THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number : 303/05

In the matter between :

E C CHENIA & SONS CC **APPELLANT**

and

LAMé & VAN BLERK **RESPONDENT**

CORAM : **BRAND, LEWIS *et* HEHER JJA**

HEARD : **9 MARCH 2006**

DELIVERED : **17 MARCH 2006**

Summary: Contractual claim – not based on tacit contract as contended for by the defendant – evidence departing from pleadings – question one of prejudice to the other side.

Neutral citation: This judgment may be referred to as *Chenia & Sons CC v Lamé & Van Blerk* [2006] SCA 16 (RSA)

JUDGMENT

BRAND JA/

BRAND JA:

[1] This appeal has its origin in the magistrate's court for the district of Vereeniging. The respondent ('plaintiff'), a partnership of consulting civil and structural engineers, instituted action against the appellant ('defendant') for payment of an amount of R22 852,80. In the summons, the plaintiff's cause of action was described as a claim for 'professional services rendered by plaintiff to defendant at the latter's special instance and request'. This 'special instance and request' was denied by the defendant in its plea.

[2] At the end of the trial proceedings, the magistrate granted judgment in favour of the plaintiff for the amount claimed together with interest and costs. The defendant's appeal against that judgment was dismissed by the Johannesburg High Court (Goldstein J with Khampepe J concurring). The further appeal to this court is with the leave of the court *a quo*.

[3] Central to the defendant's case on appeal is the proposition that the evidence led by the plaintiff at the trial was not covered by its pleadings. In the event, so the defendant contended, both the trial court and the court *a quo* erred in holding for the plaintiff on the basis of that evidence. The evaluation of this contention clearly requires a comparison of the allegations in the pleadings with the evidence led at the trial. I first deal with the pleadings. As I have said, the summons, rather tersely, indicated that the plaintiff's claim was for 'professional services rendered at the defendant's special instance and request on or about 31 January 2002'. In response to the defendant's request for further particulars, the plaintiff added the following allegations: that the professional services included 'structural advice, drawing of plans . . . on upgrading and extension of the old building'; that these services were rendered during about January and February 2002, and that the 'special instance and request' had been made by Mr Chenia, on behalf of the defendant, to Mr Da Silva, on behalf of the plaintiff. The defendant's plea to these allegations read as follows:

'1. The defendant denies that it requested and insisted on the rendering of professional services by the plaintiff as alleged, or at all.

1.1 In amplification of the aforegoing the defendant denies any knowledge of a certain Mr Da Silva and that any request or insistence was directed to him by the defendant as alleged.

2. The defendant has no knowledge of the professional services allegedly rendered and accordingly cannot admit or deny same.

3. The defendant denies that it is indebted in the amount claimed, or any amount at all to the plaintiff.'

[4] I now turn to the evidence led at the trial. The plaintiff's main witness was Mr Carlos da Silva, a qualified civil engineer, who practiced in association with the plaintiff partnership. During January 2002, so he testified, he had been approached by an architect, Mr Nathan Heiman, who had been contracted by the defendant on a certain building project, with the proposal that the plaintiff should join the consulting team for the project. Apart from the plaintiff, the team would consist of Heiman's firm as architects and Mr Pieter Nieman, as quantity surveyor. Da Silva found Heiman's proposal acceptable. He therefore wrote a letter to the defendant on 31 January 2002. As it turned out, this letter became one of two pivotal elements of the plaintiff's case. It was addressed to 'Bargain Stores', (the defendant's trade name), and marked 'for the attention of Mr Chenia, snr'. Its subject matter was described in the heading as relating to 'additions to Bargain Stores, Vereeniging'. The relevant part then reads as follows:

'At the request of the architects for the project mentioned above we would like to present to you the cost of our services for your consideration.

... [T]he cost of the work on the above project for which we are responsible is estimated by ourselves as R269 500, 00.

Based on the above the fee according to the Engineering Profession of South Africa Act, 1990 (Act 114 of 1990) [is]: . . . R30240,50.

. . . We hope the above meets with your requirements and hope further to hear from you soon.'

