

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NUMBER.: 1827/2010

In the matter between:

NV PROPERTIES (PTY) LTD

Plaintiff

And

HRN QUANTITY SURVEYORS (PTY) LTD

First Defendant

AON SOUTH AFRICA (PTY) LTD

Second Defendant

JUDGMENT

Beshe J

[1] Plaintiff in this matter instituted a claim against two defendants for damages it contends it sustained by reason of defendants' negligence and unlawful breach of their obligations to the plaintiff in respect of services the defendants undertook to deliver in terms of agreements entered into between them and the plaintiff. The agreements were alleged to have been entered into at different times and in respect of different services.

[2] On 26 February 2021, by agreement between the parties, it was ordered that all issues between the plaintiff and the second defendant be separated and be postponed sine die for determination later. In the present proceedings I am required only to determine the issues that are between the plaintiff and first defendant.

The parties

[3] Plaintiff is described as a company incorporated with limited liability, duly registered in accordance with the company laws of the Republic of South Africa, carrying on business as a developer of immovable property in East London and elsewhere, with its principal place of business and registered office at East London.

[4] First defendant, who I will henceforth refer to as the defendant is described as follows:

A company incorporated with limited liability and accordance with the company laws of the Republic of South Africa, carrying on business as quantity surveyors at First Floor, A[...] H[...], O[...] T[...], East London, with its registered office at 5[...] L[...] M[...] Street, K[...] W[...] Town, Eastern Cape. Defendant is a duly registered quantity surveyor and member of the Association of South African Quantity Surveyors in terms of the Quantity Surveying Profession Act 49 of 2000.

[5] On the 27 September 2023 the Registrar of this court issued a notice of set down to the parties intimating that the matter has been placed on the roll for hearing in Makhanda on 19 February 2024 at 09h30. On the 9 January 2024 a notice of withdrawal was filed by defendant's attorneys of record in terms of Rule 16 (4) of the Rules of Court. The notice was served on the defendant via email on 20 December 2023. There is no indication that defendant appointed alternative attorneys or took any steps in light of the withdrawal of its attorneys of record. When the matter was called on the 19 February 2024, there was no appearance on behalf of the defendant. Plaintiff invoked the provisions of Rule 39 (1) and proceeded to lead evidence in a bid to prove its claims.

Pleadings

[6] During or about 2005 to 2006 and at East London, plaintiff and defendant entered into an oral agreement. The plaintiff was represented by Mr V Nassimov, defendant was at all material times represented by Mr Hatley, Mr Ian Moss or Mr

Johan Botha. The express alternatively tacit, alternatively implied salient terms of the said agreement were that:

- defendant accepted an appointment by the plaintiff as its quantity surveyor for the purpose of providing the plaintiff with all services to be performed and which would require to be performed by a quantity surveyor prior to and during the plaintiff's building project for the Cascades Apartments and Hotel (hereinafter referred to as the project);
- would at all times exercise reasonable professional skill, care and diligence in the performance of its mandate and would act without negligence, in accordance with the generally accepted standards of members of its profession;
- would provide plaintiff regularly and whenever required and/or necessary and/or indicated with fully detailed and accurate cost estimates and feasibility studies relevant to the cost, feasibility and viability of the project;
- would regularly and whenever required and/or necessary and/or indicated furnish plaintiff with, and advise plaintiff in respect of, the full costs of the project by way of detailed measured bills of quantities, cost estimates and projections;
- would provide plaintiff regularly and whenever required and/or necessary and/or indicated with all relevant feasibility studies, information, bills of quantity and costing such as to enable plaintiff to fully understand and appreciate the projected costs of the project from time to time;
- would be responsible for and timeously advise plaintiff on an ongoing basis in respect of all issues of financial control and responsibility in respect of the project, and to identify any risks financial and otherwise in the project;
- would properly and adequately define all issues relevant to and required to be performed by first defendant in order to provide plaintiff with accurate feasibility and cost assessment and bills of quantities in respect of the project;

- would timeously and properly and professionally respond to reasonable enquiries from plaintiff, and where necessary, accurately and professionally adjust the necessary feasibility and costs studies and bills of quantities to reflect such enquiries and instructions;
- would ensure from time to time, and as was necessary on an ongoing basis, that all feasibility studies and bills of quantities accorded with the project and accurately reflected the anticipated and actual cost thereof;
- would, wherever necessary from time to time and on an ongoing basis, and as was required by it having regard to its professional duty, to re-measure the intended works and the works before they commenced and as they progressed during the construction period, and keep plaintiff accurately advised of the projected and where appropriate of the actual cost relevant to the project;
- would at all times and on an ongoing basis provide plaintiff with all information plaintiff required to enable plaintiff to achieve a proper economic assessment of the feasibility of the project, defendant to advise plaintiff in respect of that economic assessment and the feasibility of the project accordingly;
- would at all times timeously provide plaintiff with an accurate ongoing financial reporting in respect of the entire project;
- would at all times on an ongoing basis ensure that plaintiff was aware of the total expected final cost of the project;
- would properly interpret and reflect allowance for escalation, and would reflect VAT where applicable.

[7] Plaintiff pleaded that initially defendant furnished plaintiff with a bill of quantities reflecting an initial building cost of R136 000 000.00, vat inclusive for the purpose of sectional title sale projections, marketing and project viability. Further that

relying on defendant's advice and professional services, on 24 April 2007 plaintiff concluded a written Principal Building Agreement "JBCC" Series 2000, 4th Edition with the contractor for the project being Radon Projects (Pty) Ltd in the total contract sum, vat inclusive of R173 280 000.00. In deciding to undertake the project and conclude the contract with Radon, plaintiff relied on and acted upon defendant's professional advice, its quantities and feasibility studies.

[8] Furthermore, that defendant, in breach of its contractual obligations arising from the parties' oral agreement, was negligent in the performance of its duties in one or more or at all, in respect of the following aspects:

Failed to exercise reasonable professional skill and diligence and failed to act in a proper and professional manner;

Failed to act in accordance with the generally accepted standard of members of its profession;

Failed to properly carry out and perform its appointment and mandate as plaintiff's quantity surveyor for the purposes outlined earlier;

Failed to provide plaintiff with a fully detailed accurate cost estimate and feasibility studies relevant to the cost, feasibility and viability of the project;

Failed to regularly and sufficiently furnish plaintiff with and advise plaintiff in respect of the full cost of the project by means of detailed measured bill quantities.

Failed to ensure that plaintiff was placed in possession of all relevant feasibility studies, information, bills of quantities and costings such as to enable Plaintiff to fully understand and appreciate the projected costs of the project from time to time;

Failed to timeously advise plaintiff in respect of the financial control and feasibility of the project;

Failed to identify for plaintiff the financial risks involved in the project;

Failed to adequately define the issues relevant to and required to be performed by defendant such as to provide Plaintiff with accurate feasibility assessments, cost estimates and bills of quantities in respect of the project;

Failed to respond properly and professionally to plaintiff's reasonable enquiries and failed accurately and professionally to adjust necessary feasibility studies, cost estimates and bills of quantities to reflect such enquiries and instructions;

Failed timeously and properly in the exercise of its professional duty to provide plaintiff with the necessary correct and accurate feasibility studies, cost estimates and bills of quantities, re-measured where necessary;

Failed to ensure that all feasibility studies, cost estimates and bills of quantities accorded with the intended project and accurately reflected the anticipated and actual cost thereof from time to time;

Failed to re-measure the intended works and the works on the project as they progressed during the construction period, and failed to keep plaintiff accurately advised of the projected and where appropriate actual cost relevant to the project;

Failed at all times relevant and on an ongoing basis to provide plaintiff with correct and accurate information plaintiff required to enable plaintiff to achieve a proper economic assessment of the feasibility of the project, and failed to advise plaintiff in respect of that economic assessment and feasibility of the project;

Failed to timeously provide Plaintiff with accurate financial reporting in respect of the entire project;

Failed at all times relevant to ensure that Plaintiff was aware at all times material of the total expected final cost of the project;

Failed to properly interpret and reflect allowances for escalation relevant to the costing of the project;

Omitted to make allowance for VAT in the cost reports relevant;

Failed to ensure that there were no unacceptable, unexpected or untoward deviations between the provisional bills of quantities and the cost reports produced from time to time;

Failed to re-measure the works either as was required from time to time or as was requested and instructed by plaintiff as was timeously required;

In purported performance of its mandate, but negligently in breach thereof defendant produced cost reporting showing extreme variants from that originally projected figure;

It was late in its financial reporting to plaintiff acting with undue delay;

Failed to inform plaintiff timeously of the total expected final cost of the project and plaintiff's investment therein;

Failed to properly interpret and reflect allowances for escalation and failed to reflect VAT on occasion where applicable.

Prepared the provisional bill of quantities:

based on drawings which had not been approved by the plaintiff;
 without establishing or anticipating the design criteria of the hotel and apartments regarding finishes, concrete structure and additional accommodation;
 based on limited and inadequate drawings and information;
 without input from other discipline, including architects and engineers, in order to obtain sufficient information and specifications in regard to design elements, structural information, sprinklers, air conditioning, steel reinforcement allowances, fittings, kitchen layout and back of house facilities;
 without seeking clarification and detailed information in regard to design aspects from the design team, including the architect or engineer;
 without making adequate allowance for aspects which were not indicated or shown on the drawings, including the fitment of sprinklers, air conditioning, steel reinforcement, fittings, kitchen layout and back of house facilities;
 without utilising its costing to control the design;
 without properly taking into account costs which influenced the viability of the project;
 without due consideration for the extension of commencement dates or the increase of floor areas;
 without the necessary structural information.

wrongfully and negligently utilised the provisional bill of quantities as a basis for cost development reporting to the plaintiff.

made numerous errors in estimates and cost reporting presented to the plaintiff, including, inter alia, the following:

the rates used for cost reporting were not always based on the scheduled rates in the provisional bill of quantities;

allowances for escalation when estimates were done were not in terms of information published in the BER index.

Cashflow forecasts were defective in that:

in the cashflow forecast prepared on 26 February 2007 regarding interior design costs, the nett cost of the items was tabulated by purely taking into account the amounts in the provisional bill of quantities without allowance for:

- profit on provisional sums for selected subcontractors;
- increases for the various items affected by the increased areas of the complex.

these incorrectly stated, in item 4.5 of the aforesaid report, that proportionate P&G and mark-up had been allocated when this was not correct;

the figures for purposes of the aforesaid report were incorrectly altered;

in cashflow forecasts of payment of preliminaries dated 5 March 2007 no allowance was provided for increased area.

in the preliminary cashflow forecast dated 5 March 2007 no allowance was made for increased area;

there were discrepancies in area allowances in the estimates.

