IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 2328/2002

In the matter between:

ALLAN HENRY NEWSTADT PLAINTIFF

and

H AMM (PTY) LIMITED DEFENDANT

HEARD ON: 24 NOVEMBER 2004

JUDGMENT: MUSI J

DELIVERED ON: 20 JANUARY 2005

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[1] The plaintiff is an adult married man of Clarens in the Eastern Free State. He has been self-employed as an irrigation technician and operated under the firm style of Agrisec. He is essentially an electrician who specialises in installation of electrical systems on water irrigation systems on farms, as well as working on the computer program

systems of the irrigation works. He is suing in his personal capacity. The defendant is a company with limited liability registered in terms of the company laws of the Republic of South Africa, with its head office in Bloemfontein. It conducts farming operations at Ladybrand under the name of Alpha Estates. It specialises in the production of vegetables, fruit, bean sprouts, beef and wheat. It is a large scale producer of these products and supplies big chain stores like Woolworths and exports some of its products. It is represented in these proceedings by Mr. Bernard Alex Amm its sole shareholder and director.

[2] During 1999 the defendant had been engaged in construction of a bean sprout processing plant at its place of operations in Ladybrand. It had put up the necessary buildings as can be seen on the photos in the bundle of photographs, exhibit “B”. In about June to July 1999 the plaintiff came on to the site to attend to installation of the electrical connections to the bean processing plant (the plant). He was assisted by his handyman and sole

employee Kgala Isaac Miya (Miya). He travelled daily from his home to the defendant's farm in a bakkie. He used a small ladder that he normally carried in his bakkie. At some point he had to go up to the roof of the building to connect wires there, but for that his small stepladder could not do, so he would get bigger stepladders from the defendant. One morning he got a stepladder from the defendant and climbed up. When he wanted to climb down, the stepladder collapsed causing him to fall. As a result of the fall, the plaintiff got injured.

[3] The plaintiff's case is that he was engaged by the defendant to do the electrical work on the plant. He alleges that this was in terms of an oral agreement entered into by and between himself and Mr. Bernard Amm (Amm), representing the defendant. The gist of the plaintiff's case is set out in paragraph 4 and 5 of his particulars of claim which read as follows:

> 4. It was a material term of the agreement that the

defendant would supply all the necessary scaffolding and ladders required for the performance of the plaintiff's work in terms of the agreement.

5. The defendant accordingly owed plaintiff a duty of care to furnish scaffolding and ladders that were fit for plaintiff's intended use."

The plaintiff goes on to aver that the specific stepladder that caused him to fall is a metal tripod ladder which was given to him by an employee of the defendant, one Isaac Maile, who was then acting within the course and scope of his employment, alternatively, was acting in the furtherance of the defendant's business. It is alleged that the said Maile was negligent in that he supplied a defective stepladder when he ought reasonably to have foreseen that it would malfunction. It is alleged in the alternative that the defendant was negligent in that he failed to see to it that the ladders supplied to the plaintiff were in a proper functioning condition and safe to use and allowed defective stepladders to be

supplied to the plaintiff.

[4] The defendant denies the existence of any contract with the plaintiff. Its case is essentially that it had had a verbal contract with a firm called Aqua Irrigation to carry out the work that the plaintiff did on the plant; that the plaintiff was subcontracted to Aqua Irrigation. The defendant specifically disputes the existence of the term in terms of which it had to provide the plaintiff with ladders. It is unnecessary to give further details of the defendant's plea. Suffice it to say that it denies any negligence on its part and further denies that Isaac Maile was its employee at all material times.

[5] The parties agreed at the commencement of the trial to a separation of issues in terms of rule 33(4) and asked the court to order that only the issue of liability be determined at this stage. I granted the application, so that this judgment is confined to the question of whether the defendant is liable for the plaintiff's injuries sustained as a result of the fall from a stepladder whilst working at the defendant's farm during July

1999.

[6] It will be noted that the plaintiff's claim is not based on negligence arising *ex delicto* but rather on negligence arising *ex contractu*. It is based on breach of the term of the contract that stipulated that the defendant would supply ladders to the plaintiff to enable the plaintiff to perform its part of the contract. Implied in the term is that the ladders would be in a proper, functioning condition and safe for the intended use, which imposed a duty of care on the defendant to ensure that the ladders supplied were in a safe and proper working condition. Breach of such duty would amount to negligence.

