IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE No. A961/2011

30/10/2012

(1) **REPORTABLE:** NO

(2) **INTEREST TO OTHER JUDGES:** NO

30/10/12 .....
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In the appeal of:-

UNITED ELEVATORS (Pty) LTD Appellant

and

OMARCO COMMERCIAL HOLDINGS (PTY) LTD Respondent

JUDGMENT

Van der Byl AJ:-

Introduction

[1] In this matter the Appellant (to which I will, for the sake of convenience, refer to as "*the Plaintiff*") instituted action against the Respondent (to which I will likewise refer

.../...

to as "*the Defendant*") in the magistrate's court sitting at Pretoria for payment, after a number of amendments of its Particulars of Claim, finally of an amount of R18 186,50 in respect of arrear maintenance instalments allegedly due by the Respondent in terms of a written maintenance agreement concluded between the parties on 29 September 2003.

[2] The Respondent, having denied any liability in respect of the amount claimed, instituted a claim in reconvention against the Plaintiff for payment of an amount of R92 000, being the replacement value of a Programmable Logic Controller ("*a PLC*") removed by the Plaintiff from an elevator forming the subject matter of the aforesaid maintenance agreement.

[3] On 19 November 2010 the magistrate -

(a) dismissed the Plaintiff's claim; and

(b) granted judgment in favour of the Defendant in an amount of R70 000, together with interest thereon at 15,5 per cent per annum as from date of judgment.

[4] The Plaintiff now appeals against the whole of the magistrate's judgment and the orders granted.

[5] In order to duly consider this appeal I need at first to briefly refer to the evidence adduced on both sides.

.../...

Plaintiff's case in convention

[6] The Plaintiff's case is based on an allegation -

(a) that the parties concluded a written maintenance agreement on 29 September 2003 in terms whereof the Plaintiff would service and maintain an elevator in a building, known at that stage as Home Hyper City, which would endure for a minimum period of six years;

(b) that the Defendant would pay to the Plaintiff an agreed monthly fee of R1 090,98 (Including VAT) payable monthly in advance; and

(c) that the Defendant, notwithstanding demand, failed to pay the monthly instalments for the period 1 October 2003, being the commencement date of the maintenance agreement, to 13 April 2005, being the date on which the Plaintiff removed the PLC from the elevator concerned (which, incidentally, is a vital component enabling an elevator to operate).

[7] In terms of the written maintenance agreement (which is annexed to the Particulars of Claim) -

(a) the commencement date of the agreement was 1 October 2003;

(b) the initial contract price was recorded as being R870 per month which price was

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to be adjusted annually as provided in the agreement;

(c) the contract price was payable monthly in advance which excluded VAT (**clause 7.1**);

(d) in the event of the Defendant failing to pay any amount due in terms of the agreement on the date of payment and failing to make such payment within seven days after the date of dispatch by registered post or facsimile of a written notice from the Plaintiff calling on it to make such payment, the Plaintiff would be entitled to cancel the agreement forthwith and to hold the Defendant liable for all damages sustained by the Plaintiff as a result of the breach of the agreement, including the right to claim payment of all amounts due and owing at the date of cancellation (**clause 11**).

[8] In the course of the evidence adduced on behalf of the Plaintiff it became apparent in addition to the evidence confirming more or less the averments made in the Particulars of Claim -

(a) that the Plaintiff during the period in question indeed went out to the premises approximately 270 times;

(b) that prior to the completion of the agreement in question the Defendant had purchased a PLC from the Plaintiff for installation and use in the Defendant's elevator forming the subject matter of that agreement;

.../...

(c) that the Defendant had paid the Plaintiff the agreed purchase price (of some R36 000) in respect of the PLC and it was duly installed in the elevator;

(d) that the Plaintiff had removed the PLC from the elevator on 13 April 2005 as, as held by the magistrate, it was not functioning properly, and that it did not return the PLC because it wanted the Defendant to pay what the Plaintiff regarded as arrear maintenance payment in terms of the agreement.

[9] In its Plea to the Defendant's claim in reconvention the Plaintiff tendered return of the repaired PLC against payment of the sum of R18 186,50.

