THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 20714/14

In the matter between:

LORRAINE DU PREEZ **APPELLANT**

and

TORNEL PROPS (PTY) LTD **RESPONDENT**

Neutral citation: *Du Preez v Tornel Props (Pty) Ltd* (20714/14) [2015] ZASCA 134 (29 September 2015)

Coram: Shongwe, Saldulker, Swain, Mbha JJA and Baartman AJA

Heard: **26 August 2015**

Delivered: **29 September 2015**

Summary: Contract – justifiable withholding of reciprocal obligation to perform – reasonable person not perceiving conduct as repudiation – subsequent cancellation reasonably perceived by innocent party as repudiation – ensuing cancellation justified – quantum of damages awarded not proved – court re-assessing damages.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Kollapen J sitting as court of first instance):

1 The appeal is partly upheld.

2 The order of the court a quo is set aside and is replaced with the following:

'(1) The defendant is ordered to pay the plaintiff the sum of R104 817.

(2) The defendant is ordered to pay interest thereon from 1 June 2007 to date of final payment at the rate of 15.5% per annum.

(3) The defendant is ordered to pay the costs of the action.

(4) The defendant's counter-claim is dismissed with costs'.

3 The application for condonation is granted and the appellant is ordered to pay the costs of the application on the opposed party and party scale.

4 The appellant is ordered to pay the costs of the appeal.

JUDGMENT

Shongwe JA (Saldulker, Swain and Mbha JJA and Baartman AJA concurring)

[1] The central issue to be decided in this case is whether the contractor, Tornel Props (Pty) Ltd (plaintiff in the court a quo) was justified in withholding performance and thereafter cancelling the contract between it and the employer Ms Lorraine Du Preez (defendant in the court a quo). I shall refer to the parties as the plaintiff and defendant as they were referred to in the trial court. The appeal is with the leave of the trial court.

[2] The dispute arose out of a building contract entered into by the defendant and Jonker Projekte CC (Jonker CC) on 10 November 2006. At all material times, the defendant had been the owner of Erf 4358, The Heads, Lydenberg, Mpumalanga Province. Jonker CC undertook to build a residential house on the aforesaid erf in accordance with the building plans attached to the building contract. The contract price was R1 million inclusive of VAT. It was a term of the agreement that the defendant undertook to pay the contract price in scheduled progress payments as and when certain phases of the works were completed. The payments would be made in cash after approval by an inspector or valuer.

[3] The building works commenced and the defendant paid a sum of R80 000 to Jonker CC as part of the scheduled progress payments. It is common cause that in November 2006 Jonker CC was liquidated. Subsequently, the plaintiff (represented by Mr Cassim) offered to purchase the sole right to complete the partially finished construction from Jonker CC (in liquidation). The offer not only referred to the building works of the defendant but included other projects undertaken by Jonker CC. The offer was accepted – the agreed amount was paid to the liquidators.

[4] In December 2006 the plaintiff and the defendant concluded a partly written and partly oral agreement. The written portion of the agreement was the building contract and annexures – which was originally concluded by the defendant and Jonker CC. It was expressly, alternatively tacitly or impliedly agreed inter alia that the contract price would be R920 000 (nine hundred and twenty thousand rand); that the plaintiff would complete the works in accordance with the building plans and specifications, and that the defendant

would pay the full contract price in scheduled progress payments as and when certain phases of the works were completed – after approval by an inspector or valuer. The plaintiff proceeded with the building works. It appears that during a December 2006 meeting, the plaintiff raised the question of VAT being excluded from the contract price. The defendant rejected the suggestion and insisted that the terms of the contract price included VAT. The defendant denied there was any discussion regarding progress payments, although the building contract provided for this.

[5] During March 2007 the plaintiff presented an invoice for a progress payment in the amount of R240 000 to the defendant. As a result on 16 April 2007, the defendant's attorneys wrote to the attorneys representing the liquidators requesting approval from the liquidators to make this progress payment to the plaintiff. On 26 April 2007, new attorneys appointed to attend to the liquidation confirmed that the defendant could make the progress payment. However, no payment was made. It is clear that at this stage the defendant's attorneys accepted the defendant's obligation to make progress payments in terms of the contract.

