REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A646/2014

2/12/2014

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

SIGNATURE 28/11/2014 DATE

In the matter between:

MLZ CONSTRUCTION CC t/a PROCEM Appellant

and

WILLOW RIDING CENTRE Respondent

JUDGMENT

BASSON, J

[1] This is an appeal against the whole of the judgment handed down by the Presiding Magistrate in the Pretoria Magistrates Court. The trail court dismissed the appellant's claim as well as the respondent's counter-claim "A". The trail court, however, granted claim "B" of the respondent's counter-claim. Costs of the action were also awarded to the respondent. The respondent initially filed a belated cross-appeal in respect of the dismissal of its counterclaim "A" but withdrew same at the commencement of the proceedings.

Condonation

[2] Two applications for condonation served before us: The first is an application for the late filing of the Notice of Appeal. The appellant also applied for condonation for the late filing of security. The applications were not opposed. In the appellant's application for condonation the attorney on behalf of the appellant sets out in fair detail the reasons for the late filing of the appeal. In essence it is explained that the delay was occasioned by the fact that the attorney's legal opinion regarding the merits of the appeal was sent to an incorrect e-mail address with the result that it was not received by the client. Once the mistake was discovered the Notice of Appeal was served and filed. I am of the view that the appellant has properly explained the delay. Although the prospects of success are slim, I have decided to grant the application for condonation in light of the explanation tendered.[1] The appellant also filed an

[1] See *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A): *"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if*

application for condonation for the late filing for security. The delay is explained and there is no prejudice suffered by the respondent. In the event condonation for the late filing of security is granted.

The claim

[3] The appellant issued a simple summons against the respondent claiming an amount of R 50 426.71 in respect of professional services rendered and goods sold and delivered to the respondent. Simultaneous with the filing of the respondent's plea the respondent filed two counterclaims: Claim A pertains to the election to cancel the agreement and to claim restitution. The respondent also tendered delivery of the goods delivered to it. Claim B pertains to damages as a result of the breach of contract by the appellant. More in particular this claim pertains to costs incurred by the respondent in respect of the execution of the contract between the parties. I have already referred to the fact that the appellant's claim as well as the respondent's claim "A" was dismissed but that the trail court awarded the respondent an amount of R 21 641.34 plus interest at 15.5% per annum from 17 March 2014 in respect of counterclaim "B".

[4] The respondent contracted with the appellant to sell and install a CCTV Surveillance and Security System. The appellant alleged that the balance of

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there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits."

the contract price was still owed by the respondent. The respondent refused to make payment of the outstanding balance on the basis that the system did not constitute a fully functional system. The respondent also contended that the appellant had failed to remedy the problems in respect of the system as a result of which the respondent terminated the agreement and tendered the return of the system to the appellant.

Brief exposition of salient facts

[5] The trail was fairly lengthy and evidence was led over a number of days. For purposes of this judgment I do not intend summarizing the evidence in detail as I am of the view that the appellant's claim can be dealt with on the basis of the appellant's own evidence and the common cause facts.

[6] It was common cause that Mr Makings visited the premises of the respondent and that he and Mrs Mahon (for the respondent) concluded a written agreement following a quotation furnished to the respondent. It is common cause that certain additional work was done and that additional goods were supplied and installed by the appellant.

[7] It was also common cause that the contract provided that the installation of the security system would take approximately 2-3 days from the date of order. It was not in dispute that the appellant regarded 1 April 2004 as the operative date and that payment, according to the appellant, was due and payable on 1 April 2004.

[8] Mrs Mahon was requested to sign a so-called "hand-over certificate" dated 1 April 2004. I will return to this certificate herein below. An invoice dated 2 April 2004 requesting payment was also delivered soon after 1 April 2004. It was also common cause that on 19 May 2004 the respondent had effected part payment in the amount of R65 000.00 to the appellant.

[9] Before I turn to the main issue in dispute it is important to point out that it was common cause that it was a material term of the contract that the system had to be reliable and that it had to be operational 24 hours a day. In this regard Mrs Mahon explained why she needed a reliable security system and why it was also important that the system could be accessed remotely. Mr Makings, who is the managing director and member of the applicant, conceded that reliability was a requirement of Mrs Mahon and that the system had to be operational 24 hours a day. He also conceded that reliability meant that the system had to work 100% and that it meant that the system had to work throughout the year.

