



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

CASE NO: 12423/2016

In the matter between:

JAN HARM VENTER

1st Plaintiff

CANDICE MIA VENTER

2nd Plaintiff

and

THE FIRE PLACE STUDIO

Defendant

Bench: E.W. Fagan AJ

Heard: 26, 27, 28 November 2024 & 30 January 2025

Delivered: 18 March 2025

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII.

JUDGMENT

FAGAN, AJ

1. In May 2014 a contract was concluded between the plaintiffs, Mr Jan Venter and Ms Candice Venter, and the defendant, The Fire Place Studio CC ("FPS"). In terms of it, FPS would install a fireplace in the plaintiffs' house in Claremont.
2. The fireplace was installed. What is described as the "wet work" on the installation – which meant in this case bricking in the new fireplace and plastering the surrounds – was done by a builder, Mr Roderick Steward, who was subcontracted by FPS to do so. Mr Steward also did the work necessary to lead a flue from the fireplace to the outside. The installation of the flue pipe from there to the top of the outside wall and through the eave was done by Mr Glynn Lindt, an employee of FPS.
3. Very early on the morning of 11 June 2015 a fire broke out, causing damage to the house.
4. The plaintiffs allege that the fire resulted from a poorly-installed boxed-in flue pipe. They allege that this was the fault of FPS. They have claimed in contract, alternatively delict, damages in the amount of R416 801.48. Mr Rademeyer, who appeared for the Venters, did not in argument persist with the delictual claim.
5. By agreement between the parties, an order of separation was made on 10 June 2021. What was before me were only the merits of the Venters' claim, more particularly the question of whether FPS is liable to the Venters for damages.
6. The fireplace was a built-in wood-burning space heater that was installed in the lounge. A metal flue pipe led from the heater through the wall to the outside, where the flue pipe continued up the wall and through the eave. The boxing-in took place on this outside section of the flue pipe, for aesthetic reasons. The frame of the box was 40 mm pine, which was clad with Nutec board.

7. There is no dispute about the fact of a fire. There is also no dispute that the fire was caused by the boxing-in of the exterior flue pipe. Mr Daniel Joubert, a forensic fire investigator called as an expert on behalf of the Venters, wrote in his report, "What should have been obvious to the installers ... were the irrational inclusion of a wood frame for this box and also the proximity of the frame to the exposed sections of the flue pipe." Mr André de Beer, a forensic fire investigator qualified as an expert by FPS, but who was not in the event called to testify, agreed in his report with "the area of fire origin" as described in Mr Joubert's report. This agreement was confirmed in the experts' joint minute.
8. What FPS however says – and this is its sole defence on the merits – is that it was not contractually responsible for boxing-in the flue, and did not do so. According to FPS's plea, the Venters concluded a contract with Mr Steward to box in the flue, and it was Mr Steward who, in fulfilment of his obligations under that (separate) contract, provided the materials and carried out the work.
9. This raises the question of the onus. The onus is on the Venters to prove the conclusion of a contract on the terms alleged by them, which included (in the language of the particulars of claim) an obligation on the part of FPS to box in the outside flue pipe in a safe manner, using suitable and safe material. The onus is on FPS to prove the conclusion of the alleged contract between the Venters and Mr Steward.
10. If the Venters do not succeed in discharging the onus resting on them, and FPS also does not succeed in discharging the onus resting on it, then the Venters' claim must fail. This is so, because the Venters' claim cannot succeed if they do not prove that their contract with FPS included the term about the boxing-in of the outside flue pipe. It would be irrelevant that FPS also has not proved the contract on which it relies as a defence, for it is not put to a defence.

11. The contract relied on by FPS, and the evidence pertaining to it, are however relevant considerations in determining whether the Venters have succeeded in discharging the onus of proving their contract with FPS. Self-evidently, if I should find that the Venters contracted directly with Mr Steward, then he would have performed the boxing-in work as their contractor and not as FPS's subcontractor. Conversely, if I should find that the evidence given in support of a contract between the Venters and Mr Steward was poor, that would lend support to the Venters' contention that Mr Steward was a subcontractor rather than a contractor.
12. The Venters allege a partly oral, partly written contract with FPS. FPS alleges that the contract was purely a written one. As far as the written contract, or the written part of the contract, is concerned, the parties refer to the same two one-page documents. The second document contains FPS's terms and conditions. It plays no role in the resolution of the parties' dispute.
13. The first document is a quotation from FPS, addressed to the first plaintiff, Mr Venter, by Mr Donaven Vallender on 27 May 2014. It lists the items to be supplied, with the price of each, as well as the cost of installation. The cost of installation is indicated as being shared between a building contractor and FPS.
14. The only item on the quotation that featured in the evidence is described as "6x Meter ceramic blanket", with a price of R600. The other aspect of the quotation that is of relevance is that the items do not include the 40 mm pine and the Nutec that were used to box in the outside flue pipe.
15. The evidence of Mr Venter was that he was insistent from the outset that the external flue pipe be boxed in. His first meeting with Mr Vallender was at FPS's showroom in Diep River, where Mr Vallender explained to him that FPS uses a subcontractor for installation. They arranged to meet at the Venters' house. It was during that meeting that Mr Venter, according to his testimony, explained to Mr Vallender that he did wish to see "this silver monstrosity of a flue", but wished to have a Star Jasmine that was growing on the stoep taken

