9/1958

G.P.-S.13-1917-1955-6-1,000. U.D.J. 219.

9/1958

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE [redacted] Division.)
([redacted] Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

MIKE ANTONIE ..... *Appellant,*

versus

JOHAN DAVID BOTHA ..... *Respondent.*

Appellant's Attorney / *Prokureur vir Appellant* McIntyre & Rd. Post (& C.E.L. Beck)

Respondent's Attorney / *Prokureur vir Respondent* Loonius HB (& L. vd. Merwe)

Appellant's Advocate / *Advokaat vir Appellant* W.G. Trollip QC

Respondent's Advocate / *Advokaat vir Respondent* S.L. Miller QC.

Set down for hearing on
Op die rol geplaas vir verhoor op Monday 8th Sept, 1958

(OPD) 3.5.7.9.10. (B) 9.45–12.55; 2.15–6.10

Tuesday, 7th September 1958.

2.15–6. C.A.V. Adjudged.

for REGISTRAR
9/9/58

– Appeal dismissed, with costs.

McIntyre, Rogers v. Block, Theron (Cp.) & Price (Cp.) JJA.)

Rogs. 26/9/58.

Rekord

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:

MIKE ANTONIE .....Appellant.

and

JOHAN DAVID BOTHA .....Respondent.

Coram: Steyn, Beyers, Van Blerk, JJ.A., Hall et Price, A.JJ.A.

Heard: September 8th, 1958. Delivered: September 26th, 1958

J U D G M E N T.

HALL, A.J.A.:-

The Appellant in this case decided to build for himself a dwelling house at Kroonstad at a cost of approximately £20,000. Prior to November, 1955, he had engaged an architect named van Niftrik and a building contractor named Blom, the former of whom lived in Johannesburg. The appellant had entered into a contract with Blom for the building of the house, which covered the whole of the building operations, and this contract was in the form of the contract to which the official bodies which represent architects, quantity surveyors and building trade employers had given their approval. That contract provided

that...../2

that certain specialised work should be carried out by tradesmen other than the main contractor, Blom, and one of the specialised operations was the construction of the electrical installations required in the building.

The respondent is an electrical contractor residing at Kroonstad and, as he was anxious to get the contract for these installations, he approached the appellant and discussed the matter with him. In due course he was asked to tender for the work and he received from Mr. van Niftrik particulars of what was required to be done. He tendered to do the work for £715 and he handed that tender to the appellant on the 1st November, 1954. On the 8th November a discussion took place between the appellant and the respondent in the appellant's office and it is upon what happened on that occasion that the decision of this case largely turns. Subsequently the respondent received a letter from the architect, dated the 29th November, 1954, advising him that his tender had been accepted. The respondent did certain extra work for which he claimed £89-3-2. He received payment from Blom of the sum of £332 and there remained a balance of £472-3-2 for which he did not receive payment.

In...../3

In order to finance his building operations, Blom ceded his rights under his contract with the appellant in September 1955 to the Kroonstad Board of Executors and the Board advanced him money from time to time. He got into financial difficulties and his estate was sequestrated early in June, 1956. Prior to this the respondent had completed his contract and he states that he had, on more than one occasion, requested the appellant to pay him the balance which was due to him.

When he failed to get payment he sued the plaintiff in the Orange Free State Provincial Division for £472-3-2. He averred in his declaration that a contract was concluded between the appellant and himself by virtue of his written tender and the written acceptance of that tender by van Niftrik, acting as the appellant's agent. He likewise averred that on the 15th May, 1956, the appellant verbally undertook to pay him the full amount of the balance due to him, and based an alternative claim for payment upon that averment.

In his plea the appellant denied that van Niftrik accepted the offer on appellant's behalf, or alternatively,

that...../4

that such acceptance was within the scope of his authority as appellant's agent and, consequently, he denied that any agreement was entered into between himself and the respondent. He denied, too, that the payment of £332 was made by him or in respect of a contract between himself and the respondent, and he denied that he had promised to pay the respondent any money.