[6] Because this invoice was not paid, the plaintiff cancelled it and on 10 May 2007 sent another invoice to the defendant requesting payment of R600 000 plus VAT totalling R684 000. The invoice also contained a proviso that payment must be made within three working days from date of invoice, failing which the plaintiff would stop the building works – because of cash flow problems. Discussions between the parties continued – they included, inter alia, whether the plaintiff was obliged to construct the swimming pool, the paving and the balustrades. The defendant's stance was that the plaintiff was obliged to

carry out this work in terms of the contract. Notwithstanding these disputes the building works continued.

[7] On 24 May 2007, the defendant's new attorneys (JC Marnewick) in response to the invoice of 10 May 2007 wrote to the plaintiff confirming the contract price as R1 000 000 but said that payment was only due and payable upon completion of the building works. This was contrary to the provisions of the contract. The letter also advised that, should the plaintiff stop the building works, this would be tantamount to repudiation. The stance of the defendant accordingly was that no progress payments would be made.

[8] On 29 May 2007 the plaintiff's attorneys replied confirming the contract price of R1 million but maintained it excluded VAT. The letter alleged that the parties orally agreed that the plaintiff was not obliged to build the out-buildings, the paving, swimming pool and the balustrades. It referred to the first invoice rendered by the plaintiff for payment of R240 000 which was not paid by the defendant. It was alleged that approximately 70 per cent of the house had been completed, despite no payment having been made by the defendant. A further demand was made for payment of the sum of R600 000, on or before 12 noon on 1 June 2007, failing which the plaintiff would cease building and summons would be issued. The defendant's attorneys replied on 1 June 2007 disputing that the plaintiff was not obliged to construct the specified items and stating that if the plaintiff ceased building, it would be interpreted as a repudiation of the contract by the plaintiff.

[9] The response by the plaintiff's attorneys by letter dated 7 June 2007 was that it was clear that the defendant did not intend to make any payment at that stage, and advising that no further building would be carried out until payment as demanded was made. This elicited a response from the defendant's attorneys by way of a letter dated 15 June 2007, in which it was recorded that the refusal to continue building constituted a repudiation by the plaintiff, which was accepted by the defendant and the contract was allegedly cancelled.

[10] It should be noted that the refusal by the defendant to make payment of the amount claimed by the plaintiff of R600 000 was not based upon the failure by the defendant to have this amount approved by an inspector, or valuer. The refusal was based solely upon the defendant's contention that no payment would be made until the house was complete, contrary to the express terms of the agreement. If the defendant had tendered to make a progress payment, provided its value had been approved by an inspector or valuer in terms of the contract, the outcome would have been entirely different. It is also quite clear from the correspondence that the peripheral dispute between the parties as to whether the plaintiff was obliged to build the disputed items, and whether VAT was included in the contract price, did not cause the termination of their contractual relationship.

[11] The plaintiff accordingly issued summons against the defendant claiming damages on the basis that the defendant breached the contract, alternatively repudiated it by failing to make progress payments. In the result, the plaintiff alleged it had cancelled the contract. In the alternative, the plaintiff accepted the repudiation of the contract by the defendant and cancelled the agreement, and claimed contractual damages suffered in the sum of R765 300 in respect of the

contract price excluding VAT. In the further alternative, plaintiff claimed the sum of R636 500 in the event it was found that the contract price included VAT. The difference in both respects between the amount claimed and the contract price was alleged to be the costs that would be saved by the plaintiff in not completing the building works, in the amount of R283 500. This amount was based upon an estimate provided by the defendant's attorney in the letter of 24 May 2007 referred to above. This amount purported to be the costs saved by the plaintiff in not completing the works, plus an additional amount of R50 000 being an estimate of any additional fair and reasonable costs that would be saved by the plaintiff as a result of not completing the works.

[12] The court a quo concluded that the plaintiff's conduct in ceasing building work did not constitute a repudiation of the agreement. It further decided that the defendant's refusal to make a progress payment, which was a material term of the contract, constituted a breach of the agreement. This breach, the court a quo reasoned, entitled the plaintiff to cancel the contract and claim damages. As will be seen, the court a quo incorrectly categorized the legal nature of the conduct of the respective parties. As regards the quantum of the plaintiff's damages, the court a quo relied upon a quotation prepared by Neobuild building contractors, which the defendant attached to her counterclaim in support of her assertion of the respects in which the defendant alleged the building was not completed and defective, as well as the cost of completing the building in accordance with the agreement. It is common cause that no expert evidence however was led to prove the Neobuild quotation, as the defendant never led this evidence. As will be seen, the court a quo erroneously relied upon this evidence, classifying it as the best evidence available when it was no evidence at all.

