

SOUTH AFRICA / JUDGMENT

Formex Engineering Pty Ltd v Ivo Huisman & Associates CC (CA 239/2011)

[2013] ZAECHGC 110 (17 October 2013)

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COURT

Eastern Cape High Court, Grahamstown

BEFORE

G Goosen, N Dambuza, B Hartle

CASE / FILE NUMBER

CA 239/2011

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE, GRAHAMSTOWN

CASE NO: CA 239/2011

Date Heard: 10 June 2013

Date Delivered: 17 October 2013

NOT REPORTABLE

In the matter between

FORMEX ENGINEERING (PTY) LTDAppellant

and

IVO HUISMAN & ASSOCIATES CCRespondent

JUDGMENT

GOOSEN, J.

This is an appeal against the judgment of a trial court in which that court ordered the appellant to pay to the respondent R238 170.12, plus interest and costs pursuant to an oral agreement for the rendering of professional services concluded between the parties. The respondent, as plaintiff in the court a quo, had issued summons against the plaintiff for payment of fees for professional engineering services rendered by the respondent at the appellant's instance. The contract of service was for the design and tender stage in respect of the raising of the roof of the appellant's factory situated in Port Elizabeth. The appellant, in its plea, denied the existence of the oral agreement and pleaded further that the respondent had been appointed as a consulting engineer

to supervise the construction of

concrete foundations to found certain metal presses. As far as the raising of the roof structure was concerned the appellant pleaded that the respondent had been requested only to furnish a cost estimate and not to prepare preliminary designs or to prepare

drawings for the design and tender stage of the project.

The background to the conclusion of the agreement upon which the respondent relied is the following. On or about 17 October 2007 the appellant contacted the sole member of the respondent, Mr Huisman, to discuss respondent's involvement in performing design work in respect of the foundations for two steel presses to be installed in the appellant's premises. Mr Huisman met with a Mr Els of the appellant and was informed that the work to be performed was urgent since the presses were shortly to be delivered at the appellant's premises. It was common cause that Mr Huisman had previously been involved in similar work for the appellant. Mr Huisman proposed using the same contractor who had previously constructed foundations for presses at the appellant's factory. According to Mr Huisman the proposed location of the presses would have necessitated the raising of the roof structure to accommodate the height of the presses. He was asked whether he would be able to do the work in the time period and upon answering in the affirmative was requested to provide a cost estimate in respect of raising the roof structure whilst the construction of the foundations was proceeding. It was agreed that his fees would be in accordance with the Gazetted fee structure applicable to such work and based on a percentage of the value of the work to be undertaken.

Mr Huisman proceeded to undertake a preliminary design using designs that his firm had previously done for similar work for the appellant. On 5 November 2007 he provided Mr Els with a cost estimate based on the preliminary design of R5000 per square metre. It was his recommendation that the roof over the entire area be raised. Mr Huisman was then instructed to prepare drawings and obtain a fixed price from the contractor, Heaton Construction, who was already on site undertaking work on the foundations. On 13 December a quotation was received from Heaton construction and forwarded to Mr Els. The respondent submitted its invoice to appellant on 14 December.

On or about that date Mr Huisman was informed that the work was no longer as urgent as initially stated. He was then requested to obtain from Heaton Construction a quotation only for the removal of the roof to enable the presses to be installed. This was done on 19 December. Mr Huisman was then informed that the quoted price was too high and that he should put the works out to tender. Three tenders, including that of Heaton Construction, were submitted on 25 January 2008. Thereafter he was informed that the prices were too high and that the appellant had obtained the services of another contractor. In respect of respondent's fees Mr Huisman was informed that he would have to follow legal process and that his mandate had been terminated.

The appellant contested the conclusion of an oral agreement which included the envisaged raising of the roof structure. According to Mr Els when the parties first met on 17 October it had not yet been decided where in the factory the presses were to be installed and that the raising of

the roof did not form part of the discussion at that meeting. He conceded however that the issue of raising the roof must have been discussed at some stage prior to 5 November 2007. He denied that the respondent was mandated to prepare design drawings for the raising of the roof. It was his testimony that the respondent's mandate was terminated on 14 December 2007 and that after this date he gave no further instructions to the respondent nor mandated it to proceed further with the project.

It is common cause that the trial court was confronted with two irreconcilable and mutually destructive versions as to whether there was an oral contract between the parties and if so, what the terms of the agreement were. In dealing with these mutually destructive versions the learned judge a quo applied the well known dicta set out in *National Employers General Insurance v Jagers* 1984 (4) SA 437 (E) at 440 – 441 and *Stellenbosch Farmer's Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at 14 H-J. It was not submitted that in doing so the court a quo had misdirected itself in any manner.

Before this court it was argued that the court a quo had erred in not finding that Mr Huisman was not a credible and reliable witness and that the court had therefore erred in finding that the respondent had discharged the onus which rested upon it. It was argued that Mr Huisman's evidence that an oral agreement was concluded on 17 October 2007 was not supported by the contents of a subsequent letter, dated 24 October, in which

no mention is made of the raising of the roof, reference only being made to further work to be done. It was also argued that the cost estimate of R5000 per square metre could not have been furnished on 5 December since at that stage Huisman would not have known to what height the roof needed to be raised. It was also suggested that the cost estimate all too conveniently accorded with the eventual fixed price quotation supplied by Heaton Construction.

