



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

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

SIGNATURE

DATE: 1 September 2022

CASE NUMBER: A3075/2021

In the matter between:

UNIT 15 RONDEVOUX CC t/a DONE RITE SERVICES

Appellant

and

TUMI MAKGABO

Respondent

CORAM: WRIGHT J AND WILSON AJ

JUDGMENT

WILSON AJ:

- 1 The appellant, "Done Rite", is a building contractor. The respondent, Ms. Makgabo, contracted Done Rite to complete building work on her home. The work encompassed the wholesale renovation of two bathrooms, improvements to a garden cottage and a carport, the installation of a slider-stacker door and upgrades to a swimming pool.

- 2 The contract price for this work was R190 513.38. The parties agreed that Ms. Makgabo would pay for the work in two instalments – 60% upfront, and 40% on completion. Ms. Makgabo paid the 60% deposit, which amounted to R114 308.03, and the work commenced. Ms. Makgabo later ordered further work to be done, including the installation of a new kitchen floor. The cost of the additional work was R37 875.36.
- 3 The work commenced during March 2014. Done Rite agreed that it would try to complete it in time for a party to celebrate Ms. Makgabo's fortieth birthday. The party was to take place at Ms. Makgabo's home on 12 April. The work was not complete by that time, and Done Rite returned to Ms. Makgabo's property during the week of 14 April to carry on with it.
- 4 During that week, Ms. Makgabo says that she left the property for a short time to get something from a hardware store to assist with the work. On her return, she discovered that some of her jewellery had gone missing. Ms. Makgabo immediately suspected Done Rite's workers of having stolen it, although it was later accepted at trial that Done Rite's workers were not the only ones on site. Done Rite had engaged subcontractors to work on the property, and another team of workers had been to the property at around that time to fix a ceiling that had been damaged by a burst geyser.
- 5 It was never ultimately established who, if anyone, was responsible for taking Ms. Makgabo's jewellery. However, after the incident, Ms. Makgabo was no longer comfortable with allowing Done Rite's workers access to her home. Done Rite left the property and was not allowed back on to it.

- 6 Trevor Millar, Done Rite's owner, took the view that it was futile to attempt to compel Ms. Makgabo to allow Done Rite back on to the property to complete the work. He instead asserted the right to be paid the rest of the contract price the parties had agreed, less the value of some components of the work that had not been started. This he reckoned at R97 305.61 over and above the deposit Ms. Makgabo had already paid. On 6 June 2014 and for a fourteen day period only, he offered a 10% "retention" to allow Ms. Makgabo to get quotes from other contractors to finish off components of the work that Done Rite had started, but had been unable to complete.
- 7 Ms Makgabo did not get other quotes. In response, Mr. Millar demanded R92 440.33, being the balance due on the contract price less a reduced "retention" of 5%. At trial Mr. Millar would say that he did this because, in his view, the job at Ms. Makgabo's property was "95%" done. This was reflected in Done Rite's invoice dated 17 July 2014, which is annexed to its particulars of claim. Ms. Makgabo refused to pay the amount demanded and did not respond to Mr. Millar's persistent requests that she do so.
- 8 Done Rite then instituted action in the Randburg District Court. Its particulars of claim allege that the work Ms. Makgabo contracted had been completed, and the outstanding contract balance – R92 440.33 – was now due. It sought judgment for that amount plus interest and costs.
- 9 In her plea, Ms. Makgabo denied that the work had been finished. She furthermore alleged that the work that had been done was defective. She purported to cancel her contract with Done Rite, and reserved her right to sue for damages.

- 10 After hearing evidence, the trial Magistrate took the view that the work had not been finished, and that the work that had been done was not completed in a “workmanlike manner”. He dismissed Done Rite’s claim in its entirety, with costs.
- 11 Done Rite now appeals. Mr. Carstens, who appeared for Done Rite before us, conceded at the outset of his argument that Done Rite’s pleaded case – that the contract balance was due because the work charged for had been finished – was not the case being pressed on appeal, and was not the case Done Rite had pressed at trial.
- 12 Done Rite in fact accepts – and it accepted at trial – that the work it charged for on its 17 July 2014 invoice was not the balance due on the full value of the work Ms. Makgabo contracted. The R92 440.33 Done Rite claims was merely the value of the unfinished work Done Rite actually did before it was excluded from the property.
- 13 Accordingly, the issue in this appeal is whether Done Rite’s unpleaded claim for the value of its work ought to have succeeded. That issue boils down to two questions. The first is whether we can overlook the fact that the claim now pressed was not the claim made out in Done Rite’s particulars. The second is whether the evidence led at trial established that Done Rite was entitled to the amount it sought.

