



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

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

Case number: 1859/2016

In the matter between:

**ANDREWS INCORPORATED**

Plaintiff

And

**FOUNDATION FOR FUTURE LEADERS SA**

Defendant

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**HEARD ON:** 26, 17 & 29 March 2019 and  
14, 15, 16 & 17 May 2019

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**JUDGMENT BY:** MATHEBULA, J

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**DELIVERED ON:** 21 OCTOBER 2019

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- [1] The Plaintiff, an incorporated firm of attorneys based in Welkom, is suing the defendant, a section 21 entity, for damages in the sum of R264 709.10 as a result of a breach of an oral agreement concluded

between the parties sometime in October 2014. In turn, the defendant has filed a counterclaim in the sum of R12 117000.00 for the loss of rental income and replacement costs for certificates and associated costs to issue new ones to deserving candidates.

### **Common Cause Facts**

- [2] It is common cause that sometime around end of August or beginning of September 2014, John William Andrews (“Andrews”) was approached by the Reverend Simpson Ngcizela “Simpson Ngcizela “ acting in his capacity as the chairman of the board of the defendant. The defendant as the owner/possessor of the property known as Erf 1918 district Welkom, Bronville conveyed to the plaintiff that it had been approached by the Department of Social Development, Free State Province (“DSD”) to lease the property commencing on 1 November 2014 until 31 May 2015. The rental payable by the tenant was the amount of R1 300 000.00 per month.
- [3] Andrews was appointed to act as an agent of the defendant as per the power of attorney dated 2 September 2014 signed by Simpson Ngcizela with authority to negotiate the sale or lease of the property as well as sign and execute all documentation on behalf of the defendant. The parties further agreed that management fee payable to him was 6% of the monthly rental.
- [4] It is also common cause that improvements had to be effected on the property before the tenant could be given occupation. This aspect is clearly mentioned in the Valuation Report under the heading “Current Condition of the Property” compiled by Evyn Thorne of Barbour and

Thorne Estate Agents, Welkom. The relevant paragraph reads as follows:-

**“There appears to be extensive damage to the electrical installation caused by burglary and vandalism.**

**Poor maintenance and general up keep of the property is also evident from the broken window panes and tree growing out of the swimming pool”**

[5] As a result the parties entered into an oral agreement that the plaintiff effect the improvements on behalf of the defendant. Pursuant to this agreement, the plaintiff was given access to the property for that purpose.

[6] These are facts that need not need to be proved by either party.

### **Facts in dispute**

[7] The dispute between the parties seem to be multifaceted. At the core of it is that the plaintiff is suing for expenses that the defendant failed to repay which were incurred as a result of the improvements. At the other angle, the defendant’s case as stated by counsel in the opening address, is that the plaintiff did not adhere to the specific terms of concluding the improvements within the stipulated period. As a result the contract which the plaintiff relies on had lapsed. On the other hand, the existence of the agreement is denied in paragraph 3 of the plea.

[7] On the issue of the counterclaim, the pertinent point is the validity of the contract purported to have been entered between the defendant

and the DSD. The question is whether the plaintiff breached the management contract leading the tenant to cancel the lease agreement resulting in the loss of several millions of rands in the form of rental income to the defendant. Further, whether the conduct of the contractor appointed by the plaintiff were negligent in carrying out the removal of the movable property causing damages also running into millions of rands.

### **Evidence for the plaintiff**

- [8] A total of four witnesses testified in support of the claim of the plaintiff and defence against the counterclaim. Briefly the evidence of Andrews is that after discussions with Simpson Ngcizela he procured a Valuation Report on the property because the latter was unhappy with the purchase price offered by the potential buyer. He wanted R40 million. Later he was informed about a lease and instructed to draft the Deed of Lease. It appears that it was signed on 25 October 2014 on behalf of the DSD. It is unknown who signed this document and what authority did (s)he have to do so. What is apparent is that Andrews signed on 29 October 2014 on behalf of the defendant.
- [9] It was agreed that the plaintiff will spend its money to do the improvements and recover such expenditure from the rental to be collected from the tenant. What followed is that the date of occupation was changed because the project could not be completed timeously. The main reason is that it rained in Welkom around that period which caused damage to some parts of the building. Noluthando Ngcizela, the daughter of Simpson Ngcizela, who was acting for the defendant

at all material times, apparently negotiated the extension with the potential tenant.

[10] The improvements were done which included electrical repairs, supply of materials, issuing of the electrical certificate of competence, the installation of WLAN cables, building and rewiring server. The leaking roof was repaired and sealed. The ceiling was replaced and the walls painted. The garden which was not in good condition was excavated, the overgrown grass cut, trees trimmed and the waste was removed. All these were procured on behalf of the defendant and paid for by the plaintiff. In addition the sum of R2 500.00 was paid to Noluthando Ngcizela. The reason for it was to cover the removal costs of her movable items from the property.

[11] As Andrews was continuing to pour money into these improvements, he became concerned about how matters were progressing. It appears that through Noluthando Ngcizela, a site inspection was arranged without his knowledge and that of the contractor. On the other hand, he was promised that the first rental payment was imminent. This later turned out to have been a mechanism of buying time. No payment was ever made till date.

[12] On 6 January 2015 a schedule of payments due by the defendant was sent to Noluthando Ngcizela per email. She responded the next day and set out a payment plan to liquidate the debt. At no stage did she deny indebtedness to the plaintiff. An updated list was also sent on 20 January 2015. It is unknown whether she responded or not. Again, I have not been referred to any protestations or denials from her that the defendant is under no obligation to pay the plaintiff.

- [13] Andrews testified that he was authorised by Noluthando Ngcizela to remove the movable items from the property to the church premises. He requested Jonas Nhlapo to do so. He was not part of the people who executed that mandate. On the day the items were removed he received a short message service from a livid Noluthando Ngcizela that her property has been damaged. He went to investigate and advised Nhlapo to lay a charge of malicious damage to property.
- [14] Although he acted as an agent of the defendant, the drafted deed of lease was given to Noluthando Ngcizela to hand over to the relevant officials attached to the department concerned. At no stage did he negotiate or liaise with any official from the concerned department. It was never returned to him. The extension was also negotiated by her as a result of the storms which caused a delay in the completion of the works. Every aspect of the improvement was approved by her.
- [15] They left the property on/or about 30 November 2014 and all was in good order except for the minor works still to be completed. The trimmer and spades were left on the premises because they had been purchased on behalf of the defendant. He denied the assertion that there was no need to purchase new air conditioners because they were already there. He reiterated that he was given an oral instruction to do so.
- [16] The next witness Khothatso Moletse who is a Director of Legal Services employed by the Department of Public Works and Infrastructