

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A364/2014

DATE: 2 DECEMBER 2014

In the matter between:

CAQS BK

Appellant

and

TAMBHURA PROPERTY INVESTMENTS 19 (EDMS) BPK

Respondent

JUDGEMENT

BOSMAN (AJ)

BACKGROUND

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

28/11/2014

DATE



SIGNATURE

1. In this matter summons has been issued in the North Gauteng High Court, and by agreement between the parties the matter was transferred to the Regional Court for the Regional Division of Gauteng, held at Pretoria.
2. The Regional Magistrate, Myambo delivered a judgment on 17 January 2014 in the said regional court and granted judgment in favour of the appellant in the sum of R 17,786.31 plus interest and costs.

THE APPELLANT'S CAUSE OF ACTION:

3. Briefly stated, the appellant avers in its particulars of claim that an agreement was entered into between itself and the Respondent, in terms of which the Appellant would render certain quantity survey services to the respondent.
4. The terms and conditions of the said agreement were contained in a proposal prepared by the appellant, annexed to the summons as annexure "X1".
5. It is further alleged in the particulars of claim that the appellant duly and properly performed in terms of the agreement, and rendered quantity surveying services to the respondent. In evidence it turned out that these services were the preparation of certain bills of quantities, in respect of the construction of farm managers-houses in a proposed development at Van Rheenen, Kwa-Zulu Natal and further services in terms of Phases 1 and 2 of the said proposal. The fee structure to which the appellant would be entitled is fully dealt with in the said proposal and comprises of certain percentages of an estimated value and in regard to stages of the proposed development.
6. **INVOICES:**
 - 6.1 Pursuant to the quantity surveying services rendered, the appellant delivered two invoices in respect of these services, namely invoice no 1115, and invoice no 1116.

6.2 In its plea as well as in an affidavit resisting summary judgment, the respondent denied that any contract was concluded between the appellant and the respondent. However, during cross-examination Ms. Fondse, the managing director of the respondent, admitted that the respondent was indeed indebted to the Appellant in the sum of R17, 786.31 in respect of invoice 1115;

6.3 The court *a quo* eventually granted judgment in favour of the Appellant in the amount of R 17 786.31. The dispute between the parties are, therefore, whether the appellant would be entitled to judgment in respect of services rendered and fees payable in regard to invoice 1116.

6.4 In paragraph 6.2 of the Respondent's plea, the Respondent admitted that an oral instruction was given to the Appellant by way of a letter, which eventually turned out to be a letter dated 25 September 2009, which was signed by the said Ms. Fondse. In terms of the said letter the plaintiff was appointed to do " the Pre-ROD work for the project, with regards to:-

- The bill of quantities for the managers' house
- The total estimate for the balance of work for the planned project".

7. In terms of paragraph 12 of the plea, the Respondent alleges that, despite the fact that the respondent denies that an agreement was entered into with regard to the instructions given to Appellant, the Appellant far overreached its purported instruction with regard to the scope of the work discussed.

THE EVIDENCE ON BEHALF OF THE APPELLANT:

8. Mr Cillié a, proper qualified quantity surveyor, and being issued with a Certificate of Good Standing by the Council of Quantity Surveyors explained that Ms. Linda Lee, an architect of the Defendant\Respondent contacted him during July 2009, to obtain certain quotations for quantity survey services, in respect of a development in Kwa-Zulu Natal.
9. Mr Cillié, on behalf of the Appellant, visited the said Ms. Lee and certain plans were inspected. Thereafter, Mr Cillié made calculations in regard to the number of square meters of the proposed development. He was told by Ms Lee that other quotations of other quantity surveyors would also be obtained.
10. The proposed development consisted *inter alia* of a Conference Centre, a church and houses of a trainer and a manager, office park together with certain other developments.
11. Mr Cillié calculated the costs of the project to be R258,599.595.00 and his fees in regard to these costs would be 1, 5% namely R3,878,994.00.

12. Ms. Lee informed Mr Cillié that the proposal prepared by the Appellant was acceptable to the Respondent and a site inspection and meeting was arranged.
13. The evidence of the Appellant was further that the Appellant was requested by the Respondent to prepare bills of quantities in respect of three managers' houses, which were duly completed by the Appellant.
14. On 19 August 2009 the Appellant requested the Respondent if it could proceed with preparing estimates in respect of the rest of the buildings of the proposed development and the answer of the Respondent by e-mail was:

"Ja, doen dit gerus, ek het dit nodig om my 'estimates' mee te vergelyk en 'n gebalanseerde oorsig te kry".
15. In terms of a further letter dated 25 September 2009, a letter written and signed by Ms. Fondse, the Appellant was formally appointed to do the preliminary work for the project namely, the Bill of Quantities for the managers' houses and the *"total estimate for the balance of work for the planned project"*.
16. Pursuant to the said instructions, the Appellant completed the Bill of Quantities for the Managers' houses as well as the estimates of the rest of the buildings in the proposed development.
17. On 29 September 2009 the Appellant confirmed in a letter written to the

Respondent, that stages 1 and 2 of the project is done by the Appellant and certain other information is required to proceed with the other stages. Attached to this letter dated 29 September 2009 were the invoices 1115 (amount R45,675.23) and invoice 1116 (amount R315,420.49).

