014073/23)

and

JEHOVAH JIREH ORPHANAGE HOME — First Defendant

SCOTT JOHNSON — Second Defendant

Coram: Van Zyl, J

Heard: 27 May 2024

Delivered: 27 November 2024

Summary:

Contractual claim - specific performance – only the first defendant defended the action – the first defendant closed its case without the presentation of any evidence – the plaintiff failed to make out a prima facie case for the relief sought. Action dismissed, with costs, counsel`s fees to be taxed on scale B.

ORDER

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1. The action is dismissed, with costs, which costs are to include the reserved costs of 24 April 2024, with counsel`s fees to be taxed on scale B.

JUDGMENT

Van Zyl, J

[1] The plaintiff instituted action against the first and second defendants for payment of an amount of R1 679 380.02. The action was defended by the first defendant only.

The pleadings:

[2] Following several amendments to its particulars of claim, the plaintiff averred as follows in its amended particulars of claim:

'5.

On or about 19 July 2021, the Plaintiff represented by Standford Kojana who is a Site Manager and the Defendants' duly represented by Lebogang Tau in his capacity as a representative member, entered into a verbal agreement to build an orphanage home and some of the terms were reduced in writing. See attached Annexure "WS2" – appointment letter.

6.

The terms of the agreement were as follows:

6.1 The terms of the verbal agreement were reduced in writing as contained in the appointment letter as follows:

6.1.1 The Plaintiff to build an orphanage home at Thaba Bosiu, QwaQwa. Letter of appointment is attached hereto marked Annexure "WS2".

6.1.2 The building amount is for an amount of R14 000 000.00... which after negotiation the parties agreed on amended amount of R5 175 000.00... including VAT. See attached quotation marked Annexure "WS3".

7.

The Defendant further introduced to the Plaintiff its Project Manager who was going to do the day to day running at the project, Mr Tau.

8.

On 7 August 2021, the project for construction commenced until 13 June 2022 after the Project Manager unilaterally terminated the project and instructing the Plaintiff to leave site. See attached e-mail dated 13 June 2022 marked Annexure "WS4".

9.

The Plaintiff complied and proceeded to build the required building in terms of the specifications provided by the Defendant and approval of such milestone by its appointed Project Manager.

10.

The Plaintiff further on request by the Project Manager deviated and did additional work at the request and approved by the Project Manager.

11.

The work carried out and approved by the Project Manager after presenting a quotation by the Plaintiff.

12.

At the time of the termination of agreement, the Defendant was indebted to the Plaintiff in the amount of R1 236 000.00...excluding deviation extra work.

13.

The amount of extra additional work completed on request by the Defendant amount to R443 380.02... inclusive of VAT.

14.

The Defendant is failing or refusing to pay the Plaintiff for such work completed in the amount of R1 679 380.02...'

[3] In its plea the first defendant admitted the contents of paragraphs 5, 6 and 7 of the amended particulars of claim. It further pleaded as follows:

'**<u>AD PARAGRAPH 8 THEREOF:</u>**

7.

7.1 The First Defendant admits that the construction commenced on 13 June 2022.

7.2 The First Defendant admits that it terminated the agreement between the First Defendant and the Plaintiff and pleads that such termination was lawful.

7.3 Annexure "WS4" is not attached to the Plaintiff's amended particulars of claim. The First Defendant is thus unable to plead thereto.

7.4 The remainder of the averments contained in the paragraph under reply are denied.

<u>AD PARAGRAPH 9 THEREOF:</u>

8.

8.1 The averments contained in the paragraph under reply are denied.

8.2 The First Defendant pleads that the Plaintiff breached the terms of the agreement, *inter alia*, by failing to complete the works and/or stages of the works within the agreed times, and/or within the time specified in the First Defendant's instructions and/or by failing to complete the works and/or stages of the works within the agreed budget, and/or within the budget specified in the First Defendant's instructions, and/or by refusing to perform any works without receiving advanced payments from the First Defendant.