The learned Judge in the Provincial Division (DE VILLIERS, J) gave judgment for the respondent for the sum of £472-3-2. The issue before the Court was one of fact and the learned Judge based his judgment principally upon a finding that he accepted the evidence of the respondent and rejected that of the appellant and of Blom, wherever their evidence conflicted with that of the respondent. It is against this judgment that the appeal is now brought.

The appellant's plea is so worded that it does not set out clearly the essential basis of his defence. The contract entered into between the appellant and Blom, which can for the sake of convenience be referred to as the main contract, contained a clause, i.e. clause 15(a) of which

the following...../5

the following is the relevant portion:-

"All specialists and others executing any work or supplying or fixing any goods for which provisional sums are included in the Bills of Quantities who may be nominated or selected by the architect are hereby declared to be sub-contractors employed by the contractor and are herein referred to as "nominated Sub-Contractors". "

The defence that van Niftrik did not act as the appellant's agent, or within the scope of his authority as appellant's agent, in accepting the respondent's tender rests upon the contention that by reason of the latter having been advised by van Niftrik of the acceptance of his tender he was nominated by the architect and became a sub-contractor employed by Blom.

Support for this contention was sought in a decision by this Court in the case of Concrete Construction (Pty.)Ltd. v. Keidan & Co.(Pty.)Ltd. (1955 (4) S.A. 315), where VAN DEN HEEVER, J.A., stated that the terms of clause 15 of a similar contract "virtually permit the architect, who is the agent of the building owner, to conclude a contract between the contractor and the sub-contractor". In the

circumstances...../6

circumstances of that case the learned Judge held that the effect of this clause was to authorise the architect to bring about privity of contract between the contractor and the sub-contractor. He, however, referred to the judgment of BANKES, L.J., in Hampton v. Glamorgan County Council, (84 L.J. K.B. 1506) in which the following passage appears:-

> " It is quite true.....that when the contract includes prime cost items it may be optional upon the building owner to undertake to contract with respect to those items himself, and if he does do that, he withdraws them from the contract so far as the price is concerned and so far as the obligation is concerned. In every case it seems to me that the question which has to be decided is: has the building owner exercised that option, or has he refrained from exercising it? "

VAN DEN HEEVER, J.A., adopted this statement of the position and said that in each case the question is: who assumed obligations under the sub-contract?

Mr.Trollip, who appeared for the appellant, submitted that, when the respondent tendered for the work, he had had considerable previous experience in matters in which similar contracts had governed the relationship between the parties and so he must have known the terms of the contract between the appellant and Blom and that he accepted the position that he was a sub-contractor to Blom. The respondent stated that, while he was aware that a contract of some kind had been entered into between the appellant and Blom, he never saw

the contract...../7

the contract, nor was he ever told of its terms and, in my opinion, no good reason has been advanced for rejecting his evidence. In the case of Concrete Construction (Pty.) Ltd. v. Keidan & Co. Ltd. the sub-contractor, which was a company which specialised in the supply of re-inforcing steel for building purposes, sought to recover from the building contractor the amount due to it upon a sub-contract entered into under the terms of clause 15 of the approved form of standard contract. The building owner regarded the contractor under this contract as responsible for the building and wanted no direct business dealings with sub-contractors. The Court held that the sub-contractor, with its wide experience, must have been aware of the provisions of the standard contract and intended that it should govern the position between the building contractor and themselves. These circumstances are quite different from those upon which the judgment in Concrete Construction (Pty.) Ltd. v.Keidan & Co.Ltd. was based, and the decision in the latter case is not applicable in this case.

The respondent's evidence regarding the discussion which took place between the appellant and himself in the former's office on the 8th November, 1954, was to the effect that the appellant told him that his tender was not the lowest tender and asked him to come down in his price. He refused to do this, but he told the appellant that he would meet him by obtaining his electrical fittings, which formed no part of the installation contract, at wholesale prices. He offered him a reduction of 33⅓% which was virtually the cost price of the fittings to him, respondent. The appellant then wrote out an undertaking to this effect and got the respondent to sign it. This document formed an exhibit in the case. The appellant then promised to give him the contract and stated that his architect would advise him that his tender had been accepted. He told

him...../8

him that he would have to start work shortly because piping had to be laid in the concrete floor of the building. The respondent received a letter from van Niftrik, dated the 29th November, saying that his tender had been accepted, but he commenced laying the piping in the floor before he received it. The respondent said that this was the only agreement into which he entered in connection with the building of the appellant's house. He said, too, that he asked the appellant for payment on several occasions early in 1956.

The appellant said that he did not want the respondent as a contractor at all. The respondent came to his office and asked him what the chances of the acceptance of his tender were and he told him that he wanted one, Dalleu. The respondent had offered him a 33⅓% reduction on the fittings, but that meant nothing to him because he could get that discount himself. Blom subsequently persuaded him to accept the respondent. He never told the respondent that his tender had been accepted nor did he instruct him to proceed with the work. He never discussed the contract with the respondent, nor did the respondent at any time

ask...../9

ask him for payment of moneys due under the contract.

These two versions of what took place are wholly contradictory and the learned Judge in the Court a quo, for reasons which he stated, accepted the evidence of the respondent and rejected that of the appellant.

This finding is challenged by the appellant's counsel who contends that it is contrary to the balance of probabilities as disclosed by a number of factors which appear from the evidence. Mr.Trollip submitted that the ~~only possible~~ most probable interpretation which could be put upon the ~~respondent's own account~~ evidence relating to of the conversation on the 8th November was that the appellant agreed to support the acceptance of his tender because of the promised discounts. There appears to me to be no substance in the submission for it is not consistent with the respondent's evidence and the appellant himself denies that he agreed to support the acceptance of the respondent's tender at all.

The next point taken by counsel is that it was improbable that the appellant accepted the tender on 8th November, 1954, because (a) the declaration did not allege a contract based upon such acceptance and (b) if appellant had accepted it there

was no...../10

was no need to refer it to the architect. The respondent stated that the appellant promised him the work and said that his architect would advise him that the tender had been accepted. That being so, when the architect had advised the respondent to this effect, the promise made by the appellant was duly implemented and the agreement received the final form of a written contract. It appears to me, therefore, that the form in which the declaration was framed was fully justified. Moreover, according to the respondent's evidence, the appellant himself chose the manner in which his acceptance of the respondent's tender was to be recorded and he may well have thought that the architect, whom he was employing, was the proper person to put on record the acceptance of any tender the request for which had originally emanated from him.

Another point made by counsel was that the appellant's evidence was to the effect that the acceptance of the respondent's tender was decided upon at a meeting between himself, Blom and van Niftrik which took place after the 8th November, 1954. The reason for this submission was that Blom gave evidence to the same effect. ~~It seems to me sufficient to say that, whatever appellant may have~~ This evidence is inconsistent with the respondent's statement ~~chosen~~ to ...../11

matters had emerged from which it could be fairly inferred that all the persons concerned, including the respondent, regarded the latter's contract as a sub-contract between him and Blom.

The first of these matters arose out of certain bills which were given by Blom to the respondent which the latter discounted with the bank for the purpose of enabling him to finance his undertakings. It appeared from the evidence that the respondent and Blom had been associated in the construction of buildings other than the appellant's dwelling house and that Blom had, from time to time, given the respondent bills amounting in all to £700. After the respondent had done a considerable amount of work on the appellant's building, he and Blom arrived at a settlement of the transactions in respect of which these bills had been issued and agreed that the respondent owed Blom £332. Whether this amount was due entirely in respect of advances made in connection with the appellant's contract, or whether it was due in part for that and in part for other transactions between them, is not clear from the evidence. It is, however, clear that they agreed that Blom should be

entitled...../13

entitled to receive the first amount which became payable to the respondent out of his work on the appellant's house in payment of the balance of £332 owing to him. An amount of £300 was included in a certificate issued by the architect to Blom, which stated that the respondent was entitled to payment of that sum, and Blom collected it from the appellant.

The matter of these bills was fully canvassed in the Court a quo, but the learned Judge did not deal with it in his judgment. It was contended that his failure to do so really amounted to a misdirection and that, had he considered it, he might have arrived at a different decision. In fairness to the learned Judge, I would just say that he intimated that a number of points, other than those with which he had dealt, had been submitted to him and that he was, nevertheless, convinced that the probabilities in favour of the respondent's version far outweighed those in favour of the appellant's.

From the evidence of Blom and the respondent it appeared that the practice of Blom's furnishing the latter with promissory notes for discounting had existed for a considerable time before they became associated in the

appellants...../14

appellant's contract and that the respondent had at times advanced moneys to Blom to tide him over temporary financial difficulties. Under these circumstances Blom may well have reckoned that he could always recoup himself for the accomodation with which he had provided the respondent out of the moneys which accrued to the latter by reason of his share of the work in which they were both engaged. The respondent, again, was in all probability content that the amount due to him should be included in Blom's certificate in terms of the settlement between them. I do not think that either the fact that money which had been advanced during the building operations on the appellant's house was included in the amount of £332, or the fact that this sum was included in Blom's certificate can, under the circumstances, be ~~accepted as proof~~ of much weight as indications that the respondent was a sub-contractor appointed by the architect in terms of clause 15(a) of the main contract.

At that stage he had no reason to be concerned with any question as to who the actual contracting parties were.

The next matter raised by the appellant's counsel arises out of a letter written by the respondent to van Niftrik on the 23rd April, 1956. After asking for a

variation...../15

variation order in respect of the extra work he had performed, the respondent concluded his letter as follows:-

> "Ek sal dit baie waardeer indien u my ook 'n sertifikaat vir my werk sal aanstuur, (werk kompleet) aangesien ek nog nie veel betaling gehad het nie en ek moontlik my geld van die eienaar sal moet eis."

Counsel contended that this letter shows that the respondent knew that he was a sub-contractor and that, as Blom had not paid him, he decided to try to get the money from the appellant, which it would be easier to do if he procured a certificate for direct payment from the architect.

When he was cross-examined the respondent stated that what he intended to convey to the architect was that, as he had not received payment, he ~~would~~ might have to take legal steps against the building owner. This does not appear to be a satisfactory explanation. A possible reason for this reply may be that this letter was not disclosed by the appellant and that his counsel was only advised that it was to be employed in cross-examination shortly before it was so used. Consequently, the respondent was confronted without warning with a letter which he had written some sixteen months previously and was required to explain what had actuated him in making the statement it contained.

The...../16

The element of surprise, which had its origin in the appellant's failure to disclose a letter which was in his or in his agent van Niftrik's possession, may well have led to the giving of an unsatisfactory explanation. The respondent stated that he had, on several occasions, prior to his writing that letter asked the appellant for payment and that the appellant had told him that he was not prepared to make any payment without an architect's certificate. At that stage he was not concerned about the manner in which his money was paid to him but when none was forthcoming through Blom, he may well have realised that, as his contract was with the appellant, he was entitled to look to him for payment. Having been told by the appellant that he would only pay him on an architect's certificate, he then asked van Niftrik to give him the certificate which the appellant required.

In my opinion it seems unlikely that, if, as appellant's counsel contends, the respondent was well aware that he was a sub-contractor of Blom's and, if he had had nothing whatever to do with the appellant, that he should, without any basis whatsoever for his assertion, demand...../17

demand payment from the appellant and thus invite from van Niftrik and, indeed from the appellant himself, an immediate refutation of the claim which he was brazenly putting forward.

