ILVS

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 28 NOVEMBER 2007

CASE NO: A1467/2005

UNREPORTABLE

In the matter between:

JI CONSTRUCTION PROJECTS CC	PLAINTIFF (RESPONDENT)
vs.	
WILLIAM WANG *T/A* BENDER ELEKTRIES	DEFENDANT (APPELLANT)

JUDGMENT

BOTHA J:

This is an appeal against a judgment in the Magistrates Court of Pretoria. I shall refer to the.-parties as they were cited in the court a *quo.*

The court a *quo* gave judgment for the plaintiff in an amount of R83 496.79 and dismissed the defendants two counterclaims.

No evidence was heard during the trial. The court decided that it could dispose of the matter in terms of Rule 29(6) on a question of law only.

The defendant appeals against the judgment on the plaintiff's claim and the dismissal of his first counterclaim.

The plaintiffs claim was on a building contract. The contract was a written contract signed by both parties on 3 April 2001. It was a standard contract titled JBCC Series 2000 Minor Works Agreement. In terms of the contract the defendant, as employer, appointed the architect (AIF Design) as his agent. In terms of the contract the defendant warranted that the architect had full authority. The architect had to issue payment certificates including a final payment certificate on completion of the works. It is alleged that on 11 July 2003 the architect issued a final payment certificate for an amount of R83 469.79.

In his plea the defendant raised the following defences:

(a) that the plaintiff did not duly complete the work;

(b) that he never gave the architect a mandate to issue the final payment certificates without his consent.

The defendant had two counterclaims. Counterclaim 1 was for an amount of R96 000.00. It is based on clause 19.1.16 of the contract which provides for a penalty of R750.00 per day if the work is completed after the intended date for practical completion which was 29 October 2001. The claim represents a delay of 128 days.

Counterclaim 2 was for R78 138.79. It has two components: R22 848.79 and R55 290.00. The amount of R22 848.79 is claimed in respect of credits that should have been allowed. The amount of R55 290.00 represents the costs that will have to be incurred to finish the incomplete work.

The plaintiff pleaded to the counterclaim that the architect had granted extensions of the contract period. For the rest it denied that the defendant was entitled to credits or that there was defective work that had to be completed.

The first point of the notice of appeal is that the magistrate erred in dismissing an application for an amendment of the defendant's plea. It was indeed after the application to amend the plea had been dismissed that the situation arose where the magistrate found himself in a position where he could dispose of the matter on the law only.

The second point raised in the notice of appeal is that the magistrate incorrectly found that the final certificate precluded the defendant from relying on his defence.

The third point raised in the notice of appeal is that the magistrate incorrectly found that the absence of a mention of penalties in the final certificate precluded the defendant from pursuing his counterclaim for penalties.

When the matter was before court for the first time on 31 May 2005 the defendant asked for a postponement on the basis that he was surprised by documents contained in a late discovery by the plaintiff. The documents related to applications for an extension of the contract submitted by the contractor, the plaintiff, to the architect. In the end the matter was postponed to 27 July 2005.

When the matter resumed on 27 July 2005 there was before the court a notice of amendment dated 13 July 2005 by the defendant. The amendment related to the plea as well as to its counterclaim.

The plaintiff objected against the amendment on the basis that, as far as the plea was concerned, it did not disclose a defence, and as far as the counterclaim was concerned, that it did not disclose a valid counterclaim.

It is convenient to cite the proposed amendment now.

