CASE NO.: CA 150/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HAROLD SCHMIDT t/a PRESTIGE

HOME INNOVATIONS **Appellant**

and

MATHIAS IPINGE HEITA **Respondent**

CORAM: **PARKER, A J**

Heard on: 2006 June 2

Delivered on: 2006 June 28

JUDGMENT:

PARKER, A J.:

[1] In June 2000 the appellant (plaintiff in the magistrate's court) and the respondent (defendant in the magistrate's court) entered into a written contract (the contract). In terms of the contract, the appellant agreed to carry out the following additions and changes to the respondent's property (the house), namely, a garage, an enlarged main bedroom and bathroom, an enlarged living room, dining room, precast

wall, with a metal gate, surrounding the house, and painting of the inside of the house. The contract price was N$114,000.00.

[2] The work was carried out between October 2000 and March 2001. It is not in dispute that the final instalment of N$16,000.00 remains unpaid. The appellant, therefore, issued summons in the court below against the respondent for payment of the N$16,000.00 (Claim A) and an additional N$21,650.00 (Claim B); the claim for N$21,650.00 was based on an alleged oral agreement between the parties whereby additional work was done by the appellant, to wit, the tiling of the bedroom, fitting of cupboards in the kitchen and bedroom and painting. The respondent counter-claimed for damages in the amount of N$50,647.00 being the estimated amount it would cost the respondent to (1) have the appellant's non-completed work completed, and (2) to obtain a report on alleged structural defects and remedy them (the counter-claim).

[3] The learned magistrate gave judgment in favour of the respondent, and made the following order, which is reproduced in

whole:

(17.1) Plaintiff has failed to prove on balance of probabilities that defendant had intention not to pay the amount of N$ 16 000.

(17.2) With regard with to claim B Plaintiff fails to prove that there exist oral agreement between the parties of N$ 21 650.00 neither for the letter date 10th April 2001 that he wrote to the Defendant. Could he demand such amount due for payment for the Defendant side. This claim B has been dismissed with cost.

(17.3) Plaintiff has in totally fail to perform completely and deliver quality work as per agreement as such defective and poor workmanship call for proper assessment. As result plaintiff is order to remedy such defects by appointing structural engineer to do proper assessment in order to rectify those defects and deliver a quality workmanlike performance. The recommendation made by Mr. Godo and Mr. Le Roux must be considered in such operation.

(17.4) Plaintiff is ordered to the Defendant an amount of N$50,647.50 additional works that emanate from poor workmanship of the Plaintiff's conduct. The amount of N$16000.00 that is still payable

> will be suspended pending the completion of unfinished work and rectify defects by Plaintiff.

From this decision the respondent now appeals.

[4] In his plea, the respondent set up the following defences to Claim A and Claim B. To Claim A, his defence was that the appellant was not entitled to the claim because the appellant's work was defective in that he failed to perform the work in a workmanlike manner resulting in cracks appearing in the structure of the house and the appellant did not complete the contract work, including painting. His defence to Claim B was in the form of a denial of the existence of an oral agreement. He pleaded that the tiling, fitting of cupboards in the kitchen and bedroom and painting of the inside of the house were a part of the written contract and that these works were not additional to what the written contract covered.

[5] I will now deal with Claim A. The conflicting contentions by the appellant and the respondent resolve themselves into two intertwined key issues: one is a question of fact and the other a question of law. The factual question is this: who or what caused the cracks in the respondent's property? This question is tied up with the issue of the

alleged unworkmanlike manner in which the appellant carried out the work. There is also the related question of whether the appellant completed the work. The legal question, on the other hand, relates to the effect of the interpretation and application of Clause 2.4 of the contract.

[6] In her judgment, the learned magistrate did not deal with both the factual and the legal questions in any appreciable way in terms of content and substance. As I see it, there is only one paragraph (paragraph 12) in the main body of the learned magistrate's judgment that touches on these two central and interrelated issues, and it does so tangentially. Paragraph 12 of the judgment reads, and I reproduce it as it is:

> When dealing with the individual claim certain provisions of the contract and document before this honourable court need to be considered. At this stage, having regards to the nature and terms of this agreement, one need simply draw attention to the general and inconvertible proposition that for the plaintiff to succeed. The contract determines the respective rights and obligations of the parties in relation to matter covered by the contract. It constitutes conclusive evidence of the value of works and amount due to the contractor. The fundamental principle that the object can only be attained when each party states his/her case with the precision obviously depends on the circumstances of each case.

Then, there are references in the learned magistrate's order to the said N$16,000.00. Paragraph 17.1, which I set out previously, states: "Plaintiff has failed to prove on balance of probabilities that defendant had intention not to pay the amount of N$16,000.00." And paragraph 17.4 in material part reads: "The amount of N$16,000.00 that is still payable will be suspended pending the completion of unfinished work and rectify defects by the plaintiff." Thus, these two aspects of the learned magistrate's order, in my opinion, only make opaque references to the two critical issues in this case.

[7] I proceed to deal with the factual question. In order to assist the court below to make a determination, three experts – all civil engineers – gave evidence. I will only mention the main thrust of the expert opinion of each expert. According to Mr. Le Roux, the main cause of the cracks was the weathered material of the foundation that became moist because of the rains and that had in turn caused subsidence. For Mr. Brinkman, the cracks were caused by natural phenomena such as movement under the foundations of the old portion of the house. Mr. Godo's expert opinion, on the other hand, was that the cracks were caused by the removal of the northern and southern walls by the appellant that disturbed the structural integrity of the house.

[8] It would appear from the judgment that the learned magistrate rejected the evidence of Mr. Brinkman and Mr. Le Roux and accepted Mr. Godo's evidence. The learned magistrate does not indicate the reasons for her decision. Mr. Verwey submitted that the learned magistrate erred in so doing and referred me to textual authorities in support of his argument. I do not propose to examine all the authorities in detail. Suffice to mention that the irrefragable import of those authorities is that expert opinion is sought to give guidance and assistance to the court because the expert's skill is considered greater

than that of the court.[1] In this connection, it has been held that "the true and practical test of the admissibility of opinion of a skilled witness is whether or not the Court can receive 'appreciable help' from that witness on the particular issue."[2]

[9] From the record, I do not see what 'appreciable help' the court below could have received from the three experts. First, their opinions were based on speculation and conjecture. There is no evidence that any one of them did any real scientific and empirical analysis of the problem. Indeed, all of them were of the opinion that a more in-depth analysis ought to have been done to determine the real cause of the cracks. For instance, in his report, Mr. Brinkman stated that the effect of the removal of the northern and southern walls "on the structural integrity of the building needs to be confirmed with some structural analysis" in order to come to a definitive conclusion. As Mr. Pickering correctly submitted, crucial to Mr. Le Roux's opinion was the incidence of ponding, i.e. that water had collected and permeated the foundation. But under cross-examination Mr Le Roux stated that he had no evidence to support his theory. The sources of the formulation of Mr. Godo's opinion were a report prepared by Mr. Le Roux and

[1] See *Ruto Flour Mills Ltd v Adelson* 1958 (4) SA 235 at 237 B.
[2] *Gentriruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616 H. See also Schwikkard, *et al*., *Principles of Evidence*, para. 86; Hoffman and Zeffert, *The South African Law of Evidence*, 4th ed., para. 4 (pp 103-4).

certain drawings: he did not carry out any scientific and empirical analysis of the problem, as a scientist should do. It would also appear from the tenor of the language used in his evidence that Mr. Godo was more interested in pleasing his client, the respondent, than giving an expert opinion that was of appreciable help to the court below.

