IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: ***7th April 2020*** Signature: _____

CASE NO: 2019/29442

DATE: 7TH APRIL 2020

In the matter between:

DUBE, TAKANDU	First Applicant
DUBE, TSITSI	Second Applicant

and

OFF THE GRID CC	First Respondent
DANIEL, JENNIFER MARGARET	Second Respondent
DANIEL PROJECTS CC (In Liquidation)	Third Respondent
EDUARDO TODISCO ARCHITECTS & DESIGNS	Fourth Respondent
MORRISON, TERENCE ANDREW	Fifth Respondent
THE MASTER OF THE HIGH COURT, JOHANNESBURG	Sixth Respondent

Coram: Adams J

Heard: 12 December 2019

Delivered: 7 April 2020

Summary: Civil procedure – debatement of first respondent's statement of account – in response to applicants' application to be allowed access to and

occupation of their newly completed and built residence – first respondent seeks judgment against the applicants for monetary payment – premised upon building contract – dispute about amounts due to first respondent –
Judgment granted in favour of the first respondent –

ORDER

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(1) Judgment is granted in favour of the first respondent and the second respondent against the first and second applicants, jointly and severally, the one paying the other to be absolved, for:

(a). Payment to the first respondent of the sum of R115 535.45.

(b). Payment to the first respondent of interest on R115 535.45 at the applicable legal interest rate of 10% per annum from the 12th of September 2019 to date of final payment.

(c). Payment of the first and second respondents' cost of this application for the debatement of the first respondent's statement of account.

(2) The first and second applicants, jointly and severally, the one paying the other to be absolved, shall pay the first and second respondents' costs of the applicants' opposed urgent application, which costs were reserved on the 12th of September 2019.

JUDGMENT

Adams J:

[1]. The first and second applicants in essence apply to debate a statement of account rendered by the first respondent relating to a building contract concluded between them (the first and second applicants) and the first respondent on the 11th of February 2019 ('the contract'). The first respondent is agreeable to the debatement of the account and, depending on the outcome of

the debate and the results of the subsequent calculations, asks for judgment against the first and second applicants for payment of any amounts due to it.

[2]. In terms of the contract for the building of the applicants' residence the first respondent was to 'complete the building and finishes as per [the attached] schedule of finishes' for an agreed contract price of R940 237.67. After some initial debatement of the final statement of account rendered by the first respondent, the amount owing, due and payable to it, according to the first respondent, was the amount of R650 535.45. On the other hand, it is the case of the first and second applicants that they were indebted to the first respondent only in an amount of R509 216. The difference between these parties and the disputed sum is therefore an amount R141 319.45.

[3]. This matter first came before me during September 2019 as an urgent application by the applicants for an interim order, pending the final determination of the dispute between them and the first and second respondents, that they be given free and undisturbed possession of their residence, which had by then been built and completed by the first respondent pursuant to the contract. Because of the aforementioned disputed amount the first respondent was refusing to 'sign off' on the contract and to hand over the newly built and completed house. The first respondent was simply not prepared, in the face of the dispute relating to the outstanding balance due by the applicants in terms of the contract, to allow the applicants access to the property.

[4]. What the applicants contemplated was adjudication at a later stage of the dispute relating to the amount of R141 319.45. Before such adjudication process, they (the applicants) desired to be placed in occupation of their residence, hence the urgent application. The contract envisaged that a dispute like the one in this matter should be referred to arbitration and the idea was that the order in the urgent court would be interim and pending such arbitration.

[5]. When I initially heard the application in the urgent court, which by then was vigorously opposed by the first respondent and the second respondent, who is the sole member of the first respondent, I directed the parties to attempt

to resolve the dispute. When the parties were unable to settle their dispute I made a provisional order which had the effect of authorising the applicants to take occupation of their residential property upon payment by them to the first respondent of an amount of R535 000, being a rough estimate of that portion of the balance indisputably outstanding and payable by the applicants to the first respondent. I also postponed the hearing of the remainder of the dispute to the 1st of October 2019, with the parties being in agreement that I should adjudicate the matter and that such adjudication should take the form of a debatement of the statement of account of the first respondent. The matter was finally heard by me on the 12th of December 2019.

[6]. The main disagreement between the parties arises from the different approaches adopted by them in calculating the outstanding balance. The contract itself and its terms and conditions are common cause. In the 'Summary of the Contract', which was an integral part of the agreement between the contracting parties, the contract price, after provision had been made for certain adjustments, extras and other variations, was expressly stated as being agreed upon in the total sum of R2 036 656.72 'to be paid to [the first respondent]'. In the body of the contract the 'building contract price' is expressly agreed upon as R940 237.67.

