

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
Signature	16/3/2021
Date	

CASE NO: 6684/2018

In the matter between:

TINBAR CONSULTING (PTY) LTD

PLAINTIFF

and

KPD PROPERTY DEVELOPMENT (PTY) LTD

DEFENDANT

JUDGMENT

MAKGOBA JP

- [1] In this action the Plaintiff claims an amount of R 690 000-00 from the Defendant for services rendered in terms of a consulting agreement. No agreement currently exists between the parties.

The Plaintiff contends that the agreement has been repudiated by the Defendant and such repudiation was accepted.

On the other hand, the Defendant contends that the said agreement has been cancelled on good cause.

- [2] The nub of the action revolves around the duration for which the aforesaid agreement was concluded. The Plaintiff's case is that the said agreement was concluded for a period of one year (twelve months) and the Defendant's version is that such agreement was concluded on a month to month basis.

Common Cause Facts

- [3] The following facts are common cause or not in dispute:

- 3.1. That an agreement was concluded between the parties even though no written agreement was ever signed by both parties.
- 3.2. That the agreement was concluded for the rendering of consulting services which the Plaintiff would render to the Defendant and that the Plaintiff would be compensated for the rendering of such consulting services in an amount of R 80 000-00 per month (excluding VAT).
- 3.3. The commencement date of the aforesaid agreement would be 1 March 2018. The Plaintiff rendered consulting services to the Defendant as from the said commencement date.

- 3.4. The Plaintiff was compensated for the rendering of the service for the period of four months, that is March, April, May and June 2018.

The Pleadings

- [4] What follows represents a summary of the pleadings exchanged by the parties in the matter:

- 4.1. In the amended Particulars of Claim, the Plaintiff relies on a partly written partly oral agreement, the written portion of which was the service level agreement ("SLA") excluding clauses 11, 14.1 and 14.2 thereof.

The SLA was never signed on behalf of the Plaintiff because no consensus could be reached between the parties in respect of clause 11 thereof (the indemnity clause).

- 4.2. In terms of the Plaintiff's pleaded case, the duration of the agreement concluded between the parties, the agreement shall commence on the 1st of March 2018 and endure for a period of twelve months upto the 28 February 2019.

- 4.3. It is pleaded by the Plaintiff that the Defendant repudiated the agreement by conduct that exhibits objectively the Defendant's deliberate and unequivocal intention not to be bound by the agreement.

In the light hereof on the 26 September 2018 the Plaintiff, acting through its attorney, elected to terminate the agreement, which termination was conveyed to the Defendant, thus accepting the Defendant's repudiation¹.

¹ See Bundle 2 pages 149-150

- 4.4. Because it is not in dispute that the monthly compensation agreed upon between the parties was an amount of R 80 000-00(excluding VAT), it is pleaded that the Plaintiff would have earned an amount of R 736 000-00 for the period July 2018 to February 2019.
- 4.5. The Plaintiff pleaded that as a consequence of the Defendant's repudiation of the agreement and consequent termination, the Plaintiff saved an amount of R 46 000-00 on traveling expenses, which amount was deducted from the amount of R 736 000-00 and consequently the Plaintiff claims for payment in the amount of R 690 000-00, interest and costs.
- 4.6. In the Defendant's amended Plea, it is contended that the partly written partly oral agreement it relies upon was only concluded on the 16th of June 2018 even though it is, as aforesaid, not disputed that the commencement date agreed upon was the 1st of March 2018.
- 4.7. Accordingly, at best for the Defendant, on the pleadings as they stand the notion of month to month agreement arose for the first time more than three months after the commencement date of 1st March 2018. It is common cause that the Plaintiff rendered services with effect from the 1st of March 2018 and continued to do so upto end of June 2018
- 4.8. In paragraph 4 of the Defendants Plea it stated that the month to month period was expressly, alternatively implied agreed between the parties. However, in paragraph 6.14 of the Defendant's Plea, the Defendant pleads that the agreement was only concluded on the 16th of June 2018.