Defendant's case in convention and reconvention

[10] As is apparent from the Defendant's Plea, it is its case -

(a) that it is an express, tacit or implied term of the maintenance agreement that the parties would have reciprocal obligations towards one another, more particularly, that the Plaintiff was obliged to perform its obligations to effectively maintain the Defendant's elevator before there was any obligation upon the Defendant to effect any payments in terms of the agreement "*save possibly for the first payment, given that it was a term of the agreement that payments would be made in advance*";

(b) that the Plaintiff in the first month in which it was obliged to perform, failed to do

.../...

so with the result that the Plaintiff was *in mora* and the Defendant was excused from any further payments until such time as the Plaintiff rectified its *mora* and effectively maintained the elevator.

[11] In relation to its claim in reconvention, it is the Defendant's case -

(a) that, prior to the conclusion of the maintenance agreement, it purchased during approximately December 2001 a PLC from the Plaintiff for installation and use in the elevator in question;

(b) that the Defendant paid the Plaintiff the agreed purchase price for the PLC (being a sum of R36 000) which was then duly installed;

(c) that on 13 April 2005 and under the guise that it was necessary to do so in order to maintain the elevator an employee of the Plaintiff removed the PLC from the elevator and has to date refused or neglected to return it to the Defendant;

(d) that the Defendant is under the circumstances obliged to purchase a new PLC, the fair, reasonable and necessary cost of which is in an amount of R92 000 (excluding VAT).

Findings of magistrate

[12] In relation to the claim in convention, the magistrate held -

(a) that the question to be answered is whether the Plaintiff did proper maintenance in terms of the agreement during the period it claimed arrear maintenance payments;

(b) that the Plaintiff failed to discharge the onus resting on it, being to prove that it complied with its obligations in terms of the maintenance agreement, that it was not entitled to payment for the arrear maintenance instalments

[13] In relation to the claim in reconvention, the magistrate held -

(a) that it was not necessary for the court to make a finding on the issue as to whether or not the PLC was damaged when it was removed;

(b) that the Plaintiff was liable to pay the Defendant an amount to replace the PLC removed;

(c) that, bearing in mind the fact that the PLC removed was not new and cannot have the value of a new item, somewhere between the extremes of the initial price of R36 000 and R92 00 claimed as the price of a new one he must try and determine to the best of his ability a figure that is just, and concluded, obviously arbitrarily, that an amount of R70 000 should be awarded.

Evaluation of issues on appeal

.../...

[14] In my view the decision in respect of both the claim in convention and the claim in reconvention should, albeit in certain respects for reasons not raised before the magistrate and therefore not considered by him, be interfered with.

[15] I deal *seriatim* with the appeal against each of the two claims.

Evaluation of appeal against claim in convention

[16] In the proceedings *a quo* the major part of the trial was conducted on the question as to whether or not the Plaintiff duly performed in terms of the maintenance agreement.

[17[The reason why the trial was conducted on this question is because in its Particulars of Claim, as amended, the Plaintiff specifically averred that it properly performed its obligations in terms of the maintenance agreement and, albeit in the alternative, "*that in law there is a reciprocal duty of performance between the parties*".

[18] It was accordingly in the course of the trial not the Plaintiff's case that it was excused from proper performance. Instead it was its case that it was entitled to payment of the monthly maintenance fee, particularly, because it had properly performed. In the evidence adduced by the Plaintiff it attempted to show that it did perform referring, *inter alia*, to the fact that it went to the Defendant's premises approximately 270 times.

[19] On appeal, however, the Plaintiff approached the appeal on the basis -

.../...

(a) that, upon a proper interpretation of the maintenance agreement, the Defendant was contractually bound to pay the maintenance fees agreed upon in advance and that, therefore, performance by the Defendant was not reciprocal, but consecutive;

(b) that the Defendant was first to perform by paying the monthly maintenance instalments prior to being able to demand performance;

(c) that the Defendant was at all times in breach of the agreement and, therefore, bound to pay the Plaintiff all amounts payable in terms of the agreement, particularly, from the inception of the agreement on 1 October 2003 until 13 April 2005 when the PLC was removed from the elevator in question.

