

SOUTH AFRICA / JUDGMENT

MPS Consulting engineering and Town Planners (Pty) Ltd v Archi-M Architects CC (873/2013) [2013] ZAFSHC 82 (16 May 2013)

[2013] ZAFSHC 82

COURT
Free State High Court, Bloemfontein

BEFORE
Sepato

CASE / FILE NUMBER
873/2013

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FREE STATE HIGH
COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH
AFRICA
Case No: 873/2013

In the matter between: MPS CONSULTING
ENGINEERS AND TOWN
PLANNERS (PTY) LTD
.....Plaintiff
(Registration number:
2004/000413/07)
and
ARCHI-M ARCHITECTS
CC
.....Defendant
(Registration number:
CK94/39446/23)

JUDGE: SEPATO, AJ

HEARD ON: 16 MAY 2013
REASONS FOR

JUDGMENT

INTRODUCTION

[1] Plaintiff issued summons against defendant for payment of R2 754 383.40, being remuneration for professional services rendered as per an agreement between the two. Defendant entered appearance to defend, whereupon plaintiff then brought an application for summary judgement in the above stated amount, with interest and costs. Defendant resisted and opposed the summary judgement application. On the 16th of May 2013 I granted plaintiff summary judgement in the following terms:

Payment in the amount of R2 415 291.06;

Interest thereon at 15.5% per annum aetemporamorae to date of final payment;

Costs of suit.

[2] Defendant was granted leave to appeal this order. Having undertaken to furnish reasons for my order, same follow hereunder.

FACTS AND

BACKGROUND

[3] Much of the facts herein are common cause between the parties and are summarised as follows:

(i) On the 24th January 2008, plaintiff an engineering company, entered into a formal agreement with defendant, a close corporation in terms of which plaintiff would render certain specified professional services to the defendant in exchange for remuneration by the latter. It is apparent that this deal arose out of defendant having been awarded a tender by the Free State Government to build the “New Offices Free State Government” whereupon defendant then subcontracted the engineering services to plaintiff, in association with two consultants as a Joint Venture.

(ii) Plaintiff’s letter of appointment by defendant as consultant and the subsequent formal agreement between them are Annexures ‘A’ and ‘B’ respectively, to the particulars of claim. The full terms of the agreement are expressly and clearly set out in ‘B’ the contract. Of relevant significance herein is that the contract amongst others is specific re: the identity of the parties thereto; the services to be rendered by plaintiff, payment therefore by defendant; a non-variation clause and dispute resolution steps to be taken by a party, in the event of any.

[4] These aspects of the contract are singled out because the issues to be decided herein, as shall appear hereunder, revolve around them.

[5] I believe one can safely assume that for some time since the inception of the agreement, plaintiff and defendant enjoyed a fairly harmonious relationship, each performing in accordance with the agreement. This up until March 2012 whence from a series of correspondence at least from plaintiff's side, there appears a souring of the relationship, stemming from the fact that defendant had apparently

been failing to make payments due to plaintiff as expected.

[6] For instance, annexure E1 to the particulars of claim is a letter from plaintiff's attorneys dated 14th March 2012 claiming an amount of R3 338 899.81 from defendant, same being allegedly outstanding since about November 2009 – June 2010. Annexure "E2" is another letter by plaintiff's attorney referring to and demanding from defendant payment of account number 5 of February 2012 in the amount of R2 754 383.40 for professional services rendered. This latter account forms the subject-matter

herein. Annexures "C" – "E3" to the particulars of claim show numerous requests and demands of payment of this account, without any success. It is common cause that up until March 2013, defendant had not yet paid this amount at all, which compelled plaintiff to institute the current proceedings.

THE ISSUES

[7] From the issues and response thereto as were ultimately argued before me by both counsel in court I understood the crux of the defendant's case to be to that:-

Firstly, that the amount of R2 741 383.40 sued for by plaintiff is not yet due and claimable in terms of the contract between them and that therefore these proceedings are premature based on the following grounds:

That the claim is a "dispute" as envisaged in clause 8.1 of the contract, which I shall refer to as "B", and that plaintiff failed to initiate and engage defendant in negotiations in good faith, with a view to settle the dispute before them.

