REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 33788/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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In the matter between:

ESLEY GEORGIOU Plaintiff

And

TYRES 2000 (HERIOTDALE) (PTY) LIMITED Defendant

JUDGMENT

WANLESS, AJ:

Introduction

[1] The Plaintiff in this matter is one ESLEY GEORGIOU, an adult female, who is the sole proprietor of EFFECTIVE FINISHES and who carries on business as a renovator and refurbisher of homes and offices.

[2] The Defendant is TYRES 2000 (HERIOTDALE) (SA) (PTY) LIMITED, a company which carries on business as, *inter alia*, a seller of used tyres.

[3] The Plaintiff claims payment from the Defendant in the amount of R354 959,16 arising from an oral agreement entered into between the parties during or about March/April 2010. When the agreement was entered into the Plaintiff acted in person and the Defendant was represented by TIMOTHY RICHARD JAMES HURLEY (hereafter referred to as "Hurley").

The Pleadings

[4] The Plaintiff's said claim, as pleaded on behalf of the Plaintiff in the Plaintiff's Particulars of Claim, is a relatively straightforward one. It is alleged that the Defendant was the owner of an immovable property situated at Erf [1…..] [B…….] Township (hereafter referred to as "the property") and in terms of the agreement the Plaintiff would attend to certain refurbishment and renovations of the property. Further, the Defendant would remunerate the Plaintiff at the Plaintiff's "usual rates and costs, *alternatively*, at a reasonable rate and costs".

[5] Having alleged that the Plaintiff carried out the refurbishment and renovations to the property timeously and in a proper workmanlike fashion the Plaintiff avers that the Plaintiff's usual rates and costs, *alternatively,* the Plaintiff's reasonable rates and costs are as set out in a schedule attached to the Plaintiff's Particulars of Claim marked annexure "EG1" which is supported by various slips, invoices and notes annexed thereto (annexures "EG2.1" to "EG2.95").

[6] The Plaintiff also avers (in paragraph 9 of the Plaintiff's Particulars of Claim) that on the 25th of November 2011 the Defendant, duly represented by Hurley, orally undertook to pay the sum of R354 959,16 to the Plaintiff. This alleged undertaking was not relied upon by the Plaintiff at trial.

[7] In the premises, the Plaintiff's claim, as pleaded, is one of work done and materials supplied in connection therewith.

[8] In its Plea the Defendant admits that the Plaintiff and the Defendant entered into an oral agreement but denies the terms of that agreement as set out in the Plaintiff's Particulars of Claim.

[9] In amplification of the said denial the Defendant essentially avers that the parties would enter into a joint venture whereby a property would be purchased and renovated for the purposes of re-selling the property so as to make a profit.

[10] The Defendant further avers that the Defendant would purchase the property and pay all ancillary costs in relation thereto whereafter the property would be registered in the name of the Defendant.

[11] The Plaintiff would attend to the renovations and refurbishment of the property expending reasonable costs in relation thereto.

[12] Thereafter, the parties would sell the property for the highest price they could achieve and the parties would be refunded the respective amounts they had put into the project with the

important proviso that the Defendant would be reimbursed all the monies expended by it into the purchase of the property before the Plaintiff was reimbursed for the costs incurred in carrying out the renovations and refurbishment to the property. Finally, the parties would share equally in the remaining profit from the sale of the property.

[13] It is further averred that the Plaintiff did not apply a reasonable cost in renovating and refurbishing the property but over capitalised in respect thereof.

[14] It is the Defendant's defence that after the sale of the property on or about the 30th of March 2012 for the sum of R1 600 000,00 the Defendant was reimbursed the sum of R1 379 765,42 which was the total amount expended by the Defendant on the purchase of the property which included agent's commission; interest that accrued to the seller of the property and interest on the Defendant's overdraft facility.

[15] Following thereon the Defendant avers that the total amount available for distribution after the Defendant had been so reimbursed was an amount of R220 234,58. Finally, the Defendant avers that each party is entitled to payment of an amount of R110 117,29 being an equal share of the profit and tenders to pay this amount to the Plaintiff.

[16] The Plaintiff did not file a Replication to the Defendant's Plea. The relevance of this will be dealt with at a later stage in this judgment.