[7] The critical issue therefore is proof of the existence, not only of the contract but also of the material term alleged in paragraph 4 of the plaintiff's particulars of claim. It is trite law that the onus rests on the plaintiff to prove the terms of the contract on a balance of probabilities. If the plaintiff fails to discharge such onus, that will be the end of the matter. If he

succeeds, then the further issues to be resolved would be whether Isaac Maile was an employee of the defendant and, if so, whether he supplied a defective stepladder to the plaintiff and whether his conduct constituted negligence attributable to the defendant.

[8] The plaintiff's case in this regard rests on the evidence of himself and the brothers Mr. Johannes Marthinus Spamer, popularly known as Thys (Thys) and Mr. Hendrik Jacobus Venter Spamer (Kobus). The plaintiff's employee or assistant, Miya, made it known from the onset that he did not know whether they were doing the job on behalf of Aqua Irrigation or for the account of his employer. Nor did he hear what was discussed between his employer and Amm. His evidence relates to the goings on whilst they worked on the plant and the furnishing of the stepladders to them.

[9] Now all these three witnesses were, in my view, honest and credible. Though there are discrepancies in the evidence of each one of them, these are not such as to detract from the

credibility of each of them. The plaintiff himself admitted that he occasionally had blank periods. By that I understood him to mean that he often became absent minded and lost concentration in the course of his evidence. He also admitted that he could not recall everything due to the long lapse of time, coupled with the dramatic experience he has had to endure due to his drastically deteriorating state of health. He is now wheelchair bound and at some point he experienced some kind of seizure during the course of the trial as a result of which the court had to adjourn whilst he was being attended to. He was adamant though that the events leading to and surrounding his fall remain embedded in his mind. It is largely what happened thereafter that he could not fully recall. In spite of his poor health condition, the plaintiff largely stuck to the core of his version notwithstanding extensive cross-examination.

[10] The plaintiff's version is that Kobus, who ran Aqua Irrigation and for whom the plaintiff had done a lot of subcontracting work, had recommended him to Amm for the job of doing the

electrical connections on the plant. Kobus had told the plaintiff to himself contact Amm and see if they could agree terms. He had given the plaintiff directions to the farm and the plaintiff then went and met Amm who, in the presence of Thys, showed to him the plant and what the plaintiff needed to do. He agreed to do the work and was duly engaged by Amm. Plaintiff had told Amm that he did not have long ladders that will be needed to work on the roof of the plant and Amm agreed that the plaintiff could use the ladders on the farm as there were plenty of them. No price was, however, fixed for his work, but it was nonetheless agreed with Amm that he should carry on with the work, he believing that the price would be fixed later. However, Amm kept on delaying the fixing of a price and up until the plaintiff got injured and stopped work, no price had been fixed. The plaintiff subsequently submitted an account to the defendant for the work he had done, but got no response and no payment to date.

[11] Now, this version was largely corroborated by Kobus and

Thys safe in one respect, to which I shall revert shortly. Kobus confirmed that he had recommended the plaintiff for the electrical work on the plant and made it clear that the plaintiff was not to do work on behalf of Aqua Irrigation. He denied specifically that the plaintiff was his subcontractor on the plant. Indeed he denied ever having any work to do on that project. Thys confirmed that he was present when the plaintiff first arrived on the scene and that he and Amm had shown the plaintiff around the plant and what would be required of him to do. He emphatically denied that Kobus had anything to do with the work for which the plaintiff was engaged or that Kobus did any work on the plant. He said that after the plaintiff had been shown around the plaintiff and Amm went into Amm's office and he understood that they had there agreed terms, but he did not take part in the discussions and does not know the exact terms. He did hear, however, that the plaintiff would use the stepladders on the farm.

[12] One aspect of the evidence of the plaintiff that caused much

probing by Mr. Ploos van Amstel, for the defendant, is an invoice issued to the defendant by Aqua Irrigation on 31 August 1999, and handed in as exhibit “D”. In that invoice appears an item entitled “arbeid Allan R2 000,00”. It is not disputed that the item refers to labour costs due to the plaintiff. The defendant suggested that that shows that the plaintiff was a subcontractor of Aqua Irrigation on the work he did on the plant. The plaintiff’s explanation was that he had made a personal loan from Kobus and Kobus knew that he was doing work for the defendant for which the plaintiff was entitled to remuneration. In other words, Kobus was claiming his refund from the money that would be due to the plaintiff from the defendant. The other items on the invoice relate exclusively to materials to be used on the defendant’s project by people working thereon. For example, the electrical components were meant for use by the plaintiff. It had been a standing arrangement for the defendant to order materials for its projects through the account of Aqua Irrigation which got substantial discounts from suppliers. In this way the discounts were passed on to the defendant and

