IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***13th December 2019*** Signature: _____

APPEAL CASE NO: A3049/2019

COURT *A QUO* CASE NO: 20278/2017

DATE: 13th December 2019

In the matter between:

J D BOTHA & SONS SIGNS (PTY) LIMITED Appellant

- and -

MULTI CRANES & PLATFORMS (PTY) LIMITED Respondent

Coram: Adams J *et* Coertse AJ

Heard on: 8 October 2019

Delivered: 13 December 2019

Summary: Unjust enrichment – *condictio sine causa* – no agreement in respect of services rendered and material supplied – cost of repairs to respondent's crane – a claim based on unjustified enrichment nonetheless secured

Quantification of claim – repairer's usual charges for repairs represent enrichment and conversely impoverishment – profits included in repair costs – appeal dismissed

ORDER

On appeal from: The Johannesburg Magistrates Court (Additional Magistrate B C Molwana sitting as Court of first instance):

(1) The order of the Johannesburg Magistrates Court is set aside and substituted with the following order:

'Judgment is granted against the defendant in favour of the plaintiff for:

(1) Payment of the sum of R81 961.60.

(2) Payment of interest on the amount of R81 961.60 at the rate of 10.25% per annum from the 8th of August 2017 to date of final payment.

(3) Payment of the cost of the action on the appropriate Magistrates Court scale, including the cost of Counsel.'

(2) The appellant's appeal is otherwise dismissed with costs.

JUDGMENT

Adams J (Coertse AJ concurring):

[1]. 'Scope creep' in the context of project management refers to changes or growth in the scope of a project after work on it has begun. This can occur when the scope of a project is not properly defined, documented or controlled and often results from a lack of proper initial identification of what is required to bring about the project objectives. It also often results from poor communication between parties. Scope creep may result in an overrun of cost, not specifically agreed upon between the contracting parties.

[2]. This definition of 'scope creep' is a summary of the issues involved in this appeal. On the 13th of May 2016 the appellant delivered to the respondent a *Challenger Aerial Work Platform* ('the platform' or 'the crane'), which was not functional, and the appellant requested from the respondent a quotation to repair its faults. There was also a specific written instruction contained in the order from the appellant to the respondent to 'do load testing to certification'.

[3]. The quotation, which was subsequently accepted by the appellant, was for an amount of R4479, and was paid by the appellant on the understanding that the crane would be repaired by the respondent for this amount. Five months and R81 961 repair costs later the platform was 100% ready to be returned by the respondent to the appellant during September 2016 in a proper working condition and in a good state of repair. The appellant however refused to pay the repair costs of R81 961, alleging that there was an express agreement in place between them and the respondent that the platform / crane would be repaired at an agreed price of R4479.

[4]. The question in this appeal is whether the appellant is liable to the respondent for the repair cost on the basis of unjust enrichment. By all accounts, the cost of repairs is in excess of the amount of R4479. The direct out-of-pocket expenses to the respondent were more than the quoted amount. The cost of the main spare part of the crane which required replacement was the sum of R13 210. It is therefore the case of the respondent that it is unjust and unfair that the appellant received a crane in good working order, which had been repaired at the expense of the respondent.

[5]. The appellant, at the relevant time, was carrying on business as a manufacturer, supplier and installer of signs, signboards and signage. The platform is a mechanical crane of sorts, which was being used by the appellant in its business operations. During May 2016 there was a problem with this piece of machinery. It was not working. This is where the respondent came in. After the respondent had completed the work in respect of which they had quoted an amount of R4479, the machine was still not in proper working condition. This then required further assessment and additional repairs, which *inter alia* required the involvement of a specialist technician, whose expertise the respondent had to call upon obviously at a fee for the account of the respondent. It was in fact the case of the respondent during the trial in the court *a quo* that it was suggested to the appellant that they should instruct this technician directly to affect the repairs to the crane. The appellant was however insistent that the respondent should fix the machine.

[6]. The respondent, with the assistance of the technician, one Mark De Bruyn, based at the time in KwaZulu-Natal, repaired the appellant's platform and returned to it a fully-functional and operational platform in a good state of repair. There can be no dispute that, in effecting the repairs to the appellant's platform, the respondent expended money and rendered services by working on repairing the appellant's platform. It was the case of the respondent that the total amount of the expenses incurred and the monetary value of the time spent on affecting the repairs amounted in total to R81 961.60. This amount, so the respondent contends, was the amount by which it (the respondent) was impoverished and the amount by which the appellant was enriched.

[7]. This amount is calculated as the sum total the respondent would have charged and invoiced the appellant for the repairs either as an agreed fee or as its usual fee. This amount therefore represents the sum the respondent would have invoiced the appellant for repairs done and material supplied to get the crane up and running and back to proper working condition. The profit margin built into the invoice, so the respondent contended, also formed part of the amount by which the respondent had been impoverished and the amount by which the appellant had been enriched.

[8]. As per the initial quotation dated the 19th of May 2016, the respondent had apparently diagnosed the fault as relating to some of the 'relays' of the crane, referring to electrical components, and those were in need of repair and/or replacement. It later transpired that this was not the real or only fault. However, as indicated above, the appellant accepted that quotation. Those repairs were affected. On the 2nd of June 2016 the appellant paid the amount of R4479 in settlement of the repair cost. However, the problem had not been solved. The crane was still not working properly. On the 6th of June 2016 it was discovered that 'the self-levelling' function of the cage of the crane was malfunctioning and needed to be repaired. This assessment or diagnosis was made after much ado and with the assistance of the specialist technician. I shall return to this aspect of the matter later on in this judgement.

[9]. The appellant claimed that it understood that these additional repairs would be included in the original quotation for R4479, and on this basis instructed the respondent to proceed with the repairs. According to the appellant, there was no agreement in place as regards the additional repairs other than the one in terms of which the appellant was to repair the machine for the price originally agreed upon.

[10]. On the 19th of September 2016, after the fault had been repaired and the crane was again fully operational and ready to be returned to the appellant, the respondent issued the appellant with an invoice for R81 961.60 for the subsequent repairs. This invoice revealed that it had finally been established through a process of trial and error that the part which had apparently failed and which required replacement was the 'inclinometer'. This part had to be sourced from the United Kingdom, which was done by Marc De Bruyn. He was also the one who had in fact diagnosed the problem, having been recruited from KZN by the respondent, who was responsible for all of the expenses relating to getting De Bruyn from KZN to come and assist with the repairs. In terms of this invoice, the respondent charged the appellant in respect of: De Bruyn's expenses, the cost of the spare parts and the labour charges relating to the removal and the fitting of the inclinator, as well as the labour charges relating to the time spent on ascertaining exactly what the problem with the machine was.

[11]. The appellant refused to pay the amount of R81 961.60 in respect of this invoice. Instead, it offered to pay an amount of R13 210, which, according to the invoice, was the cost of the inclinator. Importantly, the appellant did not then nor at any stage subsequently dispute that the individual sums contained in the invoice, which make up the total of R81 961.60, were unreasonable charges. In my view, there was no dispute that the amount of R81 961.60 represents the fair and reasonable charges for the repairs and included actual expenses incurred by the respondent during the course of the repairs. The dispute was that, according to the appellant, the repairs costs were covered by the initial quoted price of R4479.

[12]. The appellant's offer to pay the amount of R13 210 in full settlement of the respondent's claim was rejected by the respondent.

The Law and its application *in casu*

[13]. The respondent had instituted an action against the appellant in the Johannesburg Magistrates Court for payment of an amount, which it (the respondent) alleged was for services rendered and material supplied at the appellant's special instance and request. The respondent's main claim was a contractual one and based on an agreement concluded between the parties during June 2016. The respondent alleged that the agreement provided that it would repair the appellant's crane and that the appellant would be liable to pay its usual charges for such repairs. In the alternative, the respondent claimed an amount based on unjust enrichment.