[10] In my respectful view, the expert opinions of Mr. Le Roux and Mr. Brinkman on the one hand and that of Mr. Godo on the other were mutually destructive to each other. In such a case the proper approach, in my view, was for the court below to have applied its mind not only to the merits and demerits of the two sets of expert opinions but also their probabilities, and it was only after so applying its mind that the court would have been justified in reaching the conclusion as to which opinion to accept and which to reject.

[11] For the foregoing reasons, I am of the opinion that Mr. Verwey's submission that the learned magistrate erred in finding that the appellant was responsible for the cracks that appeared in some of the walls of the respondent's house is well founded. In the result, I have come to the conclusion that, with respect, the learned magistrate clearly misdirected herself because her reasons for so finding were based upon a false premise.

[12] On the related question of non-completion of the contract work, it seems to me that the appellant acknowledged that the contract work was uncompleted. In his re-examination of Mr. J.P. Schmidt, who managed the project for the appellant, Mr. Dicks, counsel for the appellant in the court below, asked the following question:

> Mr. J. P. Schmidt the two minor aspects that you highlighted as not being complete on Mr. Scholtz's list and any other minor retention works that might be outstanding, will you be willing to rectify them?

Mr. Schmidt's answer was:

> Yes. If we gain access to the property and we are allowed to do it and obviously if we will receive payments for the work that is outstanding and if we get a guarantee that we will receive our money then obviously we will go and repair retention work that is our responsibility.

[13] I understand Mr. Schmidt to be saying that the appellant also acknowledges that it has not completed the contract work. I will return to this observation in due course.

[14] I now proceed to deal with the legal issue concerning Clause 2.4 of the contract. That clause reads:

> For this purpose the owner hereby renounces his right of retention and hereby authorises the Building Society and/or financial institution to pay to the contractor such amounts at such times as the contractor requires. For this purpose the owner cedes to the contractor any and all amounts irrevocably and in rem suam, and furthermore cedes to the contractor all such amounts as may be come due to the owner in respect of an agreement of loan, which the owner may have entered into with the Building Society or any financial institution, the owner hereby granting the making over to the contractor all such rights as the owner may have against the Building Society and/or financial institution in respect of any loan granted to the owner and any amount payable in respect thereof.

[15] Mr. Verwey argued strenuously that the learned magistrate's finding that certain clauses of the agreement, in particular the above-quoted Clause 2.4, were unfair and unreasonable toward the respondent was wrong in law. He submitted that upon the authority of *Makono v Nguvauva*,[3] the respondent was bound by the pleadings and the respondent had not pleaded mistake, duress or undue influence; neither had he prayed for rectification of the contract. Consequently, counsel submitted, the respondent's counsel could not argue from the bar that certain clauses of the agreement were unreasonable and unfair when the respondent admitted during the hearing in the court below that he

[3] 2003 NR 138 (HC)

signed the agreement voluntarily. In sum, according to Mr. Verwey, in terms of Clause 2.4 of the agreement the respondent expressly and unequivocally renounced his right of retention, he understood the effect of that clause and he had not asked for a rectification of the contract. Counsel submitted, therefore, that the withholding of the N$16,000.00 by the respondent amounted to retention of money, something the respondent had expressly renounced in terms of the said Clause 2.4.

[16] Mr. Pickering argued contrariwise with equal vigour and force thus: in this case, the Court should consider the unfairness of the said Clause 2.4, for the idea that the only criterion for judging a contract was whether it was voluntary was outdated. Counsel argued further in this connection that the appellant's submission in support of the enforceability of Clause 2.4 based on voluntariness (or lack of duress) and contractual freedom was in conflict with reality, because "in many contracts some terms are too complex to enable a layman to predict the consequences."[4] Counsel submitted that in the Supreme Court case of *T A Eysselinck v Standard Bank of Namibia, Stannic Division and another*[5] "compelling considerations of fairness" led the Court to decide in favour of the appellant.

