G.P.-S.59968—1970-71—2 500

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J 219

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

(Provincial Division)
(~~A.D. ELATE~~ Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

TOFAZ KITCHENS (PTY) LTD. *Appellant,*

versus

NABOOM SPA (EDMS.) BPK. *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Lovius, Block & S. — *Respondent's Attorney* / *Prokureur vir Respondent* Greenberg & Co

Appellant's Advocate / *Advokaat vir Appelland* R. Ybrich — *Respondent's Advocate* / *Advokaat vir Respondent* B.R. Southwood

Set down for hearing on / *Op die rol geplaas vir verhoor op* ... 1976

3 7 10

Coram: Wessels, Muller, Kotzé AJA, Viljoen AJA et Miller AJA

(T.P.D.) Ybrich – 9.45 – 11.00, 11.15 – 11.50.
Southwood – Nie aangehoor.

C.A.V.

The Court dismisses the said appeal, with costs

(Judgment per Miller AJA)

Registrar

21/6/77

Bills taxed—Kosterekenings getakseer

Date Datum	Amount Bedrag	Initials Paraaf

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between

TOPAZ KITCHENS (PROPRIETARY) LIMITED.....APPELLANT

and

NABOOM SPA (EIENDOMS) BEPERK .....RESPONDENT

Coram: Wessels, Muller, JJ.A., et Kotzé, Viljoen, Miller, A.JJ.A.

Heard: 17 May 1976.

Delivered: 2 June 1976

J U D G M E N T

MULLER, J.A.

The appellant company, hereinafter referred to as the plaintiff, is engaged in the business of manufacturing and selling modern kitchen units (referred to

in...../2

in the evidence as "kombuiseenhede" or "kombuiskaste"). Plaintiff's factory and main place of business is in Johannesburg.

The respondent company, hereinafter referred to as the defendant, erects what were referred to at the trial as chalets at a holiday resort known as Naboom Spa, near Naboomspruit. The chalets are sold to individual purchasers.

In June 1974 the plaintiff instituted an action against the defendant for payment of a sum of R1 862-61, being the purchase price of 4 kitchen units sold and delivered to defendant, together with interest on the said sum.

In its declaration plaintiff alleged that an agreement of sale in respect of the said units was entered into during October 1973 between one, Johan Koekemoer, representing the plaintiff and one, du Buisson, representing the defendant. This agreement was partly in writing and partly

verbal...../3

verbal.

The written terms of the agreement are contained in three documents which describe the types of units sold, the colours thereof and the prices for the various components of each unit. These documents also provide that delivery was to be effected at Naboomspruit and one of the conditions of sale was "strictly nett cash". The declaration then continues with the following averments:

6.

"(a) The words 'Terms strictly cash' on Annexure B aforesaid do not correctly reflect the common intention of the parties as a result of a mistake of the signatories to the written terms aforesaid.

(b) The said words, in order correctly to reflect such intention should read: 'Payment is to occur within 30 days of delivery.'

(c) In the premises Plaintiff is entitled to rectification of the said words.

7.

The relevant verbal term of the said agreement was that delivery of the said goods was to occur during the first week of December 1973.

8. A few...../4

8.

A few days prior to delivery of the said goods the parties represented as aforesaid agreed verbally in Pretoria that delivery was to occur by leaving the said goods at the residence of the said KOEKEMOER in Pretoria."

And the declaration concludes with an allegation that the goods in question were delivered on 5 December 1973 at the residence of Koekemoer in Pretoria.

The defendant, in its plea, admitted all the allegations contained in the declaration, but averred that it was a further term of the said agreement that plaintiff would install the said kitchen units and that the cost of installation would form part of the purchase price. The defendant went on to say that the plaintiff refused to install the said units, thereby repudiating its obligation so to do, as a result whereof defendant cancelled the contract and tendered delivery of the units to the plaintiff.

There was no replication to the defendant's plea.

At the commencement of the trial counsel informed the Court that, by arrangement between them, defendant

would...../5

would adduce evidence first. It is also apposite to state here that, during the course of the trial, counsel for the plaintiff informed the Court as follows:

> "U Edele, ek en my geleerde vriend het ooreengekom dat die geskilpunt net beperk is tot die vraag of die term wat deur die verweerder in sy pleit beweer word of dit 'n deel was van die ooreenkoms of nie. Dit sou outomaties volg dat as dit 'n deel was dat die eiser nie geregtig is op vonnis vir die bedrag nie, want dan het hy nie sy prestasie nagekom nie. Die teendeel is dan natuurlik ook waar dat as bewys word.....(Hof tussenbei)....."

In view of the narrow compass of the factual dispute between the parties, as agreed upon at the trial, and, because of the form which counsel's argument, on behalf of the defendant took on appeal before us, I do not consider it necessary to enter into a detailed discussion of the evidence adduced at the trial and will, therefore, confine myself to a brief summary of the evidence of the two witnesses who testified, the one for the defendant, and the other for the plaintiff.

Du Buisson...../6

Du Buisson, the witness who was called first pursuant to the arrangement aforementioned, informed the Court that he was a director of the defendant company. He said that the defendant company had planned to erect some 1 600 chalets at the holiday resort Naboom Spa. ~~That~~ He negotiated with Koekemoer of the plaintiff company for the manufacture and supply of 4 complete kitchen units. At the time he was under the impression that Koekemoer was a partner or director in the plaintiff's organisation. These 4 units were to be installed in the first chalets to be erected which would serve as show chalets for exhibition to prospective puchasers. He informed Koekemoer that in due course further orders would be placed for kitchen units for some 1 600 chalets which were to be built over a period of time.

According to du Buisson, he was informed at the time that plaintiff did not undertake the installation of kitchen units beyond a certain radius from the factory

but...../7

but that he (du Buisson) insisted on the installation by the plaintiff of the 4 units ordered. Koekemoer agreed that the said units would be installed free of charge and it was then also arranged that workmen of the plaintiff would later instruct the employees of defendant in the installation of units so that the latter could install the further units which the defendant intended to order from time to time as more chalets were erected.

Du Buisson also testified that after the contract had been concluded he was in contact with Koekemoer and the latter knew how the work was progressing in the erection of the first chalets for which the 4 kitchen units were intended. In December 1973 Koekemoer phoned du Buisson to say that the said units had been completed and asked whether they could be delivered at the Naboom Spa. Du Buisson replied that none of the chalets had yet been completed and that there was no place at the resort in which the units could be stored. Koekemoer then undertook to

store...../8

store the units in a garage at his home in Pretoria. This he did for some time and later he told du Buisson that he needed the garage for his car. The 4 units were then stored elsewhere in Pretoria and later in one of the chalets, which had by then been partly completed, at the Naboom Spa.

By the middle of 1974 the first chalet was ready for the installation of one of the 4 units, and du Buisson called upon Koekemoer and requested that plaintiff install the unit. According to du Buisson, Koekemoer at first promised that that would be done, but later informed him that the plaintiff had decided not to install the units. This led to correspondence between the parties, through their respective attorneys, the upshot of which was that defendant, in October 1974, cancelled the contract on the ground that plaintiff had repudiated its obligation to install the units.

Du Buisson also told the Court that, after the contract had been cancelled, there were discussions between

him...../9

him, Koekemoer and Deysel, a director of the plaintiff company, as a result whereof an agreement of settlement was reached. Pursuant thereto a kitchen unit was installed by Deysel in the first chalet that had been completed. This took place in February 1975. Inasmuch as the parties are not ad idem as to the terms of the agreement of settlement, and because it does not form an issue in the proceedings, nothing further need be said thereanent.

Deysel testified for the plaintiff. He told the Court that he was a director of the plaintiff company. He had taken no part in the negotiation and conclusion of the contract in question. According to this witness Koekemoer had formerly been in the employ of the plaintiff as a qualified joiner. At the time when the contract was concluded he (Koekemoer) was an agent for the plaintiff in Pretoria and earned a commission on all sales negotiated through his agency. Deysel said that it was the practice of the plaintiff to install units only within a limited area — the

Reef...../10

Reef, the Vaal Triangle and Pretoria - and installation costs were in such cases added to the account. Koekemoer, he said, therefore had no authority to agree to an obligation on the part of the plaintiff to install the 4 kitchen units in question at Naboomspruit and, indeed, without stipulating for the cost of installation as an additional charge. In this regard it should be mentioned that the alleged incapacity of Koekemoer to have contracted for the installation of the units in question by the plaintiff was not advanced as a defence at the trial but merely as a probability against his committing plaintiff to such an undertaking.