Factual Matrix

- [5] During the negotiations and conclusion of the agreement Mr. Alister Barnetson, the director of the Plaintiff represented the Plaintiff whilst the Defendant was represented by Mr. Stembiso Bosch, its Chief Executive Officer.
- Mr. Barnetson testified on behalf of the Plaintiff at the trial of this matter. Mr. Kobus van der Merwe, the accountant of the Defendant and Mr. Bosch testified on behalf of the Defendant.
- [6] Mr. Barnetson testified that he met Mr. Bosch during March 2017. After Mr. Barnetson told Mr. Bosch of his career in the development of properties spanning over three decades, Mr. Bosch wanted to involve Mr. Barnetson in the project and indicated that he has secured the right to develop student accommodation for 10 000 students on four different campuses in Limpopo, and after conveying to Mr. Barnetson that he did not have the necessary experience and expertise, he enquired whether Mr. Barnetson would consider assisting him in the aforesaid project.
- Since at least May 2017 the parties discussed the extent of the services to be rendered by the Plaintiff to the Defendant.
- Mr. Barnetson then became involved in attending meetings with learning institutions, travelling to Pretoria on regular basis to meet committees, attend meetings with Mr. Bosch's attorney, attending meetings with potential architects, engineers and quantity surveyors.
- [7] According to Mr. Barnetson a huge quantity of work was done and that he put in a huge effort in that year, referring to the year 2017.

The compensation payable to the Plaintiff was agreed at R80 000-00 per month excluding VAT. In respect of duration, the parties initially agreed on a period of 5 years. Mr. Barnetson indicated that such period gave him a reasonable opportunity of recouping some of the costs he had incurred and all the work that he has invested during the course of 2017 and early 2018. In summary, Mr. Barnetson indicated that during 2017 already it was known who the contracting parties would be, the remuneration was agreed upon and the duration of the agreement was agreed upon.

- [8] It is not in dispute that the parties envisaged the ultimate formalization of the consulting agreement in the form of a written service level agreement ("SLA"). It is common cause that although different version of the written SLA were exchanged between the parties, the Plaintiff ultimately refused to sign the last version of the SLA because he was, at that stage, not satisfied with the indemnity clause contained therein.

Mr. Bosch, on behalf of the Defendant was, on the 14th of June 2018, completely satisfied with the last version of the SLA and had signed same.

Mr. Barnetson explained that he had discussed the indemnity clause with Mr. Bosch on many occasions and that it was a particular severe indemnity clause which he was not prepared to accept. The said indemnity clause constituted the only remaining obstacle for him signing the SLA.

- [9] Mr. Barnetson testified that at that stage an oral agreement was in place where
- "important ingredients that I was concerned about had already been agreed. So what was to be incorporated in the SLA was merely the formalization (sic) of the agreement that had already been reached."*

Two days after Mr. Bosch signed the last version of the SLA, and on the 16th of June 2018, he sent an e-mail to Mr. Barnettson. This email was sent in response to Mr. Barnettson's email also dated the 16 June 2018 wherein he stated that he had received no response to his request for an amendment of the indemnity clause. In response to this, Mr. Bosch stated that:

"In the meantime we will have to agree on a month to month then.

You are already part of the managing team and signatory, we can't continue without a clear working relationship"

According to Mr. Barnettson he never agreed to this. Mr. Barnettson explained that the aforesaid email constituted merely an extension of an invitation to him to consider whether to continue on a month to month basis.

- [10] Furthermore, Mr. Barnettson stated that he never agreed to Mr. Bosch's proposal that in the meantime the parties continue on a month to month basis

According to Mr. Bosch he proposed that the parties agreed to a month-to-month agreement and that Mr. Barnettson accepted the proposal. Mr. Barnettson's evidence is that he did not accept the proposal as all the parties' duties were clearly defined in the existing oral agreement, resulting therein that it was not necessary to conclude an oral agreement on a month to month basis.

[11] The events of the 29 June 2018 resulted in some animosity between the parties and ultimately resulted in the alleged repudiation of the agreement, which repudiation was on the 26 September 2018 allegedly accepted on behalf of the Plaintiff.

[12] Mr. Barnetson's evidence is that on the 29 June 2018 he was at a meeting with Mr. Bosch and other stakeholders when he received from Mr. Kobus van der Merwe a schedule of payments to be released. The payment had been authorized by Mr. Bosch and then loaded on the computer by Mr. van der Merwe.

It was for Mr. Barnetson to release those payments. Included in that schedule was a payment of R 92 000-00 which included VAT, due and payable to the Plaintiff. Against this amount there was a comment or note to the effect that:

"SLA required. Payment not loaded"

Mr. Barnetson showed Mr. Bosch the schedule and asked whether Mr. Bosch had authorized the payments whereafter Mr. Bosch answered that he had. Mr. Barnetson then went on to release the payments including the amount due and payable to the Plaintiff.

[13] Before releasing the payments Mr. Barnetson phoned Mr. van der Merwe to tell the latter that the payment due to the Plaintiff had been authorised by Mr. Bosch and that Mr. van der Merwe could safely load the payments.

