IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 5846/2006

DATE: 25 MAY 2010

In the matter between:

WILLEM VAN DYK Plaintiff

and

BRIAN PETERSEN Defendant

J U D G M E N T

BOZALEK, J:

The plaintiff herein sues the defendant for damages suffered arising out of the alleged breach by the latter of his obligations in terms of a building contract. In terms of the contract, the defendant undertook to build a house for the plaintiff in Wellington, in the Cape Thatch Style. As this term indicates, the house was to have a thatched roof, supported by wooden beams and it was around this requirement that the dispute arose.

A few months after taking occupation of the dwelling, the plaintiff discovered that the beams were infected by a beetle. He contacted the defendant, as the main contractor, who referred him in turn to the roofing contractor, a Mr Moller, who traded as Thatchwise. Efforts to eradicate the problem failed and the plaintiff eventually replaced the thatch roof and beams at a total cost, including necessary electrical and construction work, of R123 411,10.

The defendant raised two defences to the claim. Firstly he pleaded that the building contract had not been concluded between the plaintiff and himself in his personal capacity, but with close corporation of which he was the sole member, namely Brian Petersen Management & Investment CC. Therefore, contended the defendant, the plaintiff had sued the incorrect party. As a further defence, defendant, although admitting the infestation and unsuccessful attempts to eradicate the beetle infestation, contended that he was not liable for the damages which the plaintiff alleged he had suffered. More particularly, the defendant contended that inasmuch as the plaintiff insisted upon the use of thicker beams than were initially contracted for, he, the plaintiff, had varied the terms of the main agreement, with the result that the defendant was no longer bound thereby. Secondly, he contended that the plaintiff was partly responsible for the

beetle infestation, and hence his damages, as a result of his insistence upon thicker beams, leading to these being inadequately treated by the subcontractor against beetle infestation.

I heard the evidence of the plaintiff and his expert witness, Mr Andrew Bartens, a beetle control expert. Defendant conducted his own defence and testified on his own behalf. I shall deal firstly with the closed corporation defence. Plaintiff testified that the defendant advised him at no time that he was representing a close corporation. None of the documentation which the plaintiff read, signed or saw made any reference to a close corporation. What he did see was documentation where the defendant described himself as Brian Petersen Management & Investment. This, the plaintiff testified, he understood to be the defendant in the form of a sole proprietorship. The plaintiff's evidence was satisfactory in all material respects, including this aspect on which he was neither challenged nor shaken in cross-examination. I accept his evidence on this point.

The defendant does appear to be the sole member of a close corporation bearing the name Brian Petersen Management & Investment CC, but even on his own account at no stage did he convey to plaintiff that he was purporting to contract on

behalf of this close corporation. This, he says, was an oversight. As I have mentioned, all the documentation, including the quotation from the defendant, which made up a large part of the building contract and which passed between plaintiff and the defendant, referred to either the defendant personally or to BPM&I. There was no reference at all in that documentation to a close corporation. Not only did the defendant concede that he never expressly told plaintiff that he, defendant, was contracting on behalf of his close corporation, but none of the further documentation upon which he relied could have indicated to plaintiff, before the conclusion of the contract, that he was or may have been dealing with a CC.

It appears that the high watermark of defendant's case is that he intended to contract on behalf of his close corporation. This state of mind is disputed by the plaintiff and is certainly open to debate but, even if I assume in favour of the defendant that he did contract with this state of mind, this does not establish, in the eyes of the law, that the contract was formed between the plaintiff and the close corporation, or, if the contract was between the plaintiff and the defendant personally, that the defendant is entitled to resile therefrom.

The circumstances of this matter constitute a case of a

unilateral mistake, i.e. either one or both of the parties were mistaken about the identity of the one contracting party, but they do not share the same mistake. The rule is that a unilateral mistake renders the contract void, if it is both material and reasonable, i.e. a *justus* error. See George v Fairmead (Pty) Ltd 1958(2) SA 465 (A) and National & Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958(2) SA 473 (A).

I am prepared to assume that the error was a material one, inasmuch as the contract was one of service. On this assumption, there was a dissensus between the parties. Now this is insufficient to render the contract void. The mistake must be a *justus* error, i.e. it just be reasonable or excusable in the circumstances of the particular case. Defendant's error was, however, neither reasonable nor excusable. All his external actions suggested that he was contracting in his personal capacity. In these circumstances he cannot be held or heard to say that the plaintiff should have known that he, the defendant, was contracting on behalf of his close corporation.

The applicable principles are well expressed in quotations from the following two cases. Firstly, Wessels, JA in South African Railways & Harbours v National Bank of South Africa Limited

1924 AD 704 at 715, stated:

> "The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even, therefore, if from a philosophical standpoint the minds of the parties do not meet, yet if by their acts their minds seem to have met the law will, where fraud is alleged, look to their acts and assume that their minds did meet, and they contracted in accordance with what the parties purport accept as a record of their agreement. This is the only practical way in which courts of law can determine the terms of a contract."

In George v Fairmead supra, Fagan, CJ stated as follows at 471B:

> "When can an error be said to be *justus* for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I have read the decisions, our courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party - the one who is trying to resile - been to blame in the

sense that, by his conduct, he has led the other person, as a reasonable man, to believe that he was binding himself?"

The answer, in the present case, is that the party seeking to resile, defendant, was wholly to blame in giving no external indication at all that he was contracting on behalf of his CC and not in his personal capacity. In these circumstances he is not entitled to resile from the contract between himself, personally, and plaintiff. The close corporation defence must, therefore, fail.

I turn now to the defendant's second defence, that is, on the merits. On 26 September 2005, sometime after the subcontractor, Moller, was called back to the job to consider the infested beams, he sent a fax to the defendant setting out what he saw as the reasons for the problem and the solution. It stated, in part:

"Met die aanhoor van die nuus het ek vir Coper Arch in Natal gebel om te probeer uitvind wat verkeerd kon gegaan het met die behandeling. Hulle het die volgende uitgelig:

1. Pale van daardie dikte moes ten minste 'n uur gedompel word en nie net tien minute soos

ons gedoen het nie. Dit was egter die eerste keer dat ek 'n dak bou met daardie lengte en dikte pale op aandrang van die kliënt en was ons nie bewus daarvan dat die pale 'n volle uur moes lê nie.

2. Die voginhoud van die pale was dalk minder as 90%, wat meebring dat divusie nie so goed kon plaasvind nie. Pale moet onmiddellik na bas-verwydering gedompel word vir een uur om seker te maak divusie kon wel plaasvind soos dit moet. Die pale het vir plus minus een dag gelê voordat ons dit gedompel het, wat foutief was. Ons besef dus dat ons gefouteer het met die behandeling, maar dit was bloot uit onkunde en uit te min ervaring met daardie dikte pale, aangesien ons slegs pale van 90 tot 125 millimeter diktes gebruik maak.

Ek is bereid om alles in my vermoë te doen om die kewers te stop, maar beskou die vervanging van die dak as die heel laaste uitweg. Daar is baie metodes om sulke probleme uit te sorteer, maar moet net op die regte manier en deur die regte persoon gedoen word."

Mr Bartens testified on behalf of the plaintiff that he inspected

the roof and beams in March 2006; that the beams consisted of round blue gum poles, which were stained and varnished; that there were clear signs of a severe beetle infestation. On closer inspection, it appeared that the beetle, Iyctus brunneus, was the beetle which was infesting the beams. He was of the opinion that the beams had not been properly treated against beetle infestation by the chemical method and as was required by SABS standards; furthermore, that it would appear that the wood, the beams, had not been properly seasoned, i.e. allowed to dry, before any such treatment.

He testified furthermore that the problems experienced with the beams were consistent with the subcontractor's explanation of what had gone wrong, as I have just read out from the subcontractor's fax; furthermore, in his opinion the conditions of the beams was such that the structural integrity of the roof was threatened, and that the only feasible solution was to replace the beams in question.

Efforts were made in the early stages of the problem by a firm, Pest Control, to treat the infestation by means of gassing and by injecting the chemical treatment into holes drilled into the beams. This treatment failed to resolve or arrest the problem whereupon both the subcontractor and the defendant appeared to wash their hands off the problem. The plaintiff obtained a

series of quotes to replace the roof. He chose one which was not the most expensive. He had the repairs effected in February 2007. There is no dispute over the reasonableness of these expenses or any suggestion that the plaintiff failed to mitigate his damages.

