REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number 192/05
Not reportable

In the matter between:

RA BURRISS (PTY) LTD t/a SERVICE ELECTRICAL **APPELLANT**

and

EFSTRATIOS MOUMTZIS **FIRST RESPONDENT**
ALASIA RENE MOUMTZIS **SECOND RESPONDENT**

CORAM: FARLAM, MTHIYANE JJA et MAYA AJA

HEARD: 17 FEBRUARY 2006

DELIVERED: 23 MARCH 2006

Neutral citation: This judgment may be referred to as Burris (Pty) Ltd t/a Service Electrical v Efstratios Moumtzis and Another [2006] SCA 26 (RSA).

JUDGMENT

FARLAM JA

[1] The appellant in this matter, an electrical contractor, instituted action in the Port Elizabeth magistrate's court against the respondents, the trustees of a trading trust, which had leased commercial premises in a shopping centre in Newton Park, Port Elizabeth, claiming an amount of R47 991.11, which it alleged was the balance of the amounts owed to it by the respondents in terms of an oral contract for work to be done at the premises of which the respondents were the tenants. The respondents defended the action, pleading that they had paid to the appellant all amounts they owed it and averring further that they had overpaid the appellant in an amount of R57 008.40, which was the subject of a counterclaim which they brought against the appellant. The matter came before an additional magistrate for the district of Port Elizabeth, who dismissed the appellant's claim but gave judgment in favour of the respondents on their counterclaim.

[2] An appeal brought by the appellant against this judgment was dismissed by the Eastern Cape High Court and it now appeals to this Court (with the leave of the High Court) against its judgment dismissing the appeal. Before the matter was argued in this Court the parties agreed that if the appellant's claim were to be upheld on appeal the judgment should be given in its favour in an amount of R44 522.28 and that if the appeal were dismissed the judgment on the respondent's counterclaim in the amount of R57 008.40 should stand.

[3] There was no dispute between the parties as to the work done by the appellant nor as to the reasonableness of its charges therefor. The respondents agreed that they were liable for some of the work done by the appellant but contended that they were not liable for the rest of the work and that the appellant should have looked to the landlord of the leased premises, one Cohen in his capacity as trustee of the West Street Property Trust, for payment therefor.

[4] Before the lease between the landlord and the respondents was concluded Mr D Cohen, who was developing the shopping centre in which the

leased premises are situated, asked Sean Burriss, the appellant's managing director, to furnish him with a price for the electrical installation to be done at the premises to be leased, on which it was envisaged that a Spar store business would be conducted by the tenants. On 19 August 1998 Mr Burriss sent Mr Cohen what he described as an 'offer', in which he quoted a figure of R390 956.00 for certain electrical installation work to be done on the premises: the work to be done was particularised on the second page of the offer. The third page was headed 'Commercial Terms'. It contained four numbered paragraphs. In the first it was stated that the price was valid for 30 days and excluded VAT. The second contained the dates by which the work was to be completed. In the third, which dealt with 'Payment terms', were set out the dates on which payment of the appellant's price was to be made, viz 30 November, 15 December and 30 December, and the appellant's 'general conditions of sale' were made applicable. Subparagraph b read as follows:

'b Orders for extra work will only be carried out when instructed to do so in writing. Payment for extras will be due on the 15th January 1999.'

The fourth paragraph read as follows:

'4. General

Although care has been taken to ensure that nothing has been omitted and all is to the Spar Eastern Cape specification document as there are no consultants' drawings or design for the above Spar we assume no responsibilities for any oversight in this quotation.

On completion of the final design by us or a consulting engineer the extra's and omissions will be calculated and the price adjusted accordingly.'

[5] Before Mr Cohen accepted the appellant's quotation the lease relating to the premises was concluded. Among the documents annexed to the lease were the first two pages of the appellant's quotation. The third page, which included the adjustment provision, was not annexed.

Clause 3 of Annexure A of the lease, which contained what were described as the 'General Conditions of Lease', read as follows:

'The Landlord shall carry out certain improvements to the premises as set out in Annexure "H", which improvements shall be effected:

3.1 prior to the Possession Date;

3.2 in accordance with the Spar Specifications unless agreed in writing by SPAR but

subject to the financial limit contained in annexure D and clause 1.1.6.'

Clause 1.1.6 contained a definition of 'the Specifications' which read as follows:

'1.1.6 "The Specifications" means the plan and specifications which are annexed hereto as Annexure "H", which plan and specifications reflect the improvements to be made to the Premises by the Landlord prior to the Possession Date subject to the maximum expenditures as set out in Annexure "D", provided the work in items 1,2,3 and 4 of Annexure "D" as detailed in the quotations annexed to Annexure "D" marked "D1", "D2", "D3" and "D4" respectively" is performed by the Landlord in accordance with those quotations.'