[5] According to Da Silva he did not receive an answer to this letter. Though he realised that he had not been appointed until he received a positive response, he nevertheless attended meetings in January and February 2002 with the other members of the consulting team and started to

prepare the structural plans for which he would be responsible, obviously in the hope that his appointment by the defendant (as the client and principal) would follow. At the beginning of March 2002 the quantity surveyor, Nieman, telephoned Da Silva. He wanted the plans and specifications that had been prepared by Da Silva in order to complete his bill of quantities. Da Silva explained to him that he could not provide him with the requested information, because he had not as yet been appointed by the defendant. On 12 March Da Silva received a telephone call from the defendant's Mr Chenia. The ensuing conversation became the second pivotal element of the plaintiff's case. Chenia wanted to know whether the engineering input required by Nieman was really necessary. Upon Da Silva's confirmation that it was so, Chenia essentially told him to carry on and complete whatever engineering work was required to provide Nieman with the information that he needed. On 15 March 2002 Da Silva then complied with what had clearly been an instruction from Chenia. With regard to the amount claimed by the plaintiff, Da Silva's evidence was that it was calculated in accordance with the tariff referred to in his letter to the defendant, of 31 January 2002, which is quoted in para [4] above. This amount was less than the amount estimated in the letter, so Da Silva explained, because he had been told by the architect that Chenia had decided to abandon the project prior to its completion.

[6] Although Da Silva was cross-examined on the contents of his version, its veracity was never challenged. Heiman and Nieman also testified on behalf of the plaintiff. They confirmed what Da Silva had said in so far as they were directly involved. Thus, for example, they corroborated Da Silva's version that they required the engineering services rendered by him in order to perform their respective functions on the project and testified that they had informed Chenia accordingly; that at first, Da Silva would not provide them with the product of these services, because he told them that he had not received an appointment by the defendant. Subsequently, however, he did provide them with what they required. They therefore assumed that he had eventually been properly appointed. They could not say, of course, whether this in fact occurred. As things turned out, however, their inability to corroborate Da Silva in this respect was of no consequence. In the end, Da Silva's version needed

no confirmation since the defendant closed its case without leading any evidence and Da Silva's evidence was never impugned.

[7] Essential to the finding in favour of the plaintiff by both the trial court and the court *a quo* was their conclusion that the plaintiff had succeeded in establishing a contractual link (*locatio conductio operis*) between the parties. The defendant's objection on appeal was in essence that that conclusion was based on evidence not foreshadowed in the plaintiff's pleadings. The main argument in support of that objection, at least until the early stages of the hearing before us, was based on the following three propositions:

(a) On a proper construction of the summons, the plaintiff's claim relied on an express agreement for the rendering of professional services at a fee of R22 852,80.

(b) It is impermissible for a party relying on an express agreement to lead evidence which would establish a tacit agreement.

(c) The contract that both courts below found to have been established on the evidence, was a tacit agreement, which constituted a finding not permissible under (a) and (b).

[8] With regard to proposition (a) it appears to be generally accepted that a party who seeks to rely on a contract which was tacitly concluded, must specifically allege that the contract relied upon is a tacit one. In the absence of such allegation it will be assumed that the contract relied upon was expressly concluded (see eg *Roberts Construction Ltd v Dominion Earthworks (Pty) Ltd* 1968 (3) SA 255 (A) 260A-H; *Alphedie Investments (Pty) Ltd v Greentops Ltd* 1975 (1) SA 161 (T) 162T-163A). The proposition in (b) likewise seems to be in accordance with general principles (see eg *Clegg v Groenewald* 1970 (3) SA 90 (C) 94G-H; *Roos v Engineering Fabricators (Edms) Bpk* 1974 (3) SA 545 (A)). The acceptance of this line of argument therefore turns on the validity of proposition (c). Can it be said that the agreement established by the evidence was a tacit one? Or did the evidence in fact show an express agreement? I think the latter was the case.

[9] Generally speaking, a tacit agreement is one where either the offer or the acceptance, or both, is/are to be inferred from conduct. An express agreement, on the other hand, is one where both these elements of the contract were expressed in words, either orally or in writing. On a proper analysis, the contract which formed the basis of the finding by both courts below came into existence through the oral acceptance of a written offer. The written offer was made by Da Silva in his letter of 31 January 2002 while the oral acceptance of this offer by Chenia occurred during the telephone conversation of 12 March 2002. Since both the offer and the acceptance were thus articulated in words, there can be no suggestion of a tacit agreement.