Further, that plaintiff proceeded to initiate these proceedings without having furnished defendant with a written notice declaring that such negotiations have failed, thereby

Contrary to clause 8.2, never engaged in any mediation before taking further steps.

Defendant avers that Clause 8 is a material term of the contract and that any breach thereof amounts to breach of the contract.

Secondly, defendant contends that plaintiff per a letter dated 26th September 2012 Annexure "C" to defendant's opposing affidavit waived his right to payment as set out in Clause 5.2 of the contract, that is to payment of the account within thirty days of issue up until defendant had received payment from the Department, relating to the project.

[8] Clause 8 of the contract is titled 'Settlement of disputes'. Clause 8.1 reads:

“The parties shall negotiate in good faith with a view to settling any dispute or claim arising out of or relating to this agreement and may not initiate any further proceedings until either party has by written notice to the other, declared that such negotiations have failed.”

- [9] In response to defendant’s allegation that the outstanding payment of R2 754 383.40 is a “dispute” plaintiff denies as per heads of argument this and argues that defendant has never attempted at all, in any sense at any stage, to argue why he says the claim is a dispute, in what respect is it being disputed or by whom. The Plaintiff describes the claim in Annexure “C” as payment for professional services rendered as agreed: Structural Engineering Services Account no: 5. Annexure “D” is a summary of the fee account 5.
- [10] Further, plaintiff argued that defendant has not alleged that the said services have not been properly rendered or that they are lacking in one way or another or above all, that the amount claimed is incorrect in any sense. That, to the contrary, defendant has always acknowledged and undertaken to pay the account, but only upon receipt of payment by the Department.
- [11] Further, that as confirmation of this acknowledgement of indebtedness and the undertaking to settle same, on 19th April 2013 whilst these proceedings were pending, defendant made a part - payment of R339 091.74 towards this debt, into plaintiff’s account. This is confirmed by defendant in his supplementary affidavit filed on 10th May 2013.
- [12] Further, plaintiff denies that he failed to engage in negotiations with a view to settle the dispute in good faith, but that all the invoices and letters sent to defendant for payment are the attempts to negotiate and settle the claim, referring to Annexures “C” – “E” and the fact that certain payments were made in these periods up to and including after the issuing of the summons shows co-operation between the two.
- [13] Plaintiff alleges that he has always acted in good faith and that Annexures “E2” and “E3” for instance, particularly the last paragraphs in each letter, set out a tone of a person trying to have a dispute resolved. Further that, plaintiff’s letter dated 26th September 2012, i.e. Annexure “C” to defendant opposing affidavit is actually the expression of his bona fides in his dealings with the defendant in that in paragraph 2 thereof, defendant is requested to see to it that plaintiff’s account is paid first once money is received from the Department, in preference over other consultants.
- [14] During oral submissions plaintiff’s counsel tried to hand in or read into record a letter he says was written by plaintiff’s attorneys earlier on notifying defendant that the negotiations between them have failed but was interrupted with a fierce objection from his opponent that such letter cannot be admissible at that stage and that the court should solely confine itself to the documents already on file.

- [15] Plaintiff's counsel however maintained that still, from the contents of Annexures "E3" defendant got it clearly from plaintiff in paragraph 4, thereof which reads "...we confirm that if you do not comply with the above, we have instructions to proceed with the necessary action against yourself..." that negotiations would have failed should he fail to comply. That indeed defendant failed to comply being well aware of plaintiff's view.
- [16] Lastly, plaintiff's counsel disputed that plaintiff has waived any of his rights to payment for the services rendered to defendant, be it expressly or by any conduct on his part.
- [17] Firstly, counsel argued that throughout the duration of the contract between them, defendant has always been the person responsible for remunerating plaintiff for the services rendered and that no one else, let alone the Department, ever assumed such responsibility. That the contract itself stipulates so, and that it has never been varied nor altered to relieve defendant of such responsibility and specifically shifting same to the Department.
- [18] This, more especially because Clause 7.10 of the contract titled 'Sole Agreement' reads:
- "This agreement together with the attachment and appendices detailed in the agreement and the specific provisions constitutes the sole agreement for the services between the parties and no representation not contained herein shall be of any force and effect unless reduced to writing and signed by both parties as expressly intended to form part of the agreement."*
- [19] Keeping all the foregoing in mind, it is important to note the initial case of defendant as set out in the opposing affidavit. In paragraph 5.1.1 of his opposing affidavit defendant does admit the formal agreement between them that is "B" and in fact attached an exact copy thereof, too. Then in paragraph 5.1.2 he avers:
- "In terms of the said agreement plaintiff will deliver accounts and claim to defendant in respect of professional services rendered by plaintiff, defendant will in turn verify and submit same to the Department for payment."*
- [20] Interestingly, defendant does not quote the relevant portion of the contract which stipulates this. To the contrary, he refers the court to Clause 5 of the contract titled "Remuneration general". Clause 5.1:
- "The client shall pay the consultant for performing the services in accordance with details stated in Appendix 'B', and shall further pay for any additional services... Where a payment schedule has not been agreed then the Consultant will be entitled to render interim monthly accounts, based on progress, throughout the duration of the services."*
- [21] In the first paragraph of the contract it is stated in bold that the 'client' is ARCHI-M-STUDIO CIVIL CONSTRUCTION and the consultant, amongst others, is MPS CONSULTING AND ENGINEERS. Appendix "B" referred to in the contract, merely states REMUNERATION: "As stated on the letter of appointment".

- [22] The said letter of appointment 'A' only states "... Applicable fees will be as per the gazetted Government fees structures for your respective discipline...". Nothing is elaborated on in this regard, except for me to mention that none of these provide support for defendant's contention that plaintiff had anything whatsoever, to do with the Department.
- [23] Further in paragraph 5.1.4, defendant refers to Clause 5.2 which provides that undisputed claims of the plaintiff will be settled by defendant(client) in full on the agreed dates or within thirty days of the issue of the account.
- [24] In paragraph 5.1.5 he then says, plaintiff being a well-established engineering firm in the Free State province, has had dealings with the provincial Government before, as a consultant either directly or indirectly and that, in paragraph 5.1.6, he knows for a fact that defendant merely acts as an intermediary between the government and plaintiff as a consultant as far as payments of accounts are concerned.
- [25] He further goes to give details of how the accounts are handled by himself and the Department before payment is made. Of significance, he says at a stage, the Department informed him of its financial situation and therefore the inability to settle accounts timeously, which fact, he duly communicated to plaintiff. Annexure "B" to his opposing affidavit refers.
- [26] This is a letter from the Department of Public Works, Free State Province addressed to Defendant and no one else, and acknowledging receipt of defendant's invoice no: 8 and that some delays may occur in paying same for reasons stated. This letter is dated 9th October 2012.
- [27] According to defendant, plaintiff received and accepted the contents of the letter indicating delay in payment and this is evidenced by his (plaintiff's) letter dated 26th September 2012, Annexure "C" to defendant's affidavit. He refers to paragraph 2 thereof.
- [28] But it is important to look at its exact contents. Firstly, Plaintiff's letter is dated 26th September 2012 and is purportedly a response to a letter dated 9th October 2012. Obviously that cannot be. Anyway, from its opening paragraph, the letter makes no reference to any particular letter received. Instead paragraph 2 reads:
- "We are addressing this letter to your good selves with the request that our client's account first be paid once the Department has come into the necessary funds..."*
- [29] According to defendant, paragraph 2 of this letter constitutes a new or at least another agreement reached between him and the plaintiff that the "agreed date" of payment of plaintiff's outstanding account is, "after payment by the Department". In Paragraph 5.1.16 he states "This agreement was never cancelled by the plaintiff and therefore still subsist." I need to mention that nowhere in this affidavit does the defendant refer to any 'waiver' of any right by the plaintiff at all.

- [30] Plaintiff having fully dealt with and disputing defendant's case as per the opposing affidavit, the defendant then changed his tone as shall be set out. The defendant's Heads of Argument firstly deals with the approach that the court should adopt in relation to the case i.e. whether to grant or refuse summary judgment.
- [31] Whilst paragraphs 5-6 of the Heads deal with the defendant's defence as raised in his affidavit but then, in paragraph 7, counsel submits that actually, the plaintiff's letter dated the 26th September 2012 does not constitute an amendment to the contract i.e. "B" but that it amounts to waiver by the plaintiff of his right to payment within 30 days. Interestingly, Counsel refers to a clause in the Contract which states that "No amendments will be of any force and affect unless reduced to writing and signing by both parties as expressly intending to form part of the agreement", i.e. the non-variation clause, which directly contradicts defendant's case set out in paragraphs 5.1.15 and 5.1.16. In fact, Counsel expressly withdraws defendant's own defence of a variation to the contract and replaces it with wavier.
- [32] Defendant's counsel contends that therefore, having waived his right to payment within 30 days, plaintiff cannot institute the action until such time the Department has come into the necessary funds and that therefore summary judgement should be refused. He refers to the case of Hepner V Roodepoort – Maraisburg Town Council 1962(4) SA 772 (A) without any motivation. Having gone through the decision, I found no support for defendant's case therein. Instead, the court clearly set out what should a waiver entail and defendant herein is not clear as to what has actually been waived.

THE LAW

- [33] Rule 32 of the uniform Rules of the Supreme Court provides:

"Upon the hearing of an application for summary judgement, the defendant may

[a]...

[b] satisfy the court by affidavit or with the leave of the court by oral evidence that he has a bona fide defence...., such affidavit or evidence shall disclose fully the nature and groundsof the defence and the material facts relied upon."

- [34] This means that an application is, in the absence of oral evidence decided on the affidavits on record. Heads of Argument are only to assist to set out the party's case with more precision, and certainly are not to substitute such case with another version as counsel may deem it fit. Above all, Heads are not in a form of affidavit that carries the weight of evidence.
- [35] The law is very clear as to what constitutes a bona fide defence. Erasmus-Superior Court Practice in their discussion of the Rule 32 at Page B1-223-224 states as follows:

Firstly, that the term 'bona fides' should be given its literal meaning, i.e. the defence itself must be bona fide. Of significance, is that defendant must swear "to a defence, valid in law, in a manner which is not inherently or seriously unconvincing", or that his affidavit must show that there is a real possibility that the defence he raises may succeed, otherwise his defence must fail.

[36] Essentially, defendant's counsel also advanced these arguments too, however, in paragraph 2.2 of the Heads of Argument, he argues that the court is not necessarily bound to the manner in which defendant has presented his case and that the discretion to refuse summary judgment is not dependent upon the quality of the defendant's opposing affidavit.

[37] According to him the court should adopt a lenient approach to the allegations contained therein and then draw reasonable inferences. This, certainly in defence of the unacceptable manner in which defendant's case has been presented.

REASONS AND FINDINGS

[38] The Nature of the claim:

I am satisfied that the plaintiff's claim herein is a liquidated amount of money as envisaged in Rule 32, and that defendant has not disputed this in any manner. Further that defendant has not established in what respect is the claim a dispute which is envisaged in Clause 8 of the contract as plaintiff correctly argued it.

[39] A bona fide defence:

Re the argument that plaintiff was not entitled to institute these proceedings without having referred the issue of the payment for mediation, Clause 8.2 of the contract, provides that a party may (my emphasis) refer the dispute or claim for mediation before taking any further steps in relation thereto.

[40] The choice of the word "may" over "shall" by the parties themselves in the contract, means that a party is at liberty to go for mediation or take other further steps. That includes the defendant. Defendant has not attempted at all to explain why he, since March 2012 until in March 2013, seeing that he could not agree with plaintiff as to the payment of the account, failed to exercise his contractual right to seek mediation as provided for in Clause 8.2. Only when plaintiff chooses not to go that route does defendant want to hold him in breach. This simply shows that there was nothing to be mediated on as in accordance with their own contract, except that he wanted to effect payment as and when it was convenient for him. Is that bona fides or reasonableness in dealing with the other party? Certainly not.

[41] Further, defendant alleges that plaintiff never engaged in good faith with him. However, he has not attempted to show any malicious conduct on the part of plaintiff since the account was rendered. The contract provides that payment will be made as agreed or within 30 days of the account.

