

1. The court misdirected itself in finding that the defendant is liable to pay the plaintiff the amount of R 130 339-38, regard being had on the following: -
 - 1.1 The plaintiff's case was based on the written contract in the amount of R 450 000-00.
 - 1.2 The defendant's case was that the agreement was that the plaintiff would complete the construction of the housework with the amount of R 334 966-42, which was the balance in her home loan account. The plaintiff vehemently denied any such agreement.
 - 1.3 The court effectively rejected the plaintiff's version in this regard.
2. The plaintiff failed to prove any amount, if any, owed to it by the defendant.
3. The court failed to take into account that the plaintiff did not comply with the terms of the very same contract he relies upon.
 - 3.1 Mr Komako conceded under cross-examination that the plaintiff did not comply with the terms of clause 1 of the written contract between the parties, in that the plaintiff failed to provide and pay for all the material, tools, equipment and labour required to perform construction work required.
4. The court further failed to take into account the undisputed evidence of the defendant in respect of the further and or more expenses related to the construction of the house she incurred as further fortified by the transactions contained in her bank statements and which amounts were not covered in the plaintiff's particulars of claim.
 - 4.1 In this regard the court only focused on the deductions contained in the particulars of claim.

5. The court erroneously approached the quantum of the plaintiff's case by simple method of deducting what was proven by the defendant as her own expenses instead of what the plaintiff could or could not prove as his damages.
6. The court erred in awarding the costs in favour of the plaintiff, regard been had of the following: -
 - 6.1 The court effectively accepted that the intentions of the parties are covered in Exhibit "B", which was introduced by the defendant and rejected the plaintiff's version.
 - 6.2 Although the court found that the defendant is indebted to the plaintiff that was not found on the basis of the plaintiff's own evidence.
 - 6.3 The undisputed evidence of the defendant, that she offered the amount of R 80 000-00, in settlement of the matter before it came to court and there was no evidence and or any plausible explanation why the offer was not accepted.
7. Therefore, leave to appeal to the full court of this Division stands to be granted in that the appeal would have reasonable prospects of success.

[3] In essence, the attack on the judgment is that the court accepted that the parties regulated their contractual relationship by jointly drafting and signing annexure "A" and "B" which related to the completion of the construction work for the balance of R 334 966.42 being the remainder of the bank loan extended to the respondent. Sight has been lost of the fact that the plaintiff testified that he would complete the work with that amount¹ and also admitted his signatures to both annexures "A" and "B"². It was also not in dispute the plaintiff was

¹ Paragraph 6 of the judgment.

² Paragraph 7 of the judgment.

initially contracted to do the roof as the house was only built up to the “*Wall plate level*”³ and that the defendant conceded that the plaintiff did furnish her with the engineer’s roof certificate. The amount of R 334 966.42 was released to the defendant on 21 August 2019 and no payment whatsoever was made to the plaintiff.

- [4] One of the grounds of appeal is a concession that the undisputed evidence is that the defendant made an offer in the amount of R 80 000.00 to the plaintiff in settlement of the matter. Despite the denial in her papers and in parts of her oral evidence that she did not owe the applicant anything, she testified that she did not refuse to pay the plaintiff. The plaintiff was overhasty to institute a claim against her.
- [5] It was argued in the plaintiff’s written heads of argument that the plaintiff’s non-compliance with clause 1 of the original agreement was fatal as it militated against the sanctity and privity of contract. Furthermore, the court had rejected the plaintiff’s reliance on the agreement that was attached to the particulars of claim. The latter submission is misconceived as nowhere in the judgment was it stated that the plaintiff’s reliance on the agreement was rejected. What is clear from the judgment is that the terms of the agreement were modified by virtue of the conclusion of annexures “A” and “B” by the parties.
- [6] It is common cause that the plaintiff did not have sufficient funds to complete the project and had to rely on the defendant for financial assistance. It is also undisputed that he had to alienate some of his assets to finance the project because the bank refused to release the money as it felt at risk because of the defendant having changed the building plans. This explained his willingness to conclude exhibits “A” and “B”.
- [6] In the circumstances, I am of the opinion that this appeal does not have a reasonable prospect of success and should therefore fail.

³ Paragraph 6 of the judgment.

[7] I therefore make the following order:

Order:

The application for leave to appeal is dismissed with costs.

MHLAMBI, J

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