8.3 The aforesaid failures by the Plaintiff constituted material breaches of the agreement.

8.4 The First Defendant, thus, as it was entitled to do, lawfully cancelled the agreement.

AD PARAGRAPHS 10 AND 11 THEREOF:

9.

The First Defendant admits that its Project Manager issued variation orders to the Plaintiff from time to time. Such variation and the costs thereof were agreed upon from time to time.

AD PARAGRAPHS 12 AND 13 THEREOF:

10.

The averments contained in the paragraphs under reply are denied. The First Defendant specifically denies that the First Defendant's Project Manager approved the work which the Plaintiff had done. Without derogating from the generality of the aforesaid denial, the First Defendant denies further that any amounts are due and owing to the Plaintiff.'

The pre-trial minutes:

[4] In the pre-trial minutes the parties recorded as follows at paragraph 5 thereof:

'5. ISSUES FOR THE COURT TO DECIDE:

5.1 Whether the termination of the agreement by defendant was lawful.

5.2 Whether the plaintiff is entitled to any payment in respect of that which has been invoiced.'

The evidence:

[5] **Mr Samu Mhlanga** was the first witness who testified on behalf of the plaintiff. He was the project manager of the plaintiff. Mr Tau was the first defendant`s project manager. On 19 July 2021 the plaintiff and the first defendant concluded a partly

written and partly oral agreement in terms whereof the plaintiff was to construct an orphanage for the first defendant. This was subsequent to the plaintiff having submitted a successful tender in this regard. The 'building amount' was initially R14 000 000.00 and the estimated time frame for the project was 13 months. The project commenced during August 2021. Initially three buildings were to be constructed. By December 2021 approximately 35% of the buildings had been constructed. According to Mr Mhlanga in his evidence in chief, the parties worked on a 30-day payment period and the plaintiff produced an invoice at the end of a month for payment by the first defendant. The plaintiff carried the building costs and then billed the first defendant. Certain material was provided by the plaintiff and certain other material by the defendant, but Mr Mhlanga could not recall which party provided which material.

[6] During December 2021 the first defendant started experiencing financial constraints and the plaintiff received no payment for work done. There was a consequent closure of the site between middle December 2021 to 7 February 2022, which closure was initiated by the first defendant. Meetings were held between the parties on the site to discuss the re-opening of the site and the continuation of the project. The financial constraints of the parties were discussed. The first defendant wanted to continue with the project, but the nature of the project changed. The defendant was in a haste that the children be accommodated as soon as possible. At that stage there were three buildings which were partially constructed. It was consequently agreed between the parties that the plaintiff will restrict its work to the building which was the nearest to completion. Initially it was supposed to be an administration block, dining room, study area and playroom. It now had to be changed to also serve as a dormitory for the children. Revised building plans were consequently drafted which reflected significant changes since the dormitory had to provide for the separation of boys and girls and also a separation of the younger children. A change in the sewer line was necessitated as a result of ablution facilities which were now necessary, drywall partitioning was necessary, the electrical layout had to be changed as well as the lighting and the ventilation. In the original project the plaintiff would also have erected the roof, but the erection of the roof was now the responsibility of a different contractor. That particular building was about 60% complete at that stage. The contract value was agreed upon between the parties to be R4 500 000.00 excluding vat; hence R5 175 000.00 including vat. The plaintiff

received the above instruction on 7 February 2022 and was required to complete the project by 7 March 2022.

[7] The plaintiff was unable to meet the aforesaid time frame. The roof construction only started in March 2022 and was completed in May 2022. Because of the new design of the roof, it resulted in the plaintiff having to do bigger beam filling. The plaintiff could also not work on the interior of the building before the roof had not been finished by the other contractor. The plaintiff communicated these challenges to Mr Tau of the first defendant at the time. In-between Mr Tau also initiated site closures from time to time, for reasons unknown to the plaintiff. There was also severe rainfall.