[17] When the trial commenced, I was advised that the quantum of the Plaintiff's claim was not disputed by the Defendant save for one item. This item is a quotation at page 44 of exhibit "A" dated the 15th of November 2010 from "BATHROOM BIZARRE" in the total amount of R8 622,25.

[18] Each party led the oral evidence of a single witness. The Plaintiff herself gave evidence and Hurley gave evidence on behalf of the Defendant.

Evidence of the Plaintiff

[19] The Plaintiff gave evidence that during or about the early part of 2010 she entered into a relationship with Hurley.

[20] She further testified that it was agreed between Hurley and herself that they would purchase a house; renovate it and sell it for a profit.

[21] Hurley would be responsible for the payments in respect of purchasing the property and she would pay for the renovations and refurbishments to that property.

[22] The Plaintiff testified that it was agreed between herself and Hurley that once the property had been sold, she would be able to claim her expenses and thereafter an equal share of the profit.

[23] With regard to the single item disputed by the Defendant the Plaintiff testified that she had made payment in respect thereof, which payment appeared at page 41 of exhibit "A". Further, she confirmed that the goods purchased on the quotation as described at page 44 of exhibit "A" were used to improve the property.

[24] She further confirmed that she was simply claiming her expenses from the proceeds of the sale and was not claiming any fee in respect of professional services rendered.

[25] With regard to the reconciliation prepared on behalf of the Defendant and which appears at page 229 of exhibit "C" the Plaintiff testified that she had no knowledge of the expense claimed by the Defendant in respect of "interest on overdraft".

She also stated that she was initially unaware that the Defendant would be purchasing the property and was under the impression that Hurley would be purchasing the property in his personal capacity.

[26] Under cross-examination the Plaintiff denied the version put to her on behalf of the Defendant that the Defendant would be reimbursed first and thereafter the parties would share in the profits. She repeated her understanding of the agreement that each party would be re-imbursed in respect of their expenses and thereafter there would be an equal share in the profit.

[27] Also, under cross-examination, the Plaintiff was unable to dispute that the expenses to the Defendant may have amounted to the sum of R1 379 765,42 as set out in the reconciliation at page 229 of exhibit “C”.

Evidence of Hurley

[28] It was common cause that this witness represented the Defendant in the oral agreement entered into between the Plaintiff and the Defendant.

[29] He testified that when entering into the agreement the Plaintiff was aware, at all material times thereto, that the Defendant would be purchasing the property and would be using the Defendant's overdraft facility in respect thereof.

[30] He further testified that when entering into the agreement the Plaintiff was aware that the Defendant would have to recover these costs before the Plaintiff recovered any of her costs as Hurley had a responsibility towards "shareholders" of the Defendant to ensure that any amounts invested by the Defendant in the project were fully recovered.

[31] Hurley also testified that any profit after these costs had been recovered would be divided equally between the parties.

[32] This witness gave evidence as to the reconciliation prepared on behalf of the Defendant and which appears at page 229 of exhibit "C". He did not testify that he compiled this reconciliation personally or that he had personal knowledge as to the correctness thereof.

[33] Under cross-examination he correctly conceded that apart from the aforesaid entry of R151 890,41 in relation to the alleged expense by the Defendant arising from "interest on overdraft"

there was no real evidence placed before this Court as to how that amount was calculated and indeed, whether this expense was incurred at all.

[34] When asked under cross-examination whether, when calculating a profit, one should deduct all expenses, this witness agreed therewith.

Matters which are common cause or not in dispute

[35] The following facts are common cause or not in dispute in this matter, namely:-

[a] the Plaintiff and Hurley were in a relationship when the agreement was entered into;

[b] this relationship came to an end during or about November 2011;

[c] the Plaintiff was not in a financial position to purchase a property;

[d] both parties always envisaged a situation where the property would be resold for a price which would enable both parties to recover their expenses before there was an equal division of the profit; and

[e] both the amount and reasonableness of the Plaintiff's claim (quantum) were not seriously disputed by the Defendant, either under cross-examination or by placing any evidence before this Court.

