240/77

G.P.-S.59968—1970-71—2 500

J 219

14:2:78

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

(APPELLATE Provincial Division)
Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

DALINSA BELEGGINGS (EDMS) BPK. *Appellant,*

versus

ANTINA (EDMS.) BPK *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* KRIEK & CLOETE

Respondent's Attorney / *Prokureur vir Respondent* MC INTYRE-VDP

Appellant's Advocate / *Advokaat vir Appelland* E.L GOLDSTEIN

Respondent's Advocate / *Advokaat vir Respondent* L.T.C HARMS

Set down for hearing on / *Op die rol geplaas vir verhoor op* 23-11-1978

(T.P.D.)

CORAM: WESSELS, CORBETT, MILLER ARR, VILJOEN et HOEXTER WND ARR

GOLDSTEIN: 9h45 - 11h00, 11h15 - 12h43; 15h08 - 15h30

HARMS 14h15 - 15h08

The Court dismisses the said appeal with costs and the also the cross-appeal with costs

C.A.V.

Judgment [illegible]

78

Bills taxed—Kosterekenings getakseer

Date Datum	Amount Bedrag	Initials Paraaf

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

290/77
N.v.H.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DALINSA BELEGGINGS (PROPRIETARY) LIMITED Appellant

and

ANTINA (PROPRIETARY) LIMITED Respondent

Coram: WESSELS, CORBETT, MILLER, JJ.A.,
et VILJOEN, HOEXTER, A.JJ.A.

Heard: 23 November 1978

Delivered: 30 November 1978

J U D G M E N T

MILLER, J.A. :-

The appellant company was the plaintiff in an action instituted in the Transvaal Provincial Division. It claimed from the respondent company (a) payment of the sum of R18 787, being the balance alleged to be due to it

/in terms .....

in terms of a contract for the restoration of an existing building and the construction of additions thereto and (b) an order declaring that certain items were "extras to the written building contract between the parties" and that the amount due to it in respect of such extras was to be determined in terms of a clause in the contract which provided for arbitration. Both claims failed, the Court a quo (PREISS, J.,) decreeing absolution from the instance on each claim. A counterclaim by the respondent for payment of R12 160, said to represent contractually pre-estimated damages for late completion of the building work, also failed - again, absolution from the instance was decreed. The appeal is against the orders refusing appellant's claims (a) and (b); there is no appeal by the respondent against the refusal of its counterclaim.

Concerning appellant's claim (a), the essence of the dispute between the parties is whether appellant's claim was prematurely brought. It was alleged in the

declaration that "the plaintiff has duly executed all of the said work and supplied all of the said materials all in terms of the said written agreement .....".

The respondent, however, denied in its plea that that was so. In support of such denial it was pleaded that in terms of the building contract the appellant was to cause to be installed in the building, before 28 February 1976, a lift in working order ("in werkende toestand"); that the cost thereof (R25 560) was to be paid by appellant to the sub-contractor concerned; that appellant failed to instal a lift which was in working order by the appointed date, (or, indeed at the time of pleading) and failed to pay the sub-contractor as he was required to do.

The defence, therefore, was the exceptio non adimpleti contractus, which is essentially "a temporary defence" in the sense that it entitles the party who successfully raises it to withhold performance of his obligations under the contract until the other party has completed what he

/undertook .....

undertook to do. (Williston on Contracts, 3rd Ed., section 897; and see the exhaustive examination by Jansen, J.A., of the true nature and scope of such a defence in B.K. Tooling (Edms.) Bpk. v Scope Precision Engineering (Edms.) Bpk., AD, 15 September 1978, as yet unreported.)

