REPUBLIC OF SOUTH AFRICA

IN THE NORTH GAUTENG HIGH COURT
PRETORIA

CASE NO: 77249/2010

5/12/2013

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

5/12/2013 .....
DATE SIGNATURE

In the matter between:

LONDLIN ENTERPRISES CC. **Plaintiff**

and

WANG ON PROPERTY CO (PTY) LTD. **Defendant**

J U D G M E N T

MASIPA J:

INTRODUCTION

[1] The plaintiff seeks payment of an amount of R290 947.20 from the defendant in respect of certain civil works, including inter alia, tarring, ("the services") carried out at the defendant's premises. The plaintiff bases it's claim on an agreement that the parties entered into during or about June 2010.

[2] The defendant concedes that services were rendered but denies that it is indebted at all to the plaintiff. According to the defendant there were two oral agreements that the parties entered into and not one as alleged by the plaintiff. The defendant alleges that it was agreed that the plaintiff would do the works listed as items 1 to 7 on Annexure "A" page 10 of the pleadings bundle (the invoice dated 28 July 2010, under the heading "Extas to Contract") for the sum of R120 000. It further alleges that only R20 000 of this sum was still owed to the plaintiff.

THE ISSUES

[3] The dispute between the parties is whether there was one agreement as alleged by the plaintiff or whether the parties concluded a further agreement on 28 July 2010, as stated by the defendant.

[4] The onus is on the party who avers a positive statement to prove it.

THE EVIDENCE

The Plaintiff's Case

[5] The plaintiff led the evidence of Mr Andre du Plessis, the sole managing member of the plaintiff. He gave evidence to the following effect.

[6] He is a quantity surveyor by profession and does business through the vehicle of the plaintiff. On about May 2010 whilst he was busy with a project in Alberton, Johannesburg, he was approached by a certain Mr Carlos who requested him to do certain civil works at a site about 500 metres away. He went to the site and subsequently prepared a written quotation which he submitted. Mr Carlos asked him to once more visit the site so that they could discuss the quotation.

[7] At the site du Plessis was introduced to Mr Tong, a representative of the defendant. Mr Tong then pointed out the scope of work that needed to be done for the defendant. du Plessis immediately advised Tong that the scope of work pointed out to him was a lot more than what the plaintiff had quoted for. He had quoted on the work as set out on the quotation dated 10 June 2010 reflected on page 21 of Bundle "A". His price had been R356 per square metre for 931 square metres. Tong accepted the quotation and told du Plessis that the plaintiff

should also proceed with the additional works as per the increased quantities indicated.

[8] By 28 July 2010, the plaintiff had performed 99% of all the work (which included the extras as per items 1 to 7 of its invoice dated 28 July 2010). There was a delay at the factory in the delivery of the last of the tar. This was why the project was not 100% completed at that stage.

[9] On 28 July 2010, the plaintiff submitted its invoice, Annexure "A" to it's Particulars of Claim on the instruction of the defendant to determine all the amounts owing to it.

[10] du Plessis anticipated that Tong , as he often did, would ask for a discount on Item 7. In anticipation of that possibility the plaintiff discounted Item 7 on its tax invoice dated 28 July 2010 by only charging the sum of R200 000 (excluding Value Added Tax) for the tarred area.

[11] Du Plessis advised the defendant, through Tong, "at least fifty times" that the defendant would only qualify for the aforesaid discount as provided for in the written quotation if payment was made timeously . The amount of R200 000 was never paid.

[12] When the defendant failed to make payment as per the tax invoice dated 28 July 2010, du Plessis sent a letter dated 24 August 2010 to Tong.

[13] The body of the letter reads thus:

"We find ourselves in an awkward position to date, we were looking forward to a long term business relationship with yourself but are in a dilemma as to the approach, tomorrow we will be submitting our final progress claim and it will be calculated on the existing measurements. We sent you an updated tax invoice on 28 July 2010 setting the list of extras as per your instructions. At our last meeting you accepted 1 to 6 Item 7 being your main concern. We agreed on a sum to be paid , we have passed this date. The final re-measurement of tarred area is 1'564sm (subject to re-measurement) Two outside areas in Potgieter street were not included in last weeks agreement. Our agreed area of tar was 1421sm . And the agreed payment should have been made by Mon 23rd We are aware of the damages caused by our tar-man and are taking delivery of all the materials on Wednesday 25th that are necessary to complete the repair works. We once again would like to confirm that our original deal still hold until Wednesday 25th. Please respond a.s.a.p."