[20] As a general rule parties should define the issues in their pleadings so that they each know what case they have to meet and should, therefore, be limited to such pleadings. However, it is trite that since pleadings are made for the court and not the court for the pleadings, it is the duty of the court to determine the real issues between the parties and, provided no possible prejudice can be caused to either, to decide the case on those real issues.

In ***Robinson v Randfontein Estates G.M. Co. Ltd 1925 AD 198***, referred to with approval in the leading case in this regard of ***Shill v Milner 1937 AD 101 at 105,*** the learned Judge said the following in this regard:

.../...

[23] The Defendant admittedly failed to make any payment from the first day of the commencement of the agreement. In so far as the Plaintiff attempted to perform by, *inter alia*, visiting the Defendant's premises on approximately 270 occasions, can at most be interpreted as an indulgence, as envisaged in clause 9 of the agreement, having granted to the Defendant.

[24] I am accordingly of the opinion that the Plaintiff is entitled to an order for payment of the amount of R18 186,50 claimed.

[25] This, however, gives rise to the question whether the Plaintiff is entitled to all the costs it incurred in respect of the trial.

[26] Counsel were in agreement that this is a matter where the matter could have been disposed of by way of exception to, particularly, paragraphs 1.3, 1.4 and 1.5 of the Defendant's Plea which in my view disqualifies the Plaintiff from its entitlement to an order of costs from the moment it should have raised such an exception (***Edward L Bateman Ltd v CA Brand Projects (Pty) Ltd 1995 (4) SA 128 (T) at 141G***).

Evaluation of Defendant's claim in reconvention

[27] It is the Plaintiff's case in relation to this claim -

(a) that the Defendant's quantum had not been proved as its witness, Mr. Engelbrecht, did not qualify as an expert;

.../...

(b) that the Plaintiff was in possession of the PLC and tendered its return against payment of the sum of R18 186,50.

[28] The Defendant contended that the magistrate erred in reducing the amount of the counterclaim, but given the difference between the amount claimed and the amount awarded decided to accept the magistrate's ruling.

[29] In my view the magistrate was in any event wrong -

(a) in so far as he, without any factual basis, embarked on conjecture in assessing the Defendant's alleged damages and made an arbitrary approximation of the damages (***Aarons Whale Rock Trust V Murray & Roberts Ltd and Another 1992(1) SA 652 (C) at 656C***);

(b) in not having considered the fact that the Plaintiff tendered the return of the PLC and should rather have ordered the return of the PLC.

Order

[30] For the reasons set out in this judgment an order is granted in the following terms:-

1. **THAT** the Appellant's appeal against the judgment and order in respect of its claim in convention as well as its appeal against the judgment and order in

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respect of the Defendant's claim in reconvention be upheld with costs.

2. **THAT** the magistrate's judgment and order on the Appellant's claim in convention be set aside and the order granted be replaced with the following order:

> "1. ***THAT*** *judgment be granted in favour of the Plaintiff in an amount of R18 186,50, together with interest on that amount at 15,5 per cent per annum as from date of issue of summons to date of payment.*
>
> 2. ***THAT*** *the Respondent be ordered to pay Plaintiff's costs up to and until 18 June 2007.".*

3. **THAT** the magistrate's judgment and order in respect of the Defendant's claim in reconvention be set aside and the order granted be replaced with the following order:

> "1. ***THAT*** *the Defendant's claim in reconvention be dismissed.*
>
> 2. ***THAT*** *the Plaintiff be ordered to return to the Defendant the repaired Programmable Logic Controller removed by the Plaintiff from Defendant's elevator on 13 April 2005 upon payment of the amount of R18 186,50.*
>
> 3. ***THAT*** *the Defendant be ordered to pay the Plaintiff's costs incurred in respect of its claim in reconvention as from 13 April 2007.".*

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P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

.../...

I agree

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T A MAUMELA
JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPELLANT	ADV STYLIANOU
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DATE OF HEARING	8 OCTOBER 2012
JUDGMENT DELIVERED ON	29 OCTOBER 2012