IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION)

Case no: 295/06
Date heard: 27-29.11.07
Date delivered: 29.01.2008

In the matter between:

SPOORNET, A DIVISION OF TRANSNET LIMITED	**Plaintiff**
vs	
T A CONSTRUCTION	**1st Defendant**
W A DELPORT BUILDERS	**2nd Defendant**
MACSTEEL ROOFING (PTY) LTD	**3rd Defendant**

JUDGMENT

A.R. ERASMUS, J:

[1] The action arises out of work done for the plaintiff by the first and second defendants operating in a joint venture. It involved the partial replacement of a corrugated iron roof on a building belonging to the plaintiff, situate at the Diesel Depot, Swartkops, Port Elizabeth. The work was undertaken in terms of a written contract (the contract) signed by the parties on 25 August 2003. After the completion of the work it was found that certain sections of the roof gave way when adult persons walked thereon. This constituted a hazard unacceptable to the plaintiff.

[2] The plaintiff issued summons against the defendants for contractual damages in the amount of R509 124.00. The plaintiff alleged in essence that in terms of the contract the defendants should have used a specific type of IBR roof sheeting namely zincalume, but failed to fit such sheeting. (Later in the judgment I examine the plaintiff's cause of action in greater detail.) In their plea the defendants averred that they ordered zincalume roof sheeting from a supplier known as Macsteel Roofing (Pty) Ltd t/a Striven Profile Systems, but unbeknown to them the supplier delivered aluzinc instead. They contended that if any breach had occurred, it was in consequence of the supplier not delivering zincalume as had been ordered. The defendants thereupon joined the supplier as a third party in the action.

[3] The defendants further counterclaimed payment in the sum of R111 781.94 being the amount which they alleged was owing to them under the contract for the work done and completed by them. The plaintiff resisted the counterclaim on the same basis as it relied upon in its claim in convention. (For the sake of convenience, I refer to the parties as in convention.)

[4] In its plea the third party alleges that aluzinc is the same as zincalume alternatively has substantially the same properties as zincalume further alternatively is the generic equivalent of zincalume.

[5] The dispute that turned on the type of roof sheeting used by the defendants was in the end resolved by the acceptance by all the parties of the correctness of the contents of a report by Dr A.J. O'Donnell, an expert in

metallurgy. In his report Dr. O'Donnell states that he conducted a comparative evaluation of three samples of sheeting: sample A branded as zincalume; sample B branded as aluzinc; sample C obtained at a site inspection at the Transnet facility. The thickness of all three samples he found to be approximately 0,50mm. He describes the tests conducted by him. He notes that local and international specifications pertaining to the coating make no mention of aluzinc and zincalume, these being brand or trademark names used by the manufacturers of coated steel. The coating is to protect the steel sheeting from rusting. His relevant conclusions were as follows:

- The single spot coating thickness of all samples tested was in excess of the minimum of 130g/mm² as required by ISO 9364:2001 for a coating designation of AZ150.
- The material supplied by Macsteel roofing (Pty) Ltd is equivalent to zincalume and meets the coating requirements to which zincalume is manufactured as well as the local and international standards of aluminium and zinc containing hot dipped coatings.

He recommended that as the erected aluzinc sheeting is of the same quality as the zincalume specified, it need not be replaced. He further recommended that future procurement by Transnet should preferably not refer to a trademark or brand but to an international (or national) standard to which the product must comply. This will insure that the minimum requirements are met and that confusion attributed to branding is minimized.

[6] It was thereupon accepted by the parties that zincalume and aluzinc were similar in quality and specifications. Counsel for the plaintiff abandoned

the plaintiff's cause of action insofar as it was based on the allegation that the defendants used aluzinc instead of zincalume. Instead, he submitted that the defendants were liable in as much as they failed to complete the roof in a workmanlike manner, in the following respects: they placed the sheeting on a structure in which the purlin spacing was 2,4m, which was too wide for the thickness sheeting used; they should instead have used sheeting not less than 0,80mm in thickness, or on purlins closer than 2,4m; a reasonable contractor would not have placed the particular sheeting on the particular structure; such a contractor would have advised the plaintiff that the roof if completed according to specifications would not safely bear the weight of a grown person.

[7] Those aspects were raised in the evidence of the plaintiff's expert witness, Mr. J.F. Cairns. Mr. Jooste, who appears for the defendants, objected to the admissibility of such evidence. He further indicted that he objected to any effort on the part of the plaintiff to present evidence outside the pleadings and thereby expanding the cause of action beyond the particulars of claim. Mr. Bloem, further, cross-examined Mr. P.J.J. Delport on these aspects. (Mr. Delport trades as the second defendant.) Mr. Jooste again objected on the grounds that such line of cross-examination was irrelevant having regard to the pleadings.

[8] In argument Mr. Jooste, supported by Mr. Roos who appears for the

third party, submitted that the plaintiff's cause of action had undergone a metamorphosis taking on a form at odds with the agreement and not encompassed in the particulars of claim. It becomes necessary to consider the contract and the pleadings more closely.

[9] As between the plaintiff and the defendants it is common cause that a binding contract was entered into as per the contract documents attached to the particulars of claim. (Mr Roos contends that consensus was not proven, but I need not decide that issue.) The document consists of Part A and Part B. Part A contains the tender document completed by the defendants as tenderers. In terms thereof the tender was 'for repairs to roof at Swartkops Diesel Depot to be completed in accordance with the terms and conditions of the particulars of tender set out herein before'. Part A also contains the '*GENERAL CONDITIONS OF CONTRACT*'. Clause 1 thereof states that '(t)he contractor shall carry out the work in accordance with the attached contract specifications and in a thorough and workmanlike manner'. Part B contains the '*CONTRACT SPECIFICATIONS*'. Clause 1 has the heading '*SCOPE OF WORK*'. Subclause 1.1 thereof stipulates that '(t)he successful tenderer shall apply the material … in accordance with the specifications and drawings'. Clause 3 deals with '*ROOF COVERING* (Replace entire roof area)'. Subclause 3.1 thereof stipulates that the contractor shall '(p)rovide and cover roof with new Zincalume IBR roof sheeting'.