Matters in issue

[36] The issues to be decided are the following, namely:-

[a] whether it was agreed that the Defendant would be re-imbursed in respect of the Defendant's expenses prior to the Plaintiff being re-imbursed for hers and before splitting any profit equally between the parties;

[b] whether the amount of R151 890,41 claimed as an expense by the Defendant under "interest on overdraft" should be accepted or not;

[c] if the amount of R8 622,25 was an expense incurred on behalf of the Plaintiff as an item in the renovation or refurbishment of the property; and

[d] following thereon, whether the Defendant is liable to pay to the Plaintiff the sum of R354 959,16 as claimed by the Plaintiff, *alternatively*, the amount of R110 117,29 as tendered by the Defendant.

The argument on behalf of the Plaintiff

[37] Mr Thompson, who appeared on behalf of the Plaintiff, submitted that the Plaintiff's version was not only a "simple one" but also made "business sense". Further and in this regard, it was submitted on behalf of the Plaintiff that the Plaintiff's version of the agreement that both parties would receive back the amounts expended by them into the project and thereafter any profit would be split equally between them not only made "business sense" but was also supported by the Plaintiff's evidence (which was confirmed by Hurley when he gave evidence on behalf of the Defendant) that the Plaintiff was not in a financial position to purchase a property. It follows, so the argument on behalf of the

Plaintiff goes, that the Plaintiff would therefore not put herself at risk by reaching an agreement whereby the Defendant recovered monies put into the project before the Plaintiff was able to recover her expenses.

[38] It was further submitted by Mr Thompson that this Court should have no regard to the claim by the Defendant of the amount in respect of "interest on overdraft" and once this alleged expense was taken out of the equation there is a sufficient profit, when split equally between the parties, to cover the Plaintiff's claim.

[39] In conclusion, it was submitted on behalf of the Plaintiff that there is nothing inherently improbable about the version of the Plaintiff which should be accepted and the version of the Defendant be rejected as improbable.

The argument on behalf of the Defendant

[40] It was submitted by Miss Raff, on behalf of the Defendant, that the Plaintiff had failed to discharge the onus incumbent her to prove, on a balance of probabilities, the agreement as pleaded by the Plaintiff. In this regard, it was submitted that the Plaintiff had essentially pleaded a claim for "services rendered and costs incurred" and there was no mention whatsoever in the Plaintiff's

Particulars of Claim (the Plaintiff having declined to serve and file a Replication to the Defendant's Plea) of a "joint venture project".

[41] It was also submitted on behalf of the Defendant that the Plaintiff's evidence of the parties entering into an agreement which was essentially one of a joint venture supported the Defendant's version which this Court should accept.

[42] Miss Raff also made the submission that as it was essentially common cause between the parties that Hurley wished to give the Plaintiff a helping hand by sending business her way and that the agreement entered into was not, in a strict sense, a business transaction. Therefore, the Defendant would not accept any risk and would only have entered into the agreement if the Defendant was guaranteed to recover all the Defendant's expenses prior to a split of any profit between the parties.

[43] Finally, it was submitted that this Court should take cognisance of the tender made by the Defendant to the Plaintiff insofar as it may have a bearing on the issue of costs, regardless of my judgment in this matter.

The Law

[44] In order to resolve the factual dispute in this matter where I am faced with two irreconcilable versions, I am guided by the decision of **Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others 2003 (1) SA 11 (SCA)** where Nienaber JA summarised the technique generally employed by courts to resolve same.

[45] At paragraph [5] of the judgment, it was held:-

> "The technique generally employed by courts in resolving factual disputes where there are two irreconcilable versions before it may be summarised as follows. To come to a conclusion on the disputed issues the court must make findings on *(a)* the credibility of the various factual witnesses, *(b)* their reliability, and *(c)* the probabilities. As to *(a)*, the court's finding on the credibility of a particular witness will depend on its impression of the veracity of the witness. That in turn will depend on a variety of subsidiary factors such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of his

performance compared to that of other witnesses testifying about the same incident or events. As to *(b)*, a witness' reliability will depend, apart from the factors mentioned under *(a)*(ii), (iv) and (v) above, on (i) the opportunities he had to experience and observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to *(c)*, this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of it's assessment of *(a)*, *(b)* and *(c)* the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised, probabilities prevail."

[46] On the one hand it is true that since the object of pleading is to define the issues so as to enable the other party to know what case he has to meet the parties are, therefore, limited to their pleadings; a pleader cannot be allowed to direct the attention of the other party to one issue and then at the trial attempt to canvass another.

