IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No 7596/2007

Reportable J

In the matter between:

Peter Lawson **Applicant**

And

Schmidhauser Electrical Cc	**First Respondent**
<u>CORAM:</u>	Moosa J
<u>JUDGMENT</u> :	Moosa, J
<u>DATE OF HEARING</u>:	
<u>DATE OF JUDGMENT</u>:	1st August 2012
<u>ADV. FOR APPLICANT:</u>	G.Fitzmaurice
<u>INSTRUCTED BY:</u>	Webber Wentzel Inc

Mallinicjs

ADV. **FOR** 1st **RESPONDENT:** In Person

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE No: 7596/2007

In the matter between:

PETER LAWSON **Plaintiff**

and

SCHMIDHAUSER ELECTRICAL CC **Defendant**

JUDGMENT ON QUANTUM DELIVERED ON : 1 AUGUST 2012

MOOSA, J:

THE SECOND LEG OF THE ENQUIRY

1] The second leg of the enquiry is in respect of quantum arising from breach of contract in respect of the electrical installation done by the defendant for the plaintiff. In the first leg of the enquiry this court gave judgment on the merits in respect of the separated issues. In the second leg of the enquiry, the plaintiff only tendered evidence in respect of quantum. The defendant closed its case without presenting any evidence.

2] The first contract was based on work to be done by the defendant for the plaintiff at a stipulated price. In legal parlance this is referred to as *locatio conductio operis* (the first contract). In terms of such contract, the *modus operandi* was that the defendant, as an independent contractor, would provide the plaintiff with written quotations for stipulated work and, subject to amendments and/or changes, the plaintiff would accept such written quotations. The total value of such quotations amounted to R270 625..

3] The nature of the first contract was subsequently changed for the provision of services at a stipulated rate and not at a stipulated price. In legal parlance it is known as *locatio conductio operarum* (the second contract). In terms of such contract, the parties agreed that the defendant would supply one artisan and two semi-skilled workers for the work and their work would be co-ordinated by the defendant. The agreed rate was R200 per hour for labour; R500 per week for co-ordination; R200 per week for administration and R200 per week for consumables and miscellaneous. The materials supplied would be charged at cost plus 15%. Overtime remuneration would be governed by rates regulated by the appropriate government gazette.

4] In the first leg of the enquiry, the court found that when the second contract was concluded, it was also agreed that all work done under the terms of the first contract would be recalculated on the basis of the terms of the second contract. With the recalculation, there was an amount of R16 585 owing to the defendant for work performed prior to the coming into operation of the second contract and which amount was paid by the plaintiff in settlement of the defendant's claim arising from the first contract.

THE SCOPE OF THE DAMAGES CLAIM

5] The court in the separated issues on the merits found firstly, that the plaintiff had lawfully cancelled the contract on the ground of breach of contract and secondly, that the plaintiff is not precluded from claiming from the defendant in respect of defective workmanship and/or overreaching in respect of time and labour charges.

6] In respect of breach of contract, the plaintiff is claiming damages from the defendant: in the following amounts: the refund of R437 169, which sum is the total amount paid by the plaintiff to defendant in respect of labour and materials for the work (the first claim); the amount of R74 588.54 in respect of remedial work effected by Jacobs (the second claim); the amount of R1 140 paid to the suppliers of GIRA components for locating defects in the system (the third claim); the amount of R25 104.93 paid to Garth Holloway for co-ordinating and commissioning intercom components (the fourth

claim); the amount of R75 214.92 paid for co-ordinating and installing a wireless burglar alarm system (the fifth claim); the amount of R3 135 paid for reburying the electric cable (the sixth claim); the amount of R3 297.67 paid for repainting the burnt wall (the seventh claim) and the amount of R5 734.46 for damaged electrical components (the eighth claim). I will deal with each claim *in seriatim.*

