

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 58581/13

(1)	<u>REPORTABLE: YES</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES</u>
(3)	<u>REVISED.</u>
<u>27/04/19</u> DATE	
<u>PP. [Signature]</u> SIGNATURE	

In the matter between:

VILCOR ENTERPRISE CC

Plaintiff

and

KYLEE BURNETT

Defendant

J U D G M E N T

MNGQIBISA-THUSI, J:

- [1] The plaintiff, Vilcor Enterprise CC, has instituted an action against the defendant, Miss Kylie Joy Burnett, based on an alleged construction agreement attached to its amended particulars of claim as annexure "A"

("the agreement"). In its particulars of claim the plaintiff seeks the following relief:

- 1.1 rectification of the building agreement attached to the particulars of claim and marked as annexure "A" (claim 1);
- 1.2 payment of the amount of R200,048.00, as balance of the contract price for a house the plaintiff built for the defendant ("claim 2);
- 1.3 payment of the amount of R290,204.40, allegedly for additional work done at the instance and with the consent of the defendant and which costs were not covered by the contract price (claim 3).

[2] In her amended plea the defendant alleges that she was not afforded an opportunity to read the agreement and that the agreement was not a true copy of the agreement concluded. She further avers that it was in the parties' contemplation that amendments will be made to either in writing or orally or tacitly as the building works progressed.

[3] On 30 October 2018 an order was made on the following terms:

- "1. Pursuant to Uniform Rule 33(4) the following issue is separated and decided separately from the remainder of the issues:
'Did the written building agreement dated 13 November 2012, which is attached as annexure "A" to the plaintiff's amended particulars of claim, constitute the agreement between the parties insofar as the construction of the defendant's residential dwelling was concerned'.
2. The remainder of the issues are postponed *sine die*;

3. The defendant has the duty to begin in respect of the separated issue in 1".

[4] The issue to be decided is the validity of the agreement.

[5] At the beginning of the proceedings the parties agreed that:

- 5.1 copies maybe used;
- 5.2 all documents in the court file are what they purport to be without the correctness of their contents being admitted;
- 5.3 if a document states that it was sent on a specific date and by a particular person, it is accepted that it was sent on that date and by the person who sent it; and
- 5.4 in argument, counsel may make use only of documents referred to in evidence.

[6] Before dealing with the issue in dispute, it is apposite to deal with the relief sought for the rectification of the agreement as the correction sought is purely of a technical nature if one has regard to the agreement as a whole.

[7] Rectification of a written agreement is available where the written agreement incorrectly reflects what the parties to the agreement intended through a common mistake. In *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* [2009] (3) SA 447 (SCA) the court at para [13] referred to the decision in *Oertel en andere NNO v Direkteur van Plaaslike Bestuur en andere* 1983 (1) SA 354 at 370B, where it was

held that rectification 'does not create a new contract, nor does it amend an existing contract; it merely serves to correct the written memorial of the agreement so as to accurately express the true intention of the parties'.

[8] Despite defendant's counsel's submission that the rectification sought would not properly correct the agreement in accordance to what was agreed, it is patently clear that there was an error with regard to the clause numbers referred to in the agreement. Although it appears that both parties to the agreement signed it, it is clear there was a common error with regard to the numbering of the clauses referred to.

[9] I am satisfied that the plaintiff has shown sufficient cause for the order for rectification of the agreement to be granted.

[10] The defendant testified as follows. During November 2012 she decided to build a house for herself. She looked at various developments in the Monte Villa area. A certain Ms Erica Ferreira referred her to the Wild Teak Estate where a certain Mr Jan Viljoen (Mr Viljoen"), a representative of the plaintiff, was the sole developer. Mr Viljoen showed her a plan of a show house which was a smaller house than what she intended to build. She indicated to Mr Viljoen that she preferred to work from a basic plan and disclosed her budget. Mr Viljoen gave her a quotation on the building project which he promised would be completed within four to six months. The quotation amounted to R1, 630, 000, R1, 280,000 of which was the contract price for the building works and R350,

000.00 for the building site. As a result the agreement (annexure "A") for the construction of the house and an agreement for the purchasing of a stand were concluded on 13 November 2012. The agreement for the purchase of the site on which her house would be built was concluded with MK Lian Chen CC. The intended house was to be built on a stand situated at erf 2803 Waikiki Estate, Montana Park, Extension 114.

- [11] The defendant admitted that the signatures on the disputed agreement were hers and Mr Viljoen's, including the initials made on each page of the agreement. The defendant also testified that she and Mr Viljoen also signed the general plan of the site location.
- [12] The defendant testified that she and Mr Viljoen had agreed that the plan of the show house, which was an opposite mirror of her intended house, would be the one submitted to the local authority for approval and also for purposes of obtaining a loan from the bank. She further testified that the parties had further agreed that she would add additional items to the agreement which she wanted. The addition items did not form part of the building plan submitted for approval but were written on a separate paper with the understanding that once approval of the basic plan and the loan was obtained these additions would be added to the agreement. Further, the defendant testified that clause 18 of the agreement related to these additional items. The defendant denies that the additional work which is the subject matter of claim 3, was, as alleged by the plaintiff, agreed upon. These items were allegedly executed at the instance of

the defendant but were not covered by the contract price. The defendant testified that Mr Viljoen implemented the additional work as he was infatuated with her. Further that the plaintiff was now only claiming payment for these additional items under pressure from Mr Viljoen's wife, who had discovered his infatuation with her. However, during cross-examination, the defendant did concede that the disputed additional work was executed.

- [13] She testified that she paid a deposit of R160, 000. 00 and applied to ABSA Bank for a building loan of R 1, 465,000.00.
- [14] In her evidence the defendant denied that the agreement was a true reflection of what was agreed upon between her and Mr Viljoen in that she considered the agreement to have been intended for use merely for purposes of obtaining a loan from the bank. During her testimony, the plaintiff disputed some of the items on the list of additional work. She testified that she never agreed to the terms and conditions¹ of the agreement with the exception of clause 18, the stand on which her house was to be built and the contract price. According to the defendant, the drawings in the agreement did not look the same as her house.
- [15] The defendant further testified that she was never made aware of all the detail of the contents of the agreement she admits she signed. She testified that all the paperwork relating to the agreement was done on

¹ In particular clause 5.1.2 of the agreement which reads as follows: "In addition to the sum due in 5.1.1 above the Purchaser shall pay to the Contractor any amounts payable in respect of additional work on demand".

the same day as Mr Viljoen had given her the impression that he will deliver a product of a high quality. She testified that even though she signed the agreement with the defendant without first reading it, she did so under pressure to do so. According to the plaintiff the agreement does not reflect what was agreed upon. She further testified that the finishing specifications (attached as annexure 'B' to the agreement) were not discussed with her as she trusted Mr. Viljoen.

- [16] During cross examination the defendant denied the plaintiff's version that she had on several occasions actually gone to the development to monitor the building progress and she had at certain instances told Mr Viljoen what she wanted and after being given the price she had accepted it. She also denied going through the terms and conditions relating to the agreement. However, the defendant did admit that, even though she is not legally trained, she had some experience in dealing with agreements as she had previously signed a building contract and had held positions where it was her responsibility to advise clients about the terms and conditions of agreements (e.g insurance) clients were about to obtain.
- [17] With regard to being aware of progress being made on the building project, the defendant testified that she kept a record of the work done by taking pictures of the building progress, which pictures she posted in her scrapbook from December 2012. There was no objection to the use of the pictures contained in the defendant's scrap book. She admitted

that even though the plan had not been approved by 01 January 2013, the developer had started with the preparation of the site for building.