[7]. This apparent contradiction in the contract is explained by the fact that the contract was a take-over from the third respondent of the original contract concluded between the applicants and the third respondent on the 16th of August 2017. This original contract was cancelled by the applicants on the 11th February 2019, when they advised the grantor of the building loan, Standard Bank, that a new building contract had been concluded with the first respondent for the completion of their house. This referred to the contract, which was a carbon copy of the original contract, except that the amounts paid to the third respondent by Standard Bank, being R1 045 159.05 in total, was taken into account and deducted so as to render the contract price for the new contract, being R940 237.67, after a further downward adjustment of R51 260 in respect of further reductions allowed in respect of items paid directly by the applicants to the supplier and to the third respondent. All the same, the starting point of the

calculations should be the contract price as per the 'Summary of Contract', which is the sum of R940 237.67, which is arrive at by deducting the amount of R1 045 159.05 paid to the previous contractor, namely the third respondent, and the R51 260 mentioned above, from the contract price of R2 036 656.72.

[8]. I interpose here to mention that the contract provided that, on 'practical completion' of the works, the first respondent was to submit a final statement of account to 'the architect' (the fourth respondent), who, if satisfied therewith, should sign off on the account and certify that payment of the account should be made by the applicants. It is in fact the case of the first respondent that such a certificate was issued by the fourth respondent on the 22nd of August 2019. This means that the applicants, in terms of the contract, were obliged to make a final payment to the first respondent of the amount of R650 535.45.

[9]. This amount of R650 535.45 is arrived at by deducting from the contract price individual amounts provided for in the 'schedule of finishes', which the applicants paid themselves directly to the suppliers or to subcontractors. Except for specific amounts relating to floor and wall tiles and the joinery (kitchen cupboards and built-in cupboards), the applicants accept the adjustments as per the statement of account, duly certified by the architect. What the first respondent did was to credit the account of the applicants with those amounts specifically provided for in the schedule of finishes. So, for example, the items 16 and 17 of the schedules of finishes provided a formula for the cost relating to the supply and fitting of floor tiles, which when applied resulted in an amount of R34 720 for these items. The applicants took it upon themselves to purchase and pay for tiles of their choice at a total price of R69 936. The first respondent awarded a credit of R34 720, whereas the applicants insist on a credit of R69 936. The approach of the applicants is clearly misguided. The contract itself expressly provides that the first respondent would be completing the building and the finishes as per the schedule of finishes. The applicants were also obliged in terms of the agreement to pay such amounts as may become due and payable as may be reflected as variations or additional items in the schedule of finishes.

[10]. All of the aforegoing mean that any additional amounts should be paid by the applicants. A corollary of this is that if the applicants pay for an item themselves the amount charged as per the schedule of finishes should be reversed. If that amount is less than the amount expended by the applicants then they received a saving and if the amount is more than the amount in the schedule, as was the case in relation to the disputed items, then the applicants are liable for the extra expense. The same principle applies to the charges relating to the joinery, in respect of which R35 000 was provided for in the 'schedule of finishes' as a 'provisional sum'. The applicants contended that they should have been granted credit in an amount of R68 000, which is the amount they paid directly to the subcontractor for the built-in cupboards and kitchen. There is no logic in the approach by the applicants in that regard. That approach runs contrary to the provision of clause 2.2 of the contract, which reads thus:

'In addition to the building contract price the [applicants] shall pay on demand to the [first respondent] such amounts that may become due and payable in respect of any additional work effected on the property, or as may be reflected as variations or additional items in the schedule of finishes or from whatever cause arising.'

[11]. The applicants were insisting on receiving credits for these items for the amounts actually expended by them. As I indicated, there is no merit in this approach by the applicants. It flies in the face of the express provisions of the contract.

[12]. The applicants also contend that the amounts payable to the first respondent should be based on a 'progress chart: double story', which is a generic document generated and used by Standard Bank as a tool to assist them in their calculation of the progress payments due at any given point in the building process. The document, as I indicated, is simply a tool used by the bank to make progress payments based on the actual progress made in the completion of the building. This document has no basis in and is wholly irrelevant to the provisions of the building contract between the applicants and the first respondent. Again, the applicants' reliance on this document in calculating the balance due to the first respondent is ill-advised and misguided.

The contractual relationship between the applicants and the first respondent is regulated by the contract and that relationship indicates that the approach adopted by the first respondent is factually and legally sound.