THE FIRST CLAIM Unjust Enrichment

7] The first claim for the refund of the amount of R437 169 represents the payment made by plaintiff to the defendant for labour and material. Included in that claim, according to the plaintiff, is the amount representing overreaching. The way I understand the plaintiffs claim, it is based on two grounds, the first is a substantial ground and the second is a procedural ground. The substantial ground is based on the consequence arising from the defendant's breach in failing to provide an artisan and two semi-skilled workers and in failing to deliver an installation that was compliant and safe. In that event, it is contended by the plaintiff that no consideration became payable to the defendant in terms of the contract. The procedural ground is based on the fact that where the plaintiff has received part performance, but blamelessly cannot restore upon restitution, the obligation is on the defendant to counterclaim for enrichment and prove his counterclaim. I will deal with each ground separately.

8] In support of the first ground, the plaintiff relies on the Headnotes of the case of

Breslin v Hitchens 1914 AD 312 which read as follows:

> *"A contractor who knowingly, wilfully and without the consent of the employer departs from the terms of his contract, cannot take the benefit of the equitable doctrine that no one shall be unjustly enriched at the expense of another."*

The case was not decided on the basis of that dictum. The *ratio decidendi* in that case was that the defendant did not take the benefit of the work performed by the plaintiff under the contract at the time the summons was issued. The reliance of the plaintiff on that case is therefore misplaced. The matter is clarified further on.

9] Adv Patrick, counsel for the plaintiff, in argument before me, relied on the decisions of **Spencer v Gostelow** 1920 AD 617 and **BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk** 1979 (1) SA 391 at 425A in support of plaintiff's first ground. A close scrutiny of these authorities does not support his contention. **Innes CJ,** in **Spencer v Gostelow (supra)** at 627 says:

> *"That liability rests upon the equitable doctrine that no man is allowed to enrich himself at*

the expense of another. The scope of that principle as applied to a ***locatio operis*** *was discussed in* ***Hauman v Nortje*** *and* ***Breslin v Hichens*** *1914 A, pp 293 and 312 and I see no reason why it should not apply to a* ***locatio operarum*** *also. The benefit of the service accrued to the employer from day to day, and to permit him in terminating the contract to retain such accrued payments without payment would be to allow him unjustifiably to enrich himself at the expense of the servant. These general phnciples are clear."*

10] **innes, CJ** goes further and at 632 says:

"In ***Hauman v Nortje*** *1914 AD, p 293,* ***Lord De Villiers, CJ,*** *said that a contractor who had failed to complete his work according to contract would be entitled to be compensated by the owner who had benefit of his labour and materials,* ***in the absence of proof that he had acted in bad faith*** *(my emphasis). And in* ***Breslin v Hichens*** *1914 AD, p 315,* ***Lord De Villiers, CJ*** *remarked that a 'contractor who knowingly, wilfully and without the consent of the employer, departs from the terms of the contract, cannot be permitted to invoke the benefit of a doctrine which is founded on equity'."* The headnote in that case is taken from this dictum but, as I mentioned earlier, it does not constitute the *ratio decidendi* of the case.

Innes, CJ then goes on to comment:

> *"/ desire to guard myself now - as I did in* ***Hauman v Nortje*** *- from expressing any opinion as to extent, if any, to which* ***the mental attitude of a contractor or a servant would affect his claim to equitable relief*** (my emphasis). *That question I desire to leave entirely open. It is unnecessary and, under the circumstances, undesirable, to decide it."*

Mason, AJA, in the same case namely, **Spencer v Gostelow (supra)** agrees with **Innes, CJ** and after an exhaustive examination of the South African law, concludes:

> *"/ have come moreover to the conclusion that the master is not entitled to refuse payment of the arrear* wages to a *servant whom he had dismissed* ***for whatsoever cause*** (my emphasis) so *far* as he has *benefitted by the work of the dismissed servant."*

11] In the case of **BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk (supra)** at 423A the court, after referring to the cases of **Hauman v Nortje (supra), Breslin v Hichens (supra)** and **Van Rensburg v Straughan** 1914 AD 317, cautions against using such terms as an enrichment claim or a *quantum meruit* claim, instead of a contractual claim for the reduction of the contract price based on the doctrine of equity and fairness. This issue has been settled in subsequent case law. In the case where the contract has been cancelled, the claim for the return of the benefit has been held

to be a distinct contractual remedy, and, where the benefit is incapable of being returned, the contractor is entitled to be compensated for the value of the advantage derived by the owner **(Baker v Probert** 1985 (3) SA 429 (A) at 438J-439B; **Kudu Granite Operations (Pty) Ltd v Caterna Ltd** 2003 (5) SA 193 (SCA) 201D-F and **Van Rensburg v Straughan (supra)** at 331).

12] I now turn to deal with the procedural ground. Adv **Patrick** contended that the defendant should have instituted a counterclaim on the ground of unjust enrichment. In this regard he seeks to rely on the cases of **Spencer v Gostelow (supra)** and **BK Tooling v Scope Precision Engineering (Edms) Bpk (supra)** at 425A. In my view, neither of these cases relied on by counsel, lends support for such contention. This issue has essentially been clarified by **Schreiner JA** in **Middieton v Carr** 1949 (2) 374 (A) at 386 wherein he states that: in a number of cases based on *locatio conductio opens* and *locatio conductio operarum* where the contract remained incomplete after part of it has been carried out,

> *"Our law normally approaches the problem of adjusting the rights of the parties from the angle of unjust enrichment. A considerable number of cases have been decided on these lines and the principles on which the presence or absence of unjust enrichment may be decided, its extent assessed and its correction achieved, have become fairly well established. In such cases, it may not be difficult to conclude that to avoid unjust enrichment,*

a sum of money ought to be awarded to the conductor of the job or the locator of his services even though no express claim of that kind appears on the pleadings."

13] The damages for breach of contract is based on the principle that the plaintiff must be placed in the position that he would have found himself had the contract been performed. **Innes, CJ** in **Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines Ltd** 1915 AD, 1 at p .22 states as follows.

> *"The agreement was not one for the sale of goods or of a commodity procurable elsewhere. So that we must apply the general principles, which govern the investigation of that most difficult question of fact ~ the assessment of compensation for breach of contract. The sufferer by such breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without any undue hardship to the defaulting party. The reinstatement cannot invariably be complete for it would be inequitable and unfair to make the defaulter liable for special consequences which could not have been in his contemplation when he entered into the contract... Such damages are awarded as flow naturally from the breach or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom (see* ***Voet*** *45, 1, 9,* ***Pothier Oblig.*** *Sec. 16,* ***Hadly v Baxendale,*** *9Exch., P. 341;* ***Elmslie v***

***African Merchant Ltd** 1908 EDC, P82, etc)".*

14] On the basis of the principles enunciated above and in the particular circumstances and facts of this case, I find that the claim in respect of unjust enrichment is a contractual remedy arising from breach of contract and to avoid the plaintiff from enjoying the benefits of unjust enrichment, it is for the court to make an award by adjusting the contract price without an express claim to that effect in the pleadings. I must, however, point out that the defendant did institute a counterclaim against the plaintiff for an amount of R78 369.69 but did not pursue such counterclaim. I will return to that aspect later.

15] The overwhelming evidence tendered by the plaintiff is that, save for the remedial work, the work was substantially completed. This is confirmed by the plaintiff and his witnesses. On the basis of the undisputed evidence, I find that the electrical installation was practically complete, save for the remedial work that Jacobs was contracted to do. The remedial work, including VAT, amounted to R74 588.54. The total value of the work that the plaintiff benefitted from and for which he paid the defendant, amounted to R437 169.

16] It is not fair and equitable that the plaintiff benefits from the performance of the defendant and at the same time claims refund of the monies paid to the defendant for such performance. It is based on the equitable doctrine that no one is allowed to enrich himself at the expense of another. I find that, save for the overreaching with which I will deal in a moment, the plaintiff is liable for the payment of the work performed by the defendant in accordance with the terms and conditions of the second contract and the plaintiff is accordingly precluded from claiming the repayment thereof.