According to Deysel his understanding of the contract in question was at all times that Koekemoer had personally undertaken to install the 4 kitchen units and that it was not an obligation of the plaintiff to do so. Koekemoer was qualified to do the work, which did not involve much labour, and therewas an incentive for his undertaking

to...../11

to do it personally inasmuch as he expected to earn a substantial commission on the large number of kitchen units which, according to what he was told by du Buisson, would be ordered by defendant in future.

Deysel explained further that, when the 4 units were completed, the plaintiff was informed that these units should be delivered at Koekemoer's home in Pretoria. The units were delivered there in December 1973. Thereafter accounts and reminders for payment were sent to the defendant. The latter did not then raise any question as to installation of the units. Indeed, said Deysel, du Buisson, acting on behalf of the defendant, asked for time to pay ("hy het vir ons gevra om net so 'n bietjie te wag"). Later in 1974, said Deysel, defendant did raise the question of installation, whereupon plaintiff denied liability therefor. This eventually led to summons being issued by the plaintiff (in June 1974) and was followed by defendant's notification of cancellation of the contract.

According...../12

According to Deysel, Koekemoer was prepared to install the units, but, because of the institution of proceedings plaintiff instructed him not to do so. Towards the end of 1974 or early in 1975, after the pleadings had been filed, there were discussions between Deysel, Koekemoer and du Buisson with the object of reaching a settlement. Pursuant to an arrangement between them, Deysel then installed one of the kitchen units. He explained that he personally, with the help of employees of the plaintiff, did the work merely as a favour to Koekemoer who, though willing to do the installation, was unable to do so for reasons which are not material.

As I have indicated above, in dealing with the evidence of du Buisson, there is a dispute as to the terms of the agreement of settlement reached by the parties concerned, but, inasmuch as the agreement of settlement is not in issue in these proceedings, it need not be discussed further.

At...../14

At the conclusion of Deysel's evidence counsel for the plaintiff closed his case. Koekemoer was not called as a witness, although it appears from the record that he was available. It also appears that defendant had subpoenaed him, but that plaintiff had consulted with him.

The trial Judge, MELAMET, J., after finding that the burden of proof was on the plaintiff and, after dealing with the evidence adduced, came to the following conclusion:

> "I am not assisted in the matter by the demeanour of the witnesses. As set out above there are probabilities in favour of and improbabilities against both versions placed before the Court. I cannot say that there is a preponderance of probabilities in favour of the one or other of the versions. In the absence of the evidence of Mr Koekemoer I cannot say on a balance of probabilities that the version of plaintiff is true and that of defendant false. In the result, therefore, having regard to the fact that the onus of proof rests on the plaintiff, I find myself compelled, reluctant as I may be so to do, to find that plaintiff has failed to discharge such onus. I therefore grant AN ORDER OF ABSOLUTION FROM THE INSTANCE, WITH COSTS, AGAINST THE PLAINTIFF on the plaintiff's claim as set out in its summons."

It ...../15

It is against the above order that plaintiff is on appeal before us.

Counsel for the appellant(plaintiff) contended that the trial Judge erred in granting absolution from the instance, and that he should have found in favour of the plaintiff. This contention was based on the following main submissions, namely,

(a) that, although the circumstances in the present case were analogous to those in Kriegler v. Minitzer and Another 1949 (4) S.A. 821 (A), according to which ~~discussion~~ decision the burden of proof was on the plaintiff, there was nevertheless a duty on the defendant to begin and to adduce at least some acceptable evidence in support of his contention that there was an additional term of the contract, and

(b) that, inasmuch as, so counsel submitted, the evidence of du Buisson on the matter in issue should, for reasons to be mentioned presently, have been rejected,

there...../16

there was really no acceptable evidence in favour of the defendant, while, on Deysel's evidence, which should have been accepted, it was improbable that a term such as alleged by the defendant could have been agreed upon.

