REPUBLIC OF SOUTH AFRICA

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

APPEAL CASE NO: A3102/2014
CASE NO: 5759/2012

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

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DATE SIGNATURE

In the matter between:

NADROC LOGISTICS CC Appellant

And

GLM LOGISTICS (PTY) LTD Respondent

J U D G M E N T

CORAM: MABESELE J et ENGELBRECHT AJ:

MABESELE, J:

[1] This is an appeal against the whole judgment and order of the magistrate, handed down in Palm Ridge on 8 August 2014.

[2] The appellant first applied for condonation for late filing of this appeal. The application was not opposed. After I had considered the reasons for late filing of the appeal I am of the view that condonation should be granted.

[3] The appellant is NADROC LOGISTICS, a Close Corporation duly incorporated in terms of the applicable laws of the Republic of South Africa having its principal place of business at 1 ARMSTRONG AVENUE, LA LUCIA, KWAZULU-NATAL and its registered address at 8 CHERRY STREET, MAYBERRY PARK, ALBERTON.

[4] The respondent is GLM LOGISTICS (PTY) LTD (Reg. No 2002\011974\07) a company duly incorporated in terms of the applicable laws of the Republic of South Africa having its principal place of business at 6 RODENE AVENUE, GLENVISTA, JOHANNESBURG.

[5] The dispute between the parties revolves around a lease agreement entered into by the appellant as lessee and respondent as lessor.

[6] In terms of the agreement the appellant were to use the respondent's property as a depot for a logistic business.

[7] The appellant (defendant in a court below) failed to take occupation of the property on the date upon which the property was available. This resulted in the respondent (plaintiff in a court below) cancelling the agreement and

instituting a claim against the appellant for breach of agreement. The court *a quo* found in favour of the respondent.

[8] The appellant initially raised four grounds of appeal. At the beginning of hearing of the appeal counsel for the appellant abandoned the first ground of appeal after both counsel were in *ad idem* that the magistrate was mistaken to award an amount of R1 492 000,00 to the respondent, instead of R1 012 320,00.

[9] The second ground of appeal relates to the magistrate's finding that the damages suffered by the respondent flows naturally and generally from the breach of contract by the appellant, when the respondent neither pleaded or proved that the respondent suffered damages, nor pleaded or proved that there was a causal link between any breach by the appellant and the damages.

[10] Counsel for the respondent objected to this ground of appeal on the basis that it did not form part of the agreed issues that were to be determined by a court below.

[11] According to the respondent's counsel the magistrate was asked to determine the following:

11.1 Whether or not it was specifically agreed that the respondent was contractually obliged to ensure that the appellant received a

100 KVA electricity supply.

11.2 Whether the respondent informed the appellant that the property was ready for occupation and, if found that the respondent did in fact inform the appellant of the date of occupation, that such a notification had to be in writing.

[12] Counsel for the appellant agreed that these were the issues to be determined by the magistrate and that evidence was limited to them.

[13] Counsel argued, however, that at the close of the respondent's case he pointed out to the magistrate that the respondent did not plead or prove that it suffered damages.

[14] This argument was raised after the respondent's witness, Jakobus Schmidst, had presented evidence with regard to the monthly rental of R 40 00, 00 which the appellant was contractually liable for.

[15] In volume 3 of the record (on pages 251) Mr Schmidt testified that the rental was R 40 000,00, per month, excluding VAT and it was subject to an increase of 10% per year.

[16] Counsel for the respondent then asked the witness as follows:

"And you testified that the premises or you indicated to the defendant that the premises were ready for occupation on 1 April?.....Ja."

[17] Counsel proceeded:

"So if one calculates that, the claim from 1 April for the remainder of the lease period would be 22 months. Is that correct?.....That is correct. And it is calculated at R 40 000,00 per month excluding VAT for the remainder of 2012 and then ten percent increase would count for 2013. Is that correct?.....That is correct."

[18] Counsel then said:

'Your Worship I have asked my attorney to calculate this and it is a simple mathematical equation and the initial attorney, I do not know how she calculated the initial amount of 1492, but the calculation in respect of 22 months only comes out to R 1 012 320,00'

[19] It is so that the respondent did not allege in the pleadings that it suffered damages.

[20] Respondent pleaded as follows:

'The defendant has despite demand, failed and or refused to make payment to the plaintiff in the amount of R 1 492 000,00.'

And

'In the premises the defendant is indebted to the plaintiff in the amount of R1 492 000,00 which amount is due, owing and payable.'

[21] According to the appellant's counsel the respondent must have alleged and proved the following:

(a) The contract;
(b) Breach of the contract
(c) Damages suffered by the respondent;
(d) The loss was not too remote

[22] It is common cause that the parties agreed on the issues to be determined by the magistrate. This ground of appeal did not form part of the said issues. For this reason alone, this ground of appeal cannot stand.

[23] Regardless the issues that were to be determined by magistrate the respondent presented evidence through Mr Schmidt with regard to the loss the respondent suffered due to cancellation of the contract.

[24] Mr Ramsden who appeared for appellant did not raise an objection against evidence being led by Mr Schmidt. Instead, Mr Ramsden said the following:

'My colleague closed after his sole witness yesterday testified by quantifying the matter or should I say re-quantifying the matter and he pointed out that there had been a calculation error and that it was a lesser sum being claimed. I am not going to argue for absolution at this stage……..it is not necessary to argue it at this stage because we would in any case have to lead evidence……'

[25] In view of the above it can hardly be said that the appellant suffered prejudice as a result of the evidence which was not pleaded to

[26] The appellant, in my view, presented all the evidence that could assist the court to come to a just conclusion (Mkwanazi V Van der Merwe and Another 1970 (1) SA 609 (A); Esso Standard SA (PTY) LTD V Katz (1981) (1) SA 964 (A)).

[27] I am mindful, also, of the caution highlighted by Holmes, J.A in Mkwanazi (supra, 618) that the substance of justice should not be stifled by formalism.

[28] In view of the above, the magistrate correctly found that the damages suffered by the respondent flows naturally and generally from the breach of contract by the appellant. Therefore this ground of appeal has no substance.

[29] The third ground of appeal relates to the magistrate's finding that no mention was made in the lease agreement as to the amount of power to be installed, when special condition 22.2 of the lease agreement expressly states that 'it is to be noted that the respondent has applied for water and electrical connection'. It was argued that the magistrate should have interpreted the special condition to be a reference to the respondent's application to the Municipality of Ekurhuleni for a 100 KVA electrical connection.

[30] Clause 22.2 of the agreement reads:

> '*Lessor to ensure that there is electrical and water connection to the property: it is to be noted that the lessor has applied for water and electrical connection but in the event that connection has not been made as per the starting day of this agreement, the agreement will be postponed until such time as electrical and water connection has been made.*'

[31] There is clearly no mention of the amount of the electrical power in the special condition 22.2 of the agreement.

[32] It is so that the respondent applied to the municipality for a 100 KVA electrical connection. However, the respondent installed a 20 KVA power supply to the property. In my view the respondent complied with clause 22.2 of the special condition in that the respondent ensured that there is electrical connection to the property. The respondent did not undertake to provide 100 KVA power supply. Therefore argument that the magistrate should have interpreted special condition with reference to something which the respondent did not bind itself has no merit. Moreover there is no evidence that

parties agreed that the respondent supply 100 KVA electrical connection. The result is that this ground of appeal cannot stand.

[33] Counsel for the appellant argued with regard to the fourth ground that the respondent breached the agreement in that it failed to notify the appellant in writing of the commencement date of occupation of the property as it was obliged by clause 17.1 of the agreement.

[34] It is common cause that the respondent's representative informed the Chief Executive Officer of the appellant telephonically about the date of occupation of the property and the latter became aware of the date.

[35] Clause 17.1 of the agreement reads:

> '*Each party chooses domicilium citandi et executandi at his address as set out in clause 1, at which address all notices and legal process in relation to this agreement or any action arising therefrom may be effectually delivered and served.*'

[36] During argument counsel for the respondent asked for the following to be considered:

36.1 Whether or not the respondent was contractually obliged to give written notice of the date of occupation;

36.2 And if so, whether or not the respondent's failure to give written notice, as alleged by the appellant, constituted a material breach of the agreement;

36.3 Whether or not the verbal communication of the occupation date to the Chief Executive Officer of the appellant was sufficient notice of occupation.

[37] Clause 17.1 provides that all notices and legal process in relation to the agreement be delivered and served at the address chosen by the parties. The address of the appellant at which notices were to be delivered and served is No. 1 Armstrong Avenue, La Lucia, (KwaZulu-Natal). The respondent, in my view, was obliged to deliver and serve notice of the commencement date of occupation of the property to the appellant's address. The question is whether a verbal communication constituted a material breach of the agreement.

[38] Counsel for the respondent argued, with reference to the matter of *Aucamp v Morton* 1949 (3) SA 611 (A), that if found that the respondent was obliged to inform the appellant of the occupation date in writing the appellant cannot escape the admission that it was aware of the fact that the property was ready for occupation as at 1 April 2012.

[39] In *Aucamp, supra*, at 620, Watermeyer, CJ said:

'*On the other hand there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract.*'

[40] Van der Merwe *et al* (*Contract, General Principles* 3rd ed. 2007, at 356) said the following:

'*The test for seriousness has been expressed in a variety of ways, for example, that the breach must go to the root of the contract, must affect a vital part or term of the contract, or must relate to a material or essential term of the contract, or that there must have been a substantial failure to perform …*' (see also, *Britz v Du Preez* 1952 (2) SA 756 (T) at 757; *Radiotronics (Pty) Ltd v Scott, Lindberg & Co., Ltd* 1951 (1) SA 312 (T)).

[41] The representative of the respondent informed the Chief Executive Officer of the appellant verbally about the commencement date of occupation of the property. To my mind it cannot be said that verbal communication destroyed the foundation of the contract or affected the vital part or term of the contract. Therefore this ground of appeal must fail.

[42] Save for the appellant making payment to the respondent in the amount of R1 012 320,00, the appeal should be dismissed.

[43] In the result, I make the following order:

43.1 The appeal is dismissed with costs.

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M M MABESELE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree:

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N A ENGELBRECHT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Judgment	: 26 August 2015
Date of Hearing	: 27 July 2015
Attorneys for the Appellant	: Andrew Inc. Attorneys
Counsel for the Appellant	: Adv. Peter Ramsden
Attorneys for the Respondent	: Otto Krause Inc. Attorneys
Counsel for the Respondent	: Adv. Shaun Mc Turk