The essential facts relevant to claim (a) and the defence thereto, which were either common cause or established in evidence, may be briefly summarized. The lift which appellant was required to have installed in the building was, to the knowledge of appellant, especially essential for the purposes of a company (I shall refer to it as "Edgars") to which the respondent, the building owner, had leased part of the building. The building contract between appellant and respondent provided in clause 6 thereof that save in respect of the installation of the lift and the provision of air-conditioning, the

/appellant .....

appellant was not entitled to appoint any sub-contractor unless such sub-contractor had acknowledged to the respondent, in writing, that he was aware of the terms of the building contract, that he would have no claim for payment against the respondent and that he renounced any rights of lien or retention which he might have or acquire. Clause 14 provided that appellant was obliged to appoint sub-contractors for the installation of the lift and air-conditioning, according to specifications, and that such sub-contractors were to be paid by the appellant. (" ..... word deur die bou-aannemer vergoed".) The appellant duly appointed a company ("Schindlers") to instal the lift. It appears that the lift, in good working order, was installed during April, 1976. It was "switched on" for operation on 20th April. It functioned, apparently satisfactorily, from that date until some time in May or June 1976, when Schindlers deliberately removed from it part of the mechanism necessary to enable it to function at all.

/(There .....

(There is some uncertainty as to the date upon which Schindlers disabled the lift but for present purposes I shall accept as correct the date, 22nd June, contended for by appellant's counsel.) The lift remained incapable of being used for its purpose from that date until December 1976, when, satisfactory arrangements having been made, Schindlers replaced the vital mechanism. Thereafter the lift went into operation and functioned satisfactorily. The appellant's summons claiming, inter alia, payment of the balance of the contract price, was issued on 15th June 1976. An application for summary judgment having been unsuccessfully made, the matter went to trial, which commenced on 1st September 1977, after pleadings had been filed.

It is necessary to interpolate that at the hearing of the trial Mr Harms, for the respondent, made what the Court observed was "a generous concession". While asking for an order of absolution from the instance

against the appellant, with costs, he intimated that, the lift having been in full operation since December 1976, if the Court were satisfied that there was as at that time full compliance by appellant with its obligations, the Court should award the appellant the agreed balance of the purchase price, but without any order of costs against respondent. The concession was properly made in order to avoid the necessity of the appellant instituting action afresh following upon an order of absolution. Because the Court was satisfied that there was, upon the lift becoming freely available for use in December, proper performance of its obligations by the appellant, it made, by consent, an order for payment of R18 787, which did not carry costs. A cross-appeal against that order was noted by respondent, apparently on the ground that the Court a quo ought not to have found that what was done in December 1976 constituted full performance by appellant. At the hearing of the appeal, however, Mr Harms advanced no argument in

/support .....

support of the cross-appeal and in answer to a question by the Court conceded that if the appellant's appeal failed, the cross-appeal would fall away.

The reason for Schindlers' decision to render the lift unusable lies at the very centre of the dispute between the parties in so far as claim (a) is concerned. That reason was that, despite demands for payment, Schindlers' account for installation of the lift remained unpaid. After installation and before switching on the lift, Schindlers intimated by letter to respondent that it was "reluctant to switch on any lift when the terms of payment have not been adhered to". It signified its willingness, as a matter of indulgence, meanwhile to accommodate Edgars, which urgently required the use of the lift, but reserved to itself the right to switch off the lift if its account were not paid by 7th May. In terms of its contract with appellant, Schindlers had a right of retention over the lift until its account had been paid in full. The

appellant maintained at that time that respondent should pay to it the agreed balance of the building contract price, which would enable it, appellant, to pay Schindlers. The respondent's attitude was that it was for the appellant, in terms of the building contract, to pay Schindlers and that only when that had been done and the lift had finally and unreservedly been "handed over" to respondent as fully paid for and therefore free of any control or interference by Schindlers in the exercise of its right of retention, would appellant be entitled to claim that it had fully discharged its obligations under the building contract and that the final instalment of the contract price be paid to it.