In support of the first of the submissions, counsel relied on the following passages in Hoffmann, South African Law of Evidence, 2nd Edit., at pp. 352-353 and 359:

> "But one can also have cases in which from the very beginning the duty to adduce evidence is upon one party but the onus is on the other. In Kriegler v. Minitzer, for example, the plaintiff brought an action on an oral contract for the purchase price of a building. The defendant admitted the terms of the alleged contract as far as they went, but said that the plaintiff had also agreed to supply an additional staircase and balcony and had not done so. The Appellate Division held that as the plaintiff had to prove the terms of his contract, the onus of proving that there was no agreement for a staircase and balcony was upon him. But there can be little doubt that upon the pleadings

as...../17

as they stood, the duty to begin and to adduce evidence was upon the defendant. The plaintiff could hardly be expected to lead positive evidence that no further terms had been agreed to, and unless the defendant adduced some evidence in his favour, no reasonable man could have found that such terms existed. But once the defendant adduced sufficient evidence to leave the court in doubt, he was entitled to succeed because the onus was upon the plaintiff."

and

"In most cases, however, the practical difficulty of 'proving a negative' really means the difficulty of adducing positive evidence to establish a negative proposition. This point can be met by placing a duty to adduce evidence upon the party who denies a negative proposition, without necessarily making him bear the onus as well. There are in fact many cases where the party has the onus of proving a negative without necessarily having a duty to adduce evidence on the point. Thus a party who relies upon a contract must prove its terms, including the absence of any additional terms which might provide the other party with a defence. In Pretorius v. Van der Merwe the plaintiff bought a bull called Rhebokskraal Springtime, who regrettably

turned...../18

> turned out to be impotent. He brought an actio redhibitoria, claiming the right to rescind the sale on account of the bull's latent defect. The defendant said that the contract had provided for the sale to be voetstoots, i.e., with an express term excluding Aedilician liability for latent defects. HENNING, J., held, following a number of earlier cases, that the onus was upon the plaintiff to establish that the contract did not contain a voetstoots clause. On the other hand, if all the other terms were admitted, the defendant would have started with a duty to adduce evidence. The plaintiff could not be expected to produce positive evidence to negative the existence of a voetstoots clause. The significance of the onus is that if the court is finally left in doubt, the plaintiff has failed to establish his right to rescind."

(Pretorius v. Van der Merwe is reported in 1968 (2) S.A. 259 (N))

Counsel did not cite any authority in support of the propositions stated by Hoffmann in the above passages, namely, that, in cases such as Kriegler v. Minitzer (supra), where the burden of proof is on the plaintiff, there is nevertheless a duty on the defendant

(a) to begin and

(b) to adduce some evidence in his favour.

Indeed, counsel informed us that he was not aware of any such authority. Nor am I.

From ...../19

From the decision in Kriegler v. Minitzer and Another (supra), it is clear that the burden of proof was on the plaintiff, even though it was the defendant who relied on an alleged additional term, which was denied by the plaintiff. The burden of proof therefore involved proving a negative assertion. There is, in my opinion, no justification for the proposition that in cases such as the present case, where the plaintiff seeks to enforce a contract and the onus is on him to prove the terms thereof, which would involve his proving a negative, that burden is alleviated by a duty imposed on the defendant to begin and to adduce some evidence in support of his averment that the additional term relied on by him was agreed upon.

In Kriegler v. Minitzer and Another (supra) GREENBERG, J.A., dealt fully with the particular aspect now under consideration, namely, that the burden of proof, in cases such as the present one, involves proving a negative. There is, in my view, no suggestion in his judgment that the position is as stated by Hoffmann.

For the reasons stated I cannot agree with counsel's first submission. The position we are faced with

is ...../20

is that evidence was adduced by both sides, and, as the burden of proof was on the plaintiff, it was for the trial Court to decide whether, regard being had to all the evidence and the probabilities of the case, it had discharged that burden.

