

FORM A
FILING SHEET FOR EASTERN CAPE HIGH COURT, PORT ELIZABETH
JUDGMENT

PARTIES:

- Registrar:
- Magistrate:
- High Court: **EASTERN CAPE HIGH COURT, PORT ELIZABETH**

DATE HEARD: 22.06.2009 TO 25.06.2009

DATE DELIVERED: 21 JULY 2009

JUDGE(S): DAMBUZA J
LEGAL REPRESENTATIVES –

Appearances:

- [1] for the Plaintiff(s)/Applicant(s)/ Appellant(s): Adv S.C.
Rorke
[2] for the Defendant(s)/Respondent(s): Adv M.W.
Nobatana

Instructing attorneys:

- [a] Plaintiff(s)/ Applicant(s)/Appellant(s): Rushmere Noach Inc
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- [b] Defendant(s)/Respondent(s): Silas Nkanunu & Van
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PORT ELIZABETH

CASE INFORMATION -

- [1] *Nature of proceedings* :

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 953/2008
Date delivered: 21 July 2009

In the matter between:

GOBA (PTY) LIMITED

Plaintiff

and

DIETER HEINZ WERNER ROHRICH N.O.
SINDISWA GLADYS JAWUKA N.O.
SILAS NTUTHUZELO NKANUNU N.O.
MZIMKHULU GORDON DILIMA N.O.
MCEBISI OSMAN XUNDU N.O.
NYANISILE MOSES BOYCE N.O.

First Defendant
Second Defendant
Third Defendant
Fourth Defendant
Fifth Defendant
Sixth Defendant

J U D G M E N T

DAMBUZA, J:

[3] The plaintiff sues the defendant for fees due to it in respect of professional services rendered by it in the development of phases 2 and 3 of the Bethelsdorp North Township, Port Elizabeth (“the township”).

[4] The defendants are cited in their capacity as trustees of the Mzingisi Development Trust (TM 3252) (“the trust”).

[5] The plaintiff is a firm of consulting engineers and the trust is a township/property developer.

[6] The development of the township comprised of three phases. In the Declaration the plaintiff has formulated its claim in three claims; claims one and two relate to phase two of the development and claim three relates to phase three. In claim one the plaintiff claims an amount of R304,940.80, in claim two it claims an amount of R131,727.00 and in claim three it claims R174,564.21. At the start of the proceedings I was informed that the plaintiff no longer pursues claim 3.

[7] The two remaining claims are founded on proposals made by the plaintiff to the trust in two letters, the first one dated 18 June 2004 and the second dated 8 June 2006. In first proposal, the plaintiff offered to render professional services, including design work, for the infrastructure or bulk services construction stage of the township at a fee of R650.00 for design work per residential site. There would also be a monthly fee of R35,000.00 for construction monitoring. In respect of claim two the plaintiff was to perform additional engineering work during the house construction phase of the development at a specified tariff of fees.

[8] Most of the evidence relating to how the plaintiff's claim arises is common cause. Mr John Christopher Jones, a director of the plaintiff testified on behalf of the plaintiff and Mr Mzukisi Banzana, the General Manager of the trust, testified on behalf of the trust.

[9] The plaintiff rendered services in respect of phase 2 during the period starting from September 2005 to November 2006; the unpaid fees relate to

the period commencing from May to November 2006.

[10]The letters on which the claims are founded were not the first communication between the trust and the plaintiff. When these letters were written, the two entities already had a longstanding working relationship dating back as far as 1992. The Bethelsdorp North Township Development, however, started in 1996 when the trust was awarded the tender to develop the township by the Provincial Department of Housing and Local Government. The trust then engaged the plaintiff to render engineering services. The plaintiff was therefore also involved in the development of phase 1 of the development until completion thereof and it was duly paid for the work that it did for that stage of the development.

[11]Subsequent to completion of phase 1 of the development the parties concluded an agreement in terms of which the plaintiff was appointed by the trust to render engineering services in respect of phase 2. The terms of the agreement between the plaintiff and the trust in respect of phase 2 of the development are set out in a letter dated 4 May 1999 addressed by the trust to the plaintiff. Those terms included that the plaintiff would be paid a fee of R460.00 per site for design work. A delay in the implementation of the project resulted in work on the project only commencing in 2004. It is this delay that caused the plaintiff to propose that its fees be revised. It is common cause that subsequent to the proposals the plaintiff proceeded with its work in terms of the letter of appointment (4 May 1999) but charged its fees on the proposed revised scale.