[10] When it became apparent at the hearing that this line of argument could not be sustained, counsel for the defendant changed tack. He then argued that neither the letter of 31 January 2002 nor the contents of the conversation of 12 March were sufficiently precise and detailed enough to meet with the requirements of a contract. That, of course is a different matter. If both the offer and the acceptance were not unambiguous, there would be no contract at all. It would not render the contract a tacit one. In any event, I cannot find anything ambiguous in either the written offer or the oral acceptance. Read in context, the offer was capable of only one construction: the plaintiff would do the engineering work required for the building project concerned at a fee calculated in accordance with a specified tariff. Chenia's oral instruction 'to go ahead and do the work which is necessary' is likewise capable of only one interpretation; namely, that he accepted the offer contained in the letter in accordance with its tenor including the plaintiff's remuneration. Even if the terms of the letter fell short of setting out the precise contract price, there is no reason why the parties to a contract of *locatio conductio operis*, like the present, cannot validly agree, as the letter indeed proposed, that the remuneration of the *conductor* will be calculated in accordance with a specified tariff.

[11] The defendant’s further argument was exclusively reliant on the fact that no mention was made in the plaintiff’s pleadings of what turned out to be the second element of its case, namely the telephone conversation of 12

March 2002. What the plaintiff relied on in its pleadings, the defendant's counsel pointed out, was an agreement concluded on or about 31 January 2002, which, so counsel submitted, left no room for the acceptance of an offer on 12 March 2002. Because of this, so the argument went, any evidence with regard to that conversation was irrelevant and inadmissible. In consequence, there was no need for the defendant to challenge that evidence, either in cross-examination or by putting up a contradictory version. In the circumstances the defendant was irreparably prejudiced when both the courts allowed the plaintiff to rely on the conversation to establish an indispensable part of its case. Support for this line of argument was sought in certain *dicta* by Innes CJ in *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198 to the effect that 'parties should be kept strictly to their pleadings'.

[12] These *dicta* must, however, be read in their full context. What Innes CJ said (at 198) was:

'The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion for pleadings are made for the court not the court for the pleadings.'

[13] The question is therefore one of prejudice. Can the defendant's plea of prejudice be sustained? For a number of reasons, I think not. First, the departure from the pleadings complained of did not relate to the real issue between the parties which was whether there was any agreement between the parties at all. It did not concern the date upon which any notional agreement could have been concluded. That much was underscored in the defendant's plea which not only denied the agreement alleged by the plaintiff, but also any agreement for the rendering of professional services between the parties (see para [3] above). The second reason is that Da Silva's evidence did not depart from the plaintiff's pleadings in any material respect. A comparison between Da Silva's evidence and the allegations in the plaintiff's pleadings shows that the parties to the contract and their representatives remained the same. So did the terms of the contract and the time period during which plaintiff had performed its obligations in compliance with these

terms. Even the date of the offer (ie the letter of 31 January 2002) was correctly set out in the pleadings. The only element unaccounted for was the precise date of acceptance. This departure cannot, in my view, be said to be material, particularly when read with the explicit statement in the defendant's plea that its representative, Chenia, had never even heard of Da Silva before (see para [3] above).

[15] A third reason why the defendant's reliance on prejudice is, in my view, unsustainable flows from the failure by the defendant's counsel to raise any objection at the trial when Da Silva gave his evidence regarding the conversation of 12 March 2002. If counsel really believed that this evidence was irrelevant and thus inadmissible because it was not covered by the pleadings, he should have objected there and then. The plaintiff could then have tried to persuade the trial court that the evidence was indeed covered by the pleadings or, otherwise, sought an amendment. A party cannot be allowed to lull its opponent into a false sense of security by allowing evidence in the trial court without objection and then argue at the end of the trial, or on appeal, that such evidence should be ignored because it was inadmissible. It seems to me that when the defendant's counsel decided not to challenge both the admissibility and substance of Da Silva's evidence, he took a calculated risk and any possible prejudice resulting from such failure must be ascribed to the realisation of that risk and not to the plaintiff's departure from its pleadings.

[16] In the result, the appeal is dismissed with costs.

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F D J BRAND
JUDGE OF APPEAL

Concur: Lewis JA
Heher JA