Defendant did not follow the instructions of the plaintiff to consider the cost implications of the re-measure of the concrete structure after receipt of structural drawings from the Project Engineers, May Houseman & Associates ("MHA").

Failed to exercise proper budget control.

Failed to follow the instructions received by it from the Plaintiff in that:

Failed to follow the instructions contained in plaintiff's letter addressed to the defendant on 14 March 2007 to make a calculation of the cost of the structure as prepared by MHA to compare this with the actual costs as contained in the Contractor's bill of quantities and to make all necessary adjustments to the prevailing allowances and cost implications. A copy of the Plaintiff's letter is attached hereto marked annexure '**POC4**';

Failed to follow the instructions contained in the plaintiff's letter to the defendant on 23 March 2007 to provide an estimate for the increased building area of 3 523 m² and to do costing analyses of foundations and level of parking which was then currently in Phase 1 of Cascades. A copy of Plaintiff's letter is attached hereto marked annexure '**POC5**';

Failed to follow the plaintiff's instruction given to it at the consultants meeting on 29 March 2007 to resolve the increased areas budget and the possible savings on the provisional sums;

Failed to follow the Plaintiff's instructions contained in plaintiff's letter to defendant dated 29 June 2007 to immediately commence the re-measurement of the bill of quantities into separate blocks for purposes of Industrial Development Corporation financing. A copy of Plaintiff's letter is attached hereto marked annexure '**POC6**';

Failed to follow plaintiff's instruction contained in Plaintiff's letter to defendant dated 15 October 2007 to prepare a detailed cost report, including a breakdown of

increased cost in each area and the reasons therefor. A copy of Plaintiff's letter is attached hereto marked annexure '**POC7**';

Failed to follow plaintiff's instruction contained in plaintiff's letter addressed to defendant on 16 October 2007 to exercise cost control and to ensure that any amounts exceeding the budget must first be authorised by the plaintiff before put in hand. A copy of Plaintiff's letter is attached hereto marked annexure '**POC8**';

Failed to update the re-measurement of the provisional bill of quantities timeously.

Failed to be proactive in regard to design aspects in that:

Failed to take design into consideration;

Failed to enquire from the design team, either architect or engineer, for detailed information where the design was not clear or was dubious;

Failed to make adequate allowances for aspects which were not indicated or shown on the drawings or specifications;

Failed to make allowance in the costing of aspects such as sprinklers, air conditioning, steel reinforcement allowances, fittings, kitchen layout, back of house facilities, etc;

Failed to use the costing to control the design as the most important aspect of commercial development are the costs which influence the viability of the project and not the design;

Failed to ensure that the design was reflected in the costing done by it and that the design was subject to the costs;

Failed to report back to the plaintiff with necessary updated estimates when dates of commencement were extended or floor areas were increased.

Failed to re-measure trades.

Failed to provide proper cost reporting.

Failed to conduct proper initial estimated taking off of measurements.

Made an under-measurement of R16,294,484.00, details of which are apparent from the schedule attached hereto marked annexure "**POC2**".

[9] As a result of defendant's breach of contract, plaintiff decided to proceed with the project in circumstances where had plaintiff been properly and accurately informed of all financial issues, it would have investigated means of reducing the project costs, alternatively would have proceeded on a smaller project. The commencement project was delayed by 120 days which led to the delay in the

commencement of hotel operations by 120 days. Resulting in plaintiff suffering loss of revenue of R2 836 091.92. there was an untoward and unacceptable variance between the final cost of Cascades 1 of R10,6049,856.61 (VAT inclusive) and Cascades 2 of R85,471,635.92 (VAT inclusive), (a total of R191,521,501.53), this being a deviation of 10.53% from the original projected contract sum given on 24 April 2007 of R173,283,000.00, having in addition, and in its bill analysis relevant to cost report no. 14, projected a variance of R48,533,835.98 (a total cost of R221,813,835.98), resulting in a projected cost variation of 28% from that estimated in April 2007. There arose an increase in total escalation, this having been estimated in the provisional bill of quantities at R5,000,000.00 (VAT inclusive) to R19,489,388.58 (VAT inclusive), an increase of 290%.

[10] Plaintiff further pleaded that both parties knew that plaintiff intended to rely upon defendant's expertise and proper and professional conduct in the performance of its contractual obligation. The damages claimed flow naturally and generally from defendant's breach. As a consequence, plaintiff suffered the following damages:

Claim 1

Cascades 1

By reducing the size of several aspects of the structure plaintiff would have saved R10 532 343.00.

Compound interest in the sum of R10 532 343.00.

Claim 2: Loss of Revenue

11.10 As a result of the breach of contract and negligence adverted to above, the project was delayed, and the commencement of the operations of the hotel was set back by 120 days in respect of Cascades One, plaintiff suffering a loss of revenue accordingly in respect thereof.

11.11 The projected revenue in respect of the hotel for one year on a pro rate basis calculated on 147 rooms, resultant in a loss of revenue to plaintiff in the sum of R2,836,091.92.