The core of defendant's defence is that the problems in the beams were caused because of plaintiff's insistence on thicker beams. The plaintiff testified that after defendant appointed Thatchwise as the subcontractor, he, the plaintiff, developed reservations about the quality of the latter's work, following reports he had received from another party or parties. He called a meeting with the defendant and the subcontractor, but at that meeting was persuaded that the subcontractor would deliver work of an acceptable standard and measuring up to SABS standards for such work. The subcontractor, therefore, remained in place. At some point the plaintiff became concerned by the thinness of the poles which the subcontractor was using or intended to use as beams. The plaintiff insisted upon thicker beams and these were ultimately used. The defendant states that the beams had to be replaced after the beams of a thinner diameter were already in place in the roof, but the plaintiff denies this. Nothing turns on this, however, since it is common cause that the thicker beams were ultimately used.

The defendant testified that the job was delayed for a month as a result of the use of thicker beams and in the rush to move forward, the subcontractor did not have sufficient time to properly treat the thicker beams, which he had to cut himself. Thus, argued the defendant, plaintiff should be held at least partially responsible for any damages he may have suffered.

There are a number of flaws in this argument, however. In the first place, it involves speculation as to why the beams were not properly treated. There had been no direct evidence on this point or that any delay was the reason for the failure to treat the beams properly. Secondly, this explanation is at odds with Moller's own written and seemingly candid explanation for the infestation, which, *inter alia*, was that he was entirely ignorant as to how these thicker poles had to be treated for beetle infestation. Thirdly, the defendant did not testify that he or anyone else, warned the plaintiff of the risk of using the thicker beams or that, given the variation in the specifications for the beams, he, the defendant, disavowed responsibility for the work of the subcontractor.

Indeed every indication is that the defendant assented to the variation of the contract, even to the extent of paying to the subcontractor out of his own pocket, the extra R8 000,00 which

the thicker beams entailed. Fourthly, the subcontractor was found and appointed by the defendant, whose quote for the job included the construction of the roof. He, the defendant, agreed the terms of the subcontract with Moller, the subcontractor. In these circumstances, the defendant carried the liability for any substandard work by the subcontractor.

The relationship between the employer, main contractor and subcontractors, is described in Lawsa, 2nd Edition, Volume 2, Part I paragraph 505 as follows:

> "More commonly the main contractor may engage one or more contractors, named subcontractors, to carry out specific portions or indeed all of the work. Such collateral contractor stand in no contractual relationship to the employer. The employer may not sue them if their work is substandard and they may not sue the employer if they remain unpaid. They are contractually responsible, and must look for redress solely to the contractor. As far as the obligation to do the work is concerned, the main contractor is at one and the same time, debtor to the employer and creditor to the subcontractors."

See the references there mentioned.

I must conclude that the plaintiff has succeeded in proving, firstly, that the subcontractor performed substandard work, i.e. he failed to construct a roof that was fit for the purpose for which it was intended; secondly, that the only reasonable remedial measures were to replace the roof, i.e. the beams and the thatched roof; thirdly, that as the main contractor the defendant was liable for any damages suffered by the plaintiff, arising out of the material breach by the subcontractor of the terms of the subcontract.

It follows that judgment must be given in favour of the plaintiff.

The Court has some sympathy for the defendant, who was let down by his subcontractor, and who appears to have found himself squeezed between the client and the subcontractor, but this, unfortunately, does not alter the situation in law. The defendant also complained that he was prejudiced in not being given a further opportunity to amend his pleadings on trial. This application, or complaint, was dealt with during the course of the trial and in short the answer is that litigation, even where one party is legally unrepresented, cannot be allowed to drag on indefinitely.

As far as costs are concerned, these will follow the result, including the wasted costs occasioned by a postponement at

the defendant's request on 23 February 2009, but excluding the wasted costs occasioned by a further postponement in march 2010 when no judge was available. The sum claimed and awarded exceeds the jurisdiction of the magistrate's court, so cost will be awarded on the High Court scale. The repairs were effected in February 2007 and interest will be awarded from that date.

There will then be judgment for the plaintiff against the defendant in the following terms:

(a) for payment in the sum of R123 411,10.

(b) interest thereon at the rate of 15.5% per annum from 28 February 2007 until date of payment.

(c) costs subject to what is stated above.

BOZALEK, J

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