[8] The first defendant paid deposits over to the plaintiff in respect of the original project. According to the memory of Mr Mhlanga the plaintiff received two such payments – one in the amount of R1 000 000.00 and one in the amount of R2 500 000.00. The plaintiff ran into financial difficulties in executing the variation orders. The firs defendant, however, did not want to acknowledge that the financial constraints were due to all the variation orders. The plaintiff had to buy material on credit and it saved funds on other projects to enable it to keep building on this project. Mr Mhlanga referred to an email dated 8 June 2022, attached to the amended particulars of claim as annexure 'WS4', which he addressed to Mr Tau, in which he raised his concern about all the variation orders 'passed on site', since the plaintiff communicated the price costs of the variation orders in writing, which were just orally approved by Mr Tau. Problems arose when the plaintiff requested partial payment of the variation orders.

[9] On 13 June 2022 the first defendant terminated the mandate of the plaintiff. According to Mr Mhlanga he did not know why it was terminated but was told that it was because the plaintiff ran behind schedule with the project. The plaintiff contests the termination since it views the termination to be unjust and unlawful. According to Mr Mhlanga it was impossible to have remained within the time frames because of the delays caused by the erection of the roof. The said time frames were 7 February 2022 to 7 March 2022 when the project was initially supposed to have been completed and thereafter, after the delay caused by the roof, the new project

time was 7 March 2022 to 16 April 2022, whilst the roof was only finalised in the second week of May 2022.

[10] Mr Mhlanga denied that the plaintiff did not stay within its budget. He explained that it was the variation orders that resulted in financial implications.

[11] According to Mr Mhlanga the project was 95% complete at the time of the termination of the plaintiff's mandate. Had it not been for the delays caused by the erection of the roof, all the variation orders and the site closures, the plaintiff would have finalised the project within the agreed time.

[12] During cross-examination Mr Mhlanga conceded that it was a prerequisite for payment in this instance that work done should first be measured and approved and only thereafter the plaintiff could issue an invoice upon which it could request payment from the first defendant. Mr Mhlanga also conceded that he did not present any evidence regarding any invoices in his evidence in chief.

[13] The proposition was put to Mr Mhlanga that the plaintiff cannot base its claim on a mere deduction of payments received from the contract value, since the contract value was variable subject to measurement and approval which has to be quantified in terms of the relevant bill of quantities.

[14] Mr Mhlanga was referred to the email of 8 June 2022, referred to earlier, wherein it is stated by him that the amount due to the plaintiff by the defendant, is R1 675 000.00. Mr Mhlanga responded that he does not agree with this amount.

[15] It was put to Mr Mhlanga that according to the first respondent, all work which had been measured, approved and invoiced, had been paid by the first defendant, to which Mr Mhlanga responded that the first respondent is still in arrears.

[16] Mr **Thabo Molefe** testified that he is the Director of the plaintiff. In his said capacity he oversees and manages the plaintiff in all aspects and he was to ensure that all projects which the plaintiff is awarded get done in time and he checks the overall quality of work done.

[17] Mr Molefe presented similar evidence as Mr Mhlanga regarding the initial agreement of R14 000 000.00 and how it was later changed and re-negotiated to the agreement of R5 175 000.00. I am therefore not going to repeat his evidence in so far as Mr Mhlanga already covered certain aspects in his evidence.

[18] Mr Molefe testified that the first defendant paid the plaintiff the amount of R1 000 000.00 on 17 February 2022 and the amount of R2 500 000.00 on 4 April 2022. Mr Molefe testified that the first defendant owes the plaintiff the amount of R1 675 000.00, calculated by subtracting the amount of R3 500 000.00 from the contract price of R5 175 000.00. When he was referred to the fact that the amount claimed in the amended particulars of claim is R1 679 380.02, he responded that R1 675 000.00 is the correct amount. The said amount is for work completed, measured and verified and for which the plaintiff put in a claim for payment from the first defendant. Mr Molefe testified that the work was verified by Mr Tau and he, Mr Molefe, was also on site.