Nyandeni v Natal Motor Industries Limited 1974 (2) SA 274 (D&CLD)

Minister of Agriculture and Land Affairs v De Klerk 2014 (1) SA 212 (SCA) at 223 G - H

[47] However, since pleadings are made for the court, not the court for pleadings, it is the duty of the court to determine what are the real issues between the parties and, provided no possible prejudice can be caused to either party, to decide the case on these real issues.

Imvula Quality Protection (Pty) Limited v Loureiro and Others 2013 (3) SA 407 (SCA) at paragraph [47]

[48] In this regard the court has a wide discretion and must look at the substantial issue between the parties and not blindly follow the wording of the pleadings.

Imprefed (Pty) Limited v National Transport Commission 1993 (3) SA 94 (AD) at 108 E

Stead v Conradie en Andere 1995 (2) SA 111 (AD) at 122 B

Odendaal v Van Oudtshoorn 1968 (3) SA 433 (TPD) at 436 B – E

Weepner v Kriel 1977 (4) SA 212 (CPD) at 217 H

Bowman NO v De Souza Roldao 1988 (4) SA 326 (TPD) at 331 H

Erasmus: Superior Court Practice at B1 - 130

[49] The golden rule of interpretation is to seek the intention of the parties at the time the contract was entered into. Thus, in the matter of **Joubert v Enslin 1910 AD 6**, Innes JA held:-

> "The golden rule applicable to the interpretation of all contracts is to ascertain and to follow the intention of the parties; and, if the contract itself, or any evidence admissible under the circumstances, affords a definite indication of the meaning of the contracting parties, then it seems to me that a court should always give effect to that meaning."

[50] In ascertaining that intention our law is clear that the court may interpret same to give it business efficacy. Further, a court may, in order to give the contract the required business efficacy, apply what has become commonly known as "the officious bystander test".

Christie: The Law of Contract in South Africa (6th Edition) at pages 174 - 181

[51] In the matter of **Richard Ellis South Africa (Pty) Limited v Miller 1990 (1) SA 453 (TPD) at 460 D – E,** Kriegler J stated:-

> "*Ex hypothesi* neither the respondent nor anyone on behalf of the appellant could have given any cogent evidence regarding a term to which they had *not* consciously directed their mind. At best they could have attempted, *ex post facto* and with the point at issue clouding their *objectivity*, to furnish information which can more readily be deduced from the surrounding circumstances."

Judgment

[52] Having observed the Plaintiff and Hurley in the witness-box I am satisfied that both were credible witnesses.

[53] Obviously, their respective reliability must be weighed against their respective lack of objectivity.

[54] Bearing in mind the facts which are common cause or cannot be disputed in this matter, I find that the probabilities, insofar as whether it was agreed that the Defendant would be re-imbursed in respect of the Defendant's expenses prior to the Plaintiff being re-imbursed for hers and before splitting any profit equally between the parties, are as set out hereunder.

[55] In light of, *inter alia,* the fact that the Plaintiff and Hurley were in a relationship when the agreement was entered into, it is improbable that it would have been specifically agreed between the parties that the Defendant should be re-imbursed before the Plaintiff.

[56] More importantly, it is highly improbable that any agreement would have been specifically reached as to which party would be

re-imbursed in respect of their expenses prior to the other in light of the fact that it was never envisaged, by either the Plaintiff or Hurley (representing the Defendant), that the profit to be made would not be sufficient to cover all the expenses invested in the project by both parties.

[57] It is also more probable that the Plaintiff would not have put herself at risk by agreeing to a term whereby the Defendant would be re-imbursed before she was. In this regard, it is common cause that not only were the Plaintiff and Hurley in a relationship but also, that Hurley entered into the agreement to, at least in part, assist the Plaintiff.

[58] In order to give the agreement business efficacy, I accordingly find that it was an implied term of the agreement that both parties would be re-imbursed in respect of their expenses prior to the profit being shared equally between them.

[59] The importation of this term into the agreement not only satisfies the golden rule of interpretation and gives the agreement between the party business efficacy but it also satisfies the officious bystander test.

[60] Whilst it is true that the version put forward by the Plaintiff at trial did not fall squarely within the parameters of the Plaintiff's claim as pleaded on her behalf in the Plaintiff's Particulars of Claim (the Plaintiff having declined to serve and file a Replication to the Defendant's Plea), this did not detract in any way from the veracity of the Plaintiff's evidence and did not, in any manner, prejudice the Defendant at trial.

