

SOUTH AFRICA / JUDGMENT

Ivo Huisman and Associates v Network Health Care Holdings (Pty) Ltd (CA 254/2009) [2013] ZAECHGHC 46 (10 May 2013)

[2013] ZAECHGHC 46

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N G Beshe, D Van Zyl

CASE / FILE NUMBER

CA 254/2009

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE – GRAHAMSTOWN)

CASE NO.: CA 254/2009

In the matter between:

IVO HUISMAN AND ASSOCIATES

.....Appellant

And

NETWORK HEALTH CARE HOLDINGS (PTY)

LTD (NETCARE)

.....Respondent

JUDGMENT

BESHE J:

- [1] Appellant in this matter, Ivo Huisman and Associates is a Close Corporation which runs a consulting and civil engineering practice. It instituted action against the respondent in the Magistrates' Court Uitenhage, for the payment of R50 576.10 in respect of professional services rendered during 2004 at respondent's special instance and request. The services in question were rendered in respect of Cyler Hospital, a medical facility operated by the respondent.

- [2] Appellant's claim was dismissed by the magistrate on the basis that employees of the respondent, Messrs Swanepoel and Bekker, did not have the authority to bind the respondent and therefore no valid contract arose in terms of which the respondent can be held liable. This is an appeal against that judgment.
- [3] It is common cause that appellant rendered professional services: being the drawing of plans and the provision of a cost estimate in respect of a proposed technical workshop at Cyler Hospital. The value of the work that was done by the appellant was also common cause, having been admitted by the respondent. Respondent denied that it was liable for payment of fees in respect of the services that were rendered by the appellant. Respondent contends that plaintiff undertook to render the services in question on a speculative basis (on risk), that is without charge unless his work would be utilised by them.
- [4] In my view therefore the question to be decided was "What were the terms of the agreement between the parties when the appellant was requested to draft plans for the proposed workshop and what did those terms entail".
- [5] According to the appellant's witness, Mr Huisman, he had worked with Mr Marcus Swanepoel, who was employed by the respondent as a maintenance supervisor at Cyler Hospital, on several occasions prior to the project in question. He testified that during 2004 he was busy on yet another project at Cyler Hospital which involved the casting of a concrete slab over the hospital's computer room. It was during the course of that project that he was called aside by Mr Swanepoel, who told him that there was a need for a technical workshop at the hospital. Mr Swanepoel went on to brief him as to what features he envisaged the workshop should have.
- [6] Based on these discussions the appellant then proceeded with the design of the workshop. In August of 2004 it provided Mr Swanepoel with plans and cost estimates. Attached thereto was a letter outlining, which according to the appellant, was in line with the procedure followed in respect of previous projects, including the one he was busy with at the time he was approached by Mr Swanepoel about the proposed workshop. According to the appellant the procedure was that a representative of the respondent (Mr Swanepoel) would inform him of the proposed project of what they wanted to have fixed or built at the hospital. He would then assess their requirements and put a cost to the proposed work. Mr Swanepoel would then apply for funds and the project would thereafter proceed. The appellant would then be paid for its services. According to Mr Swanepoel, Mr Huisman presented them with this letter at a time when things were moving very slowly in so far as the workshop project was concerned. In his words the project seemed to have been dragging for a long time. Mr Huisman expressed his unhappiness about this state of affairs, saying he was upset that nothing was happening after he had put in long hours in respect of the proposed workshop. They informed him that they cannot sign the letter to signify their acceptance of the terms contained therein, but that they will contact him as soon as there was a development regarding the workshop project.

[7] In the aforementioned letter appellant wrote:

"We confirm that we have executed the works on risk to date. The agreement between ourselves and Netcare, in which you confirm that you are the authorised agent, is that in the event of you

proceeding with the construction of the workshop, we shall be appointed as your Consulting Engineer in accordance with the current

Standard Form of Agreement of the South African Association of Consulting Engineers (SAACE). In the event of you proceeding with the construction of the workshop, but not appointing us as above, design fees of work executed to date will become due to us."

(my underlining)

[8] The plaintiff's witness, Mr Huisman, had difficulty in explaining what was meant by the words "on risk" in the aforementioned letter. During his testimony Mr Huisman was asked by the appellant's legal representative why it took him a long time to claim his fees from the respondent, he answered: "Well the understanding with the client is that at that stage they did not simply have funds available for fees. And that is why one actually comes to an agreement that initially you work on risk with the understanding that once cost for the project has been established, then the project proceeds. And it is much

easier for you to then apply for your fees included in the budget of the project as opposed to let's assume the project then becomes abandoned for whatever reason, then you just need to apply for work done up to that stage, which is normally how I work with a number of clients". When asked whether Mr Swanepoel mentioned anything about fees to him he answered: "Yes certainly. He always agreed with me that fees would be due and they would be payable".

[9] When asked during cross-examination what it means to execute "work on risk" Mr Huisman indicated that it meant that in his discussion with Mr Swanepoel they agreed that he would be prepared to pay his direct

costs and overheads at that stage. He denied that it meant that he will only be paid if something came of the project. He acknowledged

that the connotation often attached to risk work is that you work free of charge and you are not going to be paid. That however risk work can also entail that you work under certain terms of a particular agreement, that you may get paid at certain delayed date, or when drawings are approved by the municipality, or when the bond comes through.

[10] When Mr Huisman was later asked during re-examination by Mr Arnold to state what "risk" connotes; he had this to say:

“Well it would be an agreement which has some terms to it which are different to one would maybe term a normal agreement which is payment in 30 days in accordance with the Government Gazette. ... So anything at variance to that would have some form of risk in it. And then risk can vary from extreme to slight, depending on the agreement. The risk can be that you do the work and there will be no payment; or there would be a promise of payment if certain terms or milestones are reached.”

