REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A3046/2014

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

29 OCTOBER 2014 FHD VAN OOSTEN

In the matter between

AR FABRICATIONS (PTY) LTD **APPELLANT**

And

HIGH CLIMBER SERVICES CC **RESPONDENT**

Appeal - Contract - based on written quotation - formation of - requirement of signature - evidence insufficient to prove signature – no external manifestations confirming contact relied on - onus of proof of contract thus not discharged – appeal upheld with costs.

J U D G M E N T

VAN OOSTEN J:

[1] The issue in this appeal, in a nutshell, turns on whether an agreement for the hiring of scaffolding was concluded. The respondent, as plaintiff, instituted action against the appellant, as the first defendant, and Colin Melling as the second defendant, for payment of the sum of R195 324.17, in respect of the hiring of scaffolding, in terms of an alleged agreement of hire, based on a quotation, dated 30 November 2007 (the agreement). I shall revert to the terms of the agreement later in

the judgment. The defendants defended the action mainly on the basis of a denial that the agreement relied on had been concluded. The matter proceeded to trial and only two witnesses testified: Mr Graham, the sole member of the plaintiff and Mr Melling, the general manager in the employ of the first defendant, who was joined to the action as the second defendant on the basis of surety and co-principal debtor for the first defendant. Having heard argument the Magistrate, sitting in Germiston, found for the plaintiff but dismissed the plaintiff's claim against the second defendant. The appeal is directed against the whole of the judgment and order made against the first defendant.

[2] For a proper understanding of the contractual setting between the parties it is necessary to refer to some relevant background facts. During July 2007 the appellant (AR), who traded as commercial shopfitters, was employed as a sub-contractor by Tsogo Sun, at Monte Casino in Fourways, Johannesburg, for the extension of a front façade of Salon Privé, in order to provide for both a smoking and a non-smoking section. That involved extending the frontage of Salon Privé forward by some 10 to 12 metres which, as two levels of the building were involved, required scaffolding and a hoist to be erected to reach the upper level. The project envisaged the use of light-weight materials for easy assembly and minimal interference with the existing building structure in order to preserve its image of an antique Italian building. A site meeting was held on 10 July 2007, which was attended by all interested persons involved in the project, including Graham and Melling. AR obtained a written quotation for the scaffolding from the respondent (HCS), trading as specialists in all forms of scaffold access. The quotation is dated 26 July 2007 and issued for 'the supply the k/stage access, hoisting equipment for various operations at [Monte Casino]' for the sum of R12 848.00, in respect of the hire for one week or part thereof and R2 932.00 per week thereafter'. The project however, was shelved. A few months later it revived but the plans for the proposed extension changed substantially. What I have thus far alluded to, in essence, constitutes common ground between the parties. For the remainder of the events relevant to the cause of action, the versions of the two witnesses I have referred to, differ materially.

[3] Graham testified that negotiations with Melling resumed during October/November 2007 for the hiring of scaffolding at Monte Casino. He was

requested to quote which he did by way of a written quotation, dated 30 November 2007. The quotation is addressed to 'AR Fabrications, PO Box 7262, Leberhale 1410' and is for the 'supply …[of] access scaffolding' for the new façade, at the contact price of R250 589.00 per 4 weeks, or part thereof, and R24 560.00 per week thereafter, exclusive of VAT. The quotation provides for the signature for and on behalf of HCS as well as that on behalf of the client, in this case AR, accepting it. Graham further testified that he thought that the quotation had been posted to AR. He did not sign the quotation. Concerning the signing on behalf of AR he, with reference to the quotation, testified as follows:

'Sir, if you look at the bottom of that page…(intervenes) --Yes.

"*Acceptance on behalf of client"* and there appears to be a marking. What is that? -- do not know. Some…Is that a signature?--Well I have seen worse. I have seen worse but I mean it could be a signature yes. It could be, but I have seen worse.'

Graham continued that he 'accepted' the quotation had been accepted by AR because, so he testified, 'well I mean, you know, he (Melling) paid portion of it and we did the scaffold complete, so I accepted it, yes, that they accepted my quotation'. In cross-examination he revealed for the first time that Melling had confirmed having received the quotation, somewhat dubiously 'during the 20th, just a little after the 20th, at the 11th when the quote was dated'. He further testified that the work quoted for commenced on 14 December 2007 (as is also pleaded in the particulars of claim) and completed on 11 January 2008. In cross-examination, however, his version changed, and the commencement date now became 5 November 2007 and completed on 9 November 2007, to which he added that he had verbally agreed with Melling that AR would be billed from 14 December 2007. AR was invoiced for the period from 14 December 2007 to 11 January 2008 in the amount of R250 589.00. The scaffolding was used until 17 March 2008 in respect of which AR was invoiced, by way of two separate invoices, in the amount of R24 560.00 for each week. AR subsequently, in April and May 2008, by way of three payments of R100 000.00 each, paid the total amount of R300 000.00, leaving a balance of R195 324.17 owing, which is the amount claimed in the action.

[4] Melling denied ever having received, signed or seen the November quotation. After the July negotiations and during November 2007, he was informed by Venessa

Welke, on behalf of the project manager at Monte Casino, of a complete change in the July plans concerning the façade: it was now envisaged that a complete steel sub-structure to the proposed façade would be erected, requiring some 38 tons of steel, and that the entire area where the work was to be performed, needed to be cordoned off. At her request he provided her with the contact details of HCR as she wanted to deal with them directly concerning the scaffolding requirements of the project. Welke (on behalf of Iqweba Solutions, the project manager for Tsogo Sun), on 5 November 2007, sent an email to a large number of recipients, who were all involved in the project, including both AR and HCR. This email is pivotal to the issues at hand and therefore requires closer examination. The subject heading of the email reads: 'monte casino salon prive scaffolding revised scaffolding sequence dates' and records in detail the required scaffolding to be erected commencing on Monday 5 November 2007 and, thereafter, on each subsequent day, until completion thereof at close of business, on Friday 9 November 2007. In addition the email records that AR was to ensure that scaffolding was made safe and inspected at all times and 'the carpet protected below'. The proposed scaffolding was erected by CHR on instructions of Welke but primarily for use by the steelwork contactors and not AR. In fact, the scaffolding contract did not involve AR at all except that AR was to ensure that the scaffolding was installed at the appropriate place on the floor in order for it to effectively and properly perform its work. AR had earlier quoted to the project manager for its work in the project based on the amount, as for scaffolding, in HCR's July quotation. The steelwork was not, as was initially envisaged, completed by 20 November 2007, which moved the commencement date of AR's work forward to probably the end of January 2008. Melling however, seized the opportunity arising from the general builders' December holidays to commence with the work on 14 December 2007, and it was finalised on 17 March 2008. Although the scaffolding that had been erected was more of a hindrance to AR's performance of its work, some of the scaffolding, in particular at the higher levels, was in fact used by it. Melling testified that there was no agreement between AR and HCR concerning the scaffolding but that AR was prepared to pay HCR for its use of part of the scaffolding that had already been erected on site for the steel construction. Based on the weekly rate in the HCR's July quotation and rounded off, the amount of R300 000.00 was arrived at and paid to HCR from progress payments received from Tsogo Sun.

[5] In the view I take of the matter two issues require determination: firstly, has CHR succeeded in proving the agreement relied on and, secondly, whether the evidence of Graham can be reconciled with the evidence as a whole, in particular the 5 November 2007 email.

[6] As to the first issue the evidence concerning the signature of the quotation, I have already alluded to, is seemingly unsatisfactory. Counsel for HCS conceded as much. The evidence does not even go as far as proving a signature. In the particulars of claim it is alleged that the quotation was signed on behalf of AR, which constituted the agreement between the parties. The references in the evidence are to either a mark or a smudge. Be that as it may, and assuming at best for HCS that it indeed is a signature, there is nothing to show that it was Melling's signature, who was the only person authorised to sign on AR's behalf. Melling repeatedly denied that it was his signature. Graham did not testify that it was Melling's signature. Graham merely assumed that the quotation was sent by post. When, and how, it was returned to HCS, assuming that to have happened remains a mystery. It is clear from the evidence that a signature on behalf of AR was necessary for an agreement to be concluded. In the absence of proof of a signature on behalf of AR the court a quo, on that ground alone, ought to have non-suited HCS.

[7] Finally, I turn to a consideration of the evidence of Graham. He admitted receipt of, as well as the implementation of the schedule in the 5 November email. But he denied that he had anything to do with Welke, in her capacity on behalf of the project manager. In this regard he professed: 'I was not contracted to Venessa in any way, shape or form' and stubbornly persisted in the allegation that this email only related to the agreement between HSC and AR. One single observation, which also prominently echoed in the version of Melling, effectively draws a line through his denial and his evidence in this regard: it is inconceivable how a quotation dated 30 November 2007 could have been issued in respect of scaffolding that had by 9 November 2007 already been erected. Graham was seemingly unable to explain this discrepancy which moreover strikes at the heart of HCS's case as pleaded 'that the plaintiff commenced work for the defendants from about 14 December 2007 and the initial quotation period ended on 11 January 2008'. Graham, in my view, was an unsatisfactory witness who was driven by the improbabilities arising from his evidence, to shift the goalposts in cross-examination. As opposed hereto Melling's

version, on all material aspects, accords with the probabilities particularly if regard is had to the documents. The court a quo in dismissing the claim against the second defendant by implication found that Melling's signature of the 30 November invoice had not been proved but, in regard to the issue whether an agreement had been concluded, reasoned that 'through external manifestations' it had been concluded. The finding, in my view, cannot be sustained. The opposite, as I have alluded to, holds true and it follows that the appeal must succeed.

[8] In the result the following order is made:

1. The appeal is upheld.

2. The order of the court *a quo* is set aside and substituted with the following:

'1. The plaintiff's claim against the first defendant is dismissed.

2. The plaintiff is ordered to pay the first defendant's costs of the action.'

3. The respondent is ordered to pay the costs of the appeal, excluding the costs relating to the appellant's application for condonation..

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

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BA MASHILE
JUDGE OF THE HIGH COURT

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DATE OF HEARING	***27 OCTOBER 2014***
DATE OF JUDGMENT	***29 OCTOBER 2014***