OVERREACHING

17] I now turn to deal with the question of overreaching. As I mentioned earlier, the court found on the merits of the separated issues that the plaintiff is not precluded from claiming from the defendant in respect of defective workmanship and/or overreaching. The overreaching has two legs, the one is the question of re-measurement in terms of time for the work done by the defendant and the other is overreaching in respect of the personnel complement that the defendant had to provide in terms of the second contract. In order to avoid confusion, I will henceforth refer to the former as overreaching in respect of time and the latter as overreaching in respect of labour.

18] According to the plaintiff the total amount paid by him to the defendant was R437 169, which included labour and materials. The amounts for overreaching in respect of time and labour, according

to the plaintiff, are included in that amount. The plaintiff alleged that the total amount overreached in respect of time by the defendant amounted to R230 941.91 which included VAT. This amount was determined by the plaintiff's expert witness, Marike Terblanche. The plaintiff, however, did not specify which part of the amount paid constituted overreaching in respect of labour. The question of overreaching in respect of labour is based on the fact that the defendant, contrary to the terms of the second contract, did not deploy an artisan. I will first deal with the question of overreaching in respect of time.

OVERREACHING IN RESPECT OF TIME

19] In arriving at the figure of R230 941.91 for overreaching in respect of time, Terblanche projected the value of the works on completion according to the defendant as at R441 056.08 and in her opinion the reasonable value of the work based on market related rates on completion, would have amounted to R210 114.17. Her projection is based on the state of completion of the wired areas as at 29 September 2006 and the amount invoiced by the defendant to the plaintiff at that stage, which amounted to R244 484.45. According to her evidence, she allowed for rates commensurate with luxury houses.

20] She concedes that she was not comparing apples to apples and pears to pears. According to the

second contract, the defendant was required to provide all materials except light fittings, the GIRA switch plates and associated equipment and to invoice materials supplied by it at cost plus 15% surcharge. She herself testified that the plaintiff was invoiced by the defendant for materials supplied, to the tune of R95 226.80 and which amount was paid by the plaintiff to the defendant. She conceded that the rates agreed upon by the parties in accordance with the second contract were consistent with reasonable market rates.

21] In her evidence, Ms Terblanche contended that the defendant was very unproductive. In the first place, the question that needs to be answered is not whether the defendant was productive or unproductive but whether, on the basis of the terms and conditions of the second contract, the defendant had overreached in respect of time. Ms Terblanche did not do that exercise, but did an exercise based on market-related rates and in such exercise excluded materials which the defendant supplied and which the plaintiff's quantity surveyor, Behr, approved for payment after checking the correctness of the invoices. Behr conceded in the evidence that he had checked the labour and materials and in his opinion everything was above board, but did not know how to explain to the plaintiff that the defendant is extremely expensive. The plaintiff conceded that you get cheap and expensive electricians and people charge different rates.

22] One cannot lose sight of the fact that the plaintiff bargained for the terms and conditions of the second contract by agreeing to a fixed-rate contract in the place of a lump-sum contract. In terms of the lumped-sum contract i.e. the first contract the price was pegged whereas with the fixed rate contract i.e. the second contract, the price was potentially open- ended. The plaintiff made an informed commercial choice and took a calculated business risk after being unhappy with the lump-sum contract. In the second place, it was never the plaintiff's case, in terms of the pleadings, that the defendant was unproductive. His case was that the defendant had invoiced the plaintiff for time in excess of that reasonably required by the defendant's staff to perform the work in terms of the second contract.

23] **Innes, CJ** in **Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines Ltd (supra)** at p.22, alluded to the fact that the agreement in that case was not for the sale of goods or of a commodity procurable elsewhere where market related value could be obtained to assess damages. In this case likewise, the court cannot rely on market related valuation particularly where firstly, the contract price was for services rendered at an agreed fixed rate and materials supplied at cost plus 15% and not for the sale of a marketable commodity, and secondly, there is direct and uncontroverted evidence relating to the contractual relationship between the parties.

24] The direct and uncontroverted evidence is, *inter alia,* the terms and conditions of the second contract; the recalculation of past work performed in terms of the rates specified in the second contract; the approval of the defendant's accounts for payment by Behr, on the basis of the time-sheets for labour, and the invoices for materials presented in support thereof; the various quotations and amendments setting out the extent and scope of the work and lastly, the quotations which were submitted by the defendant and accepted by the plaintiff.

25] The objective of awarding damages is to place the plaintiff in the position he would have been if the contract had been performed. In that respect the individual circumstances of each case have to be considered in deciding on the appropriate measure of damages that gives expression to that object **(Katzenellenbogen Ltd v Mullin** 1977 (4) SA 855 (A) at 879H-880A; **Hoffman and Carvalho v Minister of Agriculture** 1947 (2) SA 855 (T) at 871). Unlike in the case of a marketable commodity, the market-related method adopted by the plaintiff in the circumstances of this case, is, in my view, not the practical and appropriate method of determining the extent of the overreaching in respect of time. To go the market route one is not thereby giving effect to the provisions of the second

contract (see **Kudu Granite Operations (Pty) Ltd v Caterna Ltd (supra)** at 203C).

26] The onus is on the plaintiff to establish that the defendant has overreached in respect of time in terms of the second contract. In my view, other than the question of overreaching in respect of labour to which I shall return in a moment, the plaintiff has failed to prove to what extent the defendant has overreached in respect of time in terms of the provisions of the second contract. The plaintiff's claim, arising from overreaching in respect of time, is accordingly dismissed.

OVERREACHING IN RESPECT OF LABOUR

27] I now turn to deal with the question of overreaching in respect of labour. In terms of the second contract, the defendant was required to supply one artisan and two semi-skilled workers. The evidence was that the defendant had failed to provide a member of staff qualified as an artisan. The documents that the defendant discovered, in terms of a court order, shortly before the commencement of the trial, show that the employees, for whom it charged as artisans, were in fact not artisans but persons holding the qualification of domestic electrical installer, and electrical construction operators (elconop), levels 3,2 and 1. They are electricians below that of an artisan who follows in sequence after the artisan in term of the hierarchical scale of the electrical industry in South Africa.

28] In terms of the Collective Agreement of the National Bargaining Council for the Electrical Industry of South Africa, which was in force up to and including 31 January 2008 (the Collective Agreement), the tariff of an electrician in area I (which includes the Magisterial District of the Cape) is on declining scale, for example, the rate of an artisan is R42.41 per hour whereas that of an elconop 3 is R31.60 per hour. The defendant, in terms of the second contract had to provide an artisan and two semi-skilled workers.

29] The semi-skilled worker is not defined by the parties, or in the Collective Agreement. The elconop 3, although not an artisan, is, in my opinion, a skilled worker because of his special training and qualification. A semi-skilled person, in my view, could be any worker in the industry in accordance with the hierarchy below that of an elconop 2 as no qualifying tests are written by them. In any event, the plaintiff, in his evidence, does not allege that the two semi-skilled workers were not supplied. It appears that the plaintiff had the benefit of one domestic electrical installer, two workers with the qualification of elconop 3 and one with the qualification of elconop 2.

30] According to the evidence not all daily timesheets of the defendant's workforce at the plaintiffs

site were available. The plaintiffs counsel contended that the information as to what work-force was deployed by the defendant on the plaintiffs site, was peculiarly within the knowledge of the defendant. The defendant discovered some of the timesheets but not all. The defendant claimed that, in addition to the timesheets disclosed, some timesheets were in the possession of the plaintiff's main contractor and some in the possession of the plaintiffs quantity surveyor, Behr. The objective fact was that all claims by the defendant for work done and materials supplied were checked by Behr against the timesheets in respect of labour and against suppliers' invoices in respect of materials, in order to determine the correctness thereof, in terms of the rates agreed to in the second contract

31] One would assume that Behr, as a reasonable quantity surveyor, would have kept copies of the time sheets and invoices presented to him for approval and payment as part of the documents of the plaintiff. The plaintiff, therefore, cannot claim that the deployment of the defendant's personnel was peculiarly within the knowledge of the defendant. There was also evidence that an attendance register was kept by the plaintiffs building contractors and such register reflected the dates and times on which the defendant's personnel arrived and left the site. Save and except for the question of overreaching in respect of labour, it appears that all payments made to the defendant by the plaintiff was in accordance with the rates stipulated in the second contract.

32] The onus is on the plaintiff to establish to what extent the defendant had overreached in respect of labour. The plaintiff contended that the extent of the overreaching is included in the amount paid to the defendant in respect of labour without specifying what that amount is. However, the plaintiff has established that the defendant did not supply an artisan as provided for in the second contract. In fairness to the plaintiff, the court should come to his assistance on the material placed before it, by taking a fairly robust approach comparable to the position where a litigant, who experiences difficulty in computing the exact extent of his damages **(Thompson v Scholtz** 1999 (1) SA 232 (SCA) at 249A-D and **Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another** 1990 (3) SA 547 (A) at 573G-J).

33] In arriving at such damages, the court takes into consideration firstly, that the defendant deployed one domestic electrical installer, two persons with the qualification of elconop 3, and one person with the qualification of elconop 2; secondly, Jacobs, who did the remedial work, was also not a qualified electrician; thirdly, the rate charged by Jacobs for such work was R260 per hour, whereas the rate charged by the defendant was R200 per hour for an artisan and two semi-skilled workers; fourthly, that, save for the remedial work, the work executed by the defendant was practically complete and lastly, there were other charges for oversight, consumables, administration and miscellaneous which were not disputed.

34] In light thereof, the court is of the view that a fair and reasonable compensation for overcharging is to adjust the labour charges of the defendant for the work done by a reduction of 10%. The total labour charges invoiced by the defendant as at 5 February 2007, amounted to R341 942. I assume that amount included VAT. I will assume that there is no dispute with regard to the provision of the two semi-skilled workers and the other charges to which I referred, as no such evidence was tendered by the plaintiff. The net amount excluding VAT amounts to R299 949. (I am ignoring the cents). The 10% reduction amounts to R29 994, add the refund of the VAT amounting to R4 199 and the total reduction accordingly amounts to R34 193. Taking a robust approach, the court accordingly awards the plaintiff, the amount of R34 193 in respect of damages for overreaching on the labour charges

THE SECOND CLAIM

35] With regard to the second claim for remedial work, I have found above that the electrical installation was practically complete, save for the remedial work that Jacobs was contracted to do. It is common cause that, although Jacobs was not a qualified electrician, he had considerable years of experience as an electrical tradesman. He charged an hourly rate of R260 per hour, which Terblanche said was reasonable for the work that Jacobs performed. The defendant did not tender any evidence to the contrary, other than eliciting evidence, under cross-examination, that Jacobs was

not a qualified electrician.

36] I find that the remedial work performed by Jacobs was necessary and the total charge therefore was fair and reasonable. In the premises, the plaintiff is entitled to the payment of R74 588.54 in respect of the remedial work executed by Jacobs.

THE THIRD CLAIM

37] In respect of the third claim of R1 140, the plaintiff testified that he had to pay an additional amount to the suppliers of GIRA components for locating defects in the system after its defective installation by the defendant. The defendant has not tendered any evidence to contradict this allegation and in the circumstances the court allows this amount as part of the remedial work and the defendant is accordingly liable for the payment of that amount.

THE FOURTH CLAIM

38] I now turn to the fourth claim. The plaintiff claimed an amount of R25 104.93 for commissioning and co-ordinating intercom components by Garth Holloway (Garth). On 19 May 2006, the defendant was mandated by the plaintiff to obtain three independent quotations for the replacing of all existing

wiring, removing existing intercom equipment for re-use and the interlinking of intercoms. The contract was awarded to Garth Holloway for the total amount claimed. Garth Holloway then became a sub-contractor to the main contractor and was paid by the main contractor.

39] According to the evidence of the plaintiff, the only work that the defendant was required to do in respect of this matter was to obtain three quotations for the commissioning and co-ordinating the intercom system and for which he charged a flat coordinating fee. The plaintiff testified that part of the co-ordinating fee for the intercom and alarm was refunded to the plaintiff when Behr took over certain responsibility for such coordination. The defendant was not directly involved with the acquisition and installation of the system.

40] There is no legal nexus between the defendant and Garth. It appears that the defendant merely acted as an agent of the plaintiff. The contract was either between the main contractor and Garth, or between the plaintiff and Garth. Any claim for bad workmanship therefore lies with the main contractor against Garth or with the plaintiff against Garth. There is no legal basis why the defendant should be mulcted for such costs, nor, in my view, could it be deduced from the evidence that it was

reasonably within the contemplation of the parties, whether tacitly or impliedly, when they concluded the contract, that the defendant would become liable for the payment of such claim **(Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines Ltd (supra)** at p.22). The claim is accordingly dismissed.

THE FIFTH CLAIM

41] With regard to the fifth claim, plaintiff claimed the amount of R75 214.92 in respect of the acquisition and installation of a wireless burglar alarm system. On 19 May 2006, as in the case of the intercom system, the defendant, acting as an agent, was instructed to obtain three quotations for the acquisition and installation of "a *new state of the art, high tech, but within reason, alarm system".* He was asked to revise his original quote to *"include pre-wiring for* a *new alarm system unless ADT advise* a *wireless system".* It is common cause that a wireless burglar alarm was installed which made pre-wring unnecessary.

42] The contract was initially awarded to LFM Security, but they did not complete the installation and Brian Pope of Pope Alarms was called in to complete the work. Mr Pope advised that the existing system should be abandoned and a new wireless alarm system should be installed. The claim against the defendant is for the costs of installing the wireless alarm system by Pope Alarms. There was no agreement that the defendant would acquire and install the wireless burglar alarm system.

The plaintiff continued dealing with LFM Security even after the contract with the defendant was terminated.

43] The contract with LFM Security was either with the main contractor or the plaintiff. There is no legal nexus between the defendant and LFM Security. Any claim for bad workmanship accordingly lies against LFM Security with the main contractor or with the plaintiff. There is no legal basis why the defendant should be mulcted for such costs nor was it, in my view, reasonably in the contemplation of the parties, whether tacitly or impliedly, when they contracted, that the defendant would become liable for the payment of such costs **(Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines Ltd (supra)** at p.22). The claim is accordingly dismissed

THE SIXTH CLAIM

44] The sixth claim is for R3 135 for the digging up of the main supply cable and reburying it to a safe level. The plaintiff testified that the gardener was busy in the garden when he damaged the said cable because it was not buried at a safe level below the ground by the defendant. He acquired the services of Gerard's Electrical to dig up and rebury the cable at a safe level for which the plaintiff paid the amount of R3 135. The defendant's workmen were negligent in not burying the cable at a safe level. I am satisfied that the plaintiff has suffered damages in respect thereof and the defendant is liable for the payment of the amount of R3 135 for remedying the defective workmanship.

THE SEVENTH CLAIM

45] The seventh claim is for R3 297.67 for repainting the burnt wall occasioned by a fire that ignited as a result of the negligent installation of the incorrect light bulbs for two light fittings. It included the costs of material supplied by MIDAS Earthcote and of labour for work done by Autumn Skies. The work performed by the defendant constituted defective workmanship which resulted in the plaintiff suffering damages for which the defendant is liable. The defendant is accordingly liable to repay the plaintiff the amount of R3 297.67.