Two hours later Mr. Barnetson received a telephone call from Mr. van der Merwe who informed him that Mr. Bosch denied having authorized the payment to the Plaintiff and that he was upset by the conduct of Mr. Barnetson.

In an effort to clarify the issue with Mr. Bosch, Mr. Barnetson telephoned Mr. Bosch. However, Mr. Bosch was not willing to discuss the matter with Mr. Barnetson and slammed the phone down on him. That was the last conversation the two parties ever had with each other.

- [14] According to Mr. Barnetson the payment that he released was for the work done and the amount was due and payable to the Plaintiff. Over and above that the payment was duly approved by Mr. Bosch.

For the previous three months the Plaintiff received its payments for work done even though the SLA was not signed. He could not understand why at that stage, in June 2018, the signing of the SLA was a precondition to the payment of the Plaintiff's remuneration.

- [15] Mr. Barnetson explained that after the altercation on the 29 June 2018 he sent numerous e-mails and attempted to have a discussion with Mr. Bosch, but the e-mails were ignored and the requests for a meeting simply disregarded. After the aforesaid altercation he has never managed to again discuss the matter with Mr. Bosch and even though there was an arrangement that they meet after some e-mail correspondence, Mr. Bosch refused to again discuss the matter with Mr. Barnetson.

- [16] On the 26 September 2018 the Plaintiff's attorneys wrote a letter to the Defendant advising that the Plaintiff accepts the repudiation as a breach of contract and cancelled the agreement.

- [17] Mr. Barnetson, a 78 year old businessman was a credible and reliable witness whose version easily withstood cross-examination. During cross-examination Mr. Barnetson's version remained unaltered and he stood steadfast in denying any agreement concluded on a month to month basis.
- [18] Mr. Barnetson emphatically stated that the signing of the SLA was never a prerequisite for receiving payment of the amount agreed upon and, in any event no such condition has been pleaded by the Defendant.
- [19] Mr. Kobus van der Merwe was called as a witness for the Defendant mainly for the purpose of giving evidence on the incident of the 29th June 2018.
- Mr. van der Merwe conceded that verbal discussions took place between Mr. Barnetson and Mr. Bosch and that even though a written document was never signed by both parties, he conceded that an agreement came into existence.
- On the incident of the 29th June 2018, Mr. van der Merwe conceded that the services were indeed rendered and that the Plaintiff was entitled to payment. Furthermore Mr. van der Merwe conceded that in the preceding months payments were made to the Plaintiff in the absence of a signed SLA and accordingly the signing of an SLA was never an impediment against payment being made to Plaintiff.
- [20] Mr. Bosch confirmed in his evidence that after he initially met Mr. Barnetson regarding the expansion of a hotel, and upon learning about the extensive career of Mr. Barnetson, he agreed to engage Mr. Barnetson services for the Cleantech Group (i.e. his group of Companies).

[21] In his evidence in chief, after dealing with the different versions of the SLA and the amendment thereof, Mr. Bosch was asked

"but in the meantime, despite the fact that there is no signed SLA there have been service rendered and Tinbar has been paid.

What was the basis for that?"

Mr. Bosch's answer was

"the common cause is that there was a verbal agreement as far as the services are concerned. And upon conclusion of a signed SLA"

On the much debated e-mail dated 16th June 2018, Mr. Bosch explained his intention as follows:

"The intention is that it would be a verbal agreement upon conclusion of a signed Service Level Agreement."

[22] The Court wanted Mr. Bosch to clarify such e-mail (of the 16th June 2018) as same appeared to contain a proposal. The Court wanted to know whether the parties agreed on a month to month contract.

Mr. Bosch answer was not satisfactory and seemed to suggest that as CEO he could unilaterally agree to this. When pressed for an answer Mr. Bosch indicated that Mr. Barnetson *"never objected to it"* and when further asked by the Court whether Mr. Barnetson agreed, Mr. Bosch answered:

"I assumed he agreed because he continued working with me"

Mr. Bosch again reiterated his aforesaid assumption and stated that:

"I will assume that was the nature of our relationship, it is on a month to month".

- [23] Mr. Bosch could not recall whether initially a five year period was agreed upon between the parties.

On the duration of the agreement, the Court wanted clarification on exactly what was agreed upon between the parties.

Mr. Bosch then indicated that he proposed a period of twelve months and his recollection was that there was a counter proposal of fifteen months.

The Court thereafter asked a pertinent question:

"And ultimately what did you agree upon?" to which Mr. Bosch answered:

"Ultimately was 12 months."

On the basis of the answers proffered by Mr. Bosch above, I make a finding that a twelve months' period has been established and not a month to month agreement.