[14] When Tong failed to respond to the letter or to make payment as requested du Plessis phoned him and demanded payment. Subsequent phone calls, however, were not answered by Tong. This prompted du Plessis to send a final

invoice to the defendant. The invoice dated 31 August 2010 indicates all amounts received to date and the outstanding balance of R290 947,20. This excluded the discount that would have been applicable if payment was made timeously.

[15] It was du Plessis 's version that after the work was completed Tong requested him to reduce the outstanding balance in respect of Item 7 to R120 000,00. He refused and told Tong that were he to do so he would be shooting himself in the foot as he had already given him a more than generous discount.

[16] He stated that the version of the defendant could not be true because Items 1 to 3 appearing as extras on the invoice dated 28 July 2010 were already completed and charged for in 14 July 2010.

The Defendant's Case

[17] Mr Lawrence Tong was the main witness for the defendant. His initial version was that Carlos was the one who showed du Plessis the scope of the works to be done as he knew nothing about what was required. Later he stated that he was the one who took du Plessis around and showed him what was required of the plaintiff. He could, however, not remember what exactly he showed du Plessis .

[18] He offered the plaintiff the sum of R120 000, in cash, up front, without Value Added Tax for the works appearing as "extras" on the plaintiff's invoice dated 28 July 2010. He was pleasantly surprised when du Plessis accepted the offer. However, he decided that because he did not know du Plessis that well he was going to pay the amount of R120000 by instalment, namely R60 000 and later R40 000 as the work progressed. The last cheque of R20 000 was still with the defendant as du Pleasis had refused to fetch it.

[19] Under cross examination Tong conceded that the parties concluded one agreement and that the rate agreed on was R356,00 per square metre. He conceded that the area that was to be tarred as per Item 7 of the plaintiff's tax invoice dated 28 July 2010 increased from the original quote for 490 square metres to the agreed 1421 square metres.

[20] Mr Vincent Wong was the accountant of the defendant at the time of the transaction between the plaintiff and the defendant. He was not party to any negotiations but he recalled that the reason why the R20 O00 owed to the plaintiff was not paid to it was because of certain damages caused by the plaintiff to the defendant's property.

[21] Wong also said another reason the R20 000 was not paid to the plaintiff was that no progress payment claim was submitted by the plaintiff to claim the sum of R20 000 from the defendant.

[22] Both these reasons are a direct contradiction to the version of Tong who stated that the only reason the sum of R20 000 out of R120 000 was still outstanding was that the representatives of the plaintiff failed to collect the cheque from the defendant.

ASSESSMENT OF THE EVIDENCE

[23] That the parties entered into an agreement in June 2010 is beyond doubt. The issue is the existence of a second agreement in terms of which the parties allegedly agreed that the price would be R120 000.

[24] In deciding the question whether the defendant has proved the conclusion of the further agreement between the parties two questions arise, firstly whether prima facie there is any evidence of such an agreement and the terms thereof and secondly whether this court should believe the plaintiff or the defendant with regards to the non existence or existence of a further agreement. I am of the view that from the evidence led there is no prima facie evidence that the parties entered into a second agreement.

[25] There are two irreconcilable versions in this matter. The correct approach in dealing with matters of this nature was set out in the case of Stellenbosch

Farmers' Winery Group Ltd v Martel 2003 (1) SA 11 (SCA) at 14 - 15 where the following was stated:

[26] To come to the conclusion on disputed issues a court must make findings on:

(a) the credibility of 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 about the veracity of a witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as:

(I) the witness candour and demeanor in the witness box,

(ii) his bias, latent or blatant,

(iii) internal contradictions in his evidence,

(iv) external contradictions, with what was pleaded or put on his behalf, or

(v) with established fact or with his own extra curial statements or actions,

(vi) the probability or improbability of particular aspects of his version,

(vii) 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), (v) and (vi) above, on:

(i) the opportunities he had to experience or observe the event in question; and

(ii) the quality integrity and independence of his recall thereof.

As to (c), this necessitated an analyses and evaluation of the probability or improbability of each party's version on each of the disputed issues. In light of its 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 finding compels it in one direction and it's evaluation of the general probabilities and another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[27] I proceed to analyse the evidence of the relevant witnesses.