THE EIGHT CLAIM

46] The eighth claim is for R5 734.46 in respect of damaged components which could not be used or returned to the supplier. There is no evidence who and how these parts were damaged. The defendant contracted out for being held responsible for *"theft, loss, maintenance irregularities or damage".* This was the position at the time of the first contract as well as the second contract. In the circumstance the defendant cannot be held responsible for the payment of the damaged parts.

FINDINGS IN RESPECT OF THE VARIOUS CLAIMS

47] In the premises, the plaintiff partially succeeds and partially fails with claim one; he fails with claims four, five and eight and succeeds with claims two, three, six and seven.

THE COUNTERCLAIM

48] The defendant counterclaimed in an amount of R78 369.69 for the balance of the agreed costs of remuneration. The plaintiff in its Plea to the Defendant's Counterclaim denied that he was indebted to the defendant in the said amount. The defendant failed to tender any evidence in support of the Counterclaim. In the circumstances, the court grants the plaintiff absolution from the instance in respect of the Counterclaim with costs.

THE INTEREST

49] Before dealing with the question of costs, it is perhaps appropriate at this stage, to deal with the issue of interest. The plaintiff claimed interest on the amounts claimed calculated as from 12 February 2007, being the date of cancellation of the contract, to the date of payment at the prescribed rate. The question of interest is regulated by section 2A of the Prescribed Rate of Interest Act, 55 Of 1975. The particular section provides that every unliquidated amount determined by a court shall bear interest at the prescribed rate and such interest shall run from the date on which the amount is claimed by service of demand or summons, whichever date is earlier. However, sub-section 2A (5) grants the court a discretion to make such an order as appears just in respect of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which it shall run.

50] The deposit paid by the plaintiff to the defendant did not attract interest and there was no agreement between the parties that it would do so. The same principle in respect of interest that applies to the principle claim, will appiy to the claim for the refund of the deposit. Taking all the circumstances of this case into consideration, I exercise my discretion in terms of section 2A (5) and order that the interest shall run from the date of judgment at the prescribed rate of interest.

THE COSTS

51] I now turn to the question of costs. The plaintiff succeeded substantially with the first leg of the enquiry in respect of the merits relating to the separated issues. In certain instances in respect of that enquiry, the court awarded costs against the defendant or against the plaintiff, and in certain other instances, the question of costs was held over for later determination or to be determined at the trial. In those instances in respect of the first leg of the enquiry, where no cost orders were made or an order was made that costs stand over for later determination or for determination at the trial, the costs are awarded to the plaintiff.

52] With regard to the second leg of the enquiry, the plaintiff's claim was substantially reduced namely, from R635 427.22 to R116 354.21, which does not take into consideration the R57 000 deposit, which the plaintiff paid and which must be refunded to the plaintiff. The plaintiffs claim tor the refund of the total amount paid to the defendant in respect of the contract price was dismissed on legal grounds. The plaintiff's claim for overreaching in respect of labour succeeded. The plaintiffs claim in respect overreaching in respect of time was refused The plaintiffs claims in respect of the wireless burglar system and the intercom system constituted, in the view of the court, overreaching and were rejected. Taking into consideration all the circumstances, the court is of the view that it is only fair and equitable that, in respect of the second leg of the enquiry, each party pays its own costs.

THE ORDER

53] In the premises the court grants the following order:

1. The defendant shall pay the plaintiff the sum of R116 354.21 (one hundred and sixteen thousand three hundred and fifty four rand and twenty one cents);

2. The defendant shall refund to the plaintiff the sum of R57 OOO (fifty seven thousand rand);

3. The defendant shall pay the plaintiff interest on the said sums from the date of judgment to date of payment at the prescribed rate;

4. The defendant shall pay the plaintiffs costs in respect of the first leg of the enquiry, other than those costs which the court have already awarded;

5. In respect of the second leg of the enquiry i.e. the quantum, either party shall bear its own costs.

Absolution of the instance is granted to the plaintiff in respect of the defendant's counterclaim with costs.

E.MOOSA