Defendant's plea

[11] Defendant admits entering into a contract with plaintiff from about December 2005. That same was oral. Salient features thereof being inter alia that defendant would provide to the plaintiff standard services performed by a quantity surveyor as set out in Clauses 11.36, 11.37, 11.38 and 11.39 of the Tariff of Professional Fees of 2005 of the Council for Quantity Surveying Profession. That same would be performed at the request and instance of the plaintiff as is appropriate to the stages of the project. Defendant proceeds to enumerate what the service would provide / or what services it was to provide. To a large extent confirms what is stated by plaintiff in its particulars of claim regarding what performance was expected of the defendant. Defendant divides the services into four sections which are A, B, C and D.

[12] Defendant pleads that the appointment was for a project which only involved the building of apartments. That the building of a hotel was a variation and development of the original project. Denies that the standard services agreed upon include the provision of a feasibility study/studies, any assessment of viability of the project, provision of on-going bills of quantities, being responsible in respect of all issues of financial control. Denies it was required to adjust the bill of quantities to reflect enquiries or instructions from plaintiff. Denies that it agreed to provide reports which made plaintiff aware of the total expected final cost of the project. That such reports were impossible in a project which developed and changed from time to time. Denied that the construction contract was entered into relying solely on the accuracy of the provisional bill of quantities. Defendant pleads that plaintiff did not execute the project in accordance with the designs upon which the Provisional Bill of Quantities was based. The drawings used for the preparation of the provisional bill of quantities was provided by the architect then employed by the plaintiff. At the time of the preparation of the provisional bill of quantities many aspects of the design were not finalised. This was known to the plaintiff. Defendant warned the plaintiff as to the cost implications of the variations of the project design. Defendant denies the sums averred as cost variations and puts plaintiff to the proof thereof. Denies that increase in total escalation is due to its negligence. Denies that it breached the agreement

between the parties and that through its negligence the commencement of the hotel operations was delayed. Denies that plaintiff suffered loss of revenue as alleged.

[13] defendant instead instituted counterclaim against the plaintiff for professional fees it alleged the plaintiff failed to pay to it. Plaintiff denied being liable for such professional fees.

Evidence

[14] In a bid to prove its claims plaintiff led evidence from four witnesses. The summons was issued as far back as in 2010. A lot seems to have happened in the meantime, including the demise of two expert witnesses who were appointed by the plaintiff and had compiled reports in connection with this matter. Those being Professor Piet Botha, a quantity surveyor and Mr Thompson, an architect. This led to plaintiff engaging Mr Nigel Sessions to also deal with what is covered in the two reports.

[15] First to testify was Mr Neil Thomas Howell (Howell), an architect who has been in practice for 30 years. He testified that he had been involved in several hotel projects that were undertaken by the plaintiff. Howell took the court through his report which, briefly stated, reveals that as a firm of architects they were appointed by the plaintiff as architects and principal agent for the project. He prepared the contract drawing for the Premier Hotel, East London ICC, East London. He was also asked by the plaintiff to investigate whether it would have been possible to reduce the size of certain areas of the hotel so as to achieve savings. He gave his opinion about reduction in size that could be made to reduce costs and gave details thereof. This is because plaintiff was faced with a budget overflow. He testified that the budget overrun was identified well into the project because they did not have updated feasibility and estimates from the quantity surveyors. Having taken the court through the reduction in size of modules etc, he concluded that with the conservative approach he took, the total area saved would have been 2.307.5 square metres. Howell testified that the reduction in the size of the modules would have resulted in a cost saving without impacting on the final product and making it less desirable, because the bigger the structure/building, the more it will cost. At the time they were

roped in defendant has done estimates on the project based on the original drawings so were feasibilities.

[16] Next to testify was Mr Nigel David Griffin Sessions (Sessions), a quantity surveyor with a number of qualifications. He is a registered quantity surveyor in South Africa. He qualified as a quantity surveyor in 1982 and has his own firm of quantity surveyors under the style NS Solving. He was appointed by the plaintiff to investigate the services provided by the defendant and to express an opinion as to inter alia, whether the services met the employer's brief, whether they were in accordance with accepted professional standards and whether defendant was negligent in any aspect. Also to express an opinion on the saving that could have been made had certain reductions to area, scope reporting and project planning been affected timeously and effectively. Mr Sessions proceeded to take the court through the salient features of his report. He also gave an overview of what the services of a quantity surveyor should cover. Namely that the services would commence with budgeting preparing estimates for the project. Estimations are made at different stages of the project, getting more and more accurate as the project progresses. With the help received from other members of the team such as architect and engineers you produce your estimates. Outlined the method of arriving at a bill of quantities. He was referred to a document that was prepared by the defendant in December 2005 which he described as a preliminary estimate and feasibility study of the project. He testified that because defendant produced a feasibility study, there must have been a reason for that in response to it being pointed out to him that defendant denies he was required to do feasibility study. He then took the court through the feasibility studies' document that was compiled by the defendant which gives the estimated cost to be R156 444 835.00, excluding VAT and the estimates the contract period for Cascades 1 to be 15 months. In terms of yet another feasibility study number 8 dated June 2006 relating to the proposed conference centre, parking, slabs and Cascades 1 and 2. There as well, estimates are provided in respect of each component. He referred the court to a letter by Mr Nassimov of the plaintiff to the defendant on 4 July 2006 in which he raises certain concerns with the defendant's Mr Hatley such as lack of consultation in preparation of the bill of quantities, provisional bill of quantities being produced late and excluded

the Convention Centre. He also referred to other correspondence between the parties. One such letter from the defendant stating inter alia that:

‘The project will be managed by regular cost reporting.’

