



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: **3367/2019**

In the matter between:

**BBT ELECTRICAL AND PLUMBING CONSTRUCTION
AND MAINTENANCE T/A BBT CONSTRUCTION**

Plaintiff

and

**SETSHABELO TRADING 647 (PTY) LTD
(REGISTRATION NUMBER: 2013/009655/07)**

Defendant

JUDGMENT BY: C REINDERS, ADJP

HEARD ON: 11 MARCH 2022

DELIVERED ON: 02 SEPTEMBER 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 17:00 on 2 SEPTEMBER 2022.

[1] On 30 July 2019 the plaintiff (BBT Electrical and Plumbing Construction and Maintenance t/a BBT Construction - "BBT") issued summons against the defendant, Setshabelo Trading 647 (Pty) Ltd ("Setshabelo") claiming payment by the defendant of an amount of R400 000-00, interest *a tempora morae* and costs. Defendant in its plea denied being indebted in the aforesaid amount. To prove its case plaintiff called two witnesses. Defendant did not adduce any evidence resulting therein that I have to determine whether plaintiff proved its case.

[2] The summons originally issued was amended (with leave of the trial court) after closing of the plaintiff's case. Defendant applied for absolution and before I decided the issue, plaintiff applied to have its particulars of claim amended. It is necessary to consider the pleadings as it ultimately stood.

[3] When the summons was issued plaintiff averred that it and defendant on 5 March 2018 at Bloemfontein, duly represented by respectively Mr Wilson Matete ("Mr Matete") and Mr Bongani Langwenya ("Mr Langwenya") concluded a written settlement agreement ("the settlement agreement"), alternatively a partially written and partially verbal settlement agreement of which a copy was attached to the particulars of claim as Annexure "M3". The terms thereof reflect, amongst others, the following:

"PROFIT SHARE AND MARK-UP

5.1 Profits generated by the joint venture shall vest with SETSHABELO and SETSHABELO shall be liable for the following payments to BBT:

5.1.1 payment of the amount of R250 000.00 on site occupation;

5.1.2 payment of the amount of R250 000.00 one month after SETSHABELO has taken site occupation.

BREACH

7. Should any of the parties ("the defaulting party") commit any breach of any term or condition of this agreement and fail to remedy such breach within 7 (SEVEN) days of receipt of a notice from the other party ("the non-defaulting party") calling upon the defaulting party to rectify such breach, the non-defaulting party shall, without prejudice to any other rights which he may have, be entitled to cancel this agreement."

[4] It was averred that defendant only made payment in the amount of R100 000-00 and failed to perform as agreed resulting therein that on 19 March 2019 plaintiff through its attorney delivered a letter demanding payment of the R400 000-00. As defendant failed to make payment, plaintiff cancelled the aforementioned settlement agreement, wherefore plaintiff claimed an order confirming plaintiff's cancellation of the settlement agreement and payment of the amount of R400 000-00 together with the relief mentioned supra.

[5] In defendant's plea these allegations were all denied, save that defendant averred that it took note of the alleged cancellation of the settlement agreement.

[6] To prove its case plaintiff called two witnesses, namely Mr Matete and Mr Arnold Lepota (Mr Lepota).

6.1 Mr Lepota, the contract manager of BBT, testified that he was approached by Mr Langwenya, the managing director of the defendant, during October 2017 with the aim of forming a joint venture (a "JV") for securing contracts. Due to the capacity of Setshabelo the parties agreed that their respective participation rights and obligations in the JV shall be split as 60% (BBT) and 40% (Setshabelo), and he so drafted the agreement. Hereafter a tender for the construction of a bulk water pipeline was submitted. On 5 March 2018 the parties received confirmation of the acceptance of the submitted tender ("the acceptance letter"- annexed as "M2" to the particulars of claim). The acceptance letter confirms the contract value to be "an amount of R12 719 970-60 (including VAT and contingency sum)".

6.1.1 On 26 April 2018 Mr Langwenya addressed a letter to him (the proposal), requesting that Setshabelo be "released/allowed to proceed with the project on its own as a company" and that "a specific amount be payable to BBT in acknowledgement of the agreed arrangement and the involvement of the plaintiff in securing the contract for both parties". A meeting was requested and indeed took place. He and Mr Langwenya discussed the proposal that Setshabelo wished to proceed with the project on its own and an agreement was drafted by BBT's attorney of record, Mr B Blair. The settlement agreement was provided to BBT on 22 May 2018 and to Setshabelo on 23 May 2018 for signature but no response was forthcoming. The document was never returned to them.

6.1.2 Mr Blair was requested to send a letter of demand to Setshabelo for payment. Only an amount of R100 000-00 was paid, and the amount was viewed by him as a down payment in respect of the R500 000-00 agreed upon.

6.1.3 In an electronic mail dated 19 September 2021 addressed to Setshabelo from Blair Attorneys, the following was recorded:

“Our clients confirm that they wish to hereby formally terminate/withdraw from the contract due to the fact that said Setshabelo Trading has breached the terms of the contract by failing to;

1. Sign the memorandum of agreement with BBT;
2. Failing to adhere to the terms of the said agreement not signed;
3. Proceeding with works engaging BBT as the joint venture partners in the project.”