[28] The evidence of du Plessis was criticized on the basis that he was argumentative and evasive. While I agree that he was argumentative I am satisfied that he answered all questions as best as he could. In his evidence I did not detect any bias against Tong or any tendency to exaggerate. He impressed me as an honest and reliable witness. He said when Tong suggested paying him R 120 000 instead of R200 000 he rejected the offer outright and told him that he could not go lower than he had already done. His version is supported by his tax invoices as well as his letter of the 24 August 2010 that he addressed to Tong. du Plessiss may have been long winded but he definitely was not evasive. The criticism of du Plessis's evidence as unreliable, therefore, is unfounded.

[29] On the other hand I found Tong to be pathetic as a witness. He chopped and changed his version as he went along. Not only was his evidence riddled with contradictions, both internal and external but his version was improbable for a number of reasons. During examination in chief, he stated that Carlos was the one who showed du Plessis the scope of the work as he knew nothing about measurements only to change his version under cross examination. It was during cross examination when he said he is the one who showed du Plessis the scope of work to be done by the Plaintiff. He, however, could neither remember what it is that he had shown to du Plessiss nor what was discussed on that

occasion. It is so that human memory fades with time and a witness cannot be faulted for not remembering everything. This, however, cannot assist the defendant as this court cannot speculate in favour of the defendant.

[28] Tong's memory also failed him with regard to the second agreement that he alleged the parties entered into in respect of extra works. His version was that he negotiated a price of R120 000 which du Plessis accepted without demur. He, however, could not remember a single word of what du Plessis had said in response except that his response "was positive". This, in my view, is being evasive in the extreme.

[29] The date of the alleged second agreement also became an issue. In its plea the defendant alleged that the agreement concerned in respect of extras was concluded on or about the 28 July 2010. A tax invoice dated 14 July 2010 from the plaintiff reflects some of the extras as "work completed to date". This flies in the face of the version of the defendant and Tong could not explain the discrepancy. What does not make sense is that on his version,Tong paid for the completed works as set out in the tax invoice of 14 July 2010 first and then entered into an agreement on 28 July 2010. That the amount reflected on the tax invoice concerned was paid is clear from a copy of a cheque of R49 510.00 dated the 14 July 2010 and made out to the plaintiff. Tong could not explain this bizarre occurrence although he was given an opportunity to do so.

[30] There are more unexplained discrepancies. The defendant paid a sum of R60 000 and R40 000 to the plaintiff on 16 August 2010 and on 26 August 2010 respectively as an alleged part payment of R120 000. He could not explain how he could, unilaterally, change the terms of the agreement from, for instance, paying R120 000 cash upfront to paying by instalment.

[31] Even more strange about the evidence of Tong is that when the defendant received the tax invoice of 31 August 2010 reflecting R290 947.20 as amount due, Tong did nothing. I say this because although he said he was shocked when he received the invoice his conduct is irreconcilable with that of someone who was shocked. When he was asked why he did not respond or do something about the invoice concerned if he did not agree with it he said it was not necessary for him to respond. For someone who knew that the defendant did not owe the plaintiff the money reflected in the invoice Tong behaved very strangely.

[32] Notwithstanding Tong's attempt to persuade this court that there was a second agreement concluded between the parties, even on the defendant's version, it is clear that there was no meeting of the minds regarding the alleged further agreement.

[33] Having regard to the evidence as a whole I am not persuaded that the onus to prove that there was a further agreement as alleged by the defendant, has been discharged.

CONCLUSION

[34] The existence of one agreement as alleged by the plaintiff became common cause during the cross examination of Tong. What became an issue was whether the parties had entered into a further agreement where the price for extras was R120 000. No details of this agreement was placed before court. Not only was there paucity of facts regarding a further agreement but the little evidence that was presented is so improbable and so contradictory that this court can safely reject it as false.

[35] Having regard to the evidence as a whole I am satisfied that there was no further agreement as alleged by the defendant. I am also satisfied that the plaintiff was entitled to revoke the discount on the basis that the amount agreed upon was not paid when it became due.

[36] In the result I grant judgment in favour of the plaintiff against the defendant in the following terms:

1. Payment in the amount of R290 947,20;

2. Interest at the rate of 15.5% per annum calculated from 15 November 2010 until date of final payment.

3. The defendant is ordered to pay costs.

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JUDGE OF THE NORTH GAUTENG

HIGH COURT

Counsel for the plaintiff: P L Uys

Instructed by: Gerhard Botha and Partners Inc.

Counsel for the defendant: J J Bitter

Instructed by: Rothbart Inc

Date of Hearing: 26-28 Nov 2013

Date of Judgment: 5 Dec 2013