[4] Lewis, John, "Fairness in South African Contract Law," *SALJ* vol. 120 part 2, p 346.
[5] Case No. SA 25/2003. (Unreported).

[17] I understood Mr Pickering to argue that “compelling considerations of fairness” should also lead me to decide the question relating to Clause 2.4 in the respondent’s favour.

[18] On this point, Mr. Verwey asked me not to follow *Eysselinck*, *supra*, because that case was distinguishable from the present one, considering the peculiar facts of that case. I have carefully studied the *Eysselinck* case. The analyses made and the conclusions reached in that case are undoubtedly insightful and limpid. But I do not see how the decision in that case can assist the respondent. *Eysselinck* concerns the principle that estoppel can be based on a representation by conduct if the representee can show that he or she reasonably understood the representation in the sense contended for him or her and that the representer should have expected that his or her conduct could mislead the representee: it is not required that the representee must show that the conduct in question amounted to a precise and unequivocal representation.

[19] The underlined words that Mr. Pickering quoted in his submission were taken from the following passage in *Eysselinck*: “This is a case where, if there ever was one, the owner should, even if there

was no culpa on its side, be "precluded from asserting his rights by compelling considerations of fairness within the broad concept of *exceptio doli*."[6] It is my considered view that, on the facts, the decision in *Eysselinck* cannot apply to the matter before me, particularly because unlike in *Eysselinck*, in the present matter no fraudulent or suchlike dealings have been shown to be at play. Thus, with all due respect, I do not find *Eysselinck* of any real assistance on the point under consideration.

[20] I must now decide whether Clause 2.4 of the contract is enforceable. It has been said, "At common law an employer has the right to reduce the contract price by the amount it would cost to remedy any defective work caused by inferior workmanship."[7] The amount so withheld is normally referred to as 'retention money'.[8] Thus, in effect, "retention money is money set aside as security for the due completion of the work and to enable a fund to be available to rectify defects which have not been rectified by the contractor."[9] Of that there would appear to be no dispute.

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[6] *Eysselinck*, *supra*, at p 55.
[7] McKenzie, *The Law of Building and Engineering Contracts and Arbitration*, 5th ed: p 147.
[8] See e.g. *UP Construction v Cousins* 1985 (1) SA 297 (1).
[9] *McKenzie*, *ibid*., p 150.

[21] What is in contention is that, according to Mr. Verwey, by signing the contract, the respondent expressly and unequivocally renounced his common law right of retention and that the renunciation of the right of retention is not uncommon in building contracts. Mr. Pickering's response was simply that such a clause must be adjudged by this Court to be unenforceable – as the court below did, albeit in an indirect way – because it is unfair, unreasonable and oppressive. But, according to Mr. Verwey, as I understood him to say, the said Clause 2.4 could not be said to be unfair and unreasonable because the respondent has remedies under Clause 5.2 and 5.3 of the contract. Clause 5.2 provides:

> Practical completion of the works shall be deemed to be the date upon which the contractor advised the owner that the works are reasonably complete and the owner agrees to accept the works. The owner shall thereupon inspect the works and provide the contractor with a list of work remaining to be completed. The defects liability period shall commence from this date.

And Clause 5.3 provides:

> The contractor shall at his own expense make good all patent defects which may arise due to poor workmanship or faulty materials used and which

> occur within 3 months of date of practical completion of the construction works. The contractor's liability for latent defects shall be one year from the date of completion of the construction works.

[22] In his submission, Mr. Verwey reasoned that if the appellant did not comply with the above-quoted provisions, the respondent could sue for specific performance or damages. He relied on *T Scheffler v Institute for Management Leadership Training*[10] and some textual authorities. With due respect, I do not also find *Scheffler* of any real assistance on the issue under examination. The appeal in that case was against the finding of the trial magistrate that the respondent was entitled to rectify the written agreement in question on account of the common error made by the parties with regard to the duration of the contract. The question of common error has not been raised in the present case at all. The point Mr. Pickering raised was rather the unreasonableness and unfairness of Clause 2.4.