Annexure 'D' is headed 'Schedule of Limits of (sic) re Spar Building and Finishing Specifications (including Material and Labour).' It read as follows:

'1. All wall tiles and floor coverings and skirtings (including all porcelain tiles, carpets, NCI tiles, mild steel floor tiles, vinyl floor tiles, porcelain skirtings, NCI – ceramic skirting tiles, vinyl cove skirtings etc.) As per Quotation D1.

2. All ceilings and bulkheads as per Quotation D2.

3. All electrical power supply and lighting as per Quotation D3.

4. All airconditioning and fire detection system as per Quotation D4.

5. No Hoists.

6. No Trolley Bay.

7. No Off-loading Dock.'

In paragraph 1 the words 'as per quotation D1' were added in handwriting and replaced the words 'limited to R213 400.00' which were deleted. Similarly the references to quotations D2, D3 and D4 were inserted in handwriting and replaced phrases limiting the landlord's obligation to R74 000.00, R390 000.00 and R327 000.00 respectively. The quotation annexed as D1, which related to the tiling and floor covering, was for an amount of R213 400. The quotation annexed as D2, which related to the ceilings, was for an amount of R74 000. The appellant's quotation was annexed as D3 but as I have said, the last page containing the 'Commercial terms' was not annexed. The quotation annexed as D4, which related to the airconditioning and ventilation, was for an amount of R327 985.

[6] None of the quotations annexed contained a clause providing for an adjustment of the quoted price. Annexure 'H' of the lease was a copy of the Spar Eastern Cape Building and Finishing Specifications. Clause 1.1 of this document read as follows:

'1.1 Upon reaching agreement to develop and lease the premises to the SPAR Member, the owner or the appointed Developer acting on behalf of the owner shall be required to carry out the building and finishing specifications contained in this document as required by the SPAR EASTERN CAPE Development Department.'

It also contained, amongst other things, specifications for an off loading dock, two hoists (where necessary), and a ramp to facilitate trolley receiving.

[7] When the appellant commenced work on the leased premises a problem arose because there were no detailed drawings detailing the work to be done. The second respondent, who acted on behalf of herself and the first respondent in dealing with the appellant's representative, Mr Burriss, wanted an electrical consultant appointed to prepare a marked up drawing of the premises. Mr Cohen was originally unwilling to appoint a consultant but he eventually instructed Mr Burriss to appoint a Mr I Rudman as consultant. Mr Burriss then appointed Mr Rudman, assuring him that he would make sure that he was paid his fee and that he would claim it thereafter from Mr Cohen. (In the event Mr Burriss paid Mr Rudman's fee and by the time he testified he had not been reimbursed by Mr Cohen.)

[8] In addition to insisting on the appointment of an electrical consultant the second respondent also made it clear to Mr Burriss from the start that she wanted a lot of additional electrical work done, which was not included in the appellant's quotation to Mr Cohen. Some of this work was provided for in the Spar Specifications but part of the work required by the second respondent went beyond what was set out in the specification.

[9] The appellant did all the extra work required by the second respondent. Mr Burriss testified that it only did so after the second respondent had agreed that she and the first respondent would pay therefor. He said that because in terms of the appellant's contract with Mr Cohen it was limited to claiming for work done which was listed on the second page of the quotation and he had no claim against Mr Cohen for extra work in view of the fact that the appellant had not been instructed by him in writing to do the work.

[10] The second respondent testified on the other hand that she had only agreed to pay for such additional work as was not required to make the premises comply with the Spar Specification and that the appellant had to look to Mr Cohen for payment of work covered by the Spar Specification. She averred that the landlord was obliged under the lease to ensure that the premises complied with the specification and that she had not been prepared to pay the appellant for this work and then look to Mr Cohen for reimbursement. According to her evidence she did not like or trust Mr Cohen. The respondents' case was that the appellant had the right under its contract with Mr Cohen to adjust its price so as to cover all the extra work which was needed to comply with the Spar Specification.

[11] In finding in favour of the respondents the magistrate held that the version of the contract given by the second respondent was more probable than that given by Mr Burriss.
He said:

'[I]t is highly unlikely that the obviously hardbitten and shrewd experienced business woman, Mrs Moumtzis, [the second respondent] would meekly or recklessly agree to pay what the contract with Cohen said Cohen should pay. That she would willingly be ready to pay for her luxurious items over and above the Spar specifications makes sense to me. Plaintiff always had and still has the backdoor of par. 4 on page three of his quotation to fall back on and might despite protestation have been wiling to take the risk of proceeding with the work which was after all a very large contract.
If plaintiff perhaps thought that she would be an easier target than the difficult Cohen he has made a mistake. This is the counter argument to [the appellant's attorney's] suggestion that Mrs Moumtzis would much rather have locked horns with Burris than with Cohen.'