6.2 Mr Matete is the Managing Director (“MD”) of BBT. He was made aware by the projects manager of a proposal to enter into a joint venture. As MD he was the only person authorised to conclude the agreements relating to this matter on behalf of BBT, and he duly signed the JV agreement.

6.2.1 The settlement agreement originated from the proposal of 25 April 2018. Shortly after receiving the proposal from Setshabelo to proceed on their own, BBT “considered the factors and risks to establish what would be a fair compensation to BBT”. In his view the agreed upon amount was more like “compensation for them agreeing in effect to be paid for the effort that they had put in in in obtaining the tender”. In return Setshabelo would pay R500 000-00 in two instalments.

6.2.2 According to Mr Matete he personally did the estimated calculation with Mr Lepota to determine the amount of

R500 000-00 which was an estimated value based on “calculations done by the quantity surveyor” at the time. He further testified that approximately 15% of the total value of the contract (R12 719 970-60) less 14% in respect of value added tax, constituted the profit for executing the project. Based on the said amount BBT’s share of that profit would have been approximately R984 626-00 being 60% of the total profit in the amount of R1 640 876-60. As BBT was not going to proceed working with Setshabelo, the latter amount was not applicable. Mr Matete added that the estimation not only consisted of the pricing compilation, “which in itself is a professional service” of the successful tender done by BBT, but also the 20 years’ experience of BBT which included the pricing but also “goodwill, sweat and tears”.

6.2.3 On 26 June 2018 Setshabelo send correspondence to BBT to pardon them from making “the first round of payment at the end of May 2018” due to “financial constraints”.

6.3 No supporting documents in respect of the averred pricing compilation of the submitted tender were placed into evidence. The quantity surveyor did not testify.

[7] After closing plaintiff’s case and on being confronted with an application for absolution the plaintiff amended its particulars of claim. The more relevant amendments included an allegation that the defendant was in breach of the settlement agreement and the plaintiff has as a result of such breach by the defendant suffered damages in the amount of R400 000-00, the said damages being the unpaid balance of R400 000-00 to which the plaintiff was entitled but for the defendant’s breach. It was averred that plaintiff duly cancelled the settlement agreement owing to defendant’s material breach and the original prayer 1 of the summons for confirmation of the cancellation of the agreement, was deleted. The summons in its amended form claims:

“1. Payment in the amount of R400 000-00.

2. In the alternative, should it be found that the agreement was not validly cancelled, ordering specific performance by the defendant in accordance with the agreement asserted by the plaintiff, to wit, payment to the plaintiff in the amount of R400 000-00.”

[8] Having amended its particulars of claim plaintiff did not apply to reopen its case and/or to adduce any further evidence and defendant closed its case.

[9] It is trite that a party cannot approbate and reprobate.

9.1 Where a party is in breach of an agreement, the innocent party normally faces a choice to claim specific performance or to cancel the agreement and claim damages. Once a party has elected to cancel or not to cancel, the election is final and could not be reversed. The onus rests on the party alleging the election not only to allege its election, but to prove it.

See: Thomas v Henry 1985 (3) SA 889 (A)

Sandown Travel (Pty) Ltd v Cricket South Africa (42317/2011) [2012] ZAGPJHC 249; 2013 (2) SA 502 (GSJ) (7 December 2012) at par [30]

9.2 At the same time it is not possible to claim performance and in the alternative to rely on a prior cancellation as these alternatives are inconsistent.

See: Salzwedel v Raath 1956 (2) SA 160 (E)

9.3 In Basson v Hanna (37/2016) [2016] ZASCA 198 (6 December 2016) at para [22] and further the Supreme Court of Appeal reiterated the aforementioned principles and explained in the event of specific performance a claim for damages could succeed where the party in breach renders specific performance impossible (at para [42] thereof).

The Supreme Court referred to Woods v Walters 1921 AD 303 where Innes CJ stated at 310:

“It is a common practice, in South Africa to add to a prayer for specific performance, an alternative prayer for damages. That course has been followed in the present case. **Damages so claimed must, of course, be proved and ascertained in the ordinary way.** The authorities do not warrant a punitive assessment.” (emphasis added)

[10] In the matter before me the evidence and the pleadings are *ad idem* that plaintiff on learning defendant’s breach, cancelled the agreement. Not only did both Messrs Matete and Lepoto so testify, but in evidence reference to the email of dated 19 September 2018 so confirmed. The upshot thereof in my view is that plaintiff cancelled the agreement (if it ever existed – and I do not deem it necessary to make a finding thereon).

[11] Having cancelled the agreement it was incumbent on plaintiff to prove its damages, either by way of positive or negative *interesse*, but most definitely the plaintiff cannot claim payment of the R400 000-00 balance in terms of the agreement. The R400 000-00 did not constitute damages *per se*. There is no basis upon which I can find that plaintiff was not entitled to cancel the agreement as it did. It follows however that I regrettably in those circumstances cannot find in favour of plaintiff as it simply failed to prove by way of evidence damages or the amount that was allegedly suffered and/or which flowed naturally from the cancellation of the contract.

[12] Consequently I make the following order:

Absolution of the instance is ordered with costs.

C. REINDERS, ADJP

On behalf of the Plaintiff:
Instructed by:

Adv A.I.B. Lechwano
Phatshoane Henney Attorneys
BLOEMFONTEIN

On behalf of the Defendant:
Instructed by:

Adv J. Ferreira
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