- [42] The fact that plaintiff's account stood outstanding since March 2012 until March 2013 should reasonably suggest as he argues, that he had been understanding and considerate as he always acceded to and agreed with the defendant's request to wait for payment.
- [43] But clearly, this was on the terms of the defendant. Plaintiff has throughout, even before the summons was issued, been making it abundantly clear to defendant that he has got no contract with any other person nor has he agreed that some other person will be responsible for paying his account, but was only being considerate to his requests. Annexures E1 – E3 abundantly show this. I fully agree with plaintiff, that, this was just compromise on his part. Malice never entails compromise. These were negotiations in good faith.
- [44] Defendant also argued that plaintiff failed to issue him with a written notice that the negotiations have failed and that he intends instituting legal action. In plaintiff's letter dated 23/10/12 his attorney's warned defendant that should payment not be made within 21 days thereof, instructions were that they should proceed with legal action. Certainly whilst in law this constitutes a letter of demand, the practical effect thereof is to notify defendant that since it is clear he and plaintiff have failed to agree with each other about settlement of the account, plaintiff feels his only recourse, is litigation. Logic and common sense have to prevail. That was in October. Defendant does not say what he did since then up until plaintiff chose to proceed with legal action.
- [45] In March 2013 when the summons was issued to resolve the matter, he was simply waiting for payment from the Department and his attitude was that plaintiff could do as he pleased.
- [46] Lastly, defendant alleges that plaintiff, per a letter dated 26th September 2012 had entered into another agreement altering the initial agreement. Despite having shown earlier herein that plaintiff could not have been responding to a letter dated 9th October 2012 on 26th September 2012 already, plaintiff vehemently denied this and specifically referred to Clause 7 of the contract in terms of which there cannot be a variation of the contract except with the express intention and agreement to do so by both parties. Besides, if plaintiff had agreed to vary the contract per letter dated 26th September 2012, why did he per letter dated 23rd October 2012, after the Department had advised of its situation, then notify defendant of the intended legal action should payment remain outstanding after twenty one days?
- [47] I take it, defendant concedes on this fact, but unfortunately seeks to change his case through the Heads of Argument, alleging waiver. Are these still bona fides on his part? Not at all. To the contrary, this is an indication of a person who has got no bona fide defence at all, but merely trying to clutch at straws.
- [48] I fully agree with plaintiff that defendant's case is based only on technicalities, which in law should not avail him of success in the case. He refers to the case of *Breitenbach v Fiat* 1976 (2) SA 226 (T) and *W M Mentz & Seuns (Edms) Bpk v Katzake* 1969

- (3) SA 306 (T) 311A. In the latter case it was held that to give effect to purely technical defences in an application for summary

judgment

would frustrate the purpose of rule 32.

- [49] Defendant's counsel argued that the defences raised herein are not technicalities since the latter would only relate to procedural aspects of a case and not the substance thereof. This is fallacious. The defendant is accusing plaintiff for failing to engage in good faith before issuing letters of demand, for failing to engage mediation and lastly, for failing to issue a formal notice that negotiations have failed before resorting to legal proceedings. These are procedural steps and therefore technical. In accordance with the court's reasoning in Mentz's case above, such a defence cannot stand.
- [50] Throughout this case, defendant has not attempted to state why payment of plaintiff's claim should be conditional upon payment by the Department; i.e. why on his part he cannot pay but wait for the department. He has not alleged any lack of funds or some financial difficulties. He chose not to take the court into his confidence. All he says is that plaintiff knows as a well-established engineering company that defendant merely acts as an intermediary between plaintiff and the Department.
- [51] As I have already pointed out, I found no support whatsoever of this allegation from all documents placed before me, except repeating that the contract "B" identifies the parties to the contract herein – client being defendant and plaintiff herein as the consultant with no reference to the Department, expressly nor impliedly as being a party thereto.
- [52] I find that there has not been any variation of the contract "B" at all, nor waiver of any right to payment. The only reasonable inference that the court can safely draw from the defendant's attitude presented herein is that, he just wants to delay payment of plaintiff's account unduly so, contra to the purpose of summary judgment. I therefore find that defendant does not have a bona fide defence to the claim. Seeing that defendant on the 19th April 2013 made a part payment on this claim, same had to be set off when judgment was granted on the 16th May 2013, with interest and costs.

R. M. SEPATO, AJ

On behalf of the applicant: Adv. De Wet Keet

Instructed by:

Van der Berg Van Vuuren Attorneys

BLOEMFONTEIN

On behalf of the defendant: Adv. J. G. Gilliland

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