The trial court considered these and other criticisms relating to the credibility of Mr Huisman. In evaluating the credibility of the respective witnesses the court said the following:

Neither Mr Huisman nor Mr Els were perfect witnesses. The evidence of both was, at times, vague and somewhat contradictory. I do not intend in this judgment to deal with all the contradictions in the evidence of each which were pointed out by the respective counsel. In my view none of those contradictions were of so material a nature as to per se justify the conclusion that the witnesses were lying. In any event, as appears from the *Jagers* case, supra, the estimate of the credibility of each witness is inextricably bound up with a consideration of the probabilities of the case. I turn therefore to consider where the probabilities lie.

The learned judge then proceeds, in his judgment, to deal with the probabilities. In doing so certain critical issues were considered, namely whether the issue of the raising of the roof had been discussed at the meeting of 17 October as stated by Huisman; whether a cost estimate for the raising of the entire roof was furnished on 5 November and whether Huisman's mandate had been terminated on 14 December as stated by Els.

In respect of the first of these issues the trial court found, quite correctly in my view, that it is “utterly improbable that the raising of the roof would not have been a concern in the minds of Messrs Oosthuisen and Els at the meeting of 17 October”. The probabilities therefore favoured Mr Huisman’s version. In coming to this view the trial court took into account Mr Els’ concession that the raising of the roof must have been discussed prior to 5 November. Mr Huisman’s evidence in this regard was that it was evident from the outset that the roof structure would need to be raised to accommodate the height

of the steel presses. In response to a question by the learned judge Mr Huisman said the following:

Yes, indeed, M’Lord, from the start, because we’d done it in the past, assessed bases and assessed the need for the roofs to be raised. So it was one of those things which one automatically looks at when you walk through the building and note that, yes, this roof is low; it must be raised. And that is then also why at a later stage I proposed to the client that we raise a larger area of roof so that we don’t have to come back with the contractor on site and pay for re-establishment costs and overheads. Rather get the whole lot raised in one hit.

In respect of the furnishing of a cost estimate on 5 November the court accepted, again rightly in my view, that Mr Huisman had furnished the cost estimate immediately upon having received an email in which Mr Els raised a query about the raising of the roof. Mr Huisman’s evidence was that he found the content of the email strange in the light of their previous discussion about the roof and that he immediately went to the appellant’s premises to provide the estimate and discuss the matter with Mr Els. At that stage he had not yet prepared drawings. He had however undertaken the preliminary design which enabled him to furnish the cost estimate. He explained that his preliminary design was based on an assessment of the existing structure and a decision as to the type of roof structure to erect. It was, according to his evidence, at the meeting of 5 November that he was instructed to proceed with the preparation of design drawings which would enable the contractor to furnish a fixed price for the raising of the roof structure. His evidence that he was then engaged in the detail of designing the roof structure is borne out by email correspondence in which Mr Els provided the exact roof height required based on the dimensions of the presses and sought information regarding the costs associated the design. Mr Huisman’s testimony was unequivocal that by the middle of November he was already well advanced in the preparation of his design drawings and that Mr Els was well aware of this. Having regard to this evidence and in particular the fact that Els himself conceded that the roof issue must have been discussed at some time prior to 5 November and that he could not state when that was, the trial court’s finding that Huisman’s unequivocal evidence was to be preferred to the vague testimony of Mr Els cannot be faulted.

The final aspect relating to the assessment of the probabilities concerned the alleged termination of respondent's mandate on 14 December 2007. In this regard the trial court considered that it was highly improbable that Mr Huisman would, after his mandate had been terminated, nevertheless proceed with further work for the purposes of soliciting tenders and that he would in fact proceed to obtain tender prices from three contractors and submit these in January 2008. His evidence in this regard was

that he had, pursuant to the instruction to prepare detailed designs, produced full working drawings which he was able to submit

to contractors for tender purposes. He had submitted these to Heaton Construction on or about the 7 December and, following the meeting on 14 December submitted them to four other contractors. Based upon the assessment of the probabilities the trial court found that the probabilities overwhelmingly favoured the version of the respondent and that the version of Els to the contrary was not true. On this basis the trial court correctly concluded that the respondent's mandate was not terminated on 14 December and that it was only terminated in January 2008

The effect of this finding is that the trial court found that all of the terms of the agreement upon which the respondent relied were agreed on by 5 November 2007 and that the respondent had discharged the onus of proving on a balance of probabilities that it was indeed mandated to provide a costs estimate for the entire roof and to proceed to the design and tender stage of the project. On a careful consideration of the evidence this finding cannot be faulted.

In respect of the quantum of the respondent's claim it was argued on appeal that the trial court ought to have granted absolution since the quantum of the claim was not dealt with in the evidence. It was submitted that the court erred in giving judgment for fees based on the highest quotation for the raising of the entire roof.

The appellant's argument loses sight of the fact that the agreement concluded between the parties, as found by the court, was that the respondent should proceed to the design and tender stage in respect of the raising of the entire roof structure and that the respondent would be entitled to fees in accordance with the standard Gazetted tariff in respect of that work. Mr Els conceded that this was so and Mr Huisman testified as to the rates applicable for such work. His fees were calculated on the basis of the contract price furnished for conducting that work. Based on this evidence the trial court found that the respondent had proved its claim.

It follows from what is set out above that the appeal cannot succeed. I would accordingly make the following order:

"The appeal is dismissed with costs".

G. GOOSEN

JUDGE OF THE HIGH COURT

DAMBUZA, J.

I agree. It is so ordered.

N. DAMBUZA

HARTLE, J.

I agree.

B. HARTLE

APPEARANCES: For Appellant: Mr L Schubart SC

Instructed by Netteltons Attorneys

For Respondent: Mr B Boswell

Instructed by Whitesides Attorneys

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