- [11] According to Messrs Swanepoel and Bekker the appellant was engaged by the hospital to draw and cost plans for proposed alterations to a computer and server rooms. This project was handled at hospital level because it involved minor alterations or in-house modifications of the hospital building. A need had also arisen for a technical workshop to be built at the hospital. Mr Bekker and Swanepoel were required to submit drawings to their head office in respect of the proposed workshop.
- [12] It was during the process of the computer room project that Messrs Bekker and Swanepoel held discussions with Mr Huisman and suggested that he should draw plans and do a cost estimation in respect of the proposed workshop on risk. The agreement was that the plans and the cost estimates, once finalised, would be submitted to respondent's head office for approval. Upon approval thereof and if the person who drew the plans is appointed as project manager he would be paid. This also presupposed that the project would go ahead and plans (in this case appellant's) would be utilised. According to Mr Swanepoel he was going to try and get appellant appointed as structural engineer on the project.
- [13] Based on this agreement Mr Huisman drafted the plans which were in turn submitted to respondent's head office. An attempt was made to appoint appellant as engineer on the workshop project. Appellant was however not happy with the proposed terms and conditions of the appointment contract and did not accept them. The appointment did not take place. It is also common cause that the plans were not utilised.
- [14] During the trial, as well as in argument before us, much was made about whether Messrs Swanepoel and Bekker had the authority to agree to the terms as suggested by the appellant in the letter he addressed to Mr Swanepoel regarding payment for its services.
- [15] In dismissing appellant's claim, in his judgment the magistrate, after embarking on a detailed analysis of the words “work on risk” made the following finding:

“The risk that Mr Huisman thus took was that he would not be paid for his efforts if the contract was not awarded to him.

The magistrate did not stop there however, he went on to state:

“A prudent professional would have noted that the value of the project under discussion was at least 7x that of the previous project (the cement roof on the computer room) and, had either Mr Swanepoel or Mr Bekker been prepared to sign item 9 of Exhibit A, the warning lights should have started flashing and Mr Huisman should have obtained an undertaking in writing from Mr Carstens before he performed further work.”

He concluded that because Messrs Swanepoel and Bekker had no authority to bind the respondent, no valid contract arose in terms of which the respondent can be liable.

[16] The appeal against the magistrate's decision is broadly premised on the following grounds:

That he erred in failing to find that the agreement between the parties was based on the terms set out in the letter appellant wrote to Mr Bekker;

He erred in concluding that Mr Swanepoel had no authority to bind the respondent in appointing the appellant in respect of the project in question.

In his argument before us, Mr Richards for the appellant concentrated mostly on the second ground of appeal, namely, whether Messrs Swanepoel and Bekker had the authority to bind the respondent. This in my view was not the crux of the matter. The central issue to be determined are the terms of the

agreement entered into between the appellant and Mr Swanepoel regarding the drawing of plans in respect of the proposed workshop. I do not understand it to be respondent's case that Mr Swanepoel and Mr Bekker did not have the authority to enter into a contract with the appellant in terms of which they undertook that he will be paid for his services. Respondent's case, as I understand it, is that the appellant agreed to the work "on risk", meaning that it would only be paid if the project went ahead and the appellant was appointed as the consulting engineer or project manager. In my view therefore, the magistrate erred in deciding the matter on the basis of lack of authority on the part of Messrs Swanepoel and Bekker. He should not have gone any further after his pronouncement as to what he thought "work on risk" meant.

[17] There does not seem to be a dispute that the agreement between the appellant and Mr Swanepoel was that the appellant would execute the work on risk. This is also clear from appellant's letter to Mr Swanepoel. Where the parties differ is when it comes to the meaning to be attached to "work on risk". It is not clear however where the "risk" element comes in, if, according to the appellant it was entitled to payment irrespective of whether the project went ahead or not; whether its plans were utilised or not, or whether it was appointed as project manager or not.

[18] The approach to be taken when confronted with divergent versions was determined in *SFW Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 where Nienaber JA stated at page 14 that "To come to a conclusion on disputed issues a court must make findings on (a) The credibility of various factual witnesses; (b) their reliability; and

(c) the probabilities. In light of the fact that there is no disagreement that the agreement was that appellant would render the services in question on risk, and in the absence of any suggestion that respondent's witnesses misled the trial court, I do not think it will be necessary to make a finding on their credibility and the reliability of their evidence. Probabilities will then be decisive of the central issue in this appeal, namely the terms of the agreement between the parties.

- [19] I have already expressed my difficulty in understanding where the risk element featured if appellant was entitled to payment regardless of what came of the project and the plans it drew. On evaluating the overall probabilities, the inescapable conclusion is the following: On realising that the conditions that would trigger his payment may not materialise as he expected, the appellant wrote the letter in question and sought to introduce an additional condition for payment, which entailed that it will be paid design fees for work done in the event of the respondent proceeding with the construction of the workshop, but not appointing it as consulting engineer.
- [20] In my view the version that is more probable is the one presented by the respondent, namely that the appellant agreed he would only be paid if the project went ahead and his firm was appointed by the respondent as the Consulting Engineer / Project Manager in respect of the workshop project. Accordingly, the appellant has not succeeded in showing on a balance of probabilities that the agreement between it and the respondent is as it alleges. It follows therefore that the appeal must fail.
- [21] At the hearing of the appeal, appellant sought to amend its pleadings in order to file a replication to the effect that the respondent is estopped from denying that Mr Swanepoel did not have authority to represent it. It is not necessary to deal with this application in light of what I have determined to be the issue in this matter.

[22] In the result the following order is proposed:

The appeal is dismissed with costs.

N G BESHE

JUDGE OF THE HIGH COURT

VAN ZYL J

I agree, it is so ordered.

D VAN ZYL

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