- [18] Although the defendant insisted that she was not bound by the agreement, as it is not the one agreed to, she did concede that during September 2013 she brought an urgent application to enforce the same agreement she now denies being bound by, after the plaintiff locked the house and denied her access. The defendant did not respond to a statement that in her affidavit in the urgent application she had averred that she needed occupation of the house as she had sold it to third party. In this application defendant sought an order directing the plaintiff to give her occupancy of the house. However, a settlement agreement was reached between the parties in terms of which it was agreed that the balance of the contract price still held by the bank would be deposited into a trust account pending the determination of the dispute between the parties. Further, the defendant conceded that in her application for the rescission of a default judgment obtained against her by the plaintiff on 8 July 2014, in her affidavit she had averred that there was an existing valid building agreement between her and the plaintiff.
- [19] Further under cross-examination the defendant admitted signing annexure "BB" and immediately retracted her admission when it was pointed out to her that she had already testified that she had signed the agreement. Annexure "BB" is a plan which incorporates amendments to the original plan. She testified that she did not find a copy of the agreement at the offices of the local authority. She conceded that when

she applied for the loan, annexure "BB" did not exist and that "BB" differs in material respects from the plan annexed to the agreement. The plaintiff further conceded that she did have a basic building plan to which she had made amendments. Inasmuch as she admitted that annexure "BB" incorporates the changes she wanted, she maintained that annexure "BB" does not contain all the changes she wanted made.

[20] She also admitted that before signing the agreement with the plaintiff she had earlier signed a building agreement with another developer in a nearby estate even though she does not remember if it was done on the same day.

[21] The defendant further testified that she did not understand what "PC items" meant as reflected in the 'Finishing Specification List' marked as 'B'. When questioned on whether on her visits to the site to check on the building progress she had objected to the additional items not covered by the loan agreement, the defendant did not respond. She further testified that in 2017 she obtained a plan which matches her house from the local municipal offices.

[22] It is common cause that:

22.1 on 13 November, 2012, two agreements were concluded:

22.1.1 an agreement for the purchase of a site by the defendant for an amount of 3 50,000, from MK Lian Chen CC; and

- 22.1.2 a construction agreement between the plaintiff and the defendant attached to the plaintiff's particulars of claim as annexure "A" and that this agreement was signed by both parties.
- 22.2 the parties agreed that the agreement with its attachment, inclusive plan of a show house would be submitted for purposes of the defendant obtaining a loan from a bank;
- 22.3 the defendant would in writing and once the plan was approved, include additional items she wanted incorporated into the submitted plan;
- 22.4 the agreement included clause 18 which contains the additional work the defendant wanted added to the plan submitted for approval by the municipality and to the bank;
- 22.5 the plaintiff did build a house for the defendant;
- 22.6 during September 2017, the defendant brought an application in which she sought an order directing the plaintiff to grant her occupancy of the completed house on the basis that there was an agreement between the parties for the plaintiff to build the disputed house. A settlement agreement was reached which was made an order of court in terms of which the plaintiff deposited the balance still remaining of the contract price into a trust account pending the finalisation of this matter; and
- 22.7 in her application for the rescission of the default judgment the defendant averred that a building agreement between herself and the plaintiff was concluded on 13 November, 2012. Further, in

support of her application for the rescission of the default judgment, the *bona fide* defence relied upon by the defendant was that the building works when not properly executed.

- [23] In argument, counsel for the defendant submitted that the house built was not in accordance with what was agreed upon by the parties in terms of their agreement. Further that the agreement was inconsistent with the specifications document which is attached to the particulars of claim as 'B'.
- [24] On behalf of the plaintiff, it was submitted that even though initially, the defendant had denied being bound by the agreement, defendant's counsel was now arguing a different case that the agreement was admitted but that the building works when not in accordance with the agreement. Further that at the start of the proceedings. It is common cause that the defendant had denied being bound by the agreement and hence the onus was on her to prove that the *caveat subscripto* rule did not apply and further why there was a duty on the defendant to begin.
- [25] During her testimony, the defendant admitted that she signed the agreement inclusive of clause 18 thereof. There is therefore no doubt that the defendant in terms of the *caveat subscripto* rule bound herself to the agreement as amended by the inclusion of clause 18. Inasmuch as the defendant admits that most of the items in clause 18 were incorporated in the house built for her, in her testimony she denied that

all the items in clause 18 were implemented or executed properly. Further, the defendant although denying agreeing to the additional work done which is not covered by the contract price, admitted that the work was done even though again she claimed poor workmanship. From her evidence as a whole there is no doubt that the defendant does admit that she signed the agreement and is therefore bound by it. From her evidence it could be deduced that her main bone of contention appears to be that the house was not built according to the agreed specifications and that the building works were of poor quality. Further, the defendant appears to be complaining about the fact that the house was not completed within the specified period.

- [26] Parties to written agreements abound by their signatures which they attached to the written agreements. It is trite that a person who signs a contractual document thereby signifies his assent to the contents of the document. As indicated by Christie (R.H Christie **The Law of Contract in South Africa**, 5th edition at page 175), the basis of the *caveat subscripto* rule is the doctrine of quasi-mutual assent. By signing the agreement and also including the 18 additional works in clause 18, it was reasonable for the plaintiff to rely on the doctrine, particularly if one bears in mind that the defendant in both the urgent and rescission applications had relied on the same agreement she is now trying to avoid. In *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 472A, the court stated that:

"When a man is asked to put his signature to a document cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature".

- [27] The defendant did not impress as a witness. Her evidence was full of inconsistencies and contradictions. Further, on the issue of the validity of the agreement, her evidence was incoherent to the extent of being unbelievable. Inasmuch as at the start of the proceedings, it was the defendant's version that, no valid building agreement exists between the parties, as the trial progressed the defendant admitted that she did sign the agreement albeit for the purposes of obtaining a loan. However, the defendant also admitted that the items listed in clause 18 of the agreement were what she wanted and what she had added to the agreement. Further, the defendant admitted that the items in clause 18 were submitted bank after the loan was approved indicating to the bank that the items listed in clause 18 were part of the work to the house that was to be built for her.
- [28] The defendant's assertion that she felt pressured to sign the agreement is not convincing. She is not unsophisticated as not to realise the consequences of signing a document. She by her own admission included the additional items in clause 18 which she has admitted were incorporated in the building. Further, with regard to the other additional works, though denying having agreed thereto, she could not explain why she did not object to the additional work being executed.

[29] Taking into account the defendant's evidence in chief and her responses under cross-examination it became clear that there was a deliberate intention to mislead the court by the defendant in trying to avoid the agreement by either claiming she was not bound by the agreement or that the house was poorly built. For some time the defendant has acknowledged the validity of the agreement. The fact that the construction was of a poor quality does not release her from the agreement she signed.

[30] From the evidence before me it is abundantly clear that the defendant has admitted that she did sign the agreement that she had made written amendments to the agreement by incorporating clause 18. It is also clear from her evidence that her case is not that she is not bound by the agreement but that the house was poorly built.

[31] I am satisfied that there is sufficient evidence that a valid agreement pertaining to the construction of the defendant's house was concluded between the plaintiff and the defendant on 13 November 2012.

[32] In the event that the plaintiff is successful, counsel for the plaintiff sought a punitive cost order against the defendant on the basis that she was not truthful with the court. In opposing the granting of a punitive cost order against the defendant. Counsel for the defendant argued that in the event that the plaintiff was successful, should a cost order against the defendant, it should be on a magistrate's court's scale. In view of my

finding that a valid building contract was concluded between the plaintiff and the defendant on 13 November 2012, I am not convinced that the circumstances warrant a punitive cost order. However, I am also not convinced that the cost order should be on the magistrate's court scale in view of the provisions of clause 5.1.2 (as amended) which grants the plaintiff the discretion, in the event of a dispute between the parties, of bringing an action in the High Court and also the conduct of the defendant throughout the proceedings.

[33] In the result the following order is made:

1. A valid and binding building agreement was concluded on 12 November 2012 by the plaintiff and the defendant.
2. Rectification of the agreement is granted.
3. The defendant is to pay the costs of these proceedings.


NP MNGQIBISA-THUSI
Judge of the High Court

Appearances

For Plaintiff: Adv J L Myburgh (instructed by EY Stuart Inc) and for Defendant:

Mrs A Laas (instructed by Laas Doman Inc)