[14]. The court *a quo* found that the respondent had not proven its case based on contract. I interpose here to note that my reading of the appeal record suggests that it may very well be that there was a tacit agreement in place as alleged by the respondent. That would have been my assessment of facts in the matter based on the evidence led during the trial.

[15]. The way I see the facts in this matter is that the appellant needed its crane repaired and instructed the respondent to attend to the necessary repairs. The respondent initially thought that the machine could be fixed at a cost of R4479 and concluded an agreement to repair the crane for that amount. Later it transpired that the problem was bigger than initially thought and, on the probabilities, it was then agreed between the parties that the respondent would do what was necessary to repair the appellant's crane. We accept the evidence on behalf of the respondent that the appellant insisted on its crane being fixed and that they (the appellant) agreed to pay the repair cost, obviously provided that such costs were reasonable, all things considered. In that regard, an important consideration would have been the market value of the crane, which was at least R400 000 at the relevant time.

[16]. In my judgment, there was in place a tacit agreement that the cost payable by the appellant to the respondent would be an amount equal to the

sum total of the respondent's normal and usual charges for the services rendered. Pursuant to this agreement, the respondent then proceeded to affect the repairs, whereafter the appellant became liable to pay to the respondent an amount of R81 961.60.

[17]. I do not accept the version of the appellant that the repairs would have been done for an amount, which does not even begin to cover the out-of-pocket expenses incurred by the respondent in affecting the repairs. The version of the appellant makes no sense. It is an inherently improbable version, which, like I said, I would have rejected.

[18]. However, there is no cross-appeal before us and it is therefore not necessary for this court to deal with those factual findings of the Magistrates Court.

[19]. The Magistrates Court did however find in favour of the respondent on its alternative claim and gave judgment in its favour for payment of the sum of R86 440.66, together with interest thereon and costs of suit. It is against this judgment and the order which the appellant appeals.

[20]. The grounds of appeal are that the learned Magistrate erred in finding that the evidence supported a conclusion that the appellant was enriched and conversely that the respondent was impoverished. The appellant also contends that the court *a quo* erred in finding that the respondent had proven the quantum of the unjust enrichment in an amount of R86 440.66. In that regard the appellant submits that the Magistrate erred, in his assessment of the quantum, by including in the claim any amounts which are actual profits which the respondent would have earned on the agreement. In sum, the appeal against the judgment of the Magistrates Court is on the basis that it erred in finding that the evidence on behalf of the respondent was sufficient to discharge the onus to succeed on a claim based on unjustified enrichment.

[21]. The appellant also contends that the Learned Magistrate should have engaged in an exercise to determine the amount by which the respondent had been impoverished and conversely to ascertain the exact amount by which the estate of the appellant had been enriched.

[22]. I reiterate that in its alternative claim the respondent had claimed payment of the sum of R100 322.90 based on the common law remedy founded on unjust enrichment. The amounts claimed, according to the amended particulars of claim, was the sum total of R81 961.60 being in respect of the repair cost as per the invoice dated the 19th September 2016 from the respondent to the appellant and an amount of R8 160.58 being in respect of storage charges. There appears to have been a calculation error as these two amounts do not add up to R100 322.90 but to R90 122.18. Nothing turns on this mistake as the Magistrate appears to have disallowed the claim for storage.

[23]. There is also a patent error in the amount of the judgment of the court *a quo*. To the amount of R81 961.60 claimed as repair costs was added the sum of R4479.06, which was in fact the amount of the very first invoice, which amount the appellant had in fact paid. The total of these two amounts, namely R86 440.66, should therefore not have been awarded as the amount of R4479 had already been paid by the appellant. In any event, the respondent did not claim this amount from the appellant in its amended particulars of claim. There was no reason for the appellant to be held liable for payment of this amount.

[24]. The crux of the matter is whether, on the evidence led at the trial, the respondent had established that it was entitled to payment from the appellant of the amount of R81 961.60 on the basis of unjust enrichment. A further issue closely related to the aforegoing dispute relates to whether on the evidence before the court *a quo* the quantum of the respondent's claim had been established on a balance of probabilities.

