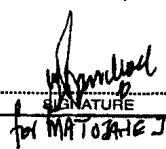


**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES /NO.	
(3) REVISED.	
07.02.13	
DATE	SIGNATURE

Case Number: 47605/2009

Date: 7 February 2013

In the matter between:

JOHN RONALD PANKHURST

PLAINTIFF

and

PATRICK FITZGERALD

DEFENDANT

JUDGMENT

K E MATOJANE J

Introduction

[1] This is an action for payment of contractual, alternatively delictual damages allegedly suffered by the plaintiff.

[2] On or about the 23 October 2007 the plaintiff entered into a written building agreement with Fitzcon Development Trust , duly represented by the defendant, in terms whereof the Fitzcon Development Trust undertook to construct a dwelling and outbuildings on stand 729 Midstream for the plaintiff for a total price of R1 878 000.00.

[3] The written building agreement was on the letterhead of Fitzgerald Properties & Building (Pty) Ltd.

[4] During the construction of the dwelling and from time to time the plaintiff paid progress payments into the bank account of Fitzgerald Property Developers (Pty) Ltd held with ABSA Bank Ltd. The plaintiff was then requested in future to pay progress payments into the personal account of the defendant.

[5] The plaintiff's case as pleaded is that the defendant negligently, alternatively, purported to represent, or contract on behalf of a nonexistent trust or other entities which were no more than his alter ego.

[6] In paragraph 9 of its Particulars of Claim the plaintiff alleges that by virtue of the non existence of the trust, an oral express

alternatively an implied or tacit agreement was concluded between the plaintiff and the defendant personally on the following dates and in the following terms:

- "9.1 On or about 6 May 2008 to the effect that the defendant would put the sum of R50 000.00 paid by the plaintiff to the defendant on or about that date to use in respect of project management fees that had validly been earned or that were validly to be earned;
- 9.2 On or about 8 May 2008 to the effect that the defendant would put the sum of R50 000.00 paid by the plaintiff to the defendant on or about that date to use in respect of a deposit for kitchen cupboards;
- 9.3 On or about 23 May 2008 to the effect that the defendant would put the sum of R50 000.00 paid by the plaintiff to the defendant on or about that date to use in respect of tiles for the dwelling and/or outbuilding;
- 9.4 On or about 26 May 2008 to the effect that the defendant would put R25 000.00 of the sum of R35 000.00 paid by the plaintiff to the defendant on or about that date to use in respect of a fire place, and R10 000.00 of the sum of R35 000.00 paid by the plaintiff to the defendant on or about that date to use in respect of a deposit for a swimming pool; and
- 9.5 On or about 26 May 2008 to the effect that the defendant would put R20 000 of the sum of R50 000.00 paid by the plaintiff to the defendant on or about that date to use in respect of bedroom cupboards, and R30 000.00 of the sum of R50 000.00 paid by the plaintiff to the defendant on or about that date to use in respect of sanitary ware".

[7] The plaintiff's case as pleaded is that the above payments were appropriated by the defendant and put to his own personal use or to use other than what the defendant had alleged them to be due for and has thereby breached the said oral agreements. The defendant's case on the other hand is that he acted as a trustee for the trust when receiving and utilizing the money and denies that he undertook to utilize the monies for the reasons set out by the plaintiff. The defendant specifically denies the oral express alternatively implied further alternatively tacit agreements as alleged by the plaintiff.

[8] The plaintiff testified that he entered into a building contract with the Fitzcon Development Trust and that he dealt with the defendant throughout the duration of the construction work until the plaintiff sent a fax on the 26 November 2008 cancelling the agreement with the Trust. He testified that he was satisfied with the payments and expenses as recorded by the Trust up until 6 May 2008. The accounting document by the trust records the payments and expenses up to the 27 July 2008 and the contract was cancelled on the 26 November 2008. The plaintiff conceded under cross examination that all the payments between the 6 May and the 27 May form part of the building contract entered into between himself and the trust represented by the defendant.

[9] At no stage in his evidence in chief did plaintiff testify that the trust did not exist nor that he was no longer bound by the terms of the contract he entered into with the trust. Under cross examination, the plaintiff testified that he did not know whether the trust existed or not, this cannot be reconciled with his testimony that he does not dispute the account that the trust has prepared except for entries relating to Erf 1100 and Sammy Ceilings.

[10] It is clear from the original deed of trust and the letter of authority presented by the master of the High Court under subpoena, that the defendant is one of the trustees of the trust and that the trust exists. This disposes of the basis upon which the alleged tacit contracts came into being and the contention that the contracts were breached. It is also clear from the evidence of the plaintiff that the building contract between himself and the trust was always applicable and that all payments between 6 May and 27 July 2008 except for entries relating to Erf 1100 and Sammy Ceilings formed part of the building contract. According to the plaintiff's letter dated the 19 November 2008, the development was 68% complete.

[11] Having found that the building contract between the plaintiff and the trust was in place when the alleged tacit contracts were

entered into, the case must turn upon the terms of the building contract with the trust.

Clause 4.2 of the building contract provides as follows :

"Payment to the contractor from a building loan by the owner shall occur according to the normal schedules and procedures of the relevant financial institution. The owner agrees that all payments by the financial institution will be made with the procedures prescribed by the financial institution. This means in general that all payments by the financing institution are ceded to the contractor in lieu of construction in accordance with this agreement, any applicable addendums, and appendix 'A'".

[12] "Clause 4.3 provides:

"A final, consolidated account statement shall be presented by the contractor to the owner prior to the date of occupation, reflecting all costs and payments. The owner undertakes to settle the outstanding balance, if any prior to the date of occupation and agrees that he /she has no right to occupation until such outstanding amounts have been paid. If, for whatever reason, the constructed building is occupied before the final account has been paid, the owner acknowledges that he/she is responsible for the immediate payment of the balance once brought to his attention by the contractor".

[13] Clause 8.1 provides:

"This agreement and all duly signed addendums to it constitutes the entire contract between the owner and the contractor. Verbal agreement do not form part of this contract, neither do they amend this contract and

no amendment will be considered valid unless it is documented and signed by both parties”.

[14] I agree with defendant’s counsel that a tacit term or a tacit contract cannot come into being if it is in conflict with the express provisions of a contract. The building contract in the annexure, makes express provision for project management fees, kitchen cupboards, tiles for the dwelling fire place and swimming pool, all these items are subject matters in the alleged five separate tacit contracts and without a written variation of the main agreement in terms of clause 8 the oral agreements cannot come into being. See **Alfred McAlphine & Son (Pty) Ltd v Transvaal Provincial Administration** 1974(3)SA 506(A) at 531 – 537.

[15] The plaintiff’s counsel argued that the fact that defendant conceded that he never paid the R50 000.00 in respect of project management fees to the Fitzgerald Development Trust is proof that defendant appropriated for himself all the project management fees and did not pay it towards the validly earned contractors fees as he undertook to do. Counsel further argued that the defendant cannot say that the monies that defendant personally paid to the contractors was put to the plaintiff’s use as it was Fitzcon Development Trust that was responsible for payment of contractors. Counsel submitted that no factual or legal basis was pleaded as to

why such payments could be set off against monies that the defendant owes the plaintiff.

[16] I do not agree with this semantic analysis. It is self-evident that the defendant acted throughout in his capacity as a trustee of the trust when he received and utilized the monies. The trust accounted to the plaintiff for the payments received pursuant to the trustee's arrangement, which was accepted by the plaintiff, as to how and whereto payment should be effected. Accordingly, the monies were not appropriated by the defendant for personal use as alleged and there is no breach of the tacit contracts as the contracts never came into being.

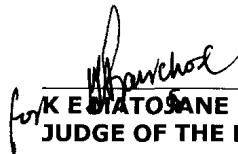
[17] The plaintiff has also not shown that his patrimony was diminished by defendant's fraudulent misrepresentation as none was shown and the parties have not debated the account for the work done. See **Trotman v Edwick** T951(1) SA 443 (A). In my view, the plaintiff has failed to show that there is anything wrongful or unlawful in any of the defendant's conduct and in the result the plaintiff's claim must fail.

[18] Defendant has requested costs as between attorney and client including the costs of two counsel and of the qualifying reservation

and attendance fees of the defendant's expert witness. In my view, such costs are not justified as the matter is not out of the ordinary justifying the employment of two counsel and an expert.

[19] In the result, the following order is made:

The plaintiff's claim is dismissed with costs.


K E DIATOANE
JUDGE OF THE HIGH COURT