all that it had to do, was pay Aqua Irrigation, which in turn would pay the suppliers. The defendant did not dispute this arrangement. However, the defendant referred to a similar invoice exhibit “C” which was issued to F D Lotz. There too appears an item referring to Allan for visits and transport and another item for the amounts of R1 050,00 and R1 350,00 respectively. Defendant’s contention was that this confirms the plaintiff’s status as a subcontractor of Aqua Irrigation. But the plaintiff conceded that he was indeed a subcontractor on that project.

[13] The plaintiff was fully corroborated by Kobus on the inclusion of R2 000,00 relating to Allan’s labour in exhibit “D”. To some extent Thys also corroborates them. He says that Kobus had phoned him and inquired about the plaintiff’s progress with his work on the plant and Kobus had indicated that the plaintiff had approached him for a personal loan and Kobus would rely on being repaid out of the plaintiff’s remuneration. Thys saw nothing wrong with such arrangement and he remarked as follows:

> "So hy het nie meer brandstof, toe het hy 'n voorskot gevra of Kobus hom nie sal help nie. Toe het Kobus dit nou maar nou net hier afgetrek. Ja, dit is nou seker moeilik, groot besighede werk nie op hierdie manier nie, maar as 'n mens maar so hier help en daar, dan stuur 'n mens maar 'n rekening so deur."

This is typical of Thys' frankness and honesty and there are numerous such examples in his evidence.

In my view, the contents of exhibit "D" have been fully and satisfactorily explained. The fact that the plaintiff was a subcontractor in respect of exhibit "C" does not mean that he would be a subcontractor of Aqua Irrigation in all other works. He is fully corroborated by Kobus that he did not work exclusively as subcontractor, but that on certain projects he worked independently on his own contracts.

[14] But what is the defendant's version in regard to the alleged contract with the plaintiff? Amm is a single witness on this aspect. His two witnesses, Mrs. Lynette Esme Ramsay and Mr. Isaac Maile could not throw any light on what was

discussed between him and the plaintiff. Amm's version that the plaintiff was a subcontractor of Aqua Irrigation has been vigorously denied by both Kobus and Thys. Now Kobus is the man who was supposed to have engaged the plaintiff and Thys was the defendant's farm manager at the time and these two men emphatically denied the defendant's version. Thys was at the time in charge of the day to day operations and he has testified that he himself put up the building of the plant with the assistance of his farm labourers including Isaac Maile. He should surely know who was engaged on that project. He contradicted Amm completely where Amm said that the construction of the plant was a so-called turnkey operation. It is interesting that Amm says that Kobus would have provided a quotation for the whole turnkey operation, but he was not sure what was the overall price. All he says is that it was not more than what he could afford and gives an estimation of about R100 000,00. He initially suggested that Kobus would have given a verbal quotation. But when confronted with the evidence of Kobus that Kobus issues written quotations for every work he does Amm

somersaulted and said there was a written quotation but he could not produce it. Just like the register of his permanent employees during 1999 it has vanished without trace.

[15] Amm was not a satisfactory witness at all. He was generally vague and uncertain. For example, take the following passage:

> "When the plaintiff arrived on the farm, when he came there the first time, did he commence work on that very same day or not? --- I seem to recall that he did. He came here to do what he was supposed to do.
>
> So he came with all his tools? ---To the best of my knowledge he did."

And when asked whether he had discussed providing the plaintiff with ladders, this is how he responds:

> "You did not have such a discussion? --- No. It would not be appropriate, because we would have expected his company to issue him with whatever he was required to do."

The problem is that Amm could not controvert the plaintiff's evidence as to the terms of the contract because he alleges that he never discussed a contract with him, it is a matter between the plaintiff and Aqua Irrigation, about which he

knows nothing as well. In the same breath he could not recall discussing certain things with the plaintiff. For example, he could not recall any discussion regarding ladders.

> "Now, Mr Newstadt maintains that he believes that he spoke to you on that occasion, do you remember anything or was there any discussion regarding ladders with you, sir? --- I do not recall any discussion regarding ladders at all."

"But you do not recall anything regarding ladders? --- No, I do not."

But then he denies what the plaintiff says was discussed. It is a contradiction in terms.