"A. KINDLY TAKE NOTICE that the Defendant intends to amend his pleadings in this case as follows:

1. Defendant's plea:

1.1 By numbering the existing paragraph contained in paragraph 2 of Defendant's plea as paragraph 2.2.1

1.2 By adding the following sub-paragraphs to paragraph 2:

2.2 The error aforementioned which had been made by Defendant's agent had been bona fide and reasonable, under circumstances where Plaintiff had knowledge of such error, alternatively Plaintiff

should reasonably have been aware of, and which it failed to disclose to Defendant or his agent;

2.3 Defendant furthermore alleges that Plaintiff had represented to the said agent that all work and the repair of defects had properly been executed, alternatively that Plaintiff should reasonably have been aware that the works and the repairs had not been executed, and in respect of which Plaintiff had a duty to disclose;

2.4 Defendant's agent, acting under the impression that all work and repairs had been done, issue the certificate of completion and the final payment certificate, which he would not have done had he known that the work had not been properly completed as aforementioned;

2.5 Defendant accordingly alleges that he is not bound by the consequences of the issue of the said certificates;

2. Counterclaim:

2.1 By numbering the paragraph contained in paragraph 3 of Defendants counter claim as paragraph 3.1;

2.2 By adding the following sub-paragraphs to paragraph 3:

3.2 Plaintiff failed to obtain extensions of time from Defendant's agent as required in the agreement between the parties;

3.3 Defendant alleges that Plaintiff had made misrepresentation to Defendant's agent as specified in Defendant's plea *supra,* and that the said agents omission to specify the penalties applicable had been brought about by Plaintiff as aforementioned;

3.4 Defendant alleges that he is under the circumstances entitled to claim penalties in terms of the agreement between the parties."

The issue was argued and the court dismissed the application for an amendment without giving any reasons.

When the matter proceeded the magistrate correctly, in my view, found in respect of the plea that there was no evidence that the defendant could adduce that could undo the effect of the final payment certificate issued by his authorized agent, the architect. As was said in **Smith v Mouton 1977(3) SA 9 W at 13A-B** the employer should be bound by his agent's certificate subject to certain defences like fraud and collusion. The fact that in this case the contract did not specify that a final certificate would be conclusive proof of the indebtedness does not affect the situation. The employer is bound by the certificate through the operation of the law of agency.

I can add that there is no merit in the defence that the defendant never gave the architect a mandate to issue a final payment certificate without his consent. There is no provision in the contract requiring the employer's consent to a final certificate.

The question that has to be asked is whether the application for an amendment of the defendant's pleadings was correctly dismissed. Mr Viljoen, who appeared for the defendant, submitted that the amendment sought introduced allegations of fraud that

would have constituted a permissible defence to the architect's certificate.

I shall now consider the various paragraphs of the proposed plea as set out in the notice of amendment.

Clause 2.2 does not set out a defence that can defeat the final certificate. It alleges that the certificate was issued by the architect in error and that the error was *bona fide* and reasonable. That does not constitute a defence against the certificate. Then it goes on to state that the error was made in circumstances where the plaintiff had knowledge of the error, or should have been aware of it, and failed to disclose it to the architect or the defendant.

The fact that the plaintiff should have known that the architect had made an error cannot constitute a defence to the certificate.

If the plaintiff in fact knew that the certificate was issued in error, its failure to inform the defendant or the architect of the error can only be considered to be a--misrepresentation if there was a duty on it to disclose the error. In general there is no duty on a

party "to tell the other all he knows about anything that may be material". See Absa Bank Ltd v Fouche 2003 (1) SA 176 SCA at 181 A-B. In this case no allegations are pleaded as to why the plaintiff would have been under a duty to impart its knowledge to the architect.

There is no allegation, for instance, that the plaintiff was the sole source of the information on which the erroneous certificate was based.

In the circumstances I do not think that the proposed paragraph 2.2 would have constituted a defence to the certificate.

In the proposed paragraph 2.3 it is stated that the plaintiff represented to the architect that the work had been properly executed. In the alternative it is alleged that the plaintiff should reasonably have been aware that the work had been properly executed and that it had a duty to disclose it.

This paragraph does not amount to an allegation of fraud. In Breedt v Elsie Motors (Edms) Bpk 1963 (3) SA 525 AD at 529 B-H it was said that the word "wanvoorstelling" need not amount to

fraud and that a party relying on fraud should plead it expressly and with responsibility. That is my problem with the proposed paragraph 2.3.