The onus was on the appellant to establish that it had done all that it was required to do in terms of the contract on which it sued. (Voet, 19.1.23; B.K. Tooling case, supra.) There can be no questioning that the

/provision .....

provision of a lift in good working order was an important and very substantial element of the building contract. It was the appellant's duty to cause such a lift to be installed and in due course to hand over the building, complete with such a lift, to the building owner. Mr Goldstein, for the appellant, contended that a lift in good working order was in fact installed during April and put to use. That is undoubtedly true. But it was a lift which, although present and functional, was not freely available to the building owner or those who might occupy the building by leave of such owner. Its utility was subject to the pleasure of the sub-contractor, Schindlers, which might at any time, by reason of non-payment of the price and within the rights conferred by the contract between itself and the appellant, render the lift useless to the owner and those occupying through him. I agree with the learned Judge a quo that delivery of a lift thus burdened cannot be regarded as proper performance by the appellant of his obligations under the contract. (Cf. Hitchens v Breslin 1913 TPD

676 at p 684, where Wessels, J., indicated that the duty of the builder was to complete the contract "as contemplated by the parties".) Mr Goldstein sought to meet this difficulty by contending, firstly, that the plea did not raise this particular aspect of the matter but merely alleged that a lift in working order had not been installed; and secondly, that in any event the "defect" to which the lift was subject was the result not of any default by the appellant, but of default by the respondent which could and ought to have paid the appellant what was still owing under the building contract and thus enabled the appellant to pay Schindlers and rid the lift of the burden attaching to it.

The first of these contentions is technical, rather than substantial. What is said in the plea is that the appellant failed to cause a lift "in werkende toestand" to be installed and neglected or failed to pay the sub-contractor for supplying the lift. In answer to a request for particulars as to "the respects in which

the lift was not in working order", the respondent said that the lift became operative during December 1976 . The very question put by the appellant in its request for particulars reveals an appreciation that it was not the installation as such that was complained of, but the functioning of the lift. And the respondent's answer (admittedly rather terse) to the question virtually re-affirms that function or operation was in issue, not installation. Moreover (i) the respondent's defence had been revealed in the summary judgment proceedings and (ii) the plea coupled with the complaint that the lift was not in working order an allegation that appellant had failed to pay the sub-contractor "vir verskaffing van die hysbak". I am therefore unable to accept the con= tention that the scope of the plea was so strictly limited as to preclude reliance by the respondent upon the residual rights of the sub-contractor and still less, having regard to the background and history of the dispute, am I able to

accept that appellant was taken by surprise or embarrassed at the trial.

The second of the contentions referred to above is also unacceptable. Clause 14 of the building contract admittedly did not provide in terms that the appellant was to pay the sub-contractor before it (the appellant) received payment from the respondent. But nor did it expressly require the respondent to place the appellant in funds specifically for the purpose of paying the sub-contractor. In terms of the building contract, periodical payments were to be made by the respondent as the work progressed, according to certificates to be issued by an official of the Iscor Pension Fund, and it is clear that such payments were periodically made. At the time in issue in this case, all but R18 000 odd of the total contract price of approximately R200 000 had been paid. It appears to me that although respondent might, as a matter of grace, have advanced the balance of the contract price to the

appellant to assist it in making payment of the larger sum due to Schindlers, it was under no legal obligation to do so. In what are sometimes called "entire contracts", the general rule is that, in the absence of agreement to the contrary, the builder is not entitled to the agreed remunera=tion or any part of it until the work has been completed. (Naude v Kennedy 1909 TS 798 at p 806, per Innes, C.J.) In contracts which provide for periodical progress payments, the final payment will ordinarily, in the absence of other indications in the contract, not be claimable until the building has been completed and delivered to the building owner. A builder who claims such final payment without having performed what he undertook to do would have to show that the terms of the contract entitled him to such payment. As Jansen, J.A., pointed out in the B.K. Tooling case, supra:-

> "Die volgorde van prestasie en teenprestasie hang ook van die kontraktuele bepalings af. As n ander bedoeling egter nie blyk nie, moet bv by locatio conductio operis die aannemer eerste presteer ....."