[16] I find that in the face of the testimony of three credible witnesses who corroborated each other in material respects, the defendant's version cannot stand and has to be rejected.

[17] Now, it is so that no price had been fixed for the work that the plaintiff did. In this regard I refer to my judgment on the application for absolution from the instance at the close of

the plaintiff's case.

> "The work was done with the full knowledge and approval of the defendant. That a price could not be fixed was due purely to the evasive tactics of the defendant's representative.

In such circumstances, the only reasonable inference to be drawn is that the plaintiff would be paid a reasonable and fair remuneration. The contract herein is a *locatio conductio operis*. There is authority for the view that in that kind of contract, if a price is not fixed, it is implied that the independent contractor is entitled to a reasonable remuneration.
See in this regard, Wille, **Principles of South African Law,** 1 st Ed. at page 574."

Nothing has since transpired in this case that detracts from the validity of that statement. I hold therefore that the plaintiff has discharged the onus of proving the existence of a verbal contract with the defendant for the carrying out of the electrical connections to the bean sprouts processing plant at the defendant's farm in July 1999 and it was an implied term of the contract that the plaintiff would be paid a reasonable and fair remuneration for his work.

[18] The matter does not, however, end there. The next question is: Has the plaintiff proved on a balance of probabilities the alleged material term that the defendant was to supply him

with stepladders? Put otherwise, has it been shown that the defendant undertook to provide the plaintiff with stepladders? The defendant has specifically disputed that it had undertaken to supply stepladders. So that the onus remains on the plaintiff to prove the specific term on a balance of probabilities and the fact that I have rejected the defendant's version regarding the existence of the contract as a whole, does not relieve him of such onus.

[19] The first hurdle is that the plaintiff is a single witness in this regard. In fact there is a contradiction between his evidence and that of Thys. The plaintiff says that Thys was present in the initial discussions covering this aspect whereas Thys says that the terms of the contract were not discussed in his presence. He only heard after the plaintiff and Amm had discussed terms in Amm's office that the plaintiff could make use of the ladders on the farm. The plaintiff's assistant, Miya, was not present when the contract was discussed and could not throw any light on what the terms were. As said previously he was candid that he could not even say whether

they were subcontracting for Aqua Irrigation or not.

[20] The matter therefore falls to be decided on the evidence of the plaintiff alone. The problem in this regard is that such evidence is rather vague and lacks cogency. The gist of his evidence is that he only had a five foot four legged aluminium ladder which he carried in his bakkie. This ladder was, however, not long enough for work on the roof and for that he would need longer ladders which, at any rate, his bakkie could not carry. He says that he told the defendant about this problem in the following terms:

> "I asked, I do believe it was Mr Amm if they had ladders I could use and the reply was more than, we have got more ladders here than will ever be necessary. He then said when can you start."

This is essentially the gist of the plaintiff's evidence on the alleged term. It does not say that this amounted to an undertaking or that the defendant bound itself to provide ladders, only that the plaintiff could use the defendant's

ladders. I think that the plaintiff's counsel, Mr. Camp, realised this and put the following interesting question to the witness:

> "And so if I understand you correctly, you would not need to worry about ladders, those would be furnished by the defendant? --- That is correct. The only thing I would have to do was bring the equipment, install it and that would be it."

In my view, what the plaintiff says is a material term is no more than a loose arrangement in terms of which he could use the defendant's long stepladders whenever he needed them. This conclusion is borne out by the probabilities in the case. The plaintiff was an independent contractor who would normally be expected to provide the tools of his own craft. It is improbable that the defendant would burden itself with the contractual duty sought to be imputed to it. A contrary conclusion would lead to absurd consequences. For instance, if the suitable ladders that the defendant had broke down, would it mean that the plaintiff would stop work until

such time that new ones are bought? Would defendant be obliged to buy new ones?

[21] I find that the plaintiff has failed to prove on a balance of probabilities the existence of the material term averred in paragraph 4 of his particulars of claim.

[22] Even if it may be that such a term was agreed upon, in my view, it could only have related to the two ladders that were used in construction of the plant. The evidence is that these two long ladders had been on site. They were readily available and were the only ladders suitable for the plaintiff's work. Indeed the plaintiff used them prior to the day of the falling incident. It could not have been within the contemplation of the parties that ladders other than those two would be used. The evidence is clear that the type of ladder that caused the plaintiff to fall was not suitable for use on hard or concrete floors. The plaintiff disputed this but his evidence in this regard is contradicted by his witness Thys Spamer, who made it clear that the tripod ladders were meant for use only in the orchard. Thys is in agreement with

Amm on this score.