- [24] During cross- examination it was clear that Mr. Bosch was evasive and refused to make simple concessions. In my view Mr. Bosch was an evasive and unreliable witness who contradicted himself on various occasions and also attempted to change his version as his evidence progressed. I agree with Counsel for the Plaintiff's submission that Mr. Bosch's version is highly improbable and makes no commercial sense whatsoever. I agree that Mr. Barnetson would surely not have concluded an agreement on a month to month basis in circumstances where he already, during the course of 2017, spent an enormous amount of time and energy on the project. It is only logical and makes business sense that an extended agreement had to be concluded between the parties in order for Mr. Barnetson to recoup or recover such time and energy spent.

- [25] The Court accepts the version of Mr. Barnetson pertaining to the incident of the 29 June 2018 and rejects the version of Mr. Bosch in so far as it purports to justify the termination of the agreement between the parties. My reason for the acceptance and rejection of the respective parties' version is based on the credibility and reliability of the parties as witnesses

See **Stellenbosch Farmers' Winery Group Limited v Martell et cie.**²

Duration of Agreement – fixed term of 1(one) year or month to month?

- [26] The Plaintiff's version is that a partly written, partly oral agreement was concluded in terms whereof the Plaintiff was appointed as consultant for a fixed period of one year from 1 March 2018. According to the Plaintiff, the written portion of the agreement is the document attached to the particulars of claim as Annexure "POC1" (the SLA referred to above) excluding clauses 11, 14.1 and 14.2.

It is recorded in clause 4.1 of Annexure "POC1" that the agreement shall commence on the commencement date and shall endure for a period of 1(one) year and may thereafter be renewed on an annual basis.

- [27] The Defendant's version is that it was agreed partially orally between the parties on 16 June 2018 at Polokwane, alternatively Magoebaskloof that the Plaintiff would continue to render services to the Defendant on a month to month basis, against payment of R 80 000-00 per month to the Plaintiff by the Defendant.

² 2006(5) SA 548 (SCA) at para [30]

- [28] Seemingly the Defendant avers that an e-mail of dated the 16th June 2018 discussed above in this judgment, retrospectively converted the agreement that was concluded between the parties to be on a month to month basis. This does not make sense at all. Mr. Bosch's evidence in this regard is highly improbable and makes no commercial sense.

Already as at 16 June 2018 when the aforesaid e-mail was sent out, there was an existing oral agreement between the parties which commenced on 1 March 2018. The latter agreement was for a fixed term of one year. It is incomprehensible that the e-mail of the 16 June 2018 could operate retrospectively to 1 March 2018 and thereby convert the existing one year agreement to a month to month agreement.

- [29] The contents of the aforesaid e-mail of the 16 June 2018 has been set out in paragraph [9] above.

The contents of the aforesaid e-mail is unambiguous and can only be interpreted to convey that until such time that the parties have reached consensus on the written SLA, the parties will have to agree (which presupposes that no agreement has been reached in this regard) that the agreement henceforth continues on a month to month basis. The evidence of Mr. Barnetson is clearly that he never agreed to this proposal or suggestion.

The email, by no stretch of the imagination, demonstrates any agreement, expressly, tacitly or impliedly on a month to month basis. It simply says that the parties will have to, in future, rather agree to continue on a month to month basis.

In any event and according to the evidence on record, Mr. Bosch wrongly made an assumption that Mr. Barnetson agreed to his proposal or suggestion of entering into a month to month agreement.

[30] It is trite that when interpreting a contract a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.³

[31] In the matter of **Novartis SA Ltd v Maphil Trading (Pty) Ltd**⁴ the Supreme Court of Appeal stated:

“But in the process of interpreting the meaning of the language of a commercial document the Court ought generally to favour a commercial sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which the reasonable person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.”

See also:

Bothma-Bathi Transport (Edms) BPK v S Botha & Seun Transport (Edms) BPK⁵
and

Northeast Finance (Pty) Ltd v Standard Bank of South Africa Limited⁶

³ Natal Joint Municipality Pension Fund v Emdumeni Municipality 2012 (4) SA 593(SCA) at para [18]

⁴ 2016 (1) SA 518 (SCA) at para {30}

⁵ 2014 (2) SA 494 (SCA)

⁶ 2013(5) SA 1 (SCA)

- [32] On the basis of the interpretation ascribed to the e-mail of the 16 June 2018 and considering the evidence on record, I make a finding that the parties entered into an agreement for a fixed period of 1(one) year and not a month to month agreement.

Breach of Contract – repudiation or cancellation.