‘That the project will be measured as the work proceeds to provide an on-going final account which will support the cost of the report process.’

Having analysed the bills of quantities vis-à-vis the purposes they are meant to serve Mr Sessions drew certain conclusions. As far as the functions of the bills of quantity are concerned, he had this to say:

It serves three functions in the project being:

An estimating to establish anticipated costs of project.

A basis to negotiate a price with Radon and a cost controlling/monitoring base for cost reporting.

He stated that the more accurate the document, the less chances of significant deviation. He opined that the bill of quantities should have been remeasured to reflect the actual design stated prevailing at the relevant time. Even though plaintiff required a revised bill in June 2007, none had been provided. Sessions concluded that:

- defendant failed to establish a competent budget taking into account plaintiff's requirements.
- Failed to produce a competent updated bill of quantities reflecting the work to be carried out at the time of negotiations of the contract price with Radon.
- failed to analyse and debate with plaintiff the risks inherent in using CPAP formula for escalation together with an inappropriate base date.
- failed to keep their client advised and updated on the expected final costs of the project.
- failed to provide regular and competent cost reports from commencement of works on site.
- failed to account timeously for increased costs.
- failed to advise client of financial risk association with escalation.
- failed to accurately assess and forecast escalation costs.
- failed to compile and issue a competent final account to the PA.
- He shares the view that had plaintiff been warned of anticipated additional costs and areas they could have taken action to minimize additional costs without

compromising the anticipated income. Had this occurred, a saving of R14 000 000.00 could have been achieved.

The next witness to testify was Mr Kamil Abdul-Karim.

[17] As was the case with the two previous witnesses, a notice in terms of Rule 36 (9) (a) and (b) was filed in respect of Mr Karim, giving notice that they will be called as expert witnesses. Mr Karim is a managing director of Pam Golding Hospitality and Consulting (Pty) Ltd. He testified that he has been involved in the hospitality business for 26 years. He is in business with Pam Golding. The business is involved in specialist market research in the hospitality. As I understand his brief, he was required to opine on whether, had the plaintiff taken a decision to revise the floor plan of the overall building, that would have had an effect on pricing of the rooms/units that were built. In other words, had plaintiff been alerted by the quantity surveyors of the cost implication and based on that decided to take steps to reduce the size of the room, that would have affected the final production and reduce its value as a hotel. Part of their advisory role as a company entailed being approached by when somebody wants to build a hotel to make a marketing study and advise the client accordingly. Regarding the issue at hand, Mr Karim testified that a 5 Star hotel room would be between 32 and 36 square metres. A 4 Star hotel room (which is what the establishment in question is) would be between 24 and 28 square metres. He also gave the room floor in respect of 3 Star hotel. Regarding plaintiff's establishment, he stated that the hotel is sufficient at a 4 Star level with a mix of room comprising two penthouses, two ambassador suites, 90 suites and 166 deluxe rooms. The deluxe rooms range between 37 square metres to 43 square metres and that reflects generous proportions for a contemporary 4 Star hotel. He confirmed that by shrinking the width of the building by 1 metre, would have resulted in a minimum saving of 4 square metres per deluxe room. Having analysed rooms of similar grading in other establishments, he concluded that upscale hotel rooms are on the average in the region of 28m². That the reduction of plaintiff's hotel room size by 4m² would have had limited or no effect on price commanded and the ADR¹ achieved. Even in respect of the sectional title the best price would have been achieved with rooms that are approximately 4m² smaller. He also referred to academic reports

¹ ADR: Average Daily Rate.

which show that room size is the least influential decision factor when it comes to choosing a room/hotel accommodation. He also made reference to Trip Advisor when he described as an online platform that reviews hotels. He testified that, according to Trip Advisor the hotel in question is rated third in Eastern Cape. But this may also be due to the fact that it has recently opened, and this is due to the “*market gestation period*”.

[18] Mr Karim explained the concept of a sectional title. Briefly that you sell some rooms in order to compliment the capital and equity requirements in order that you can build the hotel. That even in that case, investor is not looking at the room size but at making an investment. That therefore a reduction of the room by 4m² would not have any effect on the sectional title investment pricing.

[19] The last witness to give viva-voce evidence in support of the plaintiff's case was Mr Vyadislav Samuel Nassimov of the plaintiff. Which as indicated earlier is property developing company owning 14 hotels as well as other buildings.

[20] Nassimov's evidence was that he met with Hatley in 1994 who came to see him and offered his services as a quantity surveyor. This was after an article had been published in a newspaper that was in talks with Buffalo City Municipality to develop a site in East London. Mr Hatley assisted the plaintiff in the tendering process to acquire a site in the East London beach front. The development in respect of this site consists of five phases: two hotels, convention centre, indoor sports centre and a commercial area. They started by building the Regent Hotel with Mr Hatley as the quantity surveyor. Years later around 2005, Mr Hatley suggested they look at the second phase of the development. They decided to do a preliminary investigation to see if the project would be viable, a feasibility study of phase two. He engaged Hatley who introduced him to a big architectural company in Johannesburg seeing that this was a big project. They visited the offices of the Osmond Lange Architects in Johannesburg. They were shown a Melrose Arch hotel which the company designed and built, a 5 Star hotel. Both he and Mr Hatley were impressed by what they saw. Back in East London they approached the Osmond Lange offices and explained to them what they had in mind, what the phases entailed. Having briefed Mr Bill Rabie of Osmond Lange about what was envisaged, he (Rabie)

started drawing the Cascades Hotel concentrating on the number of modules that can fit into that development. Nassimov met with Rabie for this purpose a few times. Hatley attended some of the meetings. As the process was unfolding, Nassimov told Mr Rabie and Mr Hatley he needed to know the exact costs of the project. Mr Rabie said he would not do more detailed drawings unless he paid him more. Mr Hatley also indicated he wanted more money in order to do a provisional bill of costs. So, they agreed on what amounts would be paid to each of the professionals. The architects worked closely with Mr Hatley who told him what kind of finishes he must work with. After two to three weeks Mr Hatley told him they were finalizing the provisional bill. This surprised him because he had not yet approved the drawings. He conveyed this to Mr Hatley. The latter arranged a meeting with Mr Rabie where they showed him the drawings. The drawings as far as the rooms were concerned were fine but there was no provision / drawing of the back of the house.² When he asked Mr Rabie about this, he stated he had never drawn a design for a hotel. He sent both Mr Rabie and Mr Hatley back to the drawing board to redesign the hotel to have everything it requires, or a hotel should have. But by then Mr Hatley had produced a bill of quantities and came with a figure of some R136 000 000.00. Osmond Lange brought an architect from Johannesburg who knows how to design hotels. Which he did. This also entailed Mr Hatley having to redraw his bill of quantities because it was important that he provided an accurate figure in order for plaintiff to apply for a bond.

[21] Regarding defendant's denial in the pleadings that they were required to do in feasibility study, he drew the court's attention to correspondence between the parties, in particular a letter from defendant's Mr Botha dated 29 December 2005 in which their preliminary estimate and feasibility number 2 of the project are attached. In the third paragraph thereof, the following is recorded:

'Since detail designs are still not available the estimated values have been amended as requested by yourself, these costs must still be regarded as preliminary and will have to be updated when more detail design information become available '

He added that defendant prepared eight feasibility reports not one. That in fact that was part of defendant's job. Plaintiff could only decide whether to proceed with a

² Is the area where staff come in, where the kitchen, laundry, cold rooms, store rooms etc are located.

project once it has a feasibility study report from quantity surveyors. That until they are satisfied that the project is feasible professionals, such as the defendant worked at risk. It is only after a decision is taken to go ahead with the project that they will finalise the finances based on the costs and then appoint the professional teams to do the job.

[22] On the 15 May 2006 Mr Hatley wrote to a Mr Jones calling for the provision *“of all drawings including structural information”* on the project. He goes on to state *“We need to receive your structural drawings today! We are already behind even the extended program our team ceased measuring on Friday awaiting information”*.

[23] Once again in June 2006 the defendant provided the plaintiff with preliminary estimates and feasibility (no. 8). And once again undertook to update same when more information comes to hand.

[24] In the meantime, because plaintiff together with Mr Hatley and Mr Botha had done projects previously with Radon as the contractor, Mr Hatley suggested they talk to Radon in connection with the cascade project.

[25] In a letter addressed to the architects (Osmond Lange) Mr Hatley records that he is busy splitting the first provisional bill to enable tendering for phase 1 and 3 separately. In this regard Nassimov points out that the quantity surveyors were supposed to have split the provisional bill of quantities from the initial stage because first phase was fully financed by IBC. So, the splitting of bill was supposed to have been done from the beginning. And Mr Hatley was aware of that.

[26] On 3 July 2007 Mr Hatley wrote to plaintiff asking for a payment of R160 000.00 as fees for the Provisional Bill. He also points out that they have been working on the project for seven months during that time provided a detailed estimate and feasibility studies.

[27] In response Mr Nassimov pointed out that the main conditions of the contract were not complied with. Had the bill of quantities been provided three months earlier,

they could have saved on costs of the building and achieved completion by November 2007.

[28] In August 2006 he had not received a bill of quantities as well as correct phasing of bill.

[29] Mr Nassimov denied that the project got bigger and bigger saying in August 2006 there were 261 rooms, ten years later there are still 261 rooms. That if the defendant had measured correctly from the start, they would have been able to tell plaintiff how much the project will cost.

[30] According to Mr Nassimov, by September 2006 they had a proper structural engineer on board who would meet with Mr Hatley and the architect.

[31] Mr Nassimov also took issue with Mr Hatley's escalation figure he provided which in his view should have been higher.

[32] The split bill, it transpired, was never received by Mr Nassimov.

[33] He also took issue with the manner in which Mr Hatley calculated the back of the house addition to the design. Pointing out that he cannot calculate that addition the same way as he did with the rooms. The cost can never be the same. That part could be cheaper per square metre cost wise and explained why.

[34] Defendant provided a second provisional bill for R152 000 000.00. Mr Nassimov was satisfied with the figure and felt that the process could proceed. They could proceed with the project.

[35] Defendant was supposed to provide plaintiff with further updated provisional bills of quantity as the work progressed. He only produced one. A month after the contract was signed, defendant sent an estimate for R186 000 000.00 in respect of which plaintiff queried the increase.