Appellant's counsel argued that the mere fact that the respondent sought a certificate from van Niftrik was a clear indication that he regarded himself as Blom's sub-contractor. If his evidence that the appellant had consistently refused to pay anything without a certificate is accepted, as it was by the learned Judge, this argument becomes untenable. On the 15th May, 1956, the respondent again asked the appellant for payment and he states that the appellant told him, that if he went to van Niftrik and got a certificate from him, he would pay him. He went to Johannesburg immediately, obtained a certificate from van Niftrik and returned with it to Kroonstad. The certificate stated that an amount of £350 was due to the respondent by Blom, and, when the respondent presented it to the appellant, the latter said that they had to go together to one Muller, the secretary of the Kroonstad Board of Executors. There the respondent discovered that Blom had ceded all his rights

under...../17

under his contract with the appellant to the Board as security for money advanced, and Muller pointed out to him that the certificate stated that Blom owed him the money and the appellant refused to pay him. Respondent states that, when they left Muller's office, the appellant told him that he would have to get a certificate in his own name made payable by him, the appellant, before he would pay him out.

Counsel for the appellant argued that, as the ~~respondent~~ respondent's signature appeared on the certificate, he must have noticed that it stated that Blom owed him the money and that, by accepting it, he virtually acknowledged that the amount was due to him as a sub-contractor of Blom's. The respondent said that all he looked at was the amount of £350 and that he read no further, but put the certificate in his pocket. It was only in Muller's office that he realised its true import. This appears to me to be an ~~acceptable~~ possible explanation of the ~~appellant's~~ respondent's conduct.

The following day the respondent obtained from Blom a letter stating that he had paid him £332 and that any further payments should be made on an architect's certificate.

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The respondent admitted that, after Muller had refused him payment, he asked Blom to help him by giving him a letter stating that the appellant had to pay him direct and that then Blom gave him this letter. Appellant's counsel endeavoured to deduce from the respondent's action that he thereby acknowledged that it was Blom who really owed him the money, but I fail to see how such an inference can fairly be drawn. It appears to me that the respondent in the position in which he found himself, may well have caught at any straw which he thought might save him and that in his dilemma he turned to Blom for help.

In his declaration, the respondent put forward an alternative ground upon which he based his claim i.e. that on the 15th May, 1956, the appellant verbally undertook to pay the full amount due to him for his work. Mr.Trollip advanced the argument that the respondent's own evidence did not establish a cause of action, separate from and independent of the sub-contract. All that could be inferred from his evidence was an affirmation by the appellant that he would honour his obligation to pay the respondent. I agree with this submission. It seems to me, however, that

this...../20

this is a factor which has a considerable bearing upon the issue in the case for, if the appellant did give the respondent an undertaking of the kind alleged, the fact lends considerable support to the respondent's claim that he contracted directly with the appellant.

This matter was subsequently raised by the respondent in the course of a conversation which he had with the appellant over the telephone of which a tape recording was made and put in in evidence. During the course of that conversation and in reply to the respondent, the appellant admitted that he had told the respondent to go and get a certificate from van Niftik and, when asked by respondent whether he did not promise to pay him when he had got it, his reply was that it was Blom who had stopped him from paying the respondent. The whole trend of the appellant's replies to the questions put to him by the respondent over the telephone does not create the impression that he was repudiating the existence of an agreement which the respondent claimed to have made with him. He appears to be continually making excuses for his failure to carry out a promise which he had made. Furthermore, in his evidence on cross-examination, the

appellant...../21

appellant admitted that he would have paid the respondent had he brought a correct certificate from van Niftrik, a reply which he later wished the Court to believe he had made by mistake.

There is one other matter which, in my opinion, throws considerable light upon the contractual relationship between the parties. After the appellant had, upon Muller's advice refused to pay the respondent on the latter's return from Johannesburg, the respondent consulted an attorney named de Hart and, at the respondent's request, de Hart telephoned van Niftrik and asked him to alter the certificate which he had issued to the respondent by making it read that the money was payable by the appellant to the respondent. De Hart stated that Van Niftrik said that if, after due consideration, he decided that he could comply with the request, he would issue a new certificate and send it to de Hart. This conversation took place between the 24th and 26th May, 1956, and as a result of it, van Niftrik wrote the following letter to the appellant on the 28th May:-

"Mike Antonie, Esq.,
P.O.Box 166,
KROONSTAD.