[25]. It is trite that the burden of proof of enrichment rests on a plaintiff and the burden of proving the quantum is also on the plaintiff. However, the burden of proof regarding the defence of loss of enrichment rests on a defendant. *In casu* the respondent was also required to prove that the enrichment was unjustified at its expense.

[26]. To succeed with a claim based on unjust enrichment the respondent was required to comply with four general requirements: Firstly, the appellant must have been enriched; secondly, the appellant should have been impoverished;

thirdly, the appellant's enrichment must have been at the expense of the respondent; and finally the appellant's enrichment must have been proven to have been unjustified, which means that it was without a legal cause.

[27]. In *Legator McKenna Inc v Shea* [2009] 2 All SA 45 (SCA) the court held that a party may reclaim performance made pursuant to an invalid contract if invalidity is due to failure to comply with the prescribed formalities. A party performing in terms of the contract which is unenforceable or invalid due to constitutional invalidity, still has a right to claim for performances rendered. In my judgment, the same principle applies to performance by a contracting party, who believes that there is an agreement between such performing party and another person, when in fact and in truth there was no such agreement in place.

[28]. It is a well-established doctrine of our law that no man may enrich himself at the expense or to the detriment of another.

[29]. In *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) the court held at para 2 as follows:

'[21] A presumption of enrichment arises when money is paid or goods are delivered. A defendant then bears the onus to prove that he has not been enriched: De Vos (supra 2nd ed at 183), quoted with approval in *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) at 713G-H ...'

[30]. The respondent bore the full onus in the enrichment case.

[31]. If a person is enriched as a consequence of services performed by another, the measure of enrichment is the value of the service. The fact that profits were earned as a consequence of the service is causally irrelevant. These profits are not added to the enrichment claim. A plaintiff cannot include a profit when calculating his impoverishment. This is obvious if the plaintiff did not forgo the opportunity of making the profit through dealings with a party.

[32]. In *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) the Appellant Division did not indicate the criterion for calculating the extent of the defendant's enrichment derived from the contractor's defective performance. The calculation is to proceed according to normal enrichment principles and that the benchmark is not the contract price.

Since the contract price will include a profit for the contractor, it should not play a part in determining the plaintiff's impoverishment or the defendant's enrichment.

[33]. In *Hauman v Nortje* 1914 AD at 298 Lord De Villiers stated as follows:

'This compensation he must make, not because of any supposed new contract with the contractor, as in certain cases of English Law, but because of the application of the equitable principle of our law that no one shall be unjustly enriched at the expense of another. The mode of enrichment provide against is not the attainment of benefits stipulated for in the contract, but the unjust absorption by the one party of the expenditure or of the fruits of the labour of the other party in a manner not contemplated by the parties to the contract.'

[34]. The respondent's case was based on the *condictio sine causa*. The requirements of *condictio sine causa* are dependent on each other in order to establish liability. The conduct between the appellant and the respondent complies with the requirements of unjust enrichment. According to the authorities cited above, the respondent has made out a case of unjust enrichment and therefore was entitled to payment. The appellant was enriched in that the respondent rendered services to the appellant. There can be no doubt that the appellant benefitted from the services rendered by the respondent but failed to make payment for those services. The appellant was enriched at the respondent's expense. The enrichment was unjustified in that there clearly was no agreement that the respondent would render services for free to the appellant. There was also no agreement reached between the parties, as found by the Magistrates Court, in relation to the details and the particulars of the exact services to be rendered by the respondent and the consideration to be paid by the appellant to the respondent for the services rendered.

[35]. In the case of a claim based on the *condictio sine causa* there is a duty to rebut on the appellant *in casu*. There was therefore an onus of the appellant to prove that it had not been enriched by the services that the respondent rendered. The appellant failed to discharge such an onus. We are therefore

persuaded that the appellant had been enriched by the services rendered by the respondent in the form of the repairs to the crane of the appellant.