18. After the two said invoices were sent to the Respondent, a meeting was held during October 2009, with Mr Cillié and Ms. Fondse and her husband (Mr Taljaard) to discuss these invoices.
19. The said Ms. Fondse and her husband were not satisfied with the invoices and more particularly Invoice 1115. It was agreed to amend Invoice 1115 by dividing it with 3 and which had the effect that the fees were only charged in respect of one of the houses.
20. In regard to Invoice 1116, certain letters were exchanged in which the point was raised that the Plaintiff far overreached its instructions.
21. At one stage the attorneys for the Appellant wrote a letter to the Respondent in terms of which it was proposed to pay, within a short period of time a reduced amount, which was not accepted by the Respondent, and which resulted in the fact that the Appellant proceeded by way of action. The witness, Cillié, confirmed that the work was performed properly and that the fees that were charged, were approximately half of the fees prescribed by the Council of Quantity Surveyors.

22. The evidence of Mr Cillié was further that the proposal already dealt with the fee structure and the percentage of agreed fees and the invoices were based on the fees set out in the proposal, being a percentage of the value of the estimate at that stage.
23. The expert witness, Mr Tenkroden testified as an expert witness. He testified that he went through the Bills of Quantities, the plans and the feasibility studies and confirmed that the scale of fees charged by the Appellant, was below the normal scale of fees as set out by the Association of Quantity Surveyors being approximately 50%, and that this scale of fees is more than fair and reasonable.
24. Mr Tenkroden testified that the Bills of Quantity, Exhibit "B" in respect of the Managers' houses and in the regard to the survey regarding the services contained in Invoice 1116, were services that were properly rendered and the fees were based on a percentage of the total cost of the buildings, being the estimated value of the works, excluding certain services like roads, sewers, electricity, etc.
25. The said witness testified that the purpose of the calculations made by the Appellant was to furnish the client, the Respondent, an estimate of what it would be in for, and as it was put by Mr Tenkroden "*...and it takes a lot of effort to get there*". The Appellant was still awaiting certain further information, but that was beyond his terms of reference in accordance with the mandate given by the Respondent at the time.

EVIDENCE ON BEHALF OF THE RESPONDENT:

26. Ms. Fondse is the Managing Director of the Respondent. She admits that she received the proposal of the Appellant, at a certain stage and obtained it from Ms. Lee, the architect that she appointed.
27. In regard to a question whether Ms. Lee had the authority to give Mr Cillié the go ahead in regard to the proposal, this was denied by her. Her evidence was that Ms. Lee only performed an introductory function.
28. It is clear from the evidence of Ms. Fondse that she already had the proposal in her possession shortly after 14 July 2009, and that a standard contract form was presented to her by Mr Cillié, to be signed (which she refused to do).
29. Thereafter came the email letter dated 19 August 2009, referred to in paragraph 14 above. After this Ms. Fondse wrote the instruction letter. The said instruction letter dated 25 September 2009, where she "*appointed*" the Appellant to prepare a Bill of Quantities for the Manager's house and "*the total estimate for the balance of work for the planned project*" is signed by her. Her evidence is that this letter was written for the mere sake of gathering information and that the costing of such work to be done, would have to be determined and will be "*signed off by me personally*" (referring to herself).
30. It is clear from the evidence of Ms. Fondse that she expected a "*fee arrangement*" pursuant to her instruction. Her evidence shortly thereafter that there was not any fee structure in place, with Mr Cillié, flies in the face of the

fact that she already received the proposal in which the fee structure was dealt with by the Appellant.

31. There was no explanation tendered by Ms. Fondse that she enquired from the Appellant what fees would be involved in complying with the instructions given by her in the 25 September letter.
32. It is further clear from the evidence of Ms. Fondse that the Respondent instructed the Appellant to draw a Bill of Quantities in respect of one of the Manager's houses, and shortly thereafter she endeavoured to evade the term "*instruction*" to state that it was not a direct instruction, but rather a discussion.
33. Further appears from the testimony of Ms. Fondse that the Respondent has no defence in regard to the Appellant's claim pertaining to payment of the Invoice No. 1115. This admission was never reflected in either her plea or in her affidavit resisting summary judgment. Ms. Fondse's explanation that the Respondent never admitted the indebtedness in respect of one of the Manager's houses (the fees in regard to the Bill of Quantities prepared by the Appellant), because the two invoices were "*always accompanied by the other*", is unconvincing and improbable.
34. From the evidence of Ms. Fondse, it is clear that she is a woman with certain business skills and of above average intelligence. She was fully aware of the fact that her instruction letter of 25 September would probably cause that the Respondent would be liable to pay fees or remuneration to the Appellant in this regard. That is why she expected a "*fee arrangement*" in respect of these

instructions. This she already had in the form of the proposal which she received via email from Ms. Lee.