[13] On appeal, the defendant challenged the order of the court a quo on the following basis:

(a) the plaintiff repudiated the agreement by denying that the agreed price included VAT;

(b) the plaintiff repudiated the agreement by refusing to build the pool, balustrades, paving, garage and servants' quarters;

(c) the plaintiff did not prove that progress payments had to be made in terms of the agreement;

(d) even if progress payments had to be made, it was never proved that the invoice for R600 000 had been approved by a valuer or inspector.

In the result, it was submitted any obligation upon the defendant to make a progress payment was suspended during the plaintiff's repudiation of the agreement.

[14] As pointed out above, it is clear from the exchange of correspondence between the parties' attorneys which preceded the purported cancellation by the defendant, that the conflict between the parties as to the obligation upon the plaintiff to construct the disputed items, as well as whether VAT was included in the contract price, did not cause the termination of the parties contractual relationship. Although the plaintiff clearly attempted to get the defendant to agree that he was not obliged to build these items and that VAT was not included in the price, these disputes did not cause the plaintiff to cease building the house. It is quite clear that the decision by the plaintiff to cease building culminated in the termination of the contract. The plaintiff took this decision because the defendant refused to make payment of any amount until the house was complete. The defendant's refusal to make any payment at all until the house was complete, as set out in the letter dated 24 May 2007, it seems was

motivated by the fear that the plaintiff would not complete the house. Be that as it may, this did not entitle the defendant in the face of the express wording of the contract, to refuse to make any payments until the house was complete. The safeguard in the contract for the defendant lay in insisting that any claim for a progress payment be approved by a valuer or inspector.

[15] It is therefore clear that the defendant never proved that she relied upon the plaintiff's alleged repudiation of the agreement, in refusing to build the disputed items and maintaining that VAT was included in the contract price, as justification for cancelling the agreement. It is clear from the defendant's attorneys' letter of cancellation of the 15 June 2007 that the act of repudiation on the part of the plaintiff, relied upon by the defendant to justify cancellation, was the refusal by the plaintiff to continue building. The other issues, although complained of, were never relied upon as acts repudiation by the defendant.

[16] As regards proof by the plaintiff that the defendant was obliged to make progress payments, even if it is assumed in favour of the defendant that annexure D to the agreement, which set out the stages when progress payments had to be made, never formed part of the agreement, clause 2.1 makes the defendant's liability to make these payments clear. As regards the plaintiff's failure to prove that the invoice for R600 000 had been approved by an inspector or valuer, it is clear that the defendant never refused to make payment on this basis.

[17] The central issue accordingly is whether the refusal by the plaintiff to continue building was legally justified or whether it amounted to a repudiation which entitled the defendant to cancel the contract. The test for repudiation is objective and not subjective. The test as to whether conduct amounts to repudiation of a contract is whether fairly interpreted, it exhibits a deliberate

and unequivocal intention no longer to be bound by the terms of the contract (*Street v Dublin* 1961 (2) SA 4 (W) at 10B and *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) at 845A-C in which case Rabie JA referred with approval to statements made by Williamson J in *Street v Dublin* (above). See also *OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) & another* 1993 (3) SA 471 (A). Whether the plaintiff's conduct was legally justified requires a determination of whether the plaintiff was entitled to withhold this performance. It is clear that the defendant was obliged to make progress payments and the reciprocal obligation upon the plaintiff to continue building was dependent upon the performance by the defendant of this obligation.

[18] Simply put the failure to comply with the terms and conditions of the contract by the defendant in not making progress payments as agreed, entitled the plaintiff to withhold its reciprocal obligation to continue building the house. The defendant's objectively unjustifiable conduct in treating this as a repudiation of the agreement and purporting to cancel the agreement, objectively assessed amounted to a repudiation which the plaintiff accepted and justifiably cancelled the agreement. In *Datacolor International v Intamarket (Pty) Ltd* 2001 (2) SA 284 para 1, Nienaber JA, observed that:

'Repudiation has sometimes been said to consist of two parts: the act of repudiation by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of his adversary, "accepting" and thus completing the breach'.

In addition as pointed out at 294E-H:

"The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred

intention accordingly serves as the criterion for determining the nature of the threatened actual breach."