[13]. I cannot fault the approach and the calculations of the first and second respondents. The calculations are based squarely on the provisions of the contract. Ms Jordaan, the Attorney for the first and second respondents, submitted that the calculations were in fact unduly favourable to the applicants if regard is had to the schedule of finishes which provides, with reference to the kitchen and bedroom cupboards, that: 'No credit or refunds will be given to outside contractors appointed by the [applicants]'. This means that it may very well be that the actual final balance due by the applicants to the first respondent is in excess of the R650 535.45 claimed.

[14]. Moreover, the statement of account, namely the progress payment certificate dated the 22nd August 2019, appears not to have taken into account the variation for R211 269.22 relating to the extra square meterage over and above that specified in the contract. Again, this may very well mean that the amount claimed by the first and second respondents may be less the actual final balance due by the applicants to them.

[15]. On the other hand, the approach and the calculations of the applicants are unsound. It is grounded on false premises. It completely disregards the contract as the basis for the applicants' indebtedness to the first respondent and is based on a document which is irrelevant and had no bearing on the contractual relationship between the contracting parties *in casu*.

[16]. For all of these reasons, I am of the view that the first and second applicants are indebted to the first respondent in an amount of R115 535.45, which amount is arrived at by deducting the R535 000 (the sum paid pursuant to the court order of the 12th of September 2019) from the above sum of R650 535.45. The first respondent is therefore entitled to judgment in its favour against the applicants for payment of that amount.

Costs

[17]. 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 are 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.

[18]. I can think of no reason why I should deviate from this general rule.

[19]. I therefore intend awarding the costs of this application in favour of the first and second respondents against the first and second applicants.

[20]. I also need to deal with the reserved costs of the urgent application. In that regard, it is clear that, in light of my findings in this judgment, the applicants' urgent application lacked merit. This is so if for no other reason than the fact that the first respondent was, at the time when the urgent application was launched, justified in its refusal to allow the applicants occupation of the property. At that stage, they (the first and second applicants) owed the first respondent an amount R650 535.45, which means that the first respondent enjoyed a lien over and a right of continuing possession of the completed house. The applicants were under a legal obligation to pay the aforesaid sum of R650 535.45 before insisting on taking occupation of the property. They failed to pay the said amount and therefore the first and second applicants had no right to the relief sought in the urgent application.

[21]. The costs of the urgent application should therefore be borne by the applicants. There is in any event another reason why a costs order to that effect should be granted and that reason relates to the events shortly after the issue of the urgent application. On the 27th of August 2019 the first and second respondents' attorneys addressed a *communiqué* to the applicants' attorneys proposing an agreement that the applicants would be granted occupation of the property on immediate payment of the amount of R535 000 by the applicants to the first respondent, with the disputed balance to be dealt with later by way of arbitration.

[22]. This very reasonable proposal was not accepted by the applicants and I am at a loss to understand the reasoning for such rejection. Instead the applicants insisted on proceeding with the hearing of the urgent application. This conduct, in my judgment, was unreasonable and, as I indicated, is another reason why I should grant a costs order relative to the urgent application in favour of the first and second respondents.

[23]. Incidentally, none of the other respondents played any part in these proceedings. I therefore do not intend granting any costs in their favour or against any of them.

Order

In the result, I make the following order:-

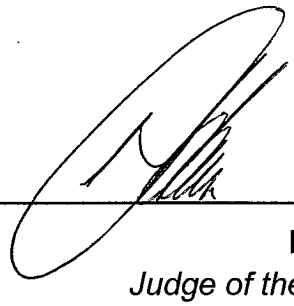
(1) Judgment is granted in favour of the first respondent and the second respondent against the first and second applicants, jointly and severally, the one paying the other to be absolved, for:

(a). Payment to the first respondent of the sum of R115 535.45.

(b). Payment to the first respondent of interest on R115 535.45 at the applicable legal interest rate of 10% per annum from the 12th of September 2019 to date of final payment.

(c). Payment of the first and second respondents' cost of this application for the debatement of the first respondent's statement of account.

(2) The first and second applicants, jointly and severally, the one paying the other to be absolved, shall pay the first and second respondents' costs of the applicants' opposed urgent application, which costs were reserved on the 12th of September 2019.



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	12th December 2019
JUDGMENT DATE:	7th April 2020
FOR THE APPLICANTS:	Adv Joyce Maluleke
INSTRUCTED BY:	Theko Attorneys Incorporated
FOR THE FIRST AND SECOND RESPONDENTS:	Ms K Jordaan
INSTRUCTED BY:	K Jordaan & Associates Incorporated
FOR THE THIRD TO SIXTH RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance