REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT
PRETORIA

CASE NO: A383/12

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

12 April 2013
DATE

SIGNATURE

12/4/2013

In the matter between:

RENÉ VILJOEN t/a WARRIORS Applicant

and

CARINE BORDUURDERS Respondent

JUDGMENT

TEFFO, J:

[1] This is an appeal against the judgment handed down by Magistrate E Mkhari for the district of Letaba in the Tzaneen Magistrate's Court on 26 March 2012.

[2] The respondent was the plaintiff in the court below and the appellant was the defendant. For purposes of this judgment I will refer to the parties as they were referred to in the court below.

[3] The plaintiff sued the defendant for payment of the sum of R2 400,00 in respect of work done and materials supplied by the plaintiff to the defendant at the defendant's special instance and request on 28 February 2007.

[4] It appears from the record that the defendant failed to enter an appearance to defend and default judgment was granted in favour of the plaintiff. The defendant subsequently applied for and succeeded with an application for the rescission of the default judgment. The defendant's affidavit in support of her application for rescission of judgment and the plaintiff's opposing affidavit form part of the record.

[5] At the conclusion of the trial in the matter, the court granted judgment in favour of the plaintiff for the amount claimed with interest and costs.

[6] The defendant appeals against the whole judgment on the following grounds:

6.1 The magistrate, after having correctly found that the defences raised in the plea were confirmed by the evidence led at the trial, erred by granting judgment in favour of the plaintiff.

6.2 The magistrate should have found that the *onus* rested on the plaintiff to prove that:

6.2.1 The defendant traded as Warriors.

6.2.2 The defendant had performed fully and precisely in accordance with the agreement.

6.3 The magistrate should have found that Warriors to whom the plaintiff's invoices were issued, was in fact the trading name of a close corporation, Warriors Skills CC, and not that of the defendant.

6.4 The magistrate should have found that the plaintiff had not performed fully in that she failed to embroider the garments with the Warriors logo and failed to remedy the defective work when the garments were returned to her for this purpose.

6.5 The magistrate erred by basing her entire judgment on a finding that Mrs Van den Heever did not know the contents of the parcel she took to the plaintiff.

[7] At the hearing of this appeal, counsel for the defendant raised another ground of appeal, which was not included in the notice of appeal, to the effect

that the plaintiff does not have *locus standi* to issue summons against the defendant as the close corporation should have done so.

[8] It is necessary to summarise the facts that led to the claim in order to identify the issues that the trial court had to deliberate upon.

[9] Mrs Karin Engelbrecht (Karin) conducted a business known as Carine Borduurders (the plaintiff) as a sole proprietor where she sold golf-shirts, t-shirts and overalls. She also did printing and embroidery work on the clothes she sold.

[10] The plaintiff previously did embroidery work for the defendant on the jackets. This work was done three months before the defendant placed an order which is the subject of the matter before court.

[11] In February 2007 the defendant placed an order where she requested the plaintiff to sell and embroider the Warriors logo on the t-shirts and overalls. A dispute arose after the work was done.

[12] According to the defendant she sent her children to fetch the goods from the plaintiff. When she opened them she found that the plaintiff had embroidered an incorrect logo on the clothing.

[13] The plaintiff contends that she performed as instructed. According to her the logo that she had embroidered is the logo that she embroidered on the previous orders of the defendant. She had saved the logo on the computer.

[14] As a result the defendant requested her daughter, Rowena, to return the goods to the plaintiff and explain to Karin what they wanted. Rowena returned the goods and explained what was required.

[15] The defendant alleges that subsequent to that she sent one Tanya, one of her staff members to go and fetch the goods. When Tanya returned with the goods, she found that nothing was done on them. They were still the same with the incorrect logo. She then requested her mother-in-law, Mrs Anna Katrina van den Heever to return the goods and explain the situation again to Karin.

[16] In her evidence Mrs Van den Heever confirmed that she returned the goods to the plaintiff and left them there.

[17] Although Karin denies that the goods were returned to her for the second time for rectification of the embroidery, she conceded that Mrs Van den Heever brought the goods back to her. She further alleged that she gave Mrs Van den Heever the goods to return to the defendant and tell her that she cannot handpick the embroidery on the t-shirts because the t-shirts would have holes. Mrs Van den Heever disputes this allegation and maintains that she would not have taken the goods back to the defendant as she was

instructed to take them to Karin because of the incorrect logo. Further that her son, Mr Rudolph Viljoen (Rudi) would not have accepted the clothing with an incorrect logo.

[18] Karin further testified that she asked the defendant to pay for the goods many a times. Despite lawful demand the defendant refuses and/or neglects to pay the amount of R2 400,00 for the work done. She alleges that the amount is due and payable as the defendant should have paid immediately after collecting the goods.

[19] In her plea the defendant made the following averments:

19.1 She denies that she trades as Warriors and puts the plaintiff to the proof thereof.

19.2 She pleads that Warriors Skills CC contracted with the plaintiff as an independent contractor to supply it with certain overalls and t-shirts on which the Warriors logo had been embroided.

19.3 She denies that the plaintiff performed fully and precisely in accordance with the agreement and states that the garments had not been embroided with the correct Warriors logo.

19.4 She accordingly raises the *exceptio non adimpleti contractus* and pleads that the plaintiff is not entitled to any remuneration

> unless and until she has remedied the defective performance, either by substituted performance or by an adjustment to the contract price.

[20] Two invoices marked Exhibits "A" and "B" in the total amount of R2 400,02 were attached to the summons.

[21] The trial court was required to determine the following issues, viz, firstly, whether the plaintiff contracted with the defendant in person or whether the plaintiff contracted with the close corporation; and secondly, whether the plaintiff performed fully and precisely in accordance with the agreement.

[22] This Court has to determine whether the court *a quo* had erred by granting judgment in favour of the plaintiff in this matter.

[23] As stated in para [7] above the defendant raised another ground of appeal which does not appear in the notice of appeal. In *Leeuw v FNB* 2010 (3) SA 410 (SCA) where the appellant persisted with an argument that the respondent's initial notice of appeal was fatally defective as it did not specify all the grounds of appeal, the court rejected the argument and found that the object of a concise and succinct statement on the main points addressed in the notice of appeal is also achieved by the heads of argument.

[24] In her heads of argument the defendant raised an issue that does not appear in the notice of appeal. The issue as highlighted in para [7] above is that the plaintiff does not have *locus standi* to issue summons against the defendant. The defendant contends that the invoices that were issued by the plaintiff to her were issued in the name of the close corporation. Counsel for the defendant submitted that it is trite law that a close corporation is a legal entity on its own, it can only sue and be sued as a close corporation. It is common cause between the parties that this issue was never raised in the notice of appeal and in the pleadings before court. It also appears nowhere in the record of the court *a quo*. Counsel for the defendant also submitted that in *Leeuw v FNB* it was held that an issue that was not raised as a ground of appeal in the notice of appeal can be raised in the heads of argument. Counsel for the plaintiff disagrees and contends that the *Leeuw* matter is distinguishable from the present matter in that all the issues that were raised in the *Leeuw* matter which were not included in the notice of appeal but only in the heads of argument were ventilated in the court below and in the pleadings. He further submitted that the issue of *locus standi* of the plaintiff was never raised in the plea although he conceded that the invoices were issued in the name of the close corporation. I agree with the plaintiff's counsel that indeed this issue was never raised in the pleadings and the court below was also not aware that this was an issue to be determined before it. Counsel for the defendant also conceded that this issue was never raised in the pleadings. This issue can therefore not be entertained for the reasons given above. It is therefore dismissed.

[25] The next issue is whether the plaintiff contracted with the close corporation or the defendant personally when the orders were made. The defendant in her plea to the plaintiff's particulars of claim denies that she trades as Warriors and alleges that the close corporation, Warriors Skills CC, contracted with the plaintiff as an independent contractor. It is common cause between the parties that when the orders were made the plaintiff was requested to issue out the invoices to Warriors and Warriors' box number was given to the plaintiff. The plaintiff was not requested to issue out the invoices to the defendant trading as Warriors and neither did it do the same. The defendant's evidence is that the defendant herself is not a member of Warriors Skills CC and neither is she employed by the close corporation. Although the defendant concedes that people in their area know them as Warriors and not as a close corporation, they only use the full name when they complete documents. A CK2 form proves that Warriors is a close corporation and that the defendant's husband, Rudolph Viljoen, is its only member. The defendant testified that she has never indicated to the plaintiff that she traded as Warriors.

[26] The plaintiff did not file a reply to the defendant's plea. In paragraph 10 of the plaintiff's opposing affidavit to the defendant's rescission application, the plaintiff alleges that at all times it had been dealing with the applicant (defendant) and not with the close corporation. All dealings in this regard and on previous occasions were done with the applicant (defendant) directly and personally. The applicant should be estopped to use this defence as she

created the impression that she was trading as a firm. The plaintiff's opposing affidavit does not, however, form part of the pleadings.

[27] It is trite law that in order to rely on a defence, same must be pleaded. The plaintiff failed to plead estoppel in any of its pleadings. It cannot therefore rely on estoppel. The fact that the plaintiff issued out invoices in the name "*Warriors*" is a clear indication that it was not contracting with the defendant in her personal capacity. The plaintiff has therefore failed to discharge its *onus* of proving that the defendant traded as Warriors when the orders were made.

[28] I now turn to deal with the merits of this claim. The reason why the defendant is not paying the plaintiff for the work done and the materials supplied is according to the defendant that the plaintiff failed to perform in accordance with the agreement. In her plea the defendant denies that the plaintiff performed fully and precisely in accordance with the agreement and states that the garments had not been enbroidered with the correct Warriors logo. She further raises the *exceptio non adimpleti contractus* and pleads that the plaintiff is not entitled to any remuneration unless and until she has remedied the defective performance, either by substituted performance or by an adjustment to the contract price.

[29] In her evidence-in-chief Karin, on behalf of the plaintiff testified that when the goods and the embroidery were ordered, she was instructed to put the logo in front on the t-shirts and on the overalls at the back. Further that previously she did a design for the front and the back. The logo was not

changed and she put the same logo on. Her further evidence was that she embroidered the t-shirt and the overalls with a feather instead of a Warriors logo because that is what she did with the previous order. Under cross-examination she testified that the logos embroidered on the garments were the same as the logos she had previously. She further testified that her instructions were to put the logo at the front on the t-shirts and at the back and front on the overalls. She also testified that she knew what the logo was as she did it before and she could remember exactly what logo to put on.

[30] The principle of *exceptio non adimpleti contractus* was set out in the case of *Thompson v Scholtz* 1999 (1) SA 232 (SCA) as follows:

> "*There are two major propositions in the judgment in BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A). The first is that the exceptio is available as a defence to a party from whom performance is demanded by the other contracting party whose reciprocal performance has not been rendered precisely or in full; the exceptio non adimpleti contractus accordingly applies even if the defect in the plaintiff's performance (short of being de minimis) is not so serious as to justify its rejection or the cancellation of the contract by the defendant. Implicit in this proposition is the notion that a plaintiff is precluded from recovering any remuneration if his performance falls short of perfection, even when the defendant, notwithstanding its shortcomings, accepts and utilises it.*"

[31] Karin was shown the logo that she allegedly did previously and cross-examined on it. It came out that the front logo was not the same as the one at the back.

[32] The previous logo was as follows: There is a back and a front logo. The back logo is a feather tied to the word "*warriors.co.za 'for the adventure of being alive"*. The word Warriors looks like it is by way of sticks tied together with a string and what purports to be an elephant. The front logo is the name "*René*" with a date with sticks "*2006*". The name "*René*" is written in the normal black letters, the logo is a stick with a feather.

[33] It was put to her that the embroidery that she did only had a stick and a feather meaning that it did not have the logo with the word "*Warriors*" in front and at the back. Her response was that according to her knowledge and the way she did it previously the feather was the front logo and the bigger logo as instructed as for the back. She further said her client told her to make the logo smaller for the front when she ordered more overalls.

[34] When told that she did not put the Warriors logo anywhere, she responded as follows:

> "*On the overalls yes because they said I must put the logo in front on the t-shirts and on the overall on the front and at the back, and that is how I did it.*"

[35] She conceded that there was no Warriors logo on the front of the t-shirts. It was only a stick and a feather.

[36] She also conceded that previously she did put the full Warriors logo on the t-shirts.

[37] It was revealed under cross-examination that the incorrect logo that Karin used which did not have the word "*Warriors*" was the logo that she allegedly saved on her computer when the logos were first designed.

[38] On the other hand the defendant's evidence was that her instructions to Karin were for her to put the Warriors logo on the front centre of the t-shirts and on the overalls she wanted the Warriors logo on the front left-hand side and the centre back as big as possible. According to her the same logo would have appeared on the t-shirts and on the overalls. She also testified that Karin asked her to give her the logo and she did it correctly on the overalls.

[39] Her further evidence was that when Rowena brought the garments home, she opened them and found that on the overalls not all the logos were right. Some were missing. There was one with a red logo on the front and the other did not have the logos at all. The t-shirts had the incorrect feather on and the incorrect embroidery on the front. The t-shirts did not have the Warrior logo at all.

[40] On the probabilities it is clear that there was something wrong with the embroidery that Karin did for the defendant. It is common cause that after the work was done the defendant sent her children to fetch the garments. When she opened them she found that an incorrect logo was embroidered. Even Karin concedes that the t-shirts did not have the Warriors logo at all although she contends that that was the logo that she used previously. From her own

evidence it was clear that what she regarded as the previous logo was not the same as the logo that she had put on the garments. This means that even the logo that she regarded as the previous logo that she used was not the correct logo of the defendant. The defendant's husband, Rudi, explained the importance of their logo to them when they market themselves and when they do business with the outside world. The fact that the garments were taken back twice to the plaintiff for corrections, is a clear indication that indeed the plaintiff had not performed precisely and fully in accordance with the agreement.

[41] The plaintiff has therefore failed to discharge its *onus* of proving that it has fully performed in accordance with the agreement.

[42] In the circumstances I agree with the defendant that the *exceptio adimpleti contractus* is applicable in this matter. Accordingly the plaintiff is precluded from recovering any remuneration if his performance falls short of perfection, even when the defendant, notwithstanding its shortcomings accepts and utilises it (*Thompson v Scholtz* referred to *supra*). The plaintiff is therefore not entitled to remuneration unless and until it has remedied the defective performance, either by substituted performance or by an adjustment to the contract price (*Thompson v Scholtz*).

[43] A further issue that required determination by the trial court was whether the goods were returned to the plaintiff.

[44] According to the plaintiff's evidence the garments are with the defendant and the defendant is utilising them. She testified that she saw a certain gentleman wearing a golf-shirt. That evidence was not taken any further. Nothing has been said with regard to this person, whether the person has any connections with the defendant. On the other hand the defendant's evidence is that the last time she spoke with Karin was after she had sent her mother-in-law, Anna Katrina van den Heever, to return the garments to her when she phoned her and told her that she cannot handpick the embroidery on the t-shirts as the t-shirts would have holes. At the time she made some suggestions which were not acceptable to the defendant. Finally realising that the defendant was not accepting any of her suggestions, she requested her to ask the children to sell the t-shirts to cover the costs. Karin disputes this evidence and alleges that since the garments were taken to the defendant she never spoke to the defendant. The only person she spoke to was the defendant's mother-in-law when she brought the garments to her and complained that she had embroidered the incorrect logo. She testified that she told her to return the garments to the defendant and tell her that she cannot handpick the embroidery on the t-shirts as they would have holes. From there she never heard anything from the defendant. Mrs Van den Heever disputes that she was given the garments back by Karin to return to the defendant. She further testified that she would not have taken them back because her instructions were for her to take them to Karin because she had embroidered an incorrect logo and that Rudi would not have accepted them with the incorrect logo. The defendant denies being in possession of the goods and contends that they could not wear the garments which do not have

their logo on. She also testified that Karin knows that she did not accept the work.

[45] If one takes the evidence in its entirety one wonders why would the defendant who has shown her dissatisfaction about the work that was done and supplied to her by the plaintiff take the same work back to her possession if the defective performance was not rectified. The probabilities favour the defendant that she would surely have taken back the garments which did not have their correct logo if the work that she complained about was not corrected. Karin testified that she performed as agreed and the defendant accepted the work. This evidence is contradicted by the defendant's evidence that she was not happy about the work done and she returned the garments to the plaintiff twice. Even the plaintiff through Karin's evidence conceded that the defendant's mother-in-law, Mrs Van den Heever brought the garments to them and complained that the work was not properly done. This contradicts plaintiff's earlier evidence that the work was done in accordance with the agreement and that the defendant accepted it. Initially in her evidence Karin testified that the goods were not returned to her. Later on she conceded that Mrs Van den Heever returned the goods and asked her to take them back to the defendant. It is strange for Karin to give the goods to Mrs Van den Heever to take back to defendant without talking to the defendant. It is probable that while the goods were with Karin after they were left by Mrs Van den Heever, Karin phoned the defendant and negotiated with her as alluded to by the defendant in her testimony. I am therefore persuaded that the goods were returned to the plaintiff by the defendant through Mrs Van den Heever and

they were never taken back to the defendant. There is absolutely no reason why the goods could be with defendant if she could not use them and the purpose for which they were made was not achieved.

[46] In her judgment the learned magistrate did not deal with the issue of who were the contracting parties when the order was made.

[47] The learned magistrate based her judgment on the fact that Mrs Van den Heever in her evidence testified that she did not open the parcel and check the goods when she was sent by the defendant to take it back to the plaintiff. She accordingly held that because Mrs Van den Heever did not know what was contained in the parcel, the *exceptio non adimpleti contractus* was not applicable and that defendant's defence must fail. This finding is indeed misplaced if one takes the evidence in its entirety. The plaintiff's evidence was to the effect that Mrs Van den Heever brought the goods to Karin and Karin told her take them back to the defendant and tell her that she cannot handpick the t-shirts as they would have holes. It was therefore common cause between the parties that Mrs Van den Heever took the garments back to the plaintiff for correction of the logo. The learned magistrate has therefore misdirected herself in this regard and had erred in granting judgment in favour of the plaintiff for the reasons given above. The appeal must therefore succeed under the circumstances.

[48] In the result I make the following order:

48.1 The appeal is upheld with costs.

48.2 The order of the court below is set aside and replaced with the following order:

"*The action is dismissed with costs.*"

M J TEFFO
JUDGE OF THE NORTH GAUTENG
HIGH COURT, PRETORIA

I agree:

J F VAN SCHALKWYK
ACTING JUDGE OF THE NORTH GAUTENG
HIGH COURT, PRETORIA

HEARD ON	:	7 FEBRUARY 2013
FOR THE APPELLANT	:	S A VISSER
INSTRUCTED BY	:	STEWART MARITZ BASSON
FOR THE RESPONDENT	:	L K VAN DER MERWE
INSTRUCTED BY	:	MESSRS VEZI & DE BEER