down neatly and for the flue to be clad so that the Star Jasmine could be put back up. Mr Vallender told Mr Venter that that was doable.

16. The quotation, according to Mr Venter's understanding of it, included the totality of the work as per his discussions with Mr Vallender. Not having time to supervise the project himself, Mr Venter regarded FPS as "a one-stop shop".
17. An invoice was presented to the Venters by FPS on about 10 July 2014. It was for a VAT-exclusive amount of R30 273.68, of which R11 069 was for installation. The latter sum included, according to Mr Vallender, the amount of R5 800 that Mr Steward had quoted FPS to do the wet work. There is an invoice from Mr Steward to FPS, dated 11 July 2014, in that amount.
18. Mr Venter initially said that FPS's invoice had been presented by Mr Vallender, but was unsure that his memory in that regard was correct when it was put to him in cross-examination by Mr Coetsee (who appeared on behalf of FPS) that it was Mr Lindt who had presented the invoice. Mr Vallender's evidence was that it was Mr Lindt who had presented the invoice, and who had returned the invoice to him. Mr Lindt himself had no recollection of having done so.
19. According to Mr Venter, he advised Mr Vallender (or, in the event, Mr Lindt) that the work was not yet complete. The second plaintiff, Ms Candice Venter, wrote on the invoice that what was "OUTSTANDING" was "Boxing in of the flue in Nutec board as discussed and agreed with Donavon [*sic*] / Rod". Mr Venter testified that although the boxing-in of the flue had been part of the work to be performed from the outset, it was only at this time that there was a discussion about the material to be used for doing so.
20. Mr Vallender denied that the quotation included the boxing-in of the flue. He testified that there was no discussion when he visited the Venters' home about this, nor was the Star Jasmine discussed. According to him, FPS simply never quoted for the boxing-in.

21. When he received the invoice with Ms Venter's annotation from Mr Lindt, Mr Vallender telephoned Ms Venter and told her that FPS does not do boxing-in of flues. There was no further discussion about this with the Venters. Mr Vallender has no knowledge about when the flue was boxed in.
22. Ms Venter did not give evidence. Mr Steward did, and he said that Ms Venter had called him and asked him to box in the outside flue pipe. (Later on in his evidence he said that he was standing in the garden with Ms Venter when she asked him to box in the flue.) He had told her what material he intended to use, and she had agreed with that. He had given her a price.
23. Mr Steward also testified that he spoke to Mr Vallender about the boxing-in, because after he had finished that job, FPS had to continue the flue flow through the eave. According to him, the flue was up to the eave when he did the boxing-in, after which Mr Vallender and his crew came to continue the flue in the roof.
24. As regards the boxing-in, Mr Steward said that normally he uses about 3 metres of ceramic blanket to cover the fireplace. The balance (i.e. of the 6 metres that had been quoted for) he had used to insulate the box. Mr Steward testified that the quotation for 6 metres of ceramic blanket had included 3 metres for the boxing-in.
25. Having completed the boxing-in work, called Ms Venter a few times about payment. He subsequently dropped an invoice into her post box, although he did not have a copy of the invoice, as he had not used his invoice book for this purpose. About a week later he was called by Ms Venter and told that he could come and fetch his money, which he was sure he did.
26. On 14 August 2014 the Venters paid the balance due to FPS.
27. The trial took place some ten years after the events about which the witnesses testified. The evidence was for the most part unreliable. Mr

Rademeyer in his heads of argument on behalf of the Venters for example identified a number of discrepancies between what was put to his witnesses in cross-examination and what was in fact then testified by FPS's witnesses.

28. Thus, it was put to Mr Venter that Mr Vallender would testify that there had been a discussion about the boxing-in of the flue during Mr Vallender's first visit to the premises; that Mr Venter had been at the house when Mr Vallender went to test the fireplace; that Mr Vallender had on that occasion again informed Mr Venter that FPS does not box in flues; that Mr Vallender had presented the invoice to Mr Venter on 10 July 2014. Mr Vallender confirmed none of this in his own evidence. Mr Lindt, too, had no recollection of having presented the invoice to Ms Venter, despite this having been put to Mr Venter as Mr Lindt's evidence.
29. Regarding Mr Steward's evidence, it was put to Mr Venter that he would say that Mr Steward had made a separate contract with Mr Venter; that he had invoiced Mr Venter; and that he had not been paid. Mr Steward's own evidence was that he had dealt exclusively with Ms Venter, and that he had been paid in cash by her.
30. I am not suggesting that the witnesses were intent on misleading the court. They were however insufficiently alive to the inherent unlikelihood of being able to recall, with any real accuracy, events and the contents of discussions that took place a decade ago. They therefore gave evidence with a measure of confidence and a degree of certainty that was wholly unwarranted in the circumstances. If one were to take at face value, for instance, Mr Steward's evidence that the installation by FPS was only completed *after* he had boxed in the flue, FPS's case collapses on the basis of the evidence of its own witness.
31. We do well to bear in mind what Leggatt J said in *Gestmin SGPS SA v Credit Suisse (UK) Ltd and another* [2013] EWCH 3560 (Comm). Having made the point that the legal system has not "sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the

unreliability of eyewitness testimony”, including “that in everyday life we are not aware of the extent to which our own and other people’s memories are unreliable and believe our memories to be more faithful than they are” (para 16), Leggatt J went on to say the following (para 22):

“[T]he best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses’ recollections of what was said in meetings and conversations and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.”

32. There are not many contemporaneous documents in this case. There is however FPS’s tax invoice of 10 July 2014, annotated by Ms Venter. What it indicates is that the Venters were of the view that the boxing-in of the flue was an outstanding item. It suggests, further, that there was a discussion and agreement about doing the boxing-in with Nutec board with both Mr Vallender and Mr Steward.
33. In common with the quotation of 27 May 2014, the invoice reflects 6 metres of ceramic blanket as an item, twice as much as would have been needed or used to cover the fireplace. There is no good explanation for why this additional metreage of ceramic blanket was included in the quotation, other than its intended use being for the boxing-in of the flue. Mr Steward said that that was the reason for its inclusion. The fact that the length of ceramic blanket on the invoice matches that of the quotation is indicative of an original

intention to use half the ceramic blanket to cover the fireplace and the other half to box in the flue – as Mr Steward testified he did. (I should point out that Mr Steward's evidence in this regard is reliable, because he was testifying about how much ceramic blanket would have been used by him to cover the fireplace – something that he knows from experience rather than from specific recall.)

34. There is one other relevant item of what might be termed documentary evidence, in the form of the *absence* of an invoice from Mr Steward to the Venters. His recollection of not having used his invoice book for this purpose is unreliable. Unlikely, too, is his evidence that he used the invoice book only for invoices addressed to FPS.
35. It is true, as Mr Coetsee argued on behalf of FPS, that Nutec board does not feature as an item on the quotation or the invoice. If however the insulation of the flue pipe was subcontracted to Mr Steward, there would have been no need for this to be itemised: it would have been an item provided by Mr Steward and therefore part of his R5 800 quotation to FPS. In the same way, the bricks and plaster for the installation of the fireplace were not itemised.
36. Mr Venter in his evidence drew a distinction, which strikes one as a sensible one, between the original agreement that the flue pipe would be boxed in and the later discussion about using Nutec board to do the job.
37. The sole member of FPS, Mr Hillel Nachman, testified that although it did not itself box in flues, FPS had on occasion in the past employed a subcontractor to do so. That testimony is consistent with what is again sensible evidence on the part of Mr Venter: that he regarded FPS as a one-stop shop, which would install the fireplace in its totality, including subcontracting where necessary. As a fact, Mr Steward was the subcontractor for one part of the job. Why not then for another part of the job?

38. I am satisfied, on a balance of probabilities, that Mr Steward boxed in the outside flue pipe in his capacity as a subcontractor to FPS rather than as a contractor to the Venters.

39. Accordingly:

(a) It is determined that the defendant is liable to the plaintiffs for the damages resulting from the fire at their home on 11 June 2015.

(b) The costs occasioned by the determination of the merits are to be paid by the defendant, including the costs of counsel on scale B.

FAGAN, AJ

APPEARANCES

For the plaintiffs Adv. H Rademeyer
 Van Breda Herbst Attorneys
 Cape Town.

For the defendant Adv. D Coetsee
 BDP Attorneys
 Cape Town.