

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION**



**Case No: 77719/2018
23/01/2023**

(1) **REPORTABLE: YES**
(2) **OF INTEREST TO OTHER JUDGES: YES**
(3) **REVISED: Yes**

Signature

Date

In the matter between:

MUNYAI MALAKA ENGINEERS (PTY) LTD
(Reg No: 1999/026328/07)

Plaintiff

and

TGBI SOCIAL HOUSING COMPANY (NPC)
(Reg No:2016/460026/08)

First Defendant

TGBI HOLDINGS (PTY) LTD
(Reg No:2016/501795/07)

Second Defendant

CIVCON HOLDINGS (PTY) LTD
(2013/201312/07)

Third Defendant

IAN MARK BROWN

Fourth Defendant

JUDGMENT

SARDIWALLA J:

[1] In this action the Plaintiff claims payment of its outstanding invoices due and payable by the Defendants for professional services rendered by the Plaintiff on instruction of the Defendants in the sums of R1 790 407.59, together with *mora* interest thereon and cost of suit.

Background

[2] On/or about 24 August 2016 the Plaintiff and the First to Third Defendants, duly represented by the Fourth Defendant entered into a partially written, partially oral agreement ("*the agreement*") in terms of which the Defendants appointed the Plaintiff as civil and structural engineers for the project.

[3] The relevant written terms¹ of the agreement were as follows:

3.1 That the shareholding agreement is different from the professional fees.

3.2 Professional fees are at arm's length as professional fees will be costed into construction.

3.3 MME (the Plaintiff) is appointed to do all engineering work, as no one else has been appointed.

3.4 The Fourth Defendant awarded the Plaintiff the Social Housing Engineering Contract.

[4] The further express alternatively, tacit further alternatively, implied terms of the agreement were as follows:

4.1 The First, Second and Third Defendants would be liable jointly and severally, to pay the Plaintiff for the professional consulting services rendered at the rate and cost set out in the Plaintiff's taxed invoice rendered to the Defendants from time to time.

4.2 The Plaintiff's invoices would be due and payable upon receipt of such invoice by one or more of the Defendants.

[5] The Plaintiff allegedly rendered professional consulting services to the First and Second Defendants between August 2016 and August 2018.

[6] The Plaintiff also allegedly rendered both Civil and Structural Engineering services to the Defendants and completed stages 1 to 2 as prescribed in the

¹ Plaintiff's Heads of Argument, pages 2-5

Government Gazette, 4 December 2015 No. 39480 (the “Government Gazette”).

[7] The Plaintiff consequently invoiced the Third Defendant for an amount of R251 217.24,² as directed by the Fourth Defendant, which amount was duly paid by the Second Defendant.

[8] The Plaintiff alleges that it illustrated its concerns regarding the calculation of the amount of R251 217.24.

[9] On or about 1 August 2018, the Defendants repudiated the agreement and informed the Plaintiff that it was now splitting the Civil and Structural Engineering work and that the Plaintiff was welcome to do all the civil works only as long as it is in line with all professional fees to be finalized by the quantity surveyor.

[10] That upon the Defendants’ unilateral decision to revoke the Plaintiff’s structural works it was no longer financially viable for the Plaintiff to continue with the agreement for only civil work and the Plaintiff consequently, accepted the repudiation.

[11] The Plaintiff duly rendered its invoice for professional services rendered from date of the agreement to date of the termination less the amount already paid by the Second Defendant.

[12] The Defendants have refused alternatively, failed further alternatively, neglected to pay the Plaintiff for the work completed to date as per its invoice in the outstanding amount of R1 790 407.59.

[13] The defence to this claim as pleaded in its second amended plea, is that the First Defendant entered into a shareholders’ agreement with Triple M Properties

² Particulars of Claim, pages 001-11 and 12

(Pty) Ltd (“MMM”) in terms of which MMM would allegedly render professional consulting and engineering services for the Soweto City Social Housing Project (the “Project”).

[14] That during March 2018, the Third Defendant allegedly entered into an oral agreement with the Plaintiff to render services to the Third Defendant in respect of a stormwater attenuation plan for the Project. The Defendants therefore deny that the Plaintiff was contracted for any professional services save for the services in respect of a stormwater attenuation plan for the project.

[15] The issue before this Court is a factual one relating to whether or not an agreement was concluded between the parties. The following is in dispute:

15.1 The agreement as alleged by the Plaintiff.

15.2 The terms as alleged by the Plaintiff.

15.3 The nature of the work that the Plaintiff rendered to the Defendants and the nature of the work that the Plaintiff compensated the Defendants for.

15.4 Whether the Plaintiff is entitled to payment in the amount of R 1 790 407.59.

Evidence

[16] The Plaintiff led the evidence of Mr Tsepho Matshego. The summary of his evidence is as follows:

16.1 He testified that the appointment date was 24 August 2016, in terms of which the parties had concluded a partially oral and partially written agreement. In terms of the Agreement concluded the Plaintiff would render professional services to the First and Second Defendant for all engineering work which would include all civil and structural work. It confirmed that the Plaintiff duly rendered all services which included but was not limited to advising on the structural aspects of the Project, providing the Defendants with the necessary structural advice, input and structural estimates. The Plaintiff would also render all services relating to the civil engineering which included but was not limited to stormwater, sewer, roads, water and so forth.

16.2 The Plaintiff had also submitted the necessary reports to City of Johannesburg: Johannesburg Water and Johannesburg Roads Agency ("Johannesburg"); for Water & Sanitation and also Roads & Stormwater services respectively; to obtain the necessary comments. The Plaintiff was not tasked with compiling such traffic impact assessment report as this was part of the Traffic Engineers' duties. This outstanding report held up the process to advance to stage 3 in terms of the Government Gazette. As such the Plaintiff completed stage 1 (Inception) and 2 (Concept and Viability also termed Preliminary Design) of the project by submitting the necessary reports and obtaining the necessary comments from Johannesburg.

16.3 Stage 3 would be the amendments of the Reports to bring them in line with the comments received and submitting them for final approval. This would also include the submission of detailed drawings and technical specifications for such approved work that incorporates all comments and conditions. The Plaintiff's report was accepted by Johannesburg on 25 June 2018.

16.4 Johannesburg Roads Agency, in principle, accepted the Plaintiff report however, indicated that the Traffic Report must first be submitted. The

Plaintiff completed stage 2 in this regard and could not proceed further until the Traffic Report was made available.

16.5 It submitted that the Plaintiff did not want to enter into the shareholding agreement with the Second Defendant as it intended to separate its engineering services from property management services which was the purpose of the shareholders agreement, to manage the development once the project was completed. As such the Plaintiff substituted itself with another juristic entity, Triple M Properties (MMM), which is a property management company. The purpose of MMM entering into the shareholders agreement would be to manage the development from an engineering point of view once completed. For example, if certain engineering services would be required after the completion of the development MMM would procure those services to attend to upgrades for example.

16.6 It was therefore the parties intention to separate professional services the Plaintiff rendered from the shareholders agreement and shareholding at completion of the project, as confirmed by the Fourth Defendant in the email correspondence.

16.7 On or about 1 August 2018, the Defendants repudiated the Agreement by informing the Plaintiff that another service provider had been appointed for structural engineering work and the Plaintiff can, if it wanted to, only proceed with the civil engineering work. The Plaintiff's witness explained that it could not proceed on this basis given work already completed and due to the fact that civil and structural engineering was integrated. The witness further testified that for indemnity, risk and insurance purposes it could not proceed in this fashion. The witness further testified that it would not be financially viable for the Plaintiff to only proceed with civil engineering work and as such it elected to accept the Defendants repudiation.

16.8 The witness testified that all professional fees and calculations were based on the Quantity Surveyor's calculations of project estimates up to concept and viability, being stage 2. The witness testified that the Plaintiff was entitled to 30% of its fees having completed stages 1 and 2 as per the Government Gazette, less the amount already paid of R251 217.24. The amount due reflected as R1 790 407.59.