[12]It is not in dispute that the plaintiff did render the services in respect of which it now seeks payment. There is also no dispute about the quality of its workmanship.

[13]In their plea the defendants state that the operative terms of the agreement between the parties are contained in the letter of 4 May 1999. They plead that the proposal for a revision of fees was rejected by the trust in a letter dated 3 June 2004 and that the offer made by the plaintiff in respect of claim two (letter of 8 June 2006) was subject to the signing of a written agreement. They dispute the existence of a duty on them to speak in the event that they did not agree to the proposal that the fees be revised. They contend that all fees due to the plaintiff were paid and that the trust in fact erroneously overpaid the plaintiff in the amount of R597,902.82. The overpayment was then the basis for a counterclaim by the trust against the plaintiff. However, after the close of the defendants' case, before argument, the defendants abandoned the counterclaim.

[14]It is the plaintiff's case is that, in view of the past relationship between the parties, there was a duty on the trust "to speak" in the event of it rejecting the proposals contained in its letters.

[15]The six invoices on which the plaintiff's claim is based were the last invoices issued by the plaintiff in respect of phase 2. It is common cause that the amounts claimed in these invoices are charged on the revised

scale. It is also common cause that the first eight invoices which preceded the invoices in question, which were also drawn on the revised scale, were paid by the trust. These are the payments which, according to the trust, were made in error and resulted in the overpayment.

[16]Mr Banzana testified that he, in a letter dated 3 June 2004, rejected the proposal that the fees be revised. But he, being the person responsible for payment of the invoices issued by the plaintiff paid them without having a close look at them and observing that they had been charged on an incorrect scale. He had, however noticed the charge of R35,000.00 per month charged for construction management, which had not been part of the original agreement, but, as he testified, that charge did not bother him “as there had been an agreement that construction management would be charged on a monthly basis”. Towards the end of the contract, when the plaintiff pressed the trust for payment of its outstanding moneys and ultimately issued a letter of demand, he, having been under the impression that the plaintiff had been paid in full, did a reconciliation of the plaintiff’s account and discovered that the trust had, in fact, overpaid the plaintiff. He admitted that the trust never responded in writing to the proposal contained in the plaintiff’s letter of 8 June 2006 (claim 2).

[17]The letter dated 3 June 2004, on which the trust relies, was a response to an earlier proposal by the plaintiff, in a letter dated 24 May 2004, that the fees be increased. The relevant portion of the letter dated 3 June 2004 says:

“This project is fully funded by the Provincial Housing Board in terms of the National Housing Policy and that the Mzingisi Development Trust does not have any other funding to either subsidise or increase this funding. The Mzingisi Development Trust is consequently bound by this policy which amongst other things stipulates the fixed amounts to spend on the various professional consultants, civil infrastructure etc. There are further fixed and rigid stipulations regarding the various drawdowns that must be made...

You will recall that your letter of appointment dated 4 May 1999 stipulates among other things that your appointment was at risk and subject to the approval of our application and subsequent availability of funds. You will further recall that Phase 1 had no obstacles and as such this provision in your letter of appointment could not be felt.”

[18]The contents of this letter are, in my view, vague. But assuming that the intention was to reject the proposal for increased fees as Mr Banzana testified, the plaintiff, in its subsequent letter (18 June 2004) insisted that the fees needed to be revised and went further to suggest specific charges for specific items. In this letter the plaintiff made it clear that the project could not be implemented on the fees agreed on previously. Consequently, it is what happened subsequent to this letter (18 June 2004) that is relevant in this matter.

[19]In this regard Mr Banzana’s evidence was that the trust, having rejected the proposal for increased fees in its letter of 3 June 2004, deemed it unnecessary to communicate its rejection to the letter of 18 June 2004. However, during cross examination Mr Banzana testified that the trust registered its rejection of the proposal at meetings and telephone calls held subsequent to receipt of the letter of 18 June 2004.

[20]The problem with this explanation is that there is no written recordal of those meetings. Further, I can find no support for Mr Banzana's evidence that after the payment of the first invoices he was of the impression that the plaintiff had been paid in full for its services. I deal with this point more fully in the paragraphs that follow.

[21]I have difficulty in understanding how Mr Banzana, having noticed that the plaintiff was charging an amount of R35 000,00 which had not been part of the original agreement, and which was specifically first suggested in the letter of 18 June 2004, paid eight invoices without observing that the charges were based on the proposal made by the plaintiff. My view is that Mr Banzana, being aware that the plaintiff had insisted on the revision of fees and having noted that it was charging in terms thereof in respect of the construction and management fee, must have been aware that the charges were based on the proposed fee structure.

[22]The total amount paid by the trust in respect of the invoices issued by the plaintiff was not in dispute during the hearing. Neither was the calculation of the amount which the plaintiff is claiming (apart from the fact that the calculation was, according to the trust, based on an incorrect scale). But nowhere in the correspondence with plaintiff subsequent to the letter of 18 June 2004, does the trust refer to its rejection of the proposal for revised fees and/or to overpayment; instead in its letter dated 2 October 2006 the trust complains about interest which the plaintiff proposed to

charge and states that most of its funds are “still tied with Bhisho”. No mention is made that the plaintiff’s fees had been paid in full as Mr Banzana suggested. The letter of 2 October 2006 and numerous others presented in evidence suggest that it was the practice of the trust or, Mr Banzana, to record, in writing, issues of relative importance. The fact that there is no written confirmation of the oral rejection of this important issue or even the meetings or telephone calls whereon the rejection of the proposals was expressed does not accord with probabilities. The evidence, in my view, proves that the payments made were made with full awareness of the revision which had been effected to the original charges by the plaintiff. I am therefore persuaded by the submission made by *Mr Rorke* who appeared on behalf of the plaintiff, that Mr Banzana’s version is wholly against improbabilities and that the trust never rejected the proposal by the plaintiff for revision of its fees.

[23]On the assertion in the letter of 3 June 2004, by the trust that it could not consent to fees which exceeded the approved subsidy amounts, the evidence was that when the subsidies were approved for the project in 2002 provision was made for engineering design fees of R650.00 which was the proposed fee in the letter of 18 June 2006.

[24]Silence may amount to acceptance of an offer in circumstances which give rise to a “duty to speak” if the offeree is not prepared to accept the

offer.¹ This means that the offeree who remains silent on receiving an offer, does so at his peril. *Wessels on Contract*² says:

“But if there is a legal duty upon me to speak and I refrain from doing so, the Court will presume that I assented. ... Thus, if a merchant writes to his constant correspondent that he will forward to him certain goods at a certain price unless he hears from him to the contrary, and the addressee receives the letter but neglects to reply, the Court will consider that silence in such a case gives consent ... The course of dealing between such merchants will legitimately lead the offeror to conclude that his correspondent would reply in case he rejected the offer, and the Court will infer that if the offeree had not intended to accept he would have answered that he did not want the goods.”

[25] In this case I am satisfied that a relationship existed between the parties, giving rise to the trust to speak if it did not consent to the revised fee suggested by plaintiff. The working relationship between the parties was long established; it dates back to 1996 in respect of the Bethelsdorp North Development, and as far back as 1992 in respect of other projects. Both parties were aware that the delay in implementing the project had resulted in changes in the scope of work. In all fairness the four year delay would, in any sphere of life result in an escalation in the costs of implementation. It is common cause that prior to the approval of the application by the trust to the Provincial Housing Board, for subsidies in respect of the development, the plaintiff continued to render services at risk and that the plaintiff assisted in the resolution of the problems which had caused the delay in the implementation of the project. The plaintiff was, of course appointed at risk, as it was emphasized on behalf of the trust during the

¹ Christie R H; *The Law of Contract in South Africa*; 5th ed; at 66

² 2nd ed, at 74 paras 270-271

hearing; but the factors to which I refer prove the existence of a working relationship between the parties which gave rise to the duty on the trust to communicate its rejection of the proposals by the plaintiff.

[26]In respect of claim 2 *Mr Nobatana* who appeared for the trust submitted that the agreement on which claim 2 is founded had been conditional on it being reduced to a written agreement signed by the parties. This, however, is not supported by the evidence. The evidence only proves that the plaintiff required that the trust sign the agreement which had been reduced into writing. This was required for the plaintiff's own records rather than for validation of the agreement.

[27]In the same vein a belated suggestion that the trust never needed the plaintiff's services in respect of claim 2 does not assist the trust; it having been common cause that the services had been rendered satisfactorily and all that was in dispute was the revision of the agrees fees.

[28]Consequently I order that the defendants pay to the plaintiff:

[c] The sum of R304,940.80;

[d] The sum of R131,727.00;

[e] Interest of the aforesaid amounts *a tempore morae*;

[f] And costs of suit.

N DAMBUZA
JUDGE OF THE HIGH COURT

