

REPUBLIC OF SOUTH AFRICA



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

CASE NO: A3078/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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In the matter between:

RUST GEOTECHNICAL CONSULTANTS CC

APPELLANT

And

CAD SEARCH CC

RESPONDENT

J U D G M E N T

MASHILE, J:

[1] This appeal is directed against the whole judgment and order of the additional Magistrate A M E Oosthuizen, in Randburg, in terms of which judgment was granted in favour of the respondent for payment of the sum of R69 768.00, *mora* interest thereon and costs, on 15 July 2013.

[2] The respondent (CAD), a close corporation specialising in the placement of computer aided design qualified draughtsmen within various industries including the engineering industry, whose sole member is Ms Catherine Davis, instituted a claim against the appellant (Rust) for fees due, owing and payable, based on an alleged oral agreement between the parties in terms of which the CAD would find a draughtsman, skilled in the use of the computer aided package, used by Rust and then provide Rust with the draughtsman's *curriculum vitae* and contact details to enable Rust to interview and hire the person so referred.

[3] As for the fees, CAD pleaded that it was a tacit term of the agreement that Rust would pay CAD's usual fee alternatively a reasonable fee in respect of the recruitment services rendered. The usual fee or reasonable fee of CAD is 15% and 10% of the annual or monthly salary of a successfully placed candidate respectively. CAD further pleaded that a suitable candidate, Mr Abers, was provided to Rust by Ms Estelle Shering of Zenith Career Consultants CC, who duly represented CAD as its agent and that its contractual obligations were thus duly fulfilled.

[4] Rust is also a close corporation conducting business as geotechnical consultants, and its members are Dr Martin Rust and Dr Michelle Theron. Rust in essence denied that it concluded a verbal agreement with CAD.

[5] The common cause background facts that gave rise to the action are:

- 5.1 Dr Theron, who represented Rust in contacting Ms Davis, requested her to find a highly qualified and experienced suitable

draughtsman, with specific skills and experience for possible employment with Rust.

- 5.2 Ms Davis advised her that she was unable to assist but that she had a colleague whom she knew would be able to assist and requested whether she could forward Dr Theron's details to her. Dr Theron agreed and her details were furnished to Ms Estelle Shering, who is a personnel recruitment agent and the sole member of Zenith Career Consultants CC, specialising in the placement of computer aided design qualified draughtsmen within various industries including the engineering industry.
- 5.3 Subsequently Ms Shering presented Dr Theron with the *curriculum vitae* of Mr Abers, who as it turned out, was in all respects a suitable candidate.
- 5.4 Dr Rust and Dr Theron interviewed and appointed Abers as a specialised draftsman for a period of one year, in respect of which a written agreement of employment was concluded.
- 5.5 CAD demanded payment of the placement fee from Rust but in response thereto Dr Theron, in a letter dated 22 January 2010, stated:

5.6.1 She was not aware that a commission on Abers's salary would be claimed;

5.6.2 Any agreement with CAD was denied;

5.6.3 Ms Shering did not add any value to the discussion between themselves as members of the Rust besides, she was not part of any discussion with Abers.

5.7 Dr Theron did not concern herself with the amount of the placement fee, but simply refused to pay any placement fee and persisted that there existed no contract between Rust and CAD.

[6] Against this backdrop of the facts, the main issue that requires determination is whether or not the parties concluded an oral agreement. The other issues are in essence peripheral and in any event subsidiary to the core issue, which in the view I take of this matter, do not require further consideration.

[7] I turn now to the evidence that was presented before the court *a quo*. CAD called five witnesses to shore up its claim against Rust while the latter submitted testimony of two witnesses in support of its defence.

[8] I need to mention that, for reasons that will unfold hereunder, I do not consider it necessary to traverse the evidence of Frier, Abers, Boyd and Shering. Insofar as the witnesses on behalf of Rust are concerned the testimony of Williams, as an expert in the field, similarly can be left out of the

equation. In regard to the true issue between the parties, the evidence of these witnesses is of no value in assisting the court to decide the true issue between the parties.

[9] Ms Davis testified that:

9.1 She has been in recruitment business for more than 10 years and confirmed having received the enquiry of Dr Theron to which she responded that she was unable to assist and that Dr Theron's details were forwarded to Ms Shering.

9.2 In cross-examination, she conceded that:

9.2.1 She is an experienced and skilled businesswoman;

9.2.2 CAD's derives an income in asking a fee for every successful placement;

9.2.3 She, as the sole member of CAD, has an obligation to ensure that every new client knows and understands the fee structure of CAD in respect of which use is made of written terms and conditions which clients are required to sign;

9.2.4 In Dr Theron's case no terms of an agreement were discussed nor were the written standard terms referred to or required to be signed;

9.2.5 Fees were not discussed at all with Dr Theron;

9.2.6 Nothing was mentioned to the effect that although Ms Shering would search for a suitable candidate, Ms Davis would remain entitled to the fee for the placement;

9.2.7 It was unreasonable and unfair towards Rust not to know what CAD's fee and/or fee structure was;

[10] Dr Theron testified that:

10.1 She did not enter into an oral agreement with CAD;

10.2 She would have negotiated a placement fee of a candidate had she been informed that a fee would be charged;

10.3 There was no mention of a recruitment fee let alone an opportunity to negotiate it.

[11] In the determination of the question whether the parties concluded a valid and enforceable agreement an offer and the acceptance thereof must be shown (see *Jafta v Ezemvelo* [2008] 10 BLLR 954 (LC). The onus in this

regard is on CAD to establish, on a balance of probabilities, that an agreement came into being, by satisfying the following requirements:

11.1 An offer;

11.2 The clear unconditional acceptance of the offer;

11.3 The acceptance must be made in the mode prescribed by the offeror;

11.4 The offeree has to communicate acceptance of the offer to the offeror.

[12] CAD failed to prove any of the requirements. The clearest indication of an absence of a possible agreement ensuing was when Ms Davis unequivocally indicated to Dr Theron that she was unable to assist. The passing on of Dr Theron's details to Ms Shering, without more ado, cannot and did not create a contract between the parties. Counsel for CAD placed much emphasis on the practice prevailing in the recruitment agency industry, as was dealt with in the expert evidence of Boyd on behalf of CAD, and submitted that it should likewise apply to the parties in this instance. The argument is fallacious: there is no evidence providing the slightest inkling that the practice was either known to Dr Theron or in any manner incorporated into an agreement between the parties by the acceptance thereof. Fact of the matter is simply this: Ms Davis made no offer to Dr Theron nor was any offer accepted. Ms

Davis merely facilitated the passing on of Dr Theron's details to Ms Shering, who proceeded to deal with the request. The arrangement between Ms Davis and Ms Shering concerning sharing of fees in the event of a successful placing following upon a referral, does not assist CAD: it was merely a private arrangement between themselves of which Dr Theron had not been apprised. No case of agency, as pleaded, was moreover made out.

[13] To conclude: what transpired between Ms Davis and Ms Shering is of no relevance or consequence insofar as the conclusion of the agreement between the parties is concerned.

[14] The cases to which this court was referred dealing with tacit terms are not relevant to the facts of this matter. The tacit terms on which CAD relied presuppose the existence of an agreement between the parties. No agreement was concluded and the issue relating to tacit terms accordingly does not arise.

[15] The evidence of both experts, Mr Boyd and Ms Williams was not only superfluous but also irrelevant to the real issue between the parties. The aspects dealt with in their evidence concern matters beyond a contract that may have come into being, such as what a reasonable fee in the industry is. Both experts did not and could not testify as to what had happened between Dr Theron and Ms Davis and they both merely reiterated that the aspects they dealt with, were matters for an agreement to be negotiated and concluded between the parties. Whether or not a contract came into being is simply a factual enquiry which CAD was required to prove and which it has failed to do. It follows that CAD's claim was wrongly upheld by the court a quo.

[16] For all these reasons, the appeal must succeed.

[17] In the result the following order is made:

1. The appeal is upheld.
2. The order of the court *a quo* is set aside and substituted with the following:
 - ‘1. The plaintiff’s claim against the defendant is dismissed.
 2. The plaintiff is ordered to pay the defendant’s costs of the action.’
3. The respondent is ordered to pay the costs of the appeal.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree.

F H D VAN OOSTEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

<i>COUNSEL FOR APPELLANT</i>	<i>ADV R P VAN NIEKERK</i>
<i>ATTORNEYS FOR APPELLANT</i>	<i>WHALLEY VAN DER LITH INC.</i>
<i>COUNSEL FOR RESPONDENT</i>	<i>ADV M STRYDOM</i>
<i>ATTORNEYS FOR RESPONDENT</i>	<i>DE JAGER-DU PLESSIS ATTORNEYS</i>
<i>DATE OF HEARING</i>	<i>27 OCTOBER 2014</i>
<i>DATE OF JUDGMENT</i>	<i>29 OCTOBER 2014</i>