[17] Mr Ian Mark Brown testified for the Defendants' that the First Defendant is a Social Housing Institute ("SHI") and is registered and accredited as such by the Social Housing Regulatory Authority ("SHRA"). The witness referred to the accreditation received from SHRA and testified as follows:

17.1 The Plaintiff was approached to be a shareholder in the project, to supply its engineering services at risk until funding comes through. The basis of the shareholding would be to form a consortium of like-minded professionals, to form the SHI and to show they have the capacity to do the work for SHRA.

17.2 According to the witness, the Plaintiff indicated to the Defendants that the Plaintiff can't sign the shareholding agreement as it would pose a problem to them and proposed that Triple M sign instead. The two companies had the same shareholders and the witness for the Defendants testified that to his mind it was the same the party.

17.3 The witness pointed out on the shareholder agreement that the Plaintiff's name was then replaced with that of Triple M, and also pointed to the paragraph indicating that the initial work would be done at risk until the project is funded.

17.4 The shareholder agreement provides further that Triple M would receive 100 shares to procure that the First Defendant is provided with all such engineering services as may be required and agreed in writing from time to time.

Triple M would onboard the services if they couldn't do the work. The witness testified that the agreement primarily, almost exclusively relates to the Development and not to the property management as alleged by the Plaintiff as SHRA does not fund property management, and only funds the development.

17.5 The witness testified that SHRA only releases money on certain investment criteria being met and referred to two distinct portions of a project; Conditions Precedent and Financial Close. The witness testified that "we needed to reach Financial Close, until then we wouldn't get money from SHRA".

17.6 In terms of clause 12 of the shareholding agreement, TBG would onboard the Third Defendant to be the Development Manager and would use its own resources and work at risk until Financial Close, when money is released from SHRA.

17.7 The witness testified that Conditions Precedent relates to Land and Bulk Services. This includes electricity, sewerage and sanitation, water and roads. Once Conditions Precedent has been reached, they are allowed to draw down from SHRA to pay for the Land and Bulk Services portion.

17.8 Financial Close relates to design and development of the social housing and has ten requirements. The requirements include an approved Site Development Plan ("SDP"), approved building plans, signed contracts with professionals and signed building contracts. As part of Financial Close, SHRA had to approve the professional contracts and appointments. He testified that they never reached Financial Close as they did not have the signed professional agreements or an approved SDP. They never received a stamp from JRA for the roads and stormwater report and therefore did not have an approved SDP.

17.9 He averred that the Plaintiff was contracted to assist the Defendants' with the Bulk Services which forms part of Conditions Precedent. The Plaintiff was paid for these services upon the first draw down from SHRA for Land and Bulk Services.

17.10 On the 'fee proposal' email the witness testified that they were trying to wrap up the agreements so they can put it forward to SHRA. The Quantity Surveyor had to negotiate the fees with the Plaintiff, but it was never accepted. No agreement could be reached as there was a disagreement on the roles of the engineers, including the Plaintiff's role. A decision was taken to split civil and structural engineers and the Plaintiff disagreed with it.

17.11 All of the professionals worked on risk, subject to receiving payment once SHRA releases payment, upon Financial Close. SHRA did release payment to the Defendants upon the first investment criteria being met, Land and Services, and the professionals were paid accordingly. The Plaintiff received R 251 217.24. That was the only money released from SHRA.

17.12 The payments were made after the Quantity Surveyor consulted the professionals, satisfying itself that the work was done. The Defendants' could not comment on how the amount paid to the Plaintiff was calculated and testified that it was calculated by the Quantity Surveyor.

17.13 They averred that the Plaintiff never questioned the payment request from the Defendants and simply accepted payment. The Plaintiff sent a fee proposal for further work to the Defendants which was never accepted by the Defendants. The fees of the Plaintiff would have to be agreed upon between the professionals, the Quantity Surveyor and the Project Manager.

17.14 The witness testified that the status of the project is that it is on hold due to a contractual dispute with SHRA. Stage 1 was never even completed. They did not receive any money from SHRA for Financial Close, only the first portion for Land and Bulk Services which was used to pay the professionals, including the Plaintiff for work under Bulk Services.

17.15 He reiterated that the amount that was paid to the Plaintiff was calculated by the Quantity Surveyor after the Plaintiff submitted the work it did to the Quantity Surveyor. According to the witness, the Plaintiff never asked any questions on this amount. It was payment for Conditions Precedent which is Land and Bulk Services. The witness testified that various of the deliverables as set out in the Government Gazette was not done by the Plaintiff.

[18] Under cross-examination it was put to the witness that his version is contradictory in that he pleaded an agreement in August 2016 and an agreement in March 2018. The witness disputed same. Defendants' submitted that it was clearly an error where reference is made to March 2018. In cross-examination the witness continued to testify that Stage 1 and 2 was a separate agreement to bulk services for Conditions Precedent, and that it was never entered into and was subject to a PROCSA agreement and that the fee proposal was never accepted. The reports which were submitted by the Plaintiff related to bulk services for Conditions Precedent only.

[19] The witness disputed that the professionals calculate their fees based on the document at page 001-16. He indicated that it was a budget and that fees would be agreed upon by the Project Manager, the Quantity Surveyor and the Professionals, sitting at a table, negotiating, to be then put in a PROCSA agreement.

The Plaintiff's submissions

[20] The Plaintiff submitted that Defendant's witness not only attempted to mislead the Court but was also evasive in questions put to him regarding work submitted to Johannesburg, based on the letters received from Johannesburg confirming the reports submitted to it. Further that the Defendant's witness also made bare denials and failed to clarify contradictions pointed out to him regarding the conclusion of the partially written, partially oral agreement. The Defendants' witness also attempted to mislead the Court regarding the fact that the Plaintiff had to complete the traffic report, which according to the meeting minutes was not so and later corrected by the witness.

[21] It was the Plaintiff's further submission that the witness also failed to prove, as the Defendants' defence that the Plaintiff only completed stormwater attenuation. That based on the above-mentioned the Court cannot accept Mr. Brown as a reliable and credible witness and the Defendant's version should be rejected and the Plaintiff's version accepted.

The Defendant's submissions

[22] It is the Defendants' submission that the Plaintiff did not discharge its onus. The Plaintiff did not prove an offer, acceptance of the offer, or the terms, and most certainly not consensus. The email that the Plaintiff relies on is nothing more than a statement intended to induce the Plaintiff into negotiations with a view to arriving at a contract. In the Defendant's view there is a clear distinction between stating that one intends to contract and actually doing so. It submitted that a party will also not be held to a partial agreement if the remainder of the terms were still being negotiated, for a lack of *animus contrahendi* and in such circumstances it can also be argued to be void for vagueness or uncertainty. Lastly it submitted that no evidence was led in regards to the Defendants counterclaim and the Court would be justified in granting absolution from the instance.

The Law

[23] The dispute between the plaintiff and the defendant is a factual one, relating to emails and the interpretation of those emails. It is trite that the principles applicable to the interpretation of written documents finds application in this matter and that the primary meaning of the emails must be determined from the language of the emails in accordance with the well-known rules of interpretation.

[24] In essence the contractual relationship between the plaintiff and the defendant is being disputed where the Plaintiff says there was a legally enforceable agreement in place between them, which provided for a number of terms and conditions which regulated the relationship between them. The Defendants on the contrary says that there was no such contract in place, only an intention to contract.

[25] The evidence must then be decided on a balance of probabilities where there are two destructive versions before the Court.

[26] In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others*, 2003 (1) SA 11 (SCA) at para 5, the Supreme Court of Appeal dealt with how to resolve factual disputes by stating the following:

'To come to a conclusion on the disputed issues a court must make findings on:

- (a) the credibility of the various factual witnesses;*
- (b) their reliability; and*
- (c) the probability or improbability of each party's version on each of the disputed issues.*

In light of the assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a

court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors equipoised probabilities prevail'.

[27] In *National Employers' General Insurance Co Ltd v Jager*, 1984 (4) SA 437 (ECD), at 440D-441A the court remarked as follows:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

*This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* (supra) and *African Eagle Assurance Co Ltd v Cainer* (supra). I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a court first to consider the*

question of credibility of the witnesses as the trial judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities’.

[28] In *Govan v Skidmore*, 1952 (1) SA 732 (N), the following principle was enunciated:

‘In finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on evidence ... by balancing probabilities select a conclusion which seems to be the more natural or plausible conclusion from amongst several conceivable ones, even though that conclusion may not be the only reasonable one.’

Application of the law to the facts of this matter

[29] The main issue is that of probabilities of the Defendant’s allegation that the payment of R251 217.24 was related to Bulk Services for Conditions Precedent and therefore there was never an offer and acceptance for Professional Consulting and work for the Structural and Civil Engineering on the project by the Plaintiff. What I find significant about the Defendant’s version is that it claims that the fees are calculated by the Professionals, the Quantity Surveyor and the Project Manager, however it accepted that the payment of R251 217.24 was made by the Quantity Surveyor alone and could not even comment on how the fee was calculated. Yet surprisingly was confident in that the payment was related to Bulk services only and not for professional services as it claimed that the fees still were required to be finalised and that this was not done because disputes arose surrounding the Plaintiff’s role in the project. This despite the payment made and the invoice for the payment that was submitted by the Plaintiff clearly indicated Professional Fees.

[30] It also attempted to use the fee proposal by the Plaintiff and the Defendants' rejection of the fee proposal to suggest that the fee structure was not finalised and as a result there could not have been any contract that existed between the parties.

[31] The Plaintiff on the other hand had commenced work already on the project and per Mr. Brown's testimony the Quantity Surveyor inspected the Plaintiff's work and calculated the fees which resulted in the payment of R251 217.24. However, the Defendant alleges that the payment came from SHRA's budget for Bulk Services and that it paid the Plaintiff in terms of work rendered for Bulk Services and not for professional services rendered. In this regard I think it would have been prudent for the Quantity Surveyor to have led evidence in this regard and begs the question why the Defendants did not lead such evidence.

[32] I am furthermore of the view that, on the probabilities, the Defendant's explanation that the reference to the date of the appointment being a clear clerical error is unacceptable and must be rejected. It is inexplicable and certainly there is no relation between August 2016 and March 2018 that one can ever aver that this is purely clerical in nature. Lastly the Defendants' attempt to place the burden on the Plaintiff querying the payment of R251 217.24 being for Bulk Services makes no sense. It is highly unlikely that they would have concluded an agreement for Bulk Services only as alleged by the Defendants.

[33] To the contrary the Defendants' version corroborated certain material aspects of the Plaintiff's version significantly so was the Defendants' taking the decision to split the Structural and Civil works that the Plaintiff accepted the repudiation as it would not be financially viable to proceed on the Civil works only. I find the Plaintiff's version to accord with the probabilities. It would make no sense after almost two years of working on a project of this magnitude that the Plaintiff would want to restructure a contract and place itself in a financially risky position to accommodate an unknown third party to

take on the Structural Engineering work. The issue of accountability and liability would definitely have arisen and be a cause of concern for any company in the industry. It is unlikely that they, after two years of conducting work, would sit down and agree on terms and conditions.

[34] Applying the principles in *National Employers' General Insurance Co Ltd v Jager* (supra), I am of the view that the probabilities in this matter favour the Plaintiff. I say so for the above reasons.

[35] In my view and having regard to the above considerations and the probabilities in their totality, the version of the Plaintiff is more probable than that of the Defendants. I am therefore satisfied that the Plaintiff's evidence is true and the Plaintiff has discharged the onus on it to prove the existence of the agreement.

[36] As far as the Defendants' counterclaim is concerned, the Defendants' conceded that no evidence has been placed before me in support of the counterclaim. The counterclaim therefore stands to be dismissed.

[37] I accordingly make the following order:-

37.1 The First to Fourth Defendant's are directed to make payment of the amount of R1 790 407.59 to the Plaintiff.

37.2 The First to Fourth Defendants are directed to pay interest on the above-mentioned amount calculated at the prescribed rate of 10.25% per annum, a *tempore morae*, to date of final payment;

37.3 The First to Fourth Defendants are ordered to pay the costs of this action jointly and severally, the one paying the other to be absolved; and

37.4 The First to Fourth Defendant's counterclaim is dismissed.

C SARDIWALLA

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Adv. K.A. Slabbert (Wilson)

Instructed by: Weavind and Weavind Inc.

For the Defendants: Adv L Pretorius

Instructed by: Gerhold & Van Wyk Attorneys