35. It is inconceivable to reason that Ms. Fondse would not realize that the price structure dealt with in the proposal (Exhibit "A", p 5 – 11) would not be applicable. If this was not the case, she would have definitely enquired from the Appellant what amount the Respondent was in for, when the instruction was given on 25 September 2009.
36. A person in the position of Ms. Fondse would, as I view it, definitely be seeking assurance as to the question what fees would be applicable in regard to the instructions that she gave, in the said letter of instruction. The fact that this was not done, confirms the testimony of Mr Cillié that the Respondent already accepted the proposal, and more particularly the fee structure in the said proposal.
37. Further, the instruction letter of 25 September also confirms the email letters exchanged between Mr Cillié and Ms. Fondse, in regard to the estimates, regarding the balance of the buildings of the scheme. This was clearly, as stated in the email letter sent by Ms. Fondse to Mr Cillié on 19 August 2009:

"Ek het dit nodig om my estimates mee te vergelyk en 'n gebalanseerde oorsig te kry."

38. Although this instruction was given prior to the time when the record of decision ("ROD") was obtained, it is clear from the evidence of Ms. Fondse

that she expected to pay for both the instructions in regard to the Bill of quantities in respect of the managers' houses as well as the balance of the instruction contained in the 25 September letter. It is for these reasons that she eventually, on behalf of the Respondent, realized that she has to pay the first part of the instruction in regard to the Bill of Quantities prepared by the Appellant. Her evasiveness in regard to the question whether this was a direct instruction or not (she later conceded that this was an instruction) confirms the fact that the Respondent was not really a keen payer.

39. During argument Mr Cohen submitted that the finding of the Regional Court Magistrate was correct, namely that the meeting of 23 October 2009 showed that no oral agreement was reached regarding the payment of invoice 1116, having regard to the evidence of Mr Taljaard and Ms Fondse. Mr Cohen, however conceded that, on the probabilities, the proposal compiled by the Appellant and sent to Ms Lee, was received by and accepted by Ms Fondse. The fee structure of the Appellant was part and parcel of this proposal, and this is the reason why Ms Fondse never enquired what of the amount in respect of fees would be.
40. Mr Cohen further conceded that on a proper interpretation of the 25 September letter, Appellant was clearly instructed to do preliminary pre-ROD work that included both the bullet points in the letter, and not only the first bullet point, namely the bill of quantities for the managers' house.

41. The evidence of the husband of Ms. Fondse, Mr Taljaard, does not really support the evidence of Ms Fondse in any substantial manner. Her evasiveness in regard to the question whether she read the proposal that she received from Ms. Lee, or just *"flipped through it"*, confirms her unwillingness to concede liability in regard to the second part of the instruction letter. The concession made by Mr Cohen was therefore correct.
42. On the probabilities, the version of the Appellant is more plausible and acceptable. By balancing the different versions, my conclusion is that the version of the Appellant is more natural and credible, on the probabilities.

**See: Jordaan v Bloemfontein Transitional Local Authority & Another
2004 (3) SA 371 (SCA)**

43. The evidence of Mr Taljaard did not advance the case of the Appellant in any material respects. He was not acquainted with the history of the dealings between the Appellant and the Respondent.
44. The evidence of Ms. Lee (her surname was Hodgson at the time of the trial), confirmed the version of the Appellant in some respects. She conceded that Mr Cillié was showed certain plans with specific reference to square meterage, to enable him to draft the proposal. The square meterage was in respect of the conference centre, a chapel, amethyst, restaurant, office park, school and other proposed buildings.

45. It is clear from the evidence of Ms Lee that the proposal drafted by the Appellant could only be drafted in respect of certain information that the Appellant obtained from her. It is further clear from her evidence that the proposal was drafted, not only in regard to the proposed managers' houses, but also in regard to various other parts of the whole project. That is the reason, in my view, why the instruction letter, dated 25 September 2009 was drafted and signed by Ms Fondse.

CONCLUSION:

46. Having regard to the evidence, as a whole, and by balancing the probabilities in this appeal, as stated above the more natural or plausible version is the version of the Appellant, in all material respects.
47. I am therefore of the view that the appeal should succeed, with costs. I further propose that the judgment of the Magistrate be altered to read as follows:

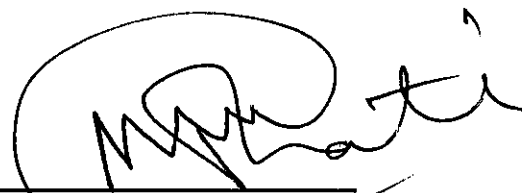
"Judgment is granted in favour of the Plaintiff for:

1. *The sum of R333,026.80;*
2. *Interest on the said amount of R333,026.80 at 15% per annum from 29 September 2009 to date of payment;*
3. *Costs of suit, on the higher scale, including the costs of counsel."*



A J H BOSMAN (AJ)
Acting Judge of the High Court

I AGREE,



AML PHATUDI (J)
Judge of the High Court

AND SO IT IS ORDERED.