[36]. As regards the profits being included in the enrichment claim and the calculations on behalf of the respondent, the authorities are clear that the measure of enrichment is the value of the services rendered. In that regard, the evidence on behalf of the respondent was that certain of the items charged in the invoice included a profit margin favouring the respondent. The evidence on behalf of the respondent was to the effect that the cost prices of the spare parts used in the repairs were marked up by between 125% and 700% mainly because of the risk involved.

[37]. On first principles, profits earned on the rendering of services and the supply of material cannot be added to and included in a claim for unjust enrichment. A plaintiff cannot include a profit when calculating his impoverishment.

[38]. In this matter the position is however that the rationale for including the profit made on the parts was that the increased price passed onto the appellant was due to the increased risk which the respondent attracted to be held liable for damages resulting from a defective part. We understand this uncontested evidence to signify that the price charged to the appellant was in fact the value of the part to the respondent. In any event, on the probabilities, the amounts which the appellant was charged for the parts represent the amounts which the respondent would have been able to on sell the parts, once acquired from the manufacturer, to any of its other clients. This then, in our judgment, is an indication of the value of the parts to the respondent and there can therefore be no doubt that the spare part prices represent the value of these parts to the respondent and therefore is the amount by which the respondent had been impoverished. Simirlarly, the charges for the labour, is a value to the respondent, which value could have been realised by doing work for another client of the respondent instead of doing the repair work for the appellant. The appellant was therefore enriched by the amount of the labour charges and by the amount which the respondent charges in respect of the material supplied to

repair the crane. The respondent, on the other hand, was impoverished by these amounts.

[39]. The point is this: the spare parts, in the hands of the respondent, were worth to it (the respondent) the consideration it would have received if it sold those parts in the course of its business to either the appellant or to any of its other customers. Simirlarly, as far as the respondent goes, the labour and time it expended in repairing the appellant's crane, were worth to it the equivalent of the consideration it would have received from the appellant or any of its other clients for that work done. Those amounts are the sums charged in terms of the invoice of 19th of September 2016.

[40]. In our view, there is no reason why the amount of respondent's usual charges in respect of the repairs should not be regarded as reflecting the value of the services which the respondent rendered. There is logic in this reasoning.

[41]. Therefore, in our judgment the respondent had established its claim in the amount of R81 961.60. We are satisfied that the evidence underpinned a finding that the respondent was impoverished by the said amount and that the appellant had been enriched in that sum. We are also satisfied that the enrichment of the appellant was at the expense of the respondent.

[42]. For these reasons, I am of the view that the court *a quo* was correct in granting judgment in favour of the respondent against the appellant. The appeal therefore stands to be dismissed.

[43]. As I indicated above, the amount of the judgment was however for an incorrect amount and that patent error in the Magistrate's judgment stands to be corrected by the appeal court. The court *a quo's* order cannot be endorsed in its original form.

[44]. Thus, despite the appeal failing, the order of the Magistrate's Court cannot stand. It must be set aside and replaced with the orders set out below.

Cost

[45]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there

be good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[46]. I can think of no reason why I should deviate from this general rule. The respondent should therefore be awarded the cost of the appeal.

Order

Accordingly, I make the following order:-

(1) The order of the Johannesburg Magistrates Court is set aside and substituted with the following order:

'Judgment is granted against the defendant in favour of the plaintiff for:

(1) Payment of the sum of R81 961.60.

(2) Payment of interest on the amount of R81 961.60 at the rate of 10.25% per annum from the 8th of August 2017 to date of final payment.

(3) Payment of cost of the action on the appropriate Magistrates Court scale, including the cost of Counsel.'

(2) The appellant's appeal is otherwise dismissed with costs.

L R ADAMS

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

I agree,

C J COERTSE

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

HEARD ON:	8th October 2019
JUDGMENT DATE:	13th December 2019
FOR THE APPELLANT	Adv J Moorcroft
INSTRUCTED BY:	C Bekker & Associates
FOR THE RESPONDENT:	Adv N Riley
INSTRUCTED BY:	Bose Attorneys