Dear Sir,

Re: New Residence on Stand 2109 Wilgenhof Kroonstad.

Please find enclosed a certificate in favour of Botha the Electrician amounting to £350 to be paid by you.

This certificate No.8 dated 28-5-'56 cancels certificate No.7 dated 17-5-'56.

In addition I enclose a certificate No.9, Instalment No.10 amounting to £644.4.5. worked out as follows:

The outstanding balance as made up by the Quantity Surveyor in his final account and signed by the Contractor,is	£1794. 4. 5.
Less 5% Retention	800. 0. 0.
Now due	994. 4. 5.
Less Certificate No.8 as enclosed	350. 0. 0.
	644. 4. 5.

This certificate is to be paid by you to L.C.Blom on account of Kroonstad Board of Executors.

A certificate for the retention money of £800.0.0. will be forwarded to you in three months from to-day.

Yours faithfully,

(sgd.) J.J. Van Niftrik. "

The appellant admitted the receipt of the letter, but denied that he had received the certificate. This was, however, obtained from van Niftrik in Court. He did not give evidence and no explanation was offered as to how it came to be in his possession. The certificate read as follows:-

No.8...../23

" No.8
28th May 1956.

~~THIS~~
THIS IS TO CERTIFY THAT THE SUM OF THREE HUNDRED AND FIFTY POUNDS is due to J.D.BOTHA, ELECTRICAL CONTRACTOR of KROONSTAD by MIKE ANTONIE ESQ., of KROONSTAD in terms of Contract dated 1st November 1954 in respect of SUPPLY & INSTALLATION OF ELECTRICAL INSTALLATION RESIDENCE – MR. ANTONIE – KROONSTAD.

Previous Instalments:	£332.0.0.
Present Instalment:	£350.0.0.
Total to Date	£682.0.0.

£350 (sgd)J.J. Van Niftrik.
Architect. "

CONTRACTOR'S RECEIPT.

Received from.....

~~the~~ the sum of.....

In payment of the above Certificate.

Signature.....

.....19....."

When the appellant denied that he had received the certificate, ~~he was~~ he was asked about the first two sentences of van Niftrik's letter. His answer was "These two paragraphs have absolutely slipped my memory. I cannot talk about them.....At that time it escaped my notice."

This reply is in itself extraordinary but what is still more extraordinary is that, if the appellant had never, as he states, contracted with the respondent and if, as he set out in his plea, he at no time agreed or undertook to

pay...../24

pay the respondent any money, he did not reply to van Niftrik at once and point out, in no undecided language, how utterly wrong his action in issuing a certificate in favour of the respondent was. This would surely have been his immediate reaction more especially since he is a business man. If the certificate was not enclosed he would ~~surely~~ very probably have got into contact with van Niftrik at once and told him not to send it to the respondent. ~~There~~ It is to my mind, however, ~~little doubt~~ quite likely that the certificate accompanied van Niftrik's letter and, even if it did not, the first two sentences of the letter set out the position with obvious clarity. The true position is that the appellant, on his own showing, did not repudiate van Niftrik's action in issuing the certificate and his excuse that this escaped his notice or slipped his memory, as he so naïvely puts it, is utterly unacceptable.

I am of opinion that the appellant has not succeeded in showing that the learned Judge in the Court a quo was incorrect in arriving at the conclusion he did upon the evidence adduced before him and that, for this reason, the appeal should be dismissed with costs.

C.J. Hall

25th.1958.

STEYN, J.A.,

BEYERS, J.A.,

VAN BLERK, J.A., concur.

PRICE, A.J.A.,