- [33] On the 26th September 2018 the Plaintiff's attorney enquired from the Defendant's attorney to clarify whether it is the Defendant's case that:

- 33.1. the agreement never came into being; or
- 33.2. the agreement came into being but terminated by the Defendant; or
- 33.3. if an agreement existed, whether same had been repudiated by the Defendant.

In the same letter the Plaintiff's attorney notified the Defendant, through its attorney, that the Plaintiff accepts the repudiation as a breach of contract and cancels the agreement. A claim for the immediate payment of damages in an amount of R 736 000-00 was made.

The Defendant's attorney never clarified the aforesaid.

- [34] A party wishing to claim damage resulting from repudiation of an agreement must allege and prove:

- 34.1. the agreement relied on;
- 34.2. repudiation of a fundamental term of contract;
- 34.3. an election by the innocent party to terminate;
- 34.4. communication of the election to the repudiating party; and
- 34.5. damages

On the evidence before me I am satisfied that the Plaintiff has succeeded in proving the aforementioned elements. I accept that Mr. Barnetson rightly released the payment to the Plaintiff on the 29 June 2018 because Mr. Bosch had duly authorized such payment.

The statement by Mr. Bosch during his altercation with Mr. Barnetson in a telephonic conversation on 29 June 2018 to the effect that

“You paid yourself. Our journey ends here. I can no longer continue in a relationship with you.”

amounts to a repudiation of the agreement between the Plaintiff and Defendant.

- [35] It is trite that where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention to no longer be bound by the contract, he is said to “repudiate” the contract. Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated.⁷

- [36] The Defendant avers that it became entitled to cancel the agreement as the Plaintiff breached the agreement. Specifically, that the Plaintiff’s representative, Mr. Barnetson, unilaterally, and without the knowledge and approval of Mr. Bosch informed the Defendant’s director, Mr. Kobus van der Merwe, on 29 June 2018, that

⁷ See *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA); *Highveld 7 Properties (Pty) Ltd and Others v Bailles* 1999 (4) SA 1307 (SCA)

the Plaintiff's remuneration could be released. According to the Defendant this conduct was not in good faith and in breach of the tacit, alternatively implied terms of the agreement.

[37] The evidence on record does not support the aforesaid averment by the Defendant. Mr. Barnetson was found to be a credible and reliable witness in his evidence relating to the incident of the 29 June 2018.

On the other hand, the evidence of Mr. Bosch was rejected. Mr. Bosch was found to be an evasive and unreliable witness.

It is surprising to note that after the alleged breach of contract by the Plaintiff, the Defendant never put the Plaintiff on terms to remedy the alleged breach failing which the agreement would be cancelled.

The Defendant did not even communicate the alleged cancellation of the agreement to the Plaintiff.

Conclusion

[38] I come to the conclusion that the Plaintiff has discharged the onus of proof regarding:

38.1. the conclusion of the agreement for a 1 (one) year fixed term.

38.2. the terms thereof; and

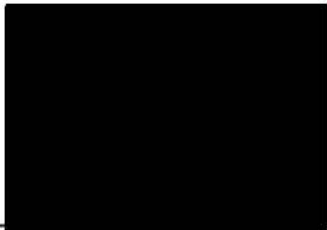
38.3. the Defendant's repudiation of the aforesaid agreement.

[39] As a consequence of the Defendant's repudiation of the agreement and the subsequent termination thereof the Plaintiff suffered financial loss (damages) in the amount of R 690 000-00, calculated as follows:

- 39.1. the remuneration of the Plaintiff would have received for the remaining period of the agreement, being the period from July 2018 to February 2019 (being a period of eight months), is the amount of R 736 000-00(inclusive of VAT);
- 39.2. as a consequence of not performing the services during the period July 2018 to February 2019, the Plaintiff saved expenses in the form of travelling costs in the aggregate amount of R 46 000-00 to be deducted from the amount of R 736 000-00.

[40] In the result I grant the following order:

- 40.1. Judgment in the favour of the Plaintiff for payment of the amount of R 690 000-00.
- 40.2. Payment of interest on the aforementioned amount of R690 000-00 a tempore morae at the prescribed rate of interest
- 40.3. Costs of suit.



**E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES

Heard on	: 9 & 10 February 2021
	5 March 2021
Judgment delivered on	: 16 March 2021
For the Plaintiff	: Adv. J.A Venter
Instructed by	: Bredells Attorneys
	c/o Kampherbeek & Pogrund Attorneys
For the Defendant	: Adv. D. Prinsloo
Instructed by	: Becker Attorneys