[23] In his authoritative work, *The Law of Contract in South Africa*, Christie writes:

> If the parties have made an onerous or one-sided, unreasonable or even grossly inequitable contract it is not for the court to amend it out of

[10] 1997 NR 50.

> sympathy with either or both of the parties, unless it is so unconscionable or oppressive as to be contrary to public policy.[11]

I do not think Clause 2.4 of the contract is so unconscionable or oppressive as to be contrary to public policy for two reasons. First, it was not contended on behalf of the respondent that renunciation by employers of their common law right of retention was not common in building contracts. Second, the respondent has adequate remedies under Clauses 5.2 and 5.3 of the contract. Thus, in the view I take of Clause 2.4, I hold that the learned magistrate's finding that that clause is unfair and unreasonable was wrong.

[24] In his heads of argument, Mr. Pickering submitted that the Building Society was not prepared to pay the outstanding amount of N$16,000.00 because of defective work rendered by the appellant. I cannot say anything about that because the Building Society is not party to the contract; neither is it a party to these proceedings.

[25] I turn now to deal with the plaintiff's Claim B, which, as I mentioned previously, is based on an alleged oral agreement between the appellant and the respondent for additional work at the alleged

[11] 3rd Ed, p 232, and the cases there cited.

price of N$21,650.00. The fact in issue – the *factum probandum* – which has been placed in issue by the pleadings and which the appellant must prove in order to succeed on his claim is the existence of the alleged oral agreement.[12] And it is trite law that if a person claims something from another in a court of law then he or she has to satisfy the court that he or she is entitled to it.[13] Of course, the standard of proof required is a balance or preponderance of probabilities. It follows, therefore, that in order to succeed in his claim under Claim B, the appellant must prove the agreement on which the relies – i.e. both the existence of the oral agreement and its terms.

[26] I do not see anything on the record that constitutes proof of the existence of the oral agreement on a balance of probabilities. Indeed, in my view, it is more probable than not, as the respondent contended, that the so-called additional work was part of the written contract work, if one took into account the fact that there is no evidence of a quotation, particularizing such items as the price of materials and labour and VAT that are common in the building industry, particularly when the alleged additional work was extra to the written contract work as aforesaid. This is crucial because the important question that arises is this: how did the appellant arrive at the amount of

[12] See *Klaassen v Benjamin* 1941 TPD 80.
[13] *Pillay v Krishna* 1946 AD 946 at 951-3.

N$21,650.00 as the oral agreement price of the alleged additional work? I do not think that Exhibit “O”, a letter dated 21 April 2001 from the appellant’s legal practitioners to the respondent, containing prices for tiling, fitting of bedroom and cupboards and kitchen cupboards and painting, does prove the oral agreement.

[27] With the greatest respect, I cannot accept Mr. Verwey’s argument that the sentence “This invoice excludes charges for any extras not included in contract” in Exhibit “L” is proof that additional work was done and that the appellant was putting the respondent on notice that an invoice for the additional work would follow in due course. Exhibit “L” is a letter, dated 10 April 2001, under the hand of H. Schmidt, addressed to the respondent. What was so difficult, if one may ask, for the appellant to have attached an invoice for the additional work to Exhibit “L”, if, indeed, the plaintiff did additional work for the respondent in terms of an oral agreement, which it had apparently completed by 10 April 2001? One must not lose sight of the fact that the above-quoted sentence is merely a postscript to the said letter of demand (i.e. Exhibit “L”). I cannot see how that postscript can assist the plaintiff’s case. I respectfully agree with Mr. Pickering that the postscript could not prove the alleged oral agreement: the evidence, I think, supports the correctness of this view.