[36] On 1 September 2008, defendant provided a building cost report which put the cost at R194 451 818.71.

[37] In a cost report dated 24 October 2008, the estimated budget is R199 776 442.29.

[38] Later on 25 September 2009, the cost report 8 puts the cost at R184 334 754.87. Mr Nassimov attributed the decrease in the estimate for costs to their efforts to reduce costs of the building, reduced specifications, certain items etc. However, it was too late to change the structure of the building. Another reason Mr Nassimov gave for the fluctuation is that defendant was still working on estimates and not accurate measurements.

[39] Mr Nassimov testified that if defendant had provided them with the correct figure earlier, he would have investigated how the project could be reduced i.e. reduce the size because he would have realised that the project is not feasible. R152 000 000.00 was feasible. He could even have taken a decision not to proceed with the project. He attributes the loss suffered as a result of the delay in the commencement of the project to defendant for the following reason:

Had they been provided with a correct bill of quantities by the defendant and the contractor does his program, he would have allocated sufficient personnel and resources in order to achieve fulfilment of obligation on the completion date. Because the completion of the project was set back by 120 days, the hotel could not start operating at the time that it was scheduled to in the feasibility study. That in actual fact the extension time for the project was more than nine months.

The amount lost was calculated by looking at their property management system, at the daily, monthly, and yearly revenue. And by calculating the difference between what they could have achieved had they opened as scheduled.

So, the amount claimed for in this regard is the money or income they would have earned in the four months that the hotel had not started operating.

[40] I now deal with the evidence of two experts that were appointed by the plaintiff. In respect of both expert witnesses, plaintiff had given notice that it was intended to call them to testify and expert witnesses and the reports they had

compiled were duly filed. Both experts have since died. I am of the view that their evidence cannot be ignored, especially in view of the fact that aspects of their reports were touched on by other witnesses who gave viva-voce-evidence. In any event, I am inclined to agree with plaintiff's counsel that this is an appropriate case where the evidence of the reports compiled by Mr Thompson and Professor Botha should be given due regard in terms of Section 3 (1) (c) of the Law of Evidence Amendment Act.³ Section 3 (1) (c) of the Act provides that hearsay evidence shall not be admitted as evidence at criminal or civil proceedings unless:

the court having regard to the—

- (i) nature of the proceedings;
- (ii) nature of the evidence;
- (iii) purpose for which it is rendered;
- (iv) the probative value of the evidence;
- (v) the reason why it is not given by the person upon whose credibility the probative value of such depends;
- (vi) prejudice that evidence might entail to the other party;
- (vii) is of the opinion that such evidence should be admitted in the interest of justice.

Having had regard to the factors above, I am of the view that it will be in the interest of justice to have regard to the two reports in question. Plaintiff's particulars of claim also seem to be based thereon to some extent. Mr Thompson was an architect attached to IDC Consultants, Cape Town. In his report he identified some areas of concern based on the documentation that he evaluated, inter alia that:

The documentation was still underdeveloped, and a full set of sketch plans was not available at the time that the measurement by quantity surveyors took place;

There appears to have been a complete absence of structural information;

There is no supporting documentation to indicate specifications or details the estimates were based on;

He concluded that it was imprudent to undertake the development of a provisional bill of quantities with the documentation and information available at the time. Messrs Nassimov and Sessions also touched on some of these aspects.

³ Act 45 of 1988.

Professor Botha was a registered Quantity Surveyor attached to Oasis Quantity Surveyors, Pretoria, with an impressive Curriculum Vitae. He was briefed to ascertain from the documentation provided:

- The instructions that were given to the quantity surveyor.
- The quantity surveyor's performance relevant thereto.
- To identify breaches of the agreement against the performance of a reasonable quantity surveyor.
- Facts and figures relevant to each breach.
- Determine the link between breach and added costs.

Having embarked on this exercise, he came to the following conclusion as regards breach/negligence by defendant:

The final bills were prepared without final authorisation from plaintiff. At the preparation stage of the BoFQ,⁴ defendant failed to anticipate the design criteria of the hotel and apartments regarding finishes, concrete structure etc. as a result of this, the BoFQ could not be used as a basis for proper cost development reporting from defendant. According to Professor Botha, inter alia the following mistakes occurred in estimates:

- Cash flow forecast was defective.
- So was preliminaries cash flow.
- Professional competence appears to be lacking.
- Defendant did not follow instructions from plaintiff.
- The major issue of negligence is not adhering to instructions.
- Not updating the measurements of the BoFQ timeously.
- Errors in cash flow and estimate forecast.
- Issuing the provisional BoFQ without authorisation from plaintiff.
- The effect of the incorrect cost control reporting affected the developer's feasibility on the contract and must have influenced his decision of what could not be provided.
- Failure to be proactive regarding design aspects.
- In respect of certain reports, it is apparent that defendant overestimated amounts and were not meticulous in their analysis.
- Defendant underestimated the value of the final account.

⁴ Which I understand to be bill of quantities.

Plaintiff's submissions

[41] It was pointed out that it is common cause that the parties concluded an agreement that defendant would provide to the plaintiff the standard services performed by a quantity surveyor for its client.

[42] It was submitted that from the evidence given by the witnesses, in particular Mr Nassimov and Mr Sessions, it is clear that defendant breached the contractual obligations he had to the plaintiff.

[43] It is also clear from the evidence that had plaintiff been properly advised by the defendant, or if defendant had not breached its contractual obligations regarding feasibility, plaintiff would have taken steps with regard to cost cutting so that it could remain within its budget. This was confirmed by Mr Howell as well. Mr Karim confirmed that cost saving measures in the form of reducing room sizes could have been taken without affecting the status of the end product. Further that Mr Nassimov has fully explained the nature of the damages plaintiff suffered and how the amounts claimed were arrived at.

Discussion

[44] Plaintiff is suing the defendant on the basis that as a consequence of defendant's failure to perform his obligations in terms of their agreement, plaintiff has suffered damages as set out in the particulars of claim. Has the plaintiff succeeded in satisfying the court that he is entitled to his claims? In other words, has the plaintiff proved his claims? It is trite that the standard of proof in civil cases is proof on a balance of probabilities.⁵ It is common cause that defendant was appointed by the plaintiff as a quantity surveyor. The standard services that are meant to be performed or provided by a quantity surveyor are tabulated under Clause 11.0 of the definitions and interpretation of the Tariff of Professional Fees, a document of the South African Council for the Quantity Surveying Profession under which Mr Hatley

⁵ See *Peregrine Group (Pty) Ltd v Peregrine Holdings Ltd* 2001 (3) SA 1268 SCA at 1275.

is also registered. The services are divided into four, from A to D. According to the tariff, service A means the estimating and cost adverse stage. To me, this sounds like a feasibility of viability study/assessment. In its plea, defendant denies that it was required to conduct a feasibility study. But submitted a number of reports headed “*preliminary and feasibility study of project*”. As Mr Sissions pointed out, there must have been a reason why defendant produced the numerous feasibility reports. Mr Nassimov testified that this was required of the defendant and Mr Hatley was aware of that. In terms of the tariff, a quantity surveyor may render services at risk on the basis that no fee will be charged for such services unless the project proceeds.⁶ This is in keeping with Mr Nassimov’s evidence. It also appears to be common cause that Mr Hatley was involved in the project from 1994 when the first phase thereof was executed. According to Mr Nassimov, Mr Hatley approached him and suggested he considers going ahead with the next stage of the project. Hence Mr Nassimov asked him to investigate and advise him of the feasibility thereof. I am satisfied that the plaintiff has succeeded in showing on a balance of probabilities that the defendant was required to conduct a feasibility study and advise the plaintiff accordingly. I am also satisfied that the plaintiff has succeeded in showing that defendant failed to comply with plaintiff’s instructions such as splitting the bills of quantities into two. The provision of bills of quantities that is:

To provide a detailed estimate and feasibility studies. Provision of bills of quantities timeously. Provision of accurate reliable figures. To adjust the bill of costs. To address plaintiff’s queries and instructions.

Plaintiff has also shown that the project remained the same, with the same number of rooms and did not mutate as defendant pleaded. Plaintiff also placed evidence before court to show that had it been aware of the figures involved at an early stage, had defendant performed its obligations with care, professionalism and diligence, plaintiff would have taken steps to reduce the costs it ended up incurring. That the completion of the project would not have been delayed by over nine months. That it would have been possible to reduce the size of the rooms/certain areas without impacting the desirability of the final product. This was confirmed by Mr Howell and Mr Karim. Mr Sessions confirmed that in his opinion defendant failed to, inter alia: establish a competence budget taking into account plaintiff’s instructions;

⁶ Clause 11.40.

produce a competent updated bill of quantities, reflecting work to be carried out at the time of negotiations of the contract price;

to keep plaintiff advised and updated on the total cost of the project; etc.

He also confirmed that had the plaintiff been warned of anticipated additional costs, they could have taken steps to minimize additional cost without compromising the anticipated income. In the process, would have saved R14 000 000.00.

[45] Mr Nassimov's evidence was also confirmed by Professor Botha and Mr Thompson's reports.

[46] As far as the amounts claimed in respect of claims 1 and 2, I am satisfied that the amounts claimed have been adequately explained and appear to be reasonable.

[47] I am satisfied that the evidence adduced by the plaintiff shows on a balance of probabilities that the defendant is guilty of breaching its obligations towards the plaintiff in accordance with the oral agreement entered into between the parties in respect of which defendant was to render the services of a quantity surveyor.

Order

[48] Consequently, the following order is made:

(a) Judgment is granted in favour of the plaintiff for the payment of the sums of R10 532 343.00 and R2 836 091.92 in respect of claims 1 and 2 respectively as and for damages.

(b) Interest on the aforesaid sums at the prevailing legal rate from date of summons to date of payment.

(c) Costs of suit, including costs of two counsel, where so employed.

(d) Qualifying expenses of all expert witnesses in respect of who plaintiff delivered notices in terms of Rule 30 of the Uniform Rules of this court, including Professor Both, Mr Thompson, Mr Sessions, Mr Howell and Mr Kamil Abdul-Karim.

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff:	Adv: Ford SC
Instructed by:	HUXTABLE ATTORNEYS 26 New Street MAKHANDA Ref: O HUXTABLE/cl/02S234001L289 Tel.: 046 – 622 2692
For the 1 st Defendant:	NO APPEARANCES
Instructed by:	
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