[61] I come to this finding on the basis that the Plaintiff's claim essentially remains one for materials supplied the Plaintiff having not proceeded with any claim for her professional fee, as pleaded. Most importantly, the real issues of this matter (as set out herein) were fully canvassed by both parties at trial and further, there was agreement between the parties as to the nature and extent of those issues.

[62] It follows from the aforegoing that I find that it was not a term of the agreement that the Defendant would be re-imbursed in respect of the Defendant's expenses prior to the Plaintiff being re-imbursed for hers and before splitting any profit equally between the parties.

[63] I turn now to consider whether the amount of R151 890,41 claimed as an expense by the Defendant under "interest on overdraft" should be accepted or not in the calculation of the

profit (if any) made after the property was sold and after deducting the expenses of both parties.

[64] To my mind it is clear that it should not. Despite having had the opportunity to do do the Defendant elected not to place any documentary evidence or evidence of a witness who had personal knowledge thereof before this court to show that this amount was, in the first instance, correct and more particularly, that it was legitimately incurred in relation to the purchase of the property. In the premises, there is nothing before me which could enable me to find that this amount can be claimed by the Defendant as an expense incurred in the purchase of the property.

[65] In light of this finding, it is not necessary for me to consider whether or not it is probable that when the parties entered into the agreement the Plaintiff was, at all material times thereto, aware that the property would be purchased by the Defendant and not by Hurley in his personal capacity.

[66] With regard to the dispute as to whether the amount of R8 622,25 was an expense incurred on behalf of the Plaintiff as an item in the renovation or refurbishment of the property, it has already been noted in this judgment that both the amount and reasonableness of the Plaintiff's claim were not seriously disputed

by the Defendant, either under cross-examination or by placing any evidence before this Court.

[67] This must apply equally to the item under consideration and in this regard the Plaintiff's evidence was both clear and uncontradicted. Under the circumstances, it must be accepted that she had made payment in respect thereof and that the goods purchased were used to improve the property.

[68] In the premises, I find that the amount of R8 622,25 was an expense incurred on behalf of the Plaintiff as an item in the renovation or refurbishment of the property.

[69] It is common cause between the parties that on or about the 30th of March 2012 the property was sold for the amount of R1 600 000,00.

[70] When one excludes the claim of R151 890,41 from the expenses of the Defendant then the Defendant's expenses amount to the sum of R1 227 875,01.

[71] Hence, the selling price (R1 600 000,00) is sufficient to cover both the expenses of the Defendant (R1 227 875,01) and the claim of

the Plaintiff (R354 959,16). This is particularly so in light of the fact that the Plaintiff is not claiming any professional fee for the work carried out by her and, most importantly, is also not claiming a share of any profit.

[72] In the premises, the Defendant is liable to pay to the Plaintiff the sum of R354 959,16 in respect of the Plaintiff's claim for materials supplied in relation to the refurbishment and renovation of the property.

[73] Under the circumstances, it is not necessary for me to consider the tender made by the Defendant to pay to the Plaintiff the sum of R110 117,29.

Interest

[74] The Plaintiff has claimed interest at the rate of 15,5% per annum from the date of demand to date of final payment (prayer 2 to the Plaintiff's Particulars of Claim at page 7 of the bundle of pleadings).

[75] The Combined Summons in this matter was served upon the Defendant on the 17th of September 2014 (the Return of Service at page 1 of the bundle of Notices, refers).

[76] As at the 1st of August 2014 the rate of interest for the purposes of Section 1(1) of the Prescribed Rate of Interest Act No. 55 of 1975 was reduced from 15,5% per annum to 9,0% per annum.

[77] Accordingly, the Plaintiff is entitled to interest at the rate of 9,0% per annum and not 15,5% per annum as prayed.

Order

[78] In the premises, I make the following order, namely:-

[a] the Defendant is to pay to the Plaintiff the sum of R354 959,16;

[b] interest thereon, calculated at the rate of 9,0% per annum from the 18th of September 2014 to date of final payment; and

[c] costs of suit.

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B.C. WANLESS
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING:	27 August 2015
DATE OF JUDGMENT:	16 September 2015
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