[28] In the result, I have come to the inescapable conclusion that the appellant has failed to prove the oral agreement. In the result, Claim B must fail. Having so held, I do not have any good reason to interfere with the learned magistrate's decision to reject Claim B as unproved.

[29] I pass to deal with the respondent's counter-claim. In her judgment, the learned magistrate upheld the respondent's counter-claim, and made the following order in relation thereto, which for the sake of completeness, I reproduce here once more and as it is:

> (1) Plaintiff has in totally fail to perform completely and deliver quality work as per agreement as such defective and poor workmanship call for proper assessment. As result plaintiff is order to remedy such defects by appointing structural engineer to do proper assessment in order to rectify those defects and deliver a quality workmanlike performance. The recommendation made by Mr. Godo and Mr. Le Roux must be considered in such operation.
>
> (2) Plaintiff is ordered to the Defendant an amount of N$50,647.50 additional works that emanate from poor workmanship of the Plaintiff's conduct.

[30] In his submission, Mr. Pickering conceded that there was an element of undue enrichment if the two aspects of the above order (i.e. (1) and (2) above) were taken separately; but, in his view, that should not affect the judgment of the magistrate in its entirety on the matter of the respondent's counter-claim. For, according to him, upon the authority of *Claasen v African Batignolles Construction (Pty) Ltd*,[14] this Court has discretion to determine the quantum of damages claimed by the respondent.

[31] With the greatest respect, I do not read *Claaasen* to lay down any such principle; neither do I think *Claasen* can be of assistance in determining the quantum of damages. On the facts before it, the Court in *Claasen* said that if the defendant considered it was entitled to claim compensation for improvements it should have filed a counter-claim; it would then have ensured the simultaneous adjudication of the claim and counter-claim.[15] *In casu*, the respondent has filed a counter-claim in which he claims damages. Be that as it may, it is my considered view that before the Court can exercise its discretion judicially in determining the quantum of damages – as it must – the respondent must (1) prove that the plaintiff did cause the damage or harm for which he seeks compensation in the form of damages, and then (2) put

[14] 1954 (1) SA 552.
[15] At 565B.

forward credible evidence on how the amount of N$50,647.50 was arrived at to enable the Court to make a fair and just determination. On (1), I have already found that the learned magistrate was wrong in finding that the plaintiff was responsible for the cracks that appeared in the respondent's house. Having so found, it will serve no purpose for me to determine the quantum of damages. That being the case, the respondent cannot succeed in his counter-claim.

[32] For the conclusions I have come to above and the reasons I have given therefor, I hold that (1) the appellant succeeds in his Claim A; (2) the appellant fails in his Claim B; and (3) the respondent fails in his counter-claim.

[33] I turn now to deal with the matter of costs. I find that Clause 11 of the contract provides for an alternative dispute resolution (ADR) mechanism. There is no evidence that the parties did attempt to take advantage of this domestic remedy before resorting to judicial proceedings in the court below. In my respectful opinion, the procedures in Clause 11 could have greatly assisted the parties in resolving their dispute outside the surrounds of the Court. What is the point, if I may ask, in providing for the ADR mechanism in the

contract if the parties were not prepared to try it out? I have taken these observations into account in deciding whether to grant costs.

[34] Accordingly, I make the following order:

(1) The learned magistrate's order is set aside and the following order substituted therefor:

The respondent shall pay to the appellant the amount of N$16,000.00 not later than one calendar month from the date of this judgment, and the amount shall attract interest at the rate of 20% per annum from the date of expiration of the one-month period.

(2) Having taken into account what I have said in the next preceding paragraph, coupled with the fact that neither the appellant nor the respondent was substantially successful in his claim, there will be no order as to costs.

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Parker, A J

ON BEHALF OF THE APPELLANT:	Adv. C J Verwey
Instructed by:	Theunissen, Louw & Partners
ON BEHALF OF THE RESPONDENT:	Adv. A G Pickering
Instructed by:	Shikongo Law Chambers