[23] This raises the further question of negligence. In my view, the plaintiff was himself negligent in using the particular stepladder. At any rate, he should have properly and fully tested it to see if it would hold before using it. Of course, the issue of negligence is irrelevant in view of my finding that the plaintiff has failed to prove the material term of the contract which allegedly gave rise to a duty to furnish ladders that were fit and safe for the plaintiff's use.

[24] In the same breath, the question of whether Isaac Maile, who according to the plaintiff's version, provided the defective stepladder, was an employee of the defendant is rendered irrelevant by my finding aforesaid.

It is my view though, that Isaac Maile was indeed an employee of the defendant and was acting within the course and scope of his employment as such for the reasons set out hereunder.

[25] The evidence of Thys Spamer is clear that he was at the relevant time so employed. Thys was the manager of the defendant at the time and he surely must have known who was employed by the defendant. I have found Thys to be a credible witness and insofar as there is a conflict between his evidence and that of Amm and Maile, on the other hand, I would prefer Thys's version.

[26] Isaac Maile's resignation on 31 May 1996 as per exhibits "J" and "K" appears to have been a ploy to circumvent the provisions of the labour laws. According to Thys it was done on the advice of a labour consultant. Isaac Maile himself does not seem to know precisely what was happening. All he knows is that he was told that there was no money or work and that he had to go but that he could return when work or money was available. He was made to sign exhibits "J" and "K", which he did not comprehend, as he is an illiterate who only knows how to sign his name. He says that he had no option in the matter. Interestingly, under cross

examination he initially denied that he had voluntarily resigned but then quickly somersaulted and said that he could not recall fully what happened. What he was certain about was that he went away and did some independent work at Marseilles. In 1999 he returned to Alpha Estate and was virtually reinstated on the farm. I say this because in spite of his insistence that he was now an independent contractor, the evidence shows that his position was the same as that of other permanent employees on the farm:

(a) He worked the normal hours, was given similar benefits, was paid on a monthly basis, was reinstated in a house on the farm and, according to Thys he was subject to Thys authority like all other employees. The only difference was that Maile earned more than the others, to wit R800,00 or R1 000,00 per month. According to Thys, this was because he was a versatile worker and led the group that worked with him. No wonder that Miya regarded him a foreman.

(b) Significantly, Maile was given his unemployment insurance fund card (UIF) only when he finally left Alpha Estates after 1999.

[27] Isaac Maile did not impress as a witness. He worked on the very plant that the plaintiff and Maile were working for at least two weeks according to his own evidence. Yet he claimed that he had no contact with them and never saw them using stepladders. This is so improbable that it is safe to say that he was lying. He also claimed that he only heard of the plaintiff's fall from Mahlako Maile after the latter had attended this trial during 2003, when he himself had been working on the same plant as the plaintiff. It is clear that he is falsely distancing himself from the plaintiff's fall. I accept the plaintiff's version that he was the one that provided the stepladders or instructed his juniors to supply them. The fact that the defendant's register of employees for the relevant period has inexplicably disappeared without trace puts a question mark on the credibility of its case in this regard.

[28] In conclusion, I wish to summarise my findings as follows:

(a) The plaintiff has proved on a balance of probabilities the existence of an oral contract with the defendant in terms of which the plaintiff did the electrical connections on the bean sprout processing plant at Alpha Estates in July 1999.

(b) The plaintiff has, however, failed to prove on a balance of probabilities the material term averred in paragraph 4 in his particulars of claim, as a result of which there was no contractual duty of care on the defendant to provide the plaintiff with stepladders that were fit and safe for the plaintiff's intended use.

(c) Isaac Maile was an employee of the defendant during the relevant period and did cause stepladders to be supplied to the plaintiff, including the stepladder that caused the plaintiff to fall.

(d) There was, however, no negligence on the part of the defendant's employees in providing the plaintiff with the particular stepladder, in view of the finding in (b) above. Furthermore it could not have been within the contemplation of the parties that the particular stepladder would be supplied and the plaintiff was negligent in using it without having first properly tested it.

[29] In the result, the issue to be determined in this part of the case is decided in favour of the defendant. Absolution from the instance is granted with costs.

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H.M. MUSI, J

On behalf on the plaintiff:	Adv. A C Camp Instructed by: Webbers BLOEMFONTEIN
On behalf of the defendant:	Adv. C Ploos van Amstel SC

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