The proposed paragraphs 2.4 and 2.5 do not take the matter any further.

The only paragraph in the proposed counterclaim dealing with misrepresentations is paragraph3. It refers to misrepresentations as specified in the plea. It does therefore not take the matter any further.

But there is a further reason why the defendant may not be allowed to rely on the so-called misrepresentation of the architect. The contract is structured in such a way that it obliges the architect to inspect the works and to give the contractor (the plaintiff) guidance on the standard and stage of completion of the works which he will require the contractor to achieve for the purposes of practical completion. That much may be gleaned from clauses 9.1 and 9.3 of the contract. It therefore presupposes that he will, as a professional person, apply his mind and may even compile a list of outstanding work to be done. Further inspections to be done by

the architect will then follow and it is only upon compliance with his requirement that he will issue a certificate of either practical or final completion. In view of the aforegoing, it is inconceivable that the contractor (the defendant) will be able to mislead the architect in regard to incomplete or erroneous work. Even if he was able to mislead him, the question is whether the misrepresentation was the cause of the issue of the certificate. Mr Clavier, correctly in my view, submitted that the pleadings are silent on this issue. I agree. It is trite that the alleged misrepresentation should have caused or induced the issue of the certificate. See Amler; Precedents of Pleadings, 6th edition, 184.

The conclusion is that the proposed plea and counterclaim do not set out a case that the certificate was issued as a result of fraud on the part of the plaintiff.

Mr Viljoen also argued in the alternative that the matter be remitted to the magistrate so that the trial can proceed in respect of defendant's counterclaim. He submitted that the counterclaim is not affected by the certificate.

I do not agree that the final certificate does not affect the counterclaim.

The defendant in his counterclaim claims penalties in terms of the contract. The penalties can only accrue if they have been levied in terms of clause 12. If penalties are levied the architect is obliged in terms of clause 12.2 of the contract to deduct the amount of the penalties from the amount certified by him in terms of clause 13.7.2. That, in my view brings about a situation where one can assume that where the final certificate does not include a reference to penalties as prescribed by clause 13.7.2 and does not reflect any deduction in respect of penalties, no penalties were payable. Where the date of completion was beyond the intended date of completion the obvious explanation is that the architect must have been aware that he had extended the period of construction in terms of clause 11.

In Hudson Building and Engineering Contracts 10th **edition,** the following is said on p 641:

"Whenever the architects decision is final, and he has powers to extend the time for the matters which have caused delay, and is required to take account, in his certificate for

payment of the final balance, of the liquidated damages due from the builder to the building owner, the right to recover liquidated damages will be lost if the architect gives an unqualified final certificate."

That is the position in this case. In my view the effect of the unqualified final certificate is that the defendant has no claim for penalties.

Mr Viljoen argued that the onus was on the plaintiff to prove an extension of the construction period in order to avert liability for penalties. I cannot agree. Clause 12.2 provides that where the employer levies a penalty, the architect shall deduct it from the amount certified. That means that the defendant should first have levied the penalties, which is not alleged in this case.

Mr Clavier however argued that the counterclaim for penalties could not have been made as such. He argued that the structure of the contract dictates that such a claim should have been made at the time, i.e. during the execution of the contract and not after the architect has issued a practical completion certificate. I agree. It is inherent in clause 12,2 of the contract that

the employer's (defendant's) entitlement to penalties, if any, arises during the execution of the contract. He cannot, in my view, resuscitate that claim at this stage.

A.C FERREIRAACTING JUDGE OF THE HIGH COURT

Mr Viljoen conceded that the claim for an amount of R22 848.79 in respect of credits that were not allowed, it is not a subject matter this appeal. The notice of appeal only refers to the counterclaim for penalties.

The result is that the appeal cannot succeed.

The appeal is dismissed with costs.

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C.BOTHA
JUDGE OF THE HIGH COURT

I agree