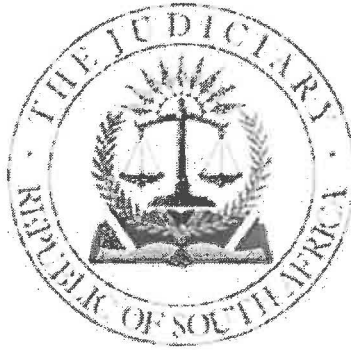




**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:
YES/NO
Of Interest to other
Judges: YES/NO
Circulate to Magistrates:
YES/NO

Case No: 4028/2021

In the matter between:

NEXCOR 312 (PTY) LTD t/a
VNA CONSULTING

Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL
OF THE FREE STATE DEPARTMENT OF PUBLIC
WORK & INFRASTRUCTURE

First Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL
OF THE FREE STATE DEPARTMENT OF POLICE,
ROADS AND TRANSPORT

Second Respondent

JUDGMENT BY: C REINDERS, ADJP

HEARD ON: 10 MARCH 2022

DELIVERED ON: 1 AUGUST 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 14:30 on 1 August 2022.

- [1] The applicant, Nexcor 312 (Pty) Ltd t/a VNA Consulting ("VNA") carries on business as a firm of multi-disciplinary built environment professionals with specific skills in, amongst others, Project Management and Infrastructure Delivery Management Services ("IDMS"). The first and second respondents are the Members of the Executive Council for respectively the Free State Department of Public Works and Infrastructure ("PWD") and the Free State Department of Police, Roads and Transport ("Roads Department").
- [2] Applicant applies for judgment against first respondent, alternatively second respondent, on a claim in the amount of R 27 526 860.00 (together with interest thereon) in terms of a written agreement (annexed to the founding affidavit as "VNA1" – the "agreement") it concluded with first respondent for the rendering of professional services at rates contained in a stipulated tariff scheme.
- [3] The respondents oppose the application, claiming that no professional services were rendered as claimed by the applicant for which payment is due.
- [4] The deponent to the founding affidavit is Mr S Raghubir, a director of the applicant and a professional construction project engineer who is also in charge of VNA's Bloemfontein office. Mr V Narsai, Chief executive Officer of VNA deposed to the applicant's replying affidavit. The applicant places reliance on the agreement with specific reference to the rendering of monthly accounts

(supported by invoices) to PWD for work done. Clause 4.4 provides that if PWD disputes any amount or part of an item in an invoice, it shall give notice thereof with reasons to the service provider (VNA), but shall not delay payment of the balance of the invoicing. Applicant states that no such notices were ever given. Clause 4.5 of the agreement furthermore provides that the PWD may on 14 days' notice nominate a reputable and independent firm of accountants to audit any claim for time charges and expense. Likewise, PWD did not proceed with any audit process as contemplated in the agreement.

- [5] Mr JJ Mosai, chief engineer with the second respondent, is the deponent to the respondents' answering affidavit, stating that he was the engineer involved in the construction projects. Annexed to the answering papers is the confirmatory affidavit of Mr V Ntaka, the then acting Chief Director of the Roads and Infrastructure Directorate who was involved during 2021 when the parties attempted to resolve the dispute regarding payment allegedly owed to the applicant. It is alleged that applicant during February 2021 submitted invoices 1135, 1136, 1137 and 1138 being invoices in respect of the years 2019 and 2020. Upon receipt of these invoices it was perused by respondent to verify same. The conclusion was that the documents did not support VNA's claim. The disbursements referred to in the invoices were in respect of work done by the CTC College for which the college was paid. The respondent communicated with the applicant in an attempt to clarify the invoices and the time record sheets were also queried as it appeared to be a "cut and paste" method employed. Despite these concerns, the applicant failed to produce the requested minutes and/or respond to the quires. Given these circumstances the respondent rejected and declined to pay the invoices. On 4 May 2021 the same invoices were resubmitted. The view of the respondent remained the same. The respondent, having been served with the papers herein, in an attempt to resolve the matter, once again sought the supporting documents to the invoices. Fifteen reports were received, but the supporting documents differed from those received in February 2021. A concern was that the same photographs were used in support of different claims. The applicant was made aware of this and undertook to rectify same, but subsequently mailed the same documents.

- [6] The applicant submits that the above shows a complete ignorance and misunderstanding of the work done and the issue at hand. It contends that respondents (Mr Mosai) confuses the disbursements made to the subcontractor CTC College with earlier and different payments which became due as payment for training. It submits that the scope of work entailed three categories of services and that the amount of this claim is separate from the paid indebtedness and includes the separate disbursement of R 24 774 174.00 which had already been paid to CTC college as a subcontractor disbursement by VNA and on which interest is running at the prime rate. The applicant therefore states that respondent does not raise a sustainable defence wherefore judgment should be granted in applicant's favour together with a punitive cost order.
- [7] On the papers I have sympathy with the applicant and without expressing any formal view thereon tend to agree with the applicant. However, being a final order sought I have to be guided by the principles set out in ***Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) at 634 H-I. It is well established that such relief may be granted if the facts averred by the applicant which had been admitted by the respondent together with the facts alleged by the respondent justify such an order, unless the allegations and denials by the respondents are so far-fetched or untenable that the court is entitled to reject the respondent's version merely on the papers.
- [8] I do not think that I can reject the respondents' defence as so far-fetched and untenable that I can grant judgment in favour of the applicant. The respondents requested that in the event I do not dismiss the application, it should be referred to trial. I am prepared to accede to this request. I did not get the impression from respondents' affidavits that it is unwilling to pay in the event they are satisfied with the claims – something which in all probability therefore could be resolved at a proper meeting in terms of Uniform Rule 37A. Should it not be resolved a court hearing evidence would be able to do so. Given the background history of this matter and in order to facilitate a swift finalization

hereof, I intend making orders to reach such an objective as will be reflected herein below.

[9] There was an informal application from the respondents for condonation for the late filing of their answering affidavit, and a formal condonation application from the applicant for the subsequent late filing of its replying affidavit. I was satisfied to grant such condonation in order to fully ventilate the dispute in the interest of justice.

[10] Consequently I make the following orders:

10.1 The application is referred to trial.

10.2 The applicant's notice of motion and founding affidavit shall stand as a combined summons.

10.3 The respondents' answering affidavit shall stand as a plea.

10.4 The applicant's replying affidavit shall stand as a replication.

10.5 The matter is postponed to the Pre-trial court roll of 22 August 2022.

10.6 The parties are ordered to convene a meeting in terms of Uniform Rule 37 A on or before 17 August 2022 and file a minute of the said meeting with the Registrar on or before 19 August 2022.

10.7 Costs to be in the cause.


C. REINDERS, ADJP

On behalf of the applicant:

Adv N Snellenburg SC

Instructed by:

V Chetty Incorporated

c/o Lovius Block Inc

BLOEMFONTEIN

On behalf of the respondents:

Adv K Matai

Instructed by:

State Attorneys

BLOEMFONTEIN