

IN THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL
PROVINCIAL DIVISION)

CASE NO: 184/2004 APPEAL CASE NO.: A 1248/2005

In the matter between:

SEBENZA CONSTRUCTION BK

Appellant

And

SAM NKOSI

Respondent

JUDGEMENT

RAULINGA. AJ

[1] This is an appeal lodged by the appellant/plaintiff against a judgement of a magistrate at Ermelo.

[2] Appellant, (a Construction Close Corporation) had issued summons against Sam Nkosi, an adult male residing at De Goedehoop- Ermelo for an amount of R 96 000, 00 which is an unpaid balance of the erection of a
not reportable

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chicken run emanating from a verbal contract (*location conduction operis*) entered into between the two parties in 2003.

- [3] The original price for the erection of the chicken run was R 320 000, 00.
- The parties entered into another contract for the amount of R 16 441, 44 for additional work. Defendant paid plaintiff R 224 000, 00 in two equal instalments of R 112 000, 00 which means that there would remain a balance of R 102 441, 44 which was reduced to R 1000 00, 00 after an amount of R 2441, 44 was abandoned to found jurisdiction at the magistrate court, less R 10 000, 00 which was an amount due to the defendant for unfinished work.
- [4] The contract price was in dispute, but the respondent further avers that the workmanship was defective.
- [5] In his pleadings the respondent contends that because the workmanship of the appellant was defective he had to employ another contractor to rectify and finish the work. The respondent didn't institute a counter-claim.
- [6] During cross-examination the respondent conceded that he owed the Plaintiff an amount of R 21 488, 84. The magistrate relied on this piece of evidence and rejected the Appellant's case holding that the Appellant didn't prove its case on a balance of probabilities.

- [7] The Respondent was a single witness. He didn't produce any proof as evidence to show how the amount was computed. Appellant also called a single witness, who is a qualified builder with seventeen (17) years experience in building construction work. The Respondent could also not produce proof as to the extent of the defect.
- [8] Although the Respondent in his pleadings denies that the contract price is R 320 000, 00 he however admits this in his evidence during the trial. The Appellant avers that the amount of R 16 441 , 44 for additional construction work is reasonable, as well as the amount of R 10 000, 00 for unfinished work.
- [9] The Respondent has the onus to prove the extent of defective work and its amounts. Respondent didn't call any witnesses to corroborate his contention that the work is defective, the court is not placed in a position to make such a finding.
- [10] The Appellant has the onus to establish that it had done all that it was required to do in terms of the contract. However, Appellant alleges that it could not complete its work because it was prevented by the Respondent from doing so. Appellant admits that there was outstanding work quantified at R 10 000, 00. In his pleadings Respondent contends that

another contractor had to be hired to rectify and complete the defective work but during the trial he says that the other contractor had to complete outstanding work. This is a contradiction in terms.

[11] It is clear that a number of issues raised by the Respondent in his evidence were not raised in his pleadings. The general rule is that issues had to be formulated in pleadings. **F & I Advisors (Edms) Bpk en ander v Eerste Nasionale Bank van Suidelike Afrika Bpk 1999 (1) SA 515 (SCA) at 524H-525B/C.**

[12] The appellant admits that the chicken-run was not completed and that

R 10 000, 00 was a reasonable amount under the circumstances.

Dalinga Beleggings (Pty) Ltd v Antina (Pty) Ltd 1979 (2) SA 56 (A). He further avers that he was prevented by the respondent from completing the work.

Bk Tooling v Scope Precision Engineering 1979 (1) SA 391 (A) at F-G.

There can only be talk of breach of contract by *more creditoris* where such a demand has in fact been made. The Appellant made several demands _

Qwa-Qwa Regeringsdiens v Martin Harris & Seuns 2000 (3) 339 (A) at G-H.

[13] In *location conduction operis*, such as in *casu*, which is a reciprocal contract when a creditor is prevented from fully performing his own counter-performance by the failure of the other party's necessary co-

operation, he, despite his own incomplete performance, can claim performance by the other party, but, basically subject to reduction of the performance claimed. This will also depend upon the contractual provisions.

Bk Tooling v Scope Precision Engineering (EDMS) BPK, *supra*.

[14] In *casu*, the appellant made a computation of R 10 000, 00 for the incomplete part of the work as reasonable. He has also made a proper quantification of the amount for additional contract work. There is therefore no need for reduction.

[15] It can be mentioned that the magistrate couldn't have awarded an amount of R 21 488, 84 as the amount to which the appellant was entitled, since this amount was not properly computed, but was as a result of thumbsucking by the respondent during the trial. Furthermore, for the respondent to succeed in his claim, that the work was defective, he had to institute a counter-claim. The respondent didn't institute a counter-claim.

[16] It is my view, that the appellant's appeal against the judgement of the *court a quo* should be upheld with costs.

[17] **It is therefore ordered that:**

I agree,

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(i) The respondent pays the appellant an amount of R 96 000, 00 with interest.

(ii) Interest *tempore morae*.

(ii) The respondent pays the costs of the appeal on a party and party scale.

T. J. RAULINGA ACTING JUDGE OF THE HIGH COURT

C. PRETORIUS JUDGE OF THE HIGH COURT