

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 38801/2012

7/12/2012

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| (1) | REPORTABLE: YES <input checked="" type="radio"/> NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES <input checked="" type="radio"/> NO |
| (3) | REVISED. |
| | 2012.12.07 |
| | DATE |
| | <i>Tatu</i> |
| | SIGNATURE |

In the matter between:

JAZZSPIRIT 101 (PTY) LTD

Plaintif

and

MILLER RORY COLE

Defendant

J U D G M E N T

MAKGOKA, J:

[1] This judgment has taken inordinately long to deliver. A number of factors led to this, mostly my personal circumstances, well beyond my control. Any hardship and inconvenience to the parties is deeply regretted.

[2] The defendant has excepted to the plaintiff's particulars of claim on the ground that the particulars are vague and embarrassing, and/or lack the averments which

are necessary to sustain a cause of action. The defendant had invited the plaintiff in terms of Rule 23(1) of the Uniform Rules of Court, to remove the cause of the complaint, which the plaintiff declined to do. The plaintiff opposes the exception.

[3] The parties concluded a written building contract (the contract) on 19 October 2004 in terms of which the plaintiff was to construct and complete the interior of a unit in a sectional title scheme, on behalf of the defendant, for a contract sum of R239 000, which was to be paid in monthly instalments, in accordance with the value of the work as certified by a quantity surveyor. Clause 12.2 of the contract provides:

'A certificate signed by the quantity Surveyor specifying the amount due by the purchaser to the developer shall be sufficient proof of any amount due to the developer in terms of this agreement and may be used by the developer for the purposes of obtaining judgment whether by default or otherwise, summary judgment or provisional sentence against the purchaser.

[4] The plaintiff issued summons against the defendant, claiming an interim payment of R119 500 in terms of the contract. It based its claim on a document titled 'Payment Certificate Issued in terms of 13.0 of the JBCC Minor Works Agreement'. In terms of clause 2.8 of the building contract, the quantity surveyor is identified as a certain C.P. De Leeuw. However, in the document relied on by the plaintiff, the name of the "principal agent" is recorded as 'De Leeuw Johannesburg (Pty) Limited'.

[5] The *gravamen* of the defendant's exception is that the document referred to above, is not a quantity surveyor's certificate. It was submitted that the document contradicted the plaintiff's allegations, resulting in the particulars of claim also not setting out a complete cause of action. Mr. Nel, counsel for the defendant,

contended that not only do the contradictions go the very root of the respondent's claim, but that there can be no other possible interpretation, than that the allegations put forward by the plaintiff are contradictory and mutually exclusive.

[6] Pleadings must be read as a whole. In its exception the defendant conveniently omits to mention the plaintiff's allegation that not only was practical completion of the building works has been achieved, but the plaintiff had finally completed the works. To this extent, the plaintiff alleges that the defendant had not given notice of any defect in the building works requiring such to be rectified. On the contrary, the defendant notified the plaintiff in writing on 30 January 2009 of his satisfaction with the works. In a document titled 'Letter of Satisfaction' (annexure "RCM3") the defendant states in paragraph 4 thereof that 'Building operations and improvements in the section in terms of (the) building contract have been completed to my satisfaction'. In my view, this renders irrelevant, whether the impugned document qualifies as quantity surveyor's certificate in terms of the contract.

[7] The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception¹.

[8] I therefore conclude that the defendant is well in a position to plead to the plaintiff's particulars of claim. The defendant's complaint relates to minor blemishes

¹ *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd* (2) 1976 (1) SA 100 (W).

and unradical embarrassments. Those can be cured by further particulars². The defendant's exception does not raise any substantial question of law which may have the effect of settling the dispute between the parties. As a result, the defendant had to make out a very clear case before his exception is allowed to succeed. In my view the defendant has not made such a clear case. I am also of the view that the defendant invites this court to adopt an over-technical approach. This was cautioned against by the Supreme Court of Appeal in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at para 3.

[9] In the circumstances the exception falls to fail and it is dismissed with costs.



TM MAKGOKA
JUDGE OF THE HIGH COURT

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| DATE OF HEARING | : 27 JUNE 2012 |
| JUDGMENT DELIVERED | : 7 DECEMBER 2012 |
| FOR THE DEFENDANT (EXCIPIENT) | : ADV GJ NEL |
| INSTRUCTED BY | : KAREN SHAFER ATTORNEY AND SERFONTEIN ATTORNEYS, PRETORIA |
| FOR THE RESPONDENT (RESPONDENT) | : ADV RF DE VILERS |
| INSTRUCTED BY | : FRONEMAN, ROUX & STREICHER ATTORNEYS, PRETORIA |

² Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W).