[19] Mr Molefe also testified that the plaintiff remained within the agreed budget and did not invoice the first defendant for more than R5 175 000.00. During cross-examination Mr Molefe testified that although there were variation orders with additional work, the costs of such additional work is included in the amount of R5 175 000.00.

[20] With regard to a second email reflected on annexure 'WS4' attached to the amended particulars of claim, addressed by Mr Tau to Mr Mhlanga and Mr Molefe on 13 June 2022, Mr Molefe testified that he attended the site meeting held on 14 June 2022, which Mr Tau described in his email as 'the last day of Winners on site'. He testified that at the said meeting they discussed outstanding invoices that still had to be paid. Thereafter Mr Molefe and Mr Mhlanga left the site, but the plaintiff still had workers on the site who continued with the work. They had reached completion stage, but there was additional work which Mr Tau and fellow employees attended to. They carried on painting, but 90% of the painting work had been done and they were attending to a few broken tiles.

[21] During cross-examination Mr Molefe conceded that the agreed contract price is a variable amount which can fluctuate in accordance with actual work done. He

also agreed that payment only becomes due once work is completed, measured, certified and an invoice is then rendered to the first defendant by the plaintiff.

[22] Mr Molefe was asked how outstanding invoices could have been discussed during the meeting of 14 June 2022 if measurement and certification still had to be performed, to which he responded that the measurement and certification did not take time. Mr Molefe could not provide any check sheet or document of what Mr Tau measured and certified. It was put to Mr Molefe that Mr Tau will testify that the certification was done according to the bill of quantities, which Mr Molefe confirmed and further testified that the plaintiff issued invoices based on the bill of quantities for work completed. When it was put to Mr Molefe that certification did not take place verbally, Mr Molefe responded that he never saw a certificate during the performance of the contract and that Mr Tau verbally confirmed what the plaintiff can be paid.

[23] During further cross-examination, Mr Molefe testified that the plaintiff had outstanding invoices in the amount of R1 675 000.00 which should be paid by the plaintiff and that was also the instruction which was given to the plaintiff's attorney of first instance for purposes of the institution of the action. With reference to the claim for R443 380.02 for extra additional work as set out in the amended particulars of claim, Mr Molefe testified that there was such additional work done that can be proved. Mr Molefe testified that the plaintiff did furnish its invoices to its legal representatives. With regard to the amount of R1 236 000.00 claimed in the amended particulars of claim, Mr Molefe testified that it is 'for work completed as per emails exchanged' and thereafter added that it was for approved work.

[24] When asked what was the amount reflected on the invoice on which the plaintiff relies for purposes of its claim, Mr Molefe testified that although he does not have the invoice in front of him, it was for the amount of R1 679 380.02. Mr Molefe was then confronted with the fact that he testified in his evidence in chief that that amount is incorrect, to which he responded that there is a reason for the R4 000.00 difference. Mr Molefe then explained that part of the money which Mhlanga testified about was for work done in 2021. According to Mr Molefe he oversees the finances, but that Mhlanga drafts and submits the claims. It was then put to Mr Molefe that Mr Mhlanga did not testify that he submitted a claim for R1 675 000.00 as claimed in

the amended particulars of claim, to which Mr Molefe responded that it was indeed a claim and it was submitted to the first defendant.

[25] It was put to Mr Molefe that Mr Tau will testify that he, Mr Molefe, did not attend the meeting of 14 June 2022, that only Mr Mhlanga attended. Mr Molefe then responded that he is not sure whether he attended. However, he then conceded that he did indeed not attend the meeting and that only Mr Mhlanga attended. It was further posed to Mr Molefe that Mr Tau testified will testify that no measurement and certification took place on that day, to which Mr Molefe responded that they looked at the work on the 13th and they put together all the invoices and handed it to the defendant.

Applicable legal principles:

[26] Plaintiff seemingly seeks to enforce what it alleges to be due to it in terms of the agreement. It consequently constitutes a claim for specific performance, for purposes of which the plaintiff is required to prove the following:

1. The existence of and the terms of the contract;
2. Compliance by the plaintiff with its antecedent or reciprocal obligations under the contract or some justification for non-performance;
2. Failure to perform the contract by the defendant;
3. If the claim is one for payment of money, the quantum of the plaintiff's claim.

See *RM Van de Ghinste and Co (Pty) Ltd v Van de Ghinste* 1980(1) SA 250 (C).

[27] With regard to prima facie proof, the following is stated by CWH Schmidt *et* H Rademeyer, *Law of Evidence*, at para 313:

> 'The normal meaning of *prima facie* proof (or evidence) is that it is proof (evidence) calling for an answer. It is conclusive proof of the point in issue unless evidence is produced to rebut it. Thus Stratford JA stated in *Ex parte Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466 478:

> If the party on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence "calls for an answer" then, in such case, he has produced *prima facie* proof, and, in the absence of an answer from the other side, it becomes conclusive proof . . .

> In *R v Mantell* 1959 1 SA 771 (C) 776H Bloch J pointed out that *prima facie* evidence is more than merely "some evidence". It is evidence "of such a character that if unanswered it would justify men of ordinary reason and fairness in affirming the question which the party on whom the *onus* lies is bound to maintain". It thus amounts to evidence calling for an answer – evidence placing an evidential burden on the opponent.

The merits of the action:

[28] Mr Zwane appeared on behalf of the plaintiff and Mr Van der Merwe on behalf of the first defendant. Both legal representatives filed heads of argument in support of their respective submissions, for which I wish to express my gratitude.

[29] From the pleadings already cited above, considered in conjunction with the evidence, it is evident that it is, *inter alia,* the case of the plaintiff that:

1. 'The plaintiff <u>complied and proceeded to build</u> the required building <u>in terms of the specification provided by the Defendant</u> and <u>approval of such milestone by its appointed Project Manager</u>.' [Paragraph 9 of the amended particulars of claim – my emphasis.]

2. At the termination of the agreement the first defendant was indebted to the plaintiff in the amount of R1 236 000.00, excluding deviation extra work.

3. The amount of extra additional work completed on request by the first defendant amounts to R443 380.02, inclusive of vat.

[30] The above averments were denied by the first defendant in its plea to the amended particulars of claim.

[31] As correctly pointed out in the first defendant`s heads of argument, the plaintiff did not plead any terms of the agreement in relation to payment. However, the following emerged from the evidence of the two witnesses who testified on behalf

of the plaintiff, either in their evidence in chief and/or by concessions made during their cross-examination:

1. The 'contract value' or the 'budget' of R5 175 000.00 which had been agreed between the parties, was a variable amount.

2. A Bill of Quantities was applicable to the agreement between the parties and the plaintiff was entitled and compelled to charge fees in accordance with the Bill of Quantities.

3. The plaintiff would become entitled to payment during the course of the execution of the project if and when:

   3.1 The plaintiff reached certain milestones which were either agreed between the parties or specified by Mr Tau; and

   3.2 Mr Tau had measured the work done; and

   3.3 The plaintiff rendered an invoice to the first defendant calculated on the basis of the Bill of Quantities; and

   3.4 Mr Tau certified the amount of the said invoice as being due and payable to the plaintiff.

[32] The main issues in dispute turn out to be the following:

1. Failure by the first defendant to perform in terms of the contract; hence, whether the termination of the agreement by the defendant was lawful.

2. Compliance by the plaintiff with its obligations under the contract; therefore, that payment is due to the plaintiff.

3. The quantum of the plaintiff's claim.

[33] In my view, it has become unnecessary to determine whether the termination of the agreement by the defendant was lawful. The reason for this conclusion is that this aspect would only have become relevant if the plaintiff has proven that it is entitled to payment and the quantum thereof, which the plaintiff, in my view, has not done.

[34] In this regard I am in agreement with the submissions in the heads of argument of the first respondent that the plaintiff should have followed one of two ways to prove compliance with its reciprocal obligations under the contract and the quantum of its claim:

> "23.1 It could have led evidence to show that the work done by it was in fact certified by the First Defendant's Project Manager in which event the onus of proving that the Plaintiff complied with its antecedent or reciprocal obligations and the Plaintiff's quantum would have been discharged as a certified payment certificate constitutes a liquid document; or
>
> 23.2 It could lead evidence regarding the work which it had actually done and the actual value thereof in light of the agreed BOQ in order to prove its claim. This would of course have required the Plaintiff to deliver expert notices as contemplated in Uniform Rule 36(9) and to lead evidence of such experts regarding the standard of the Plaintiff's work and the value which the Plaintiff was entitled to charge for such work in light of the agreed prices contained in the BOQ."

[35] The plaintiff followed neither of the aforesaid two avenues. It merely relies on the 'say so' of its two witnesses, whose evidence definitely did not prove the said elements of the plaintiff's claim. Mr Mhlanga proffered no evidence regarding the certification of any work done by the plaintiff. Mr Molefe initially testified that he was present on the site meeting on 14 June 2022 when Mr Tau allegedly certified the work done by the plaintiff. However, later in cross-examination Mr Molefe conceded that he was not present at the said meeting and could not provide any evidence that whatever work may have been done by the plaintiff was in fact certified. The plaintiff furthermore failed to present any invoice in its evidence.

[36] The aforesaid failures by the plaintiff is exacerbated by the differences in evidence between the two witnesses and between the witnesses and exhibit

'WS4' regarding the quantum of its alleged claim. Furthermore, in the very same 'WS4' the following was stated:

"Attached to this email is a bill of all completed works and prices previously quoted when approval was given as per instruction by Mr Tau. Kindly take note that these works are complete or near completion and so will be due for payment soon."

Not only is the said document not attached to the annexure and not presented in evidence, but it is also indicative thereof that the said work had not yet been measured, approved and certified at the time.

[37] In the circumstances the plaintiff did not even prima facie prove that it had complied with its reciprocal obligations under the agreement and the alleged quantum of its claim.

[38] In the absence of such prima facie proof no adverse inference can be drawn against the plaintiff for not having called Mr Tau as a witness.

[39] The plaintiff`s claim can consequently not succeed.

Costs:

[40] There is no reason why costs should not follow the outcome.

[41] With reference to Uniform rule 67A(3), read with Uniform rule 69(7), I agree with *Ghubhelabm (Pty) Ltd v R.A.W. Truck Trading CC* (B3217/2023) [2024] ZAGPPHC 460 (26 April 2024), where the court found as follows at para 27 of the judgment:

'Costs orders, including the assessment of the appropriate Rule 69 scale, remain a matter for the exercise of judicial discretion.'

[42] In view of the totality of the factors to be considered in terms of Uniform Rule 67(A)(3)(b), as well as the facts and circumstances of the present matter, I do not agree with the submission of Mr Zwane that the appropriate scale of counsel`s fees is scale A. In my view the appropriate scale is scale B.

Order:

[43] The following order is made:

1. The action is dismissed, with costs, which costs are to include the reserved costs of 24 April 2024, with counsel's fees to be taxed on scale B.

[redacted]

C. VAN ZYL, J

On behalf of Plaintiff:	Adv SM Zwane Instructed by: Moshoana Mabena Inc. c/o RC Ismael Attorneys BLOEMFONTEIN e-mail: imabena@mmmlawinc.co.za civil@rcilaw.com
On behalf of First Defendant:	Adv R van der Merwe Instructed by: Blair Attorneys BLOEMFONTEIN