[10] It is important to point out that the contract between the parties provided that payment by the respondent would be due and payable upon "*practical completion.*" It was in dispute what is meant by "*practical completion*". Unfortunately the contract between the parties does not explain what is meant by "*practical completion*". Mr Aucamp for the respondent referred the Court to a definition of what is meant by "practical" and "completion" as it appears in the South African Concise Oxford Dictionary in an attempt to define what is meant by these words. It was submitted that the

words mean that the installation of the surveillance and security system would have reached "*practical completion*" when the system – having been installed –was suitable for the intended purpose namely to operate as a CCTV surveillance and security system inclusive of the remote access. Mr Vorster objected to a reference to a dictionary but failed to enlighten the Court as to what, according to the appellant, was meant by the words "*practical completion*". In my view it is patently clear from the context of the evidence that these words mean that the surveillance and security system – which included remote access – was fully operative or plainly put, was working, on 1 April 2004. The impression Mr Vorster tried to convey to the Court was that it was sufficient if the system was fully installed on that day and further tried to persuade us that any problems that arose after 1 April 2004 had to be dealt with in terms of the guarantee. Clearly this cannot be correct. The contract stated that payment became due on practical completion. Simply put, if the evidence shows that the security system (including the remote access) did not work on 1 April 2004, the obligation to pay did not arise. This much was conceded on behalf of the appellant. The appellant, however, insisted that the system did reach the stage of practical completion on 1 April 2004.

[11] It is clear from the evidence and the submissions that the appellant's case hinged on the argument that because Mrs Mahan (for the respondent) signed the hand-over certificate she confirmed that she (as the customer) was satisfied that the system installed was to her satisfaction and that she was fully conversant with the operation of the system.

[12] It was not in dispute that Mrs Mahon did indeed sign the certificate. It was, however, in dispute what was in fact conveyed by her signing of the certificate. If regard is had *ex facie* to the certificate it is clear that Ms Mahon, in her own handwriting specifically inserted the words "*work as done by Johan in respect of camera settings*" on the certificate. Throughout the trail Mr Makings attempted to rely on this certificate to support the appellant's contention that the system had reached practical completion on 1 April 2004 and that consequently the appellant had delivered in terms of the contract. Mrs Mahon was adamant that she did not sign the certificate to indicate her satisfaction with the system. She explained that she merely noted on the certificate that she was confirming that certain work (in respect of the setting of the cameras) was in fact done by a certain Johan. She also specifically testified that it was Johan who gave her the certificate to sign and that Mr Makings and his wife were not present when she signed the certificate. Mr Makings, however, tried to persuade the trail court that he and his wife were present when Mrs Mahon signed the certificate. The trail court correctly in my view rejected his evidence as well as any attempt to rely on this certificate as proof that the system was practically operative on 1 April 2004: Firstly, the endorsement on the certificate itself belies any suggestion that this certificate conveyed that Mrs Mahon's confirmed that the work was completed. As already indicated the endorsement on the certificate conveys that certain work was done by a certain Johan in respect of the camera settings. If Mr Makings and his wife were indeed present on 1 April 2004 when Mrs Mahon inserted the words they would certainly have questioned her about it. Secondly, and more importantly, Mr Makings himself admitted that the system was not fully

operative on 1 April 2004 despite earlier attempts in his evidence to the effect that the system was in a pristine condition and that Mrs Mahon was 100% satisfied on 1 April 2004. I am also of the view that the appellant's reliance on the hand-over certificate is misplaced: The parties have never agreed that the appellant would be entitled to prove that the system had reached "*practical completion*" with a certificate similar to a certificate of balance.

[13] It is instructive to note what Mr Makings in fact testified towards the end of his examination in chief:

> *"So, just getting back to the bundle, getting back to the handover certificate [dated 1 April 2004]. In the final analysis, when you gave that certificate to the defendant [Mrs Mahon], before you gave that certificate to her, did you inspect this property? ---- Yes we did, thoroughly.*
>
> *And what did you find? --- We find it in 100% pristine condition.*
>
> *And if you say, I am not taking about the cleanliness of the place, we are talking about the system ---- We are talking about the CCTV being installed.*
>
> *And then you gave her that to sign. ---- Correct.*
>
> *When she signed that document what did you understand she was telling you? --- She was a 100% happy that it functioned fully as our initial agreement and subsequent changes to that agreement.*
>
> ...

Was this system operational when that signature was amended to that document? --- 100%, including the remote access."[2]

[14] An attempt was made to explain this concession made by Mr Makings by submitting that his evidence should be placed in context because he did not install the remote access and that it was installed by a sub-contractor. I have the following problems with this submission. Firstly, Mr Makings did not say this in this evidence. He said that the system – including the remote access - was fully functioning. Secondly, Mr Makings clearly stated that he inspected the property "thoroughly" when he gave Mrs Mahon the certificate.[3]

[15] In cross-examination Mr Makings admitted that it was conveyed to Mrs Mahon in a letter dated 12 April 2005 – which is a year later than the date upon which the system ought to have been practically operative - that the system was at least 80% operative and that that meant that the system did not function for a period of 70 days out of a possible 365 days of the year. To add insult to injury Mr Makings then suggested that because the respondent were deriving the benefits of the system 80% of the time, she had to pay the going rate for the hire of such a system for the period under review:

"Your client made use of the equipment for the past year and having derived the benefits of the system to say 80% of the time we suggest that your client pay the going rate for the hire of a system for the period under review. We have contacted several

[2] Evidence in chief of Mr Makings. Page 39 of the typed record.
[3] Supra paragraph [13].

companies and find that the higher rate for a year contract would be in the order between R 6 000.00 and R 10 000.00 per month. In the light of the above we are prepared to average the amount to R 8 000.00 per month at 80% for 12 months."

[16] It is clear from the evidence of Mrs Mahon that the installation was problematic from the inception of the installation for various reasons. In fact, her evidence is clear that on 1 April 2004 only the cameras were functional. She also testified that she paid for the cameras because they were installed but that that did not mean that they were working. It was also her evidence that the system was down probably more than 80% of the time. She also emphatically denied that the installation of the system was complete on 1 April 2004: According to her only the cameras were working although they kept "going down" and that "there was no remote access to start with". She further explained that if the remote was installed she would have paid for it. Because the work was not complete she only effected part payment.

[17] The appellant bears the onus to prove that it had fulfilled its obligations in terms of the agreement and that the system was fully operative on 1 April 2004. Having regard to the evidence of Mr Makings and specifically the evidence of Mrs Mahon - which is consistent with what appears *ex facie* from the hand-over certificate - the security system was not practically operative on 1 April 2004. In fact, the system was throughout fraught with problems to such an extent that Mr Makings in April 2012 in a letter conceded that the system was only 80% functional. In light of the fact that the remote access constituted

a material component of the security system and in light of the fact that it was common cause that reliability of the system was crucial, a failure of at least 20%, is, in my view material. In conclusion therefore it is found that the appellant has failed to discharge its onus. Consequently the appeal on the main claim should fail.

[18] In the alternative the appellant also attempted to argue that the system did not function as a result of the alleged irregular power supply. Firstly, this argument is mutually destructive with the case advanced at the trail namely that the system was fully functional: The system either functioned or it did not. Put differently, the system was either in a "100% pristine condition"[4] or it was not. However, in so far as this argument had been raised, I am equally of the view that the appellant did not discharge its onus to demonstrate that the power supply to the property was problematic and that the irregular power supply caused the system to malfunction.

Appeal against the findings in respect of counter-claim B

[19] Regarding the cross- appeal in respect of Claim B it is clear from the record that the items claimed are in fact actual amounts and/or disbursements incurred by the respondent. I have perused the record and can find no reason why this Court should interfere with the findings of the court *a quo*.

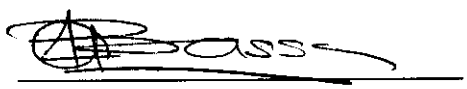
[20] In the final instance it was submitted that because payment for the items was effected by a person other than Mrs Mahon, it meant that she did

[4] *Ibid.*

not suffer any damages. I do not agree. The fact that the payment was made by Mr Mahon (her husband) is of no consequence.

[21] In the event the following order is made.

The appeal is dismissed with costs.



AC BASSON
JUDGE OF THE HIGH COURT

I agree

DPJ ROSSOUW
ACTING JUDGE OF THE HIGH COURT