The unpleaded case

- 14 Neither party outlined the true nature of their dispute in the pleadings. Done Rite claimed payment on “completion of the contractual work as agreed” even though it turned out to be common cause that the work was not completed. Ms. Makgabo pleaded that “there were various defects in the works which renders the works incomplete”, even though it was not seriously disputed at trial that Ms. Makgabo excluded Done Rite from the property before the work could be finished. There was also no serious dispute that whatever faults Done Rite left behind could have been addressed had it been allowed back on to the property to do so.
- 15 The real dispute in this case is whether Done Rite was entitled to payment for the work it had done at the time it was excluded from the property. When Ms. Makgabo ordered Done Rite off the property, she repudiated her contract with it. That being so, Done Rite had an election: cancel the contract and sue for damages, or claim specific performance.
- 16 Done Rite chose to claim specific performance, but its particulars of claim pleaded a rather confused case. The performance it alleged in its particulars – completion of all the work that it was contracted to do – was not the performance it actually rendered. Nor was the value of the performance Done Rite claimed in its particulars actually the value of the completed work. It was in fact Done Rite’s reckoning of the value of its work at the point Done Rite was excluded from Ms. Makgabo’s property.
- 17 For these reasons, Done Rite’s true claim was left substantially unpleaded. These difficulties notwithstanding, however, the trial court ought in my view

to have been alive to, and to have considered, Done Rite's unpleaded claim for the value of the work it did.

18 It is trite that a party will be kept strictly to its pleadings "where any departure would cause prejudice or would prevent full enquiry" (*Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198). However, where the evidence covers an unpleaded claim fully, "that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the Court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised" (*Middleton v Car* 1949 (2) SA 374 (A) at 385). The Supreme Court of Appeal has recently re-affirmed this approach to unpleaded issues, albeit while disallowing an unpleaded claim (see *MJ K v II K* [2022] ZASCA 116 (28 July 2022) at paragraphs 21 to 23).

19 There could, in this case, have been no real doubt about what Done Rite's claim really was on the evidence led at trial.

20 Nor was there any appreciable prejudice to Ms. Makgabo arising from Done Rite's failure to plead that claim properly. Ms. Makgabo faced a claim calculated as the value of the work at the point Done Rite left her property. She defended the claim not only on the basis that the work was unfinished, but also on the basis that the work was defective. In other words, what was placed in issue at trial was not just whether the work was finished, but also the quality and value of the work actually done.

21 Moreover, Ms. Makgabo was clearly put on notice that the true nature of Done Rite's claim was for the value of the work done. This was adverted to

in Done Rite's counsel's opening address at trial. Ms. Makgabo was also led, by her own counsel, on the issue of whether she ought to have paid more than 60% of the contract price for the work done at the point Done Rite left her property. She was emphatic that "the work [Done Rite] did do had been paid for by the 60% deposit". Whether or not that is correct, it demonstrates that Ms. Makgabo and her legal representatives were alive, at trial, to the possibility of a judgment for the value of the unfinished work.

22 In addition, both parties called experts. The experts gave detailed evidence about the state of the work. It is difficult to see what further evidence could have been led at trial to illuminate a claim for the value of the work done.

Should Done Rite's claim have succeeded?

23 Stripped to its essence, Done Rite's claim was really one of *quantum meruit*. Claims for *quantum meruit* (very loosely "as much as is warranted"), seek fair and reasonable remuneration for the value of work actually done on a partially fulfilled agreement, where that value has not been fixed in the contract governing the work. It is for the plaintiff to prove both the extent of the work done and its value. A court must be convinced that the amount of fair and reasonable remuneration due "can be sufficiently certainly fixed on the evidence", or else no award can be made (*Middleton v Carr* 1949 (2) SA 374 (A) at 386).

24 Mr. Carstens staked his case on a schedule introduced as Exhibit "C" at trial. That schedule quantified what Mr. Millar said was the value of the work actually done at Ms. Makgabo's house. The schedule took the total contract price, including the additional work agreed, and subtracted the components

of the work that were never started. A credit of R16 775.10 was given to Ms Makgabo for “work not done”. The schedule then deducted a 10% “retention” of R9 730.56 from the resulting amount as an allowance for what Mr. Millar claimed were very minor issues – or “snags” – that remained to be addressed at the time Done Rite was ordered off the property. Ultimately, this schedule valued the work done at the property at R87 575.05, including VAT. This schedule does not reflect the reduced “retention” allowance of 5% on which Mr. Millar was to calculate the amount demanded in Done Rite’s 17 July 2014 invoice.

25 These calculations inevitably raise the question of exactly what stage Done Rite’s work had reached at the time its workers were ordered off Ms. Makgabo’s property. Done Rite’s expert, Harold Hollander, a civil engineer with fairly extensive experience of large building projects, gave evidence at trial that the work appeared to be in its final stages when Done Rite left. He characterised the work left undone as easily finished in a short time, and at a very low cost.

26 Critically, none of Mr. Hollander’s conclusions was seriously challenged in cross-examination. Nor was a positive account of the true state of completion of the work put to him on Ms. Makgabo’s behalf. Although Clive Smith, who gave expert evidence for Ms. Makgabo, took a more serious view of the work left undone, he made a series of concessions under cross-examination that much of the unfinished work amounted to snags, though perhaps more serious snags than Mr. Hollander had suggested.

27 For the rest, Mr. Smith conceded that the more serious defects that he identified – for example the fact that a door to the garden cottage had been installed too low – were likely the result of previous poor building work, and not faults in the work performed by Done Rite. While he was critical of Done Rite’s failure to point these defects out to Ms. Makgabo, Mr. Smith could not attribute them directly to Done Rite’s work. Mr. Smith’s criticism must of course be evaluated against Done Rite’s sudden expulsion from the property during the week of 14 April 2014. We do not know whether, but for that expulsion, Done Rite would eventually have advised Ms. Makgabo of the apparently previously defective work.

28 The expert evidence is accordingly consistent with Mr. Millar’s assertion that the work was 95% complete at the time Done Rite was ordered off the property.

29 That said, there is one minor piece of evidence that was not clear at the trial. Mr Millar was adamant that the work Done Rite had commenced on the property had been “95% done”. In the same breath, however, he said that “R5 000 could have finished the job” or words to that effect. He also did not reconcile the R16 775 credit for work not done as he had set in out Exhibit C with the R5 000 (R5 700 after VAT is included) that he claimed at trial it would take to finish the work. The evidence at trial on this point was vague.

30 As I have said, Done Rite bears the onus of proving the value of the *quantum meruit* it claims. Accordingly, the obscurities to which I have referred must operate in Ms. Makgabo’s favour. The result must be that the appropriate amount to be awarded to Done Rite should be calculated by

adding the original contract price (R190 513.38) to the agreed extras (R37 875.36) and then subtracting the credit for work not done on Exhibit C (R16 775.10), the amount Mr. Millar conceded at trial would be necessary to complete the work (R5 700) and the amount Ms. Makgabo actually paid (R114 308.03).

31 This calculation leaves a balance due to Done Rite of R91 605.61.

32 I accept that the evidence discloses that Ms. Makgabo had to contend with what appears to have been a significant leak in one of the bathrooms just after Done Rite left. However, it was not established at trial that the leak required anything more than minor work to rectify – in other words that it was anything more than an ordinary snag rather than truly defective workmanship. It was also open to Ms. Makgabo to have Done Rite or another contractor attend to the leak. It is not clear from the evidence when or whether she did so, and what the cost of doing so was.

33 Moreover, while Ms. Makgabo's admitted failure to get quotes from other builders to finish the job when Mr. Millar gave her the opportunity to do so cannot in itself be held against her, it left her short of evidence which could possibly have been obtained when events were fresh. Her expert's report was compiled much later – around two years after Done Rite left the property. That evidence must obviously be treated with a degree of circumspection.

34 Ultimately, therefore, there was nothing to gainsay Done Rite's version that the work was in its final stages at the time it was ordered off the property. It

is, in my view, entitled to the proven value of the work it had done up until that point.

35 In its invoice of 17 July 2014 Done Rite claimed interest at 8% compounded monthly. That is wholly unreasonable. In its summons, Done Rite moderated its claim to interest at 8% per annum. There is no reason why it ought not to be awarded interest at this rate, and from 18 July 2014.

36 For all these reasons, the appeal should succeed. The Magistrate ought to have identified the true ambit of the dispute before him, and to have given judgment in Done Rite's favour on that dispute.

Order

37 In this court, the record of appeal was filed late. The application to condone its late filing was unopposed. We granted condonation at the outset of the appeal hearing, but I will record our order in what follows.

38 Accordingly I would make the following order –

38.1 The late filing of the appeal record is condoned, with each party paying their own costs.

38.2 The appeal is upheld with costs.

38.3 The order of the trial court is set aside and replaced with the following order –

“1. The defendant is directed to pay to the plaintiff the sum of R91 605.61, plus interest at 8% per annum from 18 July 2014 to date of payment.

2. The defendant is to pay the plaintiff's costs of suit, including the costs of one junior counsel".

S D J WILSON
Acting Judge of the High Court

WRIGHT J:

39 I agree and it is so ordered.

pp G C WRIGHT
Judge of the High Court

HEARD ON: 25 August 2022

DECIDED ON: 1 September 2022

For the Appellant: JC Carstens
Instructed by Erasmus De Klerk Inc.

For the Respondent: SJ Meintjies
(Heads of Argument drawn by AC Roestorf)
Instructed by Retief and SJ Meintjies Inc.