[12] In its judgment on appeal the court *a quo* held that the magistrate had not misdirected himself in rejecting Mr Burriss's version of the contract and that the probabilities strongly supported the respondents' version.

[13] The respondents' version is essentially based on two propositions:
1) the appellant could in terms of its contract with Mr Cohen adjust its price upwards to claim all extra amounts arising from work done to make the

premises comply with the Spar Specification; even if it was not instructed in writing to do such work.

2) Mr Cohen was obliged under the lease to ensure that the premises did so comply.

[14] Although I doubt, in view of the express wording of clause 1.1.6 and Annexure 'D' of the lease, whether it is correct to say that Mr Cohen was obliged under the lease to pay for the work done so that the premises complied with the Spar Specification, I am prepared to assume, without deciding the point, that the respondents' second proposition may be correct.

[15] I proceed to consider whether their first proposition is correct.

[16] I do not agree that in the circumstances of this case the appellant was entitled to claim from Mr Cohen any extra amount for work not covered by the second page of its quotation done in terms of the Spar Specification. In arguing this part of the case, Mr Huisamen quoted both paragraphs of clause 4 of the appellant's quotation and submitted that in other words, as between Mr Cohen and the appellant the appellant was 'entitled to adjust its quotation upwards to bring it in line with the full costs which would have been necessary to supply the premises to the respondents in accordance with the minimum Spar Specifications'.

[17] I do not think that clause 4 should be so interpreted. The first paragraph is in terms a rejection of liability. The appellant is making it clear that it will not be responsible for omissions in the quotation and any respect in which the work listed on the second page falls short of what the Spar Specification requires. The second paragraph clearly envisages that a final design is required and that once it is completed the extras and omissions will have to be calculated so that the price can be adjusted. But the question to be answered is: what are the extras referred to? The obvious answer is: those referred to in clause 3. b. In this regard it is important to note that the work

listed on the second page was to be paid for in three instalments on 30 November, 15 December and 30 December, while payment for any extra work done would have to take place on 15 January 1999. This clearly would include extras covered by the adjustment referred to in clause 4, paragraph 2. This link between clause 3. b and clause 4 paragraph 2 reinforces the view that the extras mentioned in clause 4 paragraph 2 can only be extras covered by clause 3. b. Once it is accepted that Mr Cohen never instructed the appellant to do any extra work, whether in writing or otherwise, it becomes clear that the appellant would not have been able to have claimed any extra amount from Mr Cohen. Mr Burriss's evidence on the point that he was aware of this must in my view be accepted. This conclusion is destructive of the respondents' case. It is impossible to accept that Mr Burriss would have agreed with the second respondent to do all the extra work requested but only to look to the respondents for payment for those portions not covered by the Spar Specification because that would mean that he would have been agreeing to do the other work for nothing. If the respondents' version were correct one would have expected him to have asked Mr Cohen for written instructions to do the work in question and only to do it once such instructions had been received. It is not suggested that he did that. It must also be borne in mind that the appellant could have walked off the job after doing the work listed on the second page of its quotation.

[18] The second respondent, on the other hand, was anxious to open the business and start trading. If the second proposition on which their case is based is correct they would be able to claim the extra amount expended to make the premises comply with the Spar Specification from Mr Cohen. If on the other hand their second proposition is not correct, then that would provide a reason for the second respondent to have agreed with Mr Burriss that she and the first respondent would pay for all the additional work to be done.

[19] In my opinion the magistrate misdirected himself in holding that the appellant had, as he put it, 'the backdoor of par 4 on page three of his quotation to fall back on'. It is accordingly necessary for us to decide the case

afresh on the record. In my view once the respondents' first proposition is rejected, their whole case crumbles and the probabilities strongly support the appellant.

[20] Mr Huisamen also referred in the course of his argument to a passage in Mr Burriss's evidence where he appeared in the course of cross-examination to concede his case. I am satisfied, however, that it is clear from his later evidence on the point that the concessions he made were made in error and cannot be relied on to justify a finding that the second respondent's evidence is to be preferred to that of Mr Burriss.

[21] It follows in my view that the magistrate should have given judgment in favour of the appellant with costs and dismissed the respondents' counterclaim, again with costs.

[22] The following order is made:

A. The appeal is allowed with costs.

2. The order made by die court *a quo* is set aside and replaced by the following:

'1. Judgment for the plaintiff with costs in an amount of R44 522.28.

2. The defendants' counterclaim is dismissed with costs.'

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IG FARLAM
JUDGE OF APPEAL

CONCURRING
MTHIYANE JA
MAYA AJA