On the evidence a reasonable person placed in the position of the plaintiff, faced with the refusal by the defendant to make any progress payments, would conclude that proper performance would not be forthcoming, which would justify cancellation of the agreement. The plaintiff however, as it was entitled to, elected at this stage not to cancel the agreement but rather to withhold its reciprocal obligation to continue building the house. A reasonable person in the position of the plaintiff would have concluded, from the defendant's subsequent response, being the purported cancellation of the contract by the defendant, that no further performance would be forthcoming, entitling the plaintiff thereafter to cancel the contract. It is therefore clear that the contractual bond that existed between the parties was justifiably severed by the plaintiff. The law accordingly provides compensation for the innocent party being in this case the plaintiff.

[19] The court a quo, in my view, albeit arriving at the correct conclusion incorrectly analysed the sequence of events between the parties as follows:

'defendant's stance in refusing to make payments would in my view constitute a breach of contract which then would have the result that the plaintiff was entitled to cancel the contract as it did on account of the defendant's conduct. … In my view the plaintiff was entitled to consider the defendant's failure to pay as a breach of contract and was accordingly under those circumstances entitled to stop further work on the dwelling house of the defendant in the light of such refusal to pay and in the light of the breach of the agreement by the defendant'.

In view of my conclusion that the defendant repudiated the agreement by purporting to cancel the agreement – leading to its cancellation by the plaintiff, it is not necessary to deal with the merits of the counterclaim. It stands to be dismissed.

[20] I now turn to deal with the quantum. As pointed out the court a quo erroneously relied on a quotation prepared by Neobuild Building Contractors, annexed by the defendant to her counterclaim. Mr Soomar, an expert called by the plaintiff simply used this quotation without verifying the correctness thereof. The purpose of the quotation was to give an indication of costs the defendant would have to incur to complete the work, and not to give an indication of costs saved by the plaintiff. The contents of this quotation cannot be viewed as evidence placed before the court a quo because Neobuild was not called to give evidence to prove its contents. As pointed out the court a quo misdirected itself in this regard, describing this as the best evidence available when it was no evidence at all. This court is therefore at large to interfere with the award granted by the court a quo.

[21] Counsel for the plaintiff before us conceded that the plaintiff will not do better than to recover damages in the sum of R104 817, which amount was calculated and arrived at by Mr Botes upon the request of the defendant. The purpose was to calculate what the plaintiff would be entitled to for the work done considering all the uncompleted work. Counsel for both parties agreed that the sum of R104 817, as calculated by Mr Botes was justifiable – in the event that this court found that the plaintiff had justifiably cancelled the agreement.

[22] I turn to the issue of the costs of the appeal. Although the defendant has been successful in the reduction of the amount awarded to the plaintiff from R434 746, 46 to R104 817 it has nevertheless been unsuccessful on the merits. It was the defendant's unjustifiable conduct in refusing to make any progress payments, despite the clear wording of the agreement, which brought the contractual relationship to an end. In the light of the evidence I do not regard this as substantial success sufficient to entitle the defendant to an award of the

costs of appeal in her favour. The defendant must accordingly pay the costs of the appeal.

[23] I now deal with the condonation application for failing to lodge with the Registrar, six copies of the record of the proceedings as prescribed by rule 8 of the rules of this court. Because of the importance of the matter to the parties and in the interest of justice, I am of the view that condonation be granted with costs on the opposed party and party scale. The default by the defendant and her attorneys does not warrant a punitive costs order.

[24] For the above reasons the following order is made:

1 The appeal is partly upheld.

2 The order of the court a quo is set aside and is replaced with the follow:

'(1) The defendant is ordered to pay the plaintiff the sum of R104 817.

(2) The defendant is ordered to pay interest thereon from 1 June 2007 to date of final payment at the rate of 15.5% per annum.

(3) The defendant is ordered to pay the costs of the action.

(4) The defendant's counter-claim is dismissed with costs'.

3 The application for condonation is granted and the appellant is ordered to pay the costs of the application on the opposed party and party scale.

4 The appellant is ordered to pay the costs of the appeal.

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J B Z SHONGWE
JUDGE OF APPEAL

Appearances

For the Appellant:	J L Bergenthuin SC with him C A L Korf Instructed by: Ernst J.V. Penzhorn Attorneys, Pretoria; Hill, McHardy & Herbst Inc., Bloemfontein.
For the Respondent:	Q Pelser SC Instructed by: Döman Weitsz Attorneys, White River; Christo Dippenaar Attorneys, Bloemfontein.