With regard to counsel's second submission, namely, that the trial Court should have rejected du Buisson's evidence on the question whether the additional term alleged by defendant had been agreed upon, counsel contended

(i) that du Buisson's evidence was incompatible with the undisputed terms of the contract,

(ii) that his evidence was improbable in certain respects,

(iii) that he contradicted himself on certain aspects of the case,

(iv) that his evidence, in some respects, was in conflict with defendant's plea, and

(v) that in certain respects his evidence was in conflict with that of Deysel, whose evidence should

have...../21

have been accepted.

Before proceeding to deal with the first of these contentions, it appears to be necessary to say something with regard to the general probabilities of the case. According to Deysel, he always understood that Koekemoer personally, for reasons of his own, was going to install the 4 kitchen units in question, and his testimony is that Koekemoer was at all times prepared to do so. From that it must be inferred that it was agreed that the units would be installed, and the probability is that Koekemoer just did not explain to du Buisson that installation would not be an obligation of the plaintiff but would be undertaken by him (Koekemoer) personally, his interest in doing so being the prospect of earning further commissions on future sales - thus leaving du Buisson under the impression that installation was an obligation resting on the plaintiff. Counsel for the plaintiff, on appeal before us, seemed to disregard the

probability..../2 2

probability just stated and argued his case as if there were only two possibilities, namely, (a) that at the time when the contract was entered into it was specifically stated that the plaintiff company would install the units and (b) that there was no agreement at all as to the installation of the units. The result was that in many respects counsel's arguments did not meet with what I regard to be the general probabilities of the case.

I come now to counsel's first and main contention, that under (i) above. Counsel's argument was that, regard being had to

(1) the fact that defendant admitted on the pleadings that delivery had to be effected during December 1973, and that payment had to be made 30 days after delivery

and

(2) the fact that, as du Buisson admitted in evidence, he knew that the first chalets would only be completed early in 1974;

it...../23

it is highly improbable that it was agreed that plaintiff would install the units. The improbability, so counsel said, lies therein that if the units had to be installed by plaintiff it is unlikely that it would have been agreed that payment had to be made 30 days after delivery, that is even before installation could take place. It is even more unlikely, said counsel, that it would have been agreed that payment was to be made 30 days after installation, which was what du Buisson thought the contract meant, because then the plaintiff, having already delivered the units, would have had to wait for payment until some unknown future date.

Although there does seem to be some substance in counsel's argument, I do not think, having regard to the general probabilities of the case, as discussed above, that du Buisson's evidence is wholly incompatible with the admitted terms of the contract. One must, I think, look at the matter also from the point of view of Koekemoer, who contracted on behalf of the plaintiff. He may well

have...../24

have thought that, in terms of the contract, payment would be made on delivery but that he would thereafter install the 4 units as soon as the chalets were ready - indeed he was at all times prepared to do so.

I do not consider it necessary to enter into a detailed discussion of all the other points of criticism (those mentioned in (ii) to (v) above) levelled against the evidence of du Buisson. Suffice it to say that, although criticism on certain aspects of his evidence is justified, if regard is had to the general probabilities of the case, as discussed above, there is, in my opinion, no ground for the suggestion that his testimony on the material issue in the case should be rejected either because it is palpably false or because it is improbable.

The only witness who could possibly have refuted du Buisson's evidence was Koekemoer, but he was not called as a witness.

That being the position, the trial Court correctly,

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in my view, granted absolution from the instance.

In conclusion it should be mentioned that counsel for the appellant initially relied also on an alternative contention and that was that the trial court should have granted judgment in favour of the plaintiff for the price of the one kitchen unit which was installed after the proceedings in this case had been instituted. However, counsel for the appellant, at the conclusion of his address, abandoned this contention and nothing more need therefore be said in that regard.

The appeal is dismissed with costs.

G.v.R.MULLER, J.A.

WESSELS, J.A.)
KOTZÉ, A.J.A.) Concur.
VILJOEN, A.J.A.)
MILLER, A.J.A.)