Case Number 329/91

/al

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

VLADISLAV MOSCAK Appellant

and

N GOODWIN DESIGN (PTY) LIMITED Respondent

CORAM : BOTHA, GOLDSTONE JJA et KRIEGLER AJA

DATE OF HEARING : 12 NOVEMBER 1993

DATE OF JUDGMENT : 25 NOVEMBER 1993

J U D G M E N T

KRIEGLER AJA /...

KRIEGLER AJA :

This is an appeal (with the leave of the court a quo) against a judgment in the Cape Provincial Division. The appellant was ordered to pay the sum of R9 452,80 to the respondent with costs. The judgment is reported (at 1992 (1) SA 167 (C)) and contains a detailed resume of the facts. The briefest of factual summaries will therefore suffice.

The appellant orally engaged the respondent to design the interior of premises in a new shopping complex in Cape Town, and to design, manufacture and install furniture and fittings for a restaurant the appellant intended opening there. Subsequently disputes arose between the parties regarding the state of completion of the work and defects to be remedied. During a joint inspection the respondent made a so-called "snagging list" and remedial work relating thereto commenced. Shortly

thereafter, and while such work was still in progress, the appellant put the respondent off the job.

In due course the respondent sued for payment for the work it had done and the materials it had supplied. Several alternative formulations of the claim were pleaded. For reasons which will become clear in a moment only one thereof need be mentioned. That was that the respondent was entitled to payment of the contract price which, in terms of a tacit term, was the fair and reasonable value thereof, less payments on account and less the cost of completing the remedial work. On that basis the respondent alleged a contract price of R82 315,24 and, giving credit for interim payments and allowing a deduction for the remedial work contained in the "snagging list" not yet done when the contract was terminated, claimed payment of R45 615,24. The appellant denied the tacit term

contended for, alleging in turn that a maximum price of R50 000,00 had been agreed upon. He denied the value put on the work and materials by the respondent, alleged additional defects and counter-claimed the amount by which his payments on account plus the sum he alleged was due to him for remedial work exceeded the sum of R50 000,00. In the course of the trial the counter-claim was abandoned.

The learned judge found that the tacit term alleged by the respondent had been proved. That finding was not challenged on appeal. Counsel were also ad idem in this court that the trial court's method of assessing the quantum of the remuneration to be awarded to the respondent was correct. That was to take whatever fair and reasonable value of the work had been proved as the starting point and then deducting from that amount the payments on account plus whatever had been proved had to be

expended for remedial work. As the payments on account were common cause the debate in this court was confined to the first and last components of the assessment, i.e. the quantum of the contract price and of the remedial work. With regard to the first the trial judge found that at least the base figure of the counter-claim, R50 000,00, had been established. With regard to the second, the "snagging list" was held to be substantially correct and only the cost of a minor additional item of remedial work was also deducted. The simple arithmetic involved in the calculation is not challenged.

Ultimately, therefore, this appeal turns on two straight-forward factual issues, namely, did the trial judge err (a) in taking R50 000,00 as the starting point of the calculation; or (b) in deducting the "snagging list" plus the one item?

The answers to both questions are equally

straight-forward. As regards the first there is much to be said for the contention that the pleadings are decisive, the very basis of the counter-claim having been a starting figure of R50 000,00 for the work done and materials supplied. Furthermore there is ample justification on the evidence for a finding that the value thereof amounted to no less than that figure. An experienced interior design consultant who had designed and supervised the fitting out of eight other shops in the same complex had done the original conceptual design of the appellant's restaurant. Prior to the trial he had visited the premises to gauge the nature, extent and quality of the work done by the respondent. He expressed the opinion in evidence that the prices charged (as detailed in a schedule to the particulars of claim) were "fair and in some cases ... I'd go so far as to say cheap and reasonable." The respondent's

managing director, a quondam architect, and his wife, who had been in charge of the respondent's office administration, book-keeping and pricing for several years, both testified in support of the amount pleaded (R82 315,24). Mr Goodwin also explained and quantified the cost of the remedial work (R2 424,40). The trial judge concluded however that their evidence was flawed in certain respects and made the award on the lines set out above.

There is no reason to say more than that such approach and conclusion certainly did no injustice to the appellant. The evidence of the Goodwins and the interior design consultant, imperfect though it may have been, stood uncontroverted and established a sufficiently certain basis on a balance of probabilities for the learned judge's assessment. In any event cross-examination on behalf of the appellant, at one stage at least, was clearly

premised on an acceptance of R50 000,00 as the base figure and he made a corresponding concession in the witness-box. Admittedly he was not qualified to express an expert opinion as to quantum, but the form of his pleadings, the conduct of cross-examination on his behalf and his own evidence served to fix R50 000,00 as the line which he had drawn qua litigant.

With regard to the second issue even less need be said. The court a quo, with the benefit not only of seeing and hearing the witnesses but also of a detailed inspection in loco, made clear and unambiguous factual findings. Nothing advanced in this court on behalf of the appellant warrants any interference with the finding that the joint compilation of the "snagging list" and the respondent's uncontroverted quantification of the items it contained, were a safe basis for assessing the subtrahend for remedial work. To this the

judge added an item contended for by the appellant at the price he alleged. Some further additions to the "snagging list" were pressed on appeal. They are either trivial or do not fall to be deducted as they relate to items not included in the computation of the overall contract price.

This appeal is dismissed with costs, including the costs of the application for leave to appeal.

J.C. KRIEGLER

ACTING JUDGE OF APPEAL

BOTHA ]

] AGREED

GOLDSTONE ]