I am unable to find any support whatever in the building contract for the contention that such contract required the appellant to pay Schindlers only after respondent had paid the cost of the lift, or the balance of the contract price, to appellant. The terms of clause 6 of the contract reveal that respondent was concerned to avoid the situation that sub-contractors might exercise any right of retention in respect of work performed by them. It is true that a sub-contractor for installation of the lift was expressly excluded from the terms of that clause, but then clause 14 expressly stipu= lated that such sub-contractor was to be paid by the appellant. I cannot spell out of the exclusion of the sub-contractor for installation of the lift from the terms of clause 6, that respondent was not concerned about such sub-contractor having a right of retention over the installed lift. The explicit provision that the appellant, who was required (not merely permitted) in terms of clause 14 to appoint a sub-contractor for installation of the lift,

/was .....

was obliged to pay such sub-contractor, necessarily indicates that the respondent was to make its own arrangements with such sub-contractor and make payment to him so that the completed building might be handed over together with a lift freely available for use. In the circumstances there is no justification for a finding that appellant was entitled to insist that the respondent make a final payment to it to enable it to pay Schindlers. I may add that there is no evidence whatever to show that a certificate was ever issued by the Iscor Pension Fund for payment of the final instalment of the contract price.

Finally, in regard to claim (a), Mr Goldstein contended that on the authority of certain passages in the judgment of Jansen, J.A., in the B.K. Tooling case, even if appellant failed to do what was required of it by the contract, the Court could (and, he contended, in this case should) exercise its discretion on the basis of considerations of fairness and reasonableness in favour of the appellant and overlook the shortcomings of its performance.

Jansen, J.A., in the judgment referred to, minutely examined earlier decisions of the Courts on the question whether a contractor who had failed fully to discharge his obligations could sue on the contract for a quantum meruit where the other party had utilized what the contractor had in fact done. There had in the past been expressions of opinion in this Court which were not easily reconcilable with each other. His conclusion was that the approach of Innes, J.A., in Hauman v Nortje 1914 AD 293 was correct and henceforth to be followed. Jansen, J.A., pointed out that

> "Die hele grondslag vir die verslapping van die wederkerigheidsbeginsel en die erkenning van die moontlikheid om 'n eis om 'n verminderde kontrakprys in te stel, berus op billikheids= oorwegings."

Mr Goldstein argued that the "verslapping" of the principle underlying the exceptio with which we are concerned was permissible also when there was no question of quantum meruit

/involved .....

involved and where the full amount of the contract price was claimed despite incomplete performance by the contractor. Even if I were to assume for present purposes that relaxa= tion of the general rule would in special circumstances be permissible where the contractor claimed full payment despite failure to perform an important part of the contract (the building owner enjoying what had been performed), the difficulty that confronts the appellant is that that was not the case made in the declaration. If the appellant wished the Court to relax the rule on grounds of fairness and reasonableness it ought to have pleaded the special facts and circumstances which it alleged justified relaxa= tion of the rule. There would then, no doubt, have been a proper canvass of the issue of fairness and reasonable= ness. As it was, the respondent closed its case without having led any evidence. There was insufficient material before the Court to enable it, even if it were minded to do so, to give proper consideration to the question whether fairness and reasonableness required that a final

payment of the relatively small balance of the contract price ought to have been made by the respondent before action was instituted, despite the restraint upon the free use of the lift, which was an important part of what the appellant was to provide.

I conclude, therefore, that the trial Judge correctly granted absolution from the instance on claim (a).

I now turn to claim (b) - the claim in respect of alleged "extras". The declaration contains a list of the extras in regard to which a declaratory order was sought. Altogether, eight items are enumerated. Seven of such items fall into a particular category; the remaining item requires different consideration. The seven items represent work done to meet the requirements of the local authority; the remaining item relates to the supply and installation of an electric transformer for the purposes of the air-conditioning required in terms of the

contract. In its plea the respondent denied, on three grounds stated in the alternative, that it was liable to make any payment in respect of extra work done by appellant. Regarding the seven items, one of respondent's defences was that by agreement it was released from any liability which might otherwise have rested upon it to compensate the appellant. To appreciate the true basis of this defence it is necessary to give a briefly summarized account of relevant developments as the building operations progressed and of arrangements made by the parties after the entering into of the original building contract on 18 April 1975.

Towards the end of May 1975, the appellant encountered certain difficulties in connection with the work and costs involved in the provision of air-conditioning. The respondent's lease agreement with Edgars threatened to be affected thereby. Respondent addressed a letter to appellant in which was indicated that their building contract was to be regarded as cancelled and that appellant would be

held liable in damages. The concluding part of the letter, however, held out the hope that new arrangements might be made with Edgars and with appellant. Probably because of that, appellant did not reply to the letter but carried on with the building operations, in terms of the contract, to the knowledge of respondent. On 20 August, appellant wrote to respondent concerning the cost involved in providing a lift and other increases in costs. It was also suggested in the letter that respondent add a further sum of approximately R10 000 to the contract price "vir onvoorsiene". To this letter the respondent, on 26 August, replied as follows:

> "Ons dank u vir u brief van die 20ste Augustus 1975 en wil bevestig dat die boukontrak en borgkontrak heringestel is op die volgende voorwaardes nl.
>
> Die prys van die boukontrak is nou soos volg:

/Afbreek .....

Afbreek van gebou (reeds betaal)	R 2 000,00
Grondvloer	R 72 000,00
Eerstevloer	R 90 000,00
Installering hysbak en koste daarvan	R 25 560,00
Oprigting afdak (Canopy)	R 8 000,00
TOTAAL	R197 560,00

Die voltooiingsdatum is 1 Januarie 1976 en die boeteklousule word uitgestel tot daardie datum. Geen vertraging was tot datum aan ons te wyte nie. Ons moes reeds aansienlike toegewings gemaak het ten aansien van die huurkontrak te wyte aan die lugreëling wat u met Edgars moes reël. Gevolglik kan ons geen verdere toege= wings maak nie. Edgars is tevrede dat al wat afgelewer kan word maar nie later as 28 Februarie 1976 is die hysbak. Die lugreëling moet u direk met Edgars reël en hulle sal u betaal. Die addendum tot die kontrak word aangeheg en ons boukontrak word mutatis mutandis gewysig sover as dit die bouvereistes aangaan. U moet dus sover dit die lugreëling aangaan u verdere koste direk van hulle verhaal.

Ons bevestig ons gesprek van die 25ste deser dat u betyds die gebou sal voltooi. Al die planne

/is .....

> is goedgekeur en dit hang nou slegs van u af. Ons kan nie voorsiening maak vir enige ekstras nie aangesien ons reeds verdere toegewings moes maak.
>
> Ons heg hierby aan 'n tjek vir R15 000,00. U aanvaarding van die tjek word beskou as 'n bevestiging van die ooreenkoms deur u maatskappy en uself as borg."

The appellant did not reply to this letter but accepted the cheque and carried on with the building operations. On 8 March 1976, the parties signed a further agreement entitled "Wysiging van Boukontrak". This was a short agreement - the contract price was reduced in certain respects (apparently largely due to the circumstance that Edgars was to contribute towards the cost of air-conditioning); a completion date for occupation by Edgars and for installation of the lift was stated; it was recorded that appellant was to agree with Edgars regarding the air-conditioning and to recover its costs from Edgars.

/The .....

The seven items of work required by the local authority were included in the plans referred to in the letter of 26 August and it appears from the evidence (and was conceded by Mr Goldstein) that certain of the items had already been built by that date. Preiss, J., concluded that he could read the letter of 26 August

> "in no other way than as a disavowal (by respondent) of liability for extras, at least as incurred up to that date"

and that by accepting the cheque for R15 000 (and, I might add, by doing so without any qualification whatever) appellant accepted such disavowal "and lost whatever right it might have had to recover its expenditure". I agree with that conclusion. Realizing the implications of the letter and respondent's unqualified acceptance of the cheque, Mr Goldstein sought to take refuge in what was called "the third contract"; i.e. the agreement of 8 March 1976.

