

- (a) to complete the walls
- (b) to plaster the walls
- (c) to make topping
- (d) to put glazestone
- (e) to do the roofing
- (f) to do glazing
- (g) to fit door locks.

He further alleges that he has completed the work and that he has never received any payment. The work was carried out in accordance with the terms of the agreement and the payment of M3,000-00 was to be done upon completion of the building. Despite demand the defendant is refusing or neglecting to pay the said sum of M3,000-00.

In his plea the defendant alleges that it is correct that a contract was entered into by the parties as indicated by the plaintiff, however he avers that plaintiff did not complete the work as agreed. He has also stolen from the site some of the materials which were to be used in the building of the house. He further avers that the plaintiff took an amount of M900-00 from the defendant for the purpose of buying some building materials but the money has never been brought back.

The defendant avers that the agreement was that plaintiff would assess the work on completion and give his price which would then be negotiated. The plaintiff has left the work unfinished and has disappeared with the money which was to buy additional building materials.

On the 1st September, 1989 the plaintiff gave oral evidence before this Court. He testified that before he started work he inspected the house and found that the walls had been built to the window level; there were no window-frames on the front wall; the concrete on the floor was not good and had to be removed and done again; the walls were not plastered; he had to do the roofing; he agreed to complete the walls, to roof the house, to plaster the walls and to partition the house. That meant that he had to finish the whole house.

The plaintiff deposed that he finished all the work covered by their agreement but did not do the facia boards, ceiling, plumbing and wiring. The amount of M3,000-00 was agreed upon after he had finished the plastering and the roofing of the house. He built a toilet and also repaired a crack in the wall by making an underpeel. He also bought bricks, glazestone, cement, glass, crushed stones and sand. The amount of M3,000-00 covers the building materials he bought with his own money as well as his labour.

The plaintiff deposed that the defendant agreed to pay him for the work he had done and that thereafter he must finish what had not been done. It is now over one year since he finished but the defendant has not paid him anything. He met him (defendant) about five times but the latter was in financial difficulties and said he was waiting for certain Government cheques which were due to him apparently for work he had done for Government. After about three months after he had completed the work the wife of the

defendant came to him and asked him to give her the keys for the house because she wanted to employ a person who would do the wiring. She has never returned the keys to him and the defendant and his family are now in occupation of the house.

The defendant did report the loss of building material from the site in question but he (plaintiff) asked him why he was claiming loss of materials after he had finished the work he was supposed to do to the house. He did not tell him when he discovered the theft nor the value of the stolen material. Regarding the amount of M900-00 allegedly given to him to buy additional building materials, the plaintiff says that the amount was in fact M700-00 and not M900-00 as alleged by the plaintiff. He used the amount for the purchase of additional building materials. The plaintiff did the assessment after he had completed the work. He denies that it was agreed that someone from outside would do the assessment.

The plaintiff admits that initially they did not agree on the price but the parties agreed on the sum of M3,000-00 after he had completed the work. It was for the work he had done and they still have to agree on the price of the outstanding work.

The defendant did not give any evidence in this Court and closed his case without calling any witness.

Mr. Monaphathi, attorney for the plaintiff, submitted that the prima facie case established by the plaintiff has not been controverted and it must now become conclusive. He further submitted that the agreement between the parties has not been denied by the defendant. The defendant admits that he has not paid the plaintiff any amount for the work he has done nor has he made any offer for such work.

On the other hand Mr. Hlaoli, attorney for the defendant, submitted that the agreement was that assessment was to be done after the completion of the whole work. He submitted that the plaintiff is in breach of contract because he has not completed the work according to the agreement. He further submitted that the evidence given by the plaintiff contradicts paragraph 4 of the declaration.

I agree with Mr. Hlaoli that there seems to be a conflict between the evidence of the plaintiff and paragraph 4 of his declaration. One cannot be allowed to give evidence which is in conflict with one's declaration unless one has been granted leave to amend the declaration to bring it in line with one's evidence. In the declaration the plaintiff avers that 'the parties agreed that the works were to be completed at the cost of M3,000-00 and that Defendant would pay Plaintiff on completion of the said building works.' In his evidence in Court plaintiff admits that initially there was no agreement on the price; there was to be an

assessment of the work done and then an agreement on how much defendant was to pay. He testified that after completing the work agreed upon the assessment was made. The parties agreed on payment of M3,000-00 for the work done.

In my view the conflict referred to above is a minor one and does not in any way change the cause of action. The amount claimed has not changed, the only change I can see is as to the time when the agreement was reached. In paragraph 3 of his pleas the defendant admits that the terms of contract were as described in paragraph 3 of the plaintiff's declaration. Paragraph 3 of the declaration must be read with the further particulars in which the plaintiff set out in detail the work that he had to do in terms of the contract. He avers in the same paragraph that all the works have been done. He also testified in Court that such works have been done.

In paragraph 3 of his plea, ^{he} merely avers that the plaintiff did not complete the works as agreed. He does not state exactly what the plaintiff has not done. It ~~was~~ necessary for him to have clearly mentioned the things he has not done because the plaintiff has given a full ^{list} of the things which he was supposed to do in terms of the contract. It seems to me that in terms of the contract the plaintiff was not to do certain things such as ceiling, plumbing and electrical wiring. These things do not appear in paragraph 3 of the declaration as supplemented by further particulars. As I have indicated above the defendant has admitted in paragraph 3 of his plea that those were the terms of the contract.

The defendant's wild allegation that the plaintiff has not finished the works, unsupported by any evidence, cannot be accepted. He elected not to give evidence despite the fact that he admits that there was a contract between him and the plaintiff. He has not given evidence to prove that the plaintiff did not complete the works agreed upon in terms of the contract.

In Ex parte Minister of Justice: re R. v. Jacobson and Levy 1931 A.D. 466 at p. 478 Stratford, J.A. said:

"Prima facie evidence in its usual sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus".

At page 36 of his book: South African Law of Evidence, 1st edition, Hoffmann has this to say:

"If the evidence adduced by one party can reasonably support an inference in his favour, and it lies exclusively within the power of the other party to show what the true facts were, his failure to do so may entitle the court to infer that the truth would not have supported his case. On the other hand, if there is no reason to expect a party to be able to throw light upon the facts, his silence can add nothing to the evidence by his opponent. In such a case there is no difference between prima facie and sufficient evidence".

I am of the view that if the defendant had given evidence he would have been able to throw light on the things which the plaintiff

left unfinished because according to him that is the first reason why he refuses to pay the plaintiff.

The second reason is that building materials were stolen. I do not see any connection between the theft of the materials and the payment of the plaintiff. The defendant does not say what materials have been stolen by the plaintiff and why he has not reported him to the police for criminal prosecution. In any case if theft by the plaintiff had been proved the defendant could claim a set-off provided he proved the value of the stolen material. He cannot arbitrarily refuse to pay the plaintiff what is due to him by relying on mere suspicion that he stole his property.

With regard to the alleged M900 which was given to him to buy additional building material the plaintiff has testified that it was in fact M700 and that he bought the relevant material with it. His evidence has not been controverted and I have no reason to disbelieve him.

For the reasons I have stated above I have come to the conclusion that the prima facie proof established by the plaintiff now becomes conclusive proof and that he has discharged his onus.

Judgment is granted for the plaintiff as prayed in the summons with costs.


J.L. KHEOLA
JUDGE

2nd February, 1990.

For Plaintiff - Mr. Monaphathi
For Defendant - Mr. Hlaoli.