

**AMELIE v MANGROO**

**(2012) SLR 48**

Elvis Chetty for the plaintiff  
France Bonte for the defendant

**Judgment delivered on 29 February 2012 by**

**EGONDA-NTENDE CJ:**

The plaintiff is seeking from this court an order to rescind the contract between the plaintiff and defendant made on 23 December 2004 and the payment by the defendant of the sum of R 445,500 to the plaintiff together with interest and costs.

The case for the plaintiff is that both parties hereto agreed that the plaintiff would build for the defendant a 4 bedroom house at Glacis, Mahe for the price of R 445,500. This sum was to be paid in installments. The first installment was to be R 125,000 for ground preparation, foundation and retaining wall. The plaintiff completed this work but was never paid the first installment of R 125,000 by the defendant. By reason of this breach the plaintiff ceased any further work in respect of the contract. He now claims the R 125,000 as well as R 310,000 being loss of profits the plaintiff would have made had he completed the contract.

The defendant opposed the plaintiff's claim as well setting up a counterclaim. She agreed that there was a contract between the parties for construction of a house for her. She contended that she paid the plaintiff the sum of R 125,000 by cheque no 475429 dated 26 November 2004 as agreed for the first installment. However the plaintiff failed to complete the first stage of the works and abandoned the works. By reason of the plaintiff's failure to complete the contract the plaintiff counterclaimed a sum of R 190,000 as loss suffered by the defendant on account of (a) expenses for additional rent payment, (b) expenses for unpaid water bills/reconnection fee, (c) uncompleted works as of date of termination, and (d) loss of enjoyment of the property; together with interest.

The plaintiff denied the counterclaim.

At the hearing of the case each party testified on his or her own behalf and no other witnesses were called. The plaintiff in his testimony stated that he received the initial payment from the defendant of R 125,000 for the initial works but that when he started construction he met some unusual conditions that necessitated further works beyond those agreed. When he brought the attention of the defendant to these extra works the defendant refused to pay him and he gave 14 days' notice to her that he would abandon the works unless she accepted to pay him. As she did not accept to pay him and the notice passed, he abandoned the works in question.

The defendant testified that she paid the plaintiff in accordance with their agreement the initial sum of R 125,000 for the plaintiff to carry out the first stage of the works. The plaintiff commenced the works but failed to complete them. In spite of repeated calls from the defendant that the plaintiff complete the work as agreed, the plaintiff failed to do so and abandoned the work. She admitted that the plaintiff had subsequently paid for the water bills to the site.

The plaintiff's case as set out in the plaint is different from that presented on evidence. In the plaint the plaintiff had claimed that the initial sum or first installment of R 125,000 had never been paid by the defendant. The claim in the plaint was for that amount plus lost profits on the contract of R 310,000. On the evidence the plaintiff admitted that he had been paid the initial first installment of R 125,000. He was only claiming an additional R 125,000 for the extra works that arose at the first stage of the works. This is a different case from the one on the pleadings and must for that reason fail.

As was observed by the Court of Appeal in *Michel Nanon v Janine Thyroomooldy* (2011) SLR 92 –

We also remind ourselves that the following points are pertinent: (i) a matter which has not been pleaded, may not be found to have been proved and no evidence should be adduced or admitted in respect thereof; (ii) a party is bound by his / her pleadings; (iii) he / she who avers must prove.

The reason for this requirement is simple. Pleadings provide the adverse party with the case it has to meet. Once the other party has prepared to meet the case at hand it is not permissible to ambush it with another case altogether of which it has no notice. Secondly, a party's pleadings ought to act as a beacon to that party delineating for that party the case it has to prove in order to succeed. It is therefore simply not permissible for a party to depart from the case set forth in its pleadings and prove another that the other party has had no notice of and or the chance to respond to. It is not permitted so to speak to move the 'goal posts' of the litigation as the plaintiff has attempted to do in this case.

On the other hand the claim for loss of profits of R 310,000 was not supported by an iota or scintilla of evidence. It remains unproven. It must fail on that account.

The counterclaim put forth by the defendant is similarly unsupported by any evidence on record. No evidence was adduced relating to how the sum of R 190,000 was arrived at. No evidence was led as to the loss suffered by the defendant on account of expenses for additional rent payment, uncompleted works as of date of termination, and loss of enjoyment of the property.

In the result I have no alternative but to dismiss both the suit and counterclaim for the reasons set out above with costs to either party.

It is apparent that counsel for both parties in handling this matter could have done much more in presenting their clients' cases than they did. I regret that not enough effort was put into preparation and presentation of their clients' cases.