/As I .....

As I understood the argument, it was that the third contract was intended to be "the sole memorial of the reinstatement" of the original agreement of 18 April 1975 as varied by the "second contract" (i.e. acceptance of the letter of 26 August), and on that basis,so it was contended, since the third contract remained silent in regard to the extras, the provisions of the first contract as to extras were restored. (I might point out that the original contract of 18 April provided for extra work which the respondent might in its discretion require, in writing, to be done.) This argument is untenable. I find nothing in the third contract to suggest that it was intended, as it were, to wipe out what had been agreed and done between 18 April 1975 and 8 March 1976. The fact that the third agreement was silent on the question is fully consistent with an intention that what had been done and agreed in August 1975 was to remain unaffected.

/Certainly .....

Certainly, the third agreement did not obliterate, as if it had never happened, the appellant's acceptance of the cheque for R15 000 and its patent acquiescence in the respondent's disavowal of liability for the "extras" in question. The decision of the Court a quo relating to the claim in respect of the seven items of extra work was correct.

As to the question of the transformer, it does not appear to me that the installation thereof could be regarded as an extra at all. For appellant it was contended that respondent admitted in its plea that it constituted an extra, but I do not think that such an admission was unequivocally made. What was admitted, in reply to the paragraph in the declaration in which was listed all the alleged extras, was merely that extra work had been done and materials supplied. There was no clear admission that all the items listed, including installation of the transformer, constituted extras in the

/sense .....

sense in which that word is used in the building trade. Work which has been expressly or impliedly included in the contract is not an extra entitling the contractor to additional remuneration. (See McKenzie, The Law of Building Contracts and Arbitration, 3rd Ed., p 102.) It is when the contractor is required

> "om werk te verrig wat wesenlik nie as deel van die oorspronklike kontrak beskou kan word nie ....."

that the contractor is generally entitled to additional remuneration. (A. McAlpine and Son (Pty.) Ltd. v Transvaal Provincial Administration 1974 (3) SA 506 at p 516 A, per Rumpff, C.J.)

The facts relative to the transformer may be briefly stated. The building contract originally concluded was by no means detailed in its descriptions and specifica= tions. The parties had entered into building contracts

/with .....

with one another before and it was no doubt accepted by them that missing details relating to contract work would be supplied from time to time, as necessary. Moreover, it was always known that Edgars was primarily interested in the air-conditioning to be supplied and that it was to be consulted thereanent. It appears that Mr Knoetse, a director of the appellant and the person who acted on its behalf at all times, was under the impression that the required air-conditioning could be supplied by means of evaporative cooling. He later discovered that that would not be effective or acceptable to Edgars, whose representative, Mr Hubbard, employed by Edgars in its architectural department, pointed out to him that an electrical transformer was essential for the purpose of the agreed air-conditioning. In those circumstances the supply and installation of a transformer was not something which fell beyond the contract. It was, on the facts, an essential component of the air-conditioning

/system .....

system which, in terms of the contract, was required to be provided; the circumstance that appellant mistakenly believed that the agreed air-conditioning could be effectively supplied without a transformer, but by some other means, would not constitute the supply thereof by the necessary means an extra. This appears to me to be sufficient ground for rejection of the appellant's claim regarding the transformer and it is unnecessary to consider other grounds upon which it was contended that the claim should fail.

The appeal is dismissed with costs and the cross-appeal is dismissed with costs.

S. MILLER

JUDGE OF APPEAL

WESSELS, J.A.)
CORBETT, J.A.) Concur
VILJOEN, A.J.A.)
HOEXTER, A.H.A.)