[10] Clearly, the obligation of the defendants to carry out the work in a

thorough and workmanlike manner related expressly to completing the work as specified. There is no basis in the contract for taking their obligation beyond that work. The contract did not require that the roof sheeting should be at least 0,80mm thick, or that the defendants were obliged to insert additional purlins into the roof structure so as to make it safe for persons to walk on the completed roof. It certainly did not require the defendants to advise the plaintiff that compliance with the specifications could result in the roof constituting a danger in any way. Viewed in the context of the contract as a whole, the words thorough and workmanlike manner have their ordinary meaning, which does not encompass the extended construction which counsel would put on them. To go beyond the specifications and the ordinary meaning of wording of the contract, counsel would have to rely on an implied or tacit term of the contract. This takes us to the pleadings.

[11] Before I consider the pleadings, I would make the following comment on the judicial nature of the plaintiff's claim. It may be that a contractor has a duty of care towards the owner of apprising him or her of the fact that the work as specified in his opinion will constitute a danger to persons or property (or that the law of delict should be developed to encompass such a duty). However, the plaintiff's claim is not in delict but is based exclusively on alleged breach of contract.

[12] In paragraph 9.4 of the particulars of claim, the plaintiff avers that '(i)n

terms of the provisions of Clause 1 of the General Conditions of Contract' the Defendants had to carry out the work in accordance with the contract specifications and in a thorough and workmanlike manner'. In paragraph 10 it is alleged that it was 'an implied/tacit term of the agreement that the Zincalume IBR roof sheeting had be be 0,53mm in thickness/diameter'. Paragraph 11 sets out the thrust of the plaintiff's cause of action:

> '11. In breach of the General Conditions of Contract (Petty Contract), Contract Specification and Specification E.7/1, the defendants have failed to comply with its obligations, more particularly in that:
>
> 11.1 It failed to fit zincalume IBR sheeting 0,53mm in thickness; alternatively, it failed to apprise itself of the correctness of the material furnished to it by its supplier;
>
> 11.2 It failed to utilize the correct purlin spacing;
> 11.3 It failed to carry out the work in a thorough and workmanlike manner.'

[13] Subparagraph 11.1 has fallen away in view of the finding of Dr. O' Donnell that both zincalume and aluzinc sheeting is 0,50mm in thickness. It is to be noted that it is not the plaintiff's case that the defendants were required to fit sheeting of 0,80mm in thickness.

[14] Subparagraph 11.2 goes completely outside the contract specifications. In terms of the contract the defendants were required to replace IBR sheeting, not to change the existing roof structure. They were under no obligation to utilize any other 'correct' purlin spacing (see paras [9] and [10]) above).

[15] In subparagraph 11.3 the phrase 'thorough and workmanlike manner' refers back to para 9.4 of the particulars of claim where the words have the meaning in which they are used in clause 1 of the GENERAL CONDITIONS

OF CONTRACT (see para [9] above). On that meaning and in that context the words are incapable of bearing the wide interpretation that Mr. Bloem would place on them. Nor is it alleged that the words have that wide meaning.

[16] It is to be noted that the plaintiff's reference to 'implied/tacit term' relates to the 'thickness/diameter' of the sheeting. There is no such averment in regard to the duty which Mr. Bloem would now place on the defendants. I agree with Harms *Ambler's Precedents and Pleadings 6th ed* 96 that an implied term (in the sense of an unexpressed provision of the contract which the law imports therein) 'must be pleaded since the relief sought will depend on it'. The plaintiff can rely on a tacit term imported into the contract only if the circumstances relied on for such construction are properly pleaded (Harms *loc cit*). This has not been done. I find that the particulars of claims do not support the cause of action which Mr. Bloem now puts forward.

[17] There remains the evidence to be considered. Despite the strenuous objections of Mr. Jooste to the expansion of plaintiff's case beyond the pleadings, Mr. Bloem relies on the evidence for his submissions (para [7] above). The witness Cairns expressed some opinion on the topic and it was canvassed with Mr. Delport in cross-examination (para [7] above). Mr. Jooste pointedly avoided dealing with this aspect. In view of the pleadings he was quite entitled to conduct his case in that manner. In the result the cause of action on which Mr. Bloem would now rely was not fully or properly canvassed in evidence.

[18] For these reasons I find that the plaintiff has failed to make out a case against the defendants. They are accordingly entitled to absolution from the instance. This finding means that there is no liability on the part of the third

party.

[19] In the action in convention costs shall follow the event. That includes the costs of the third party who was brought to court in consequence of the plaintiff's averments.

[20] The plaintiff's defence to the defendants' claim in reconvention was based on the same grounds as the claim in convention. The plaintiff having failed in its claim, the defence to the counterclaim falls away and the amount claimed by the defendants becomes due and payable. They are, further, entitled to their costs.

[21] In the result:

1. The claim in convention is dismissed with costs, which costs shall include the costs of the defendants as well as of the third party;
2. The claim in reconvention succeeds and the plaintiff is ordered to pay the defendants –
   - 2.1 the sum of R111 781.94;
   - 2.2 interest on the said amount, calculated at the prevailing legal rate *a tempora morae*; and
   - 2.3 costs of suit.

_____
A.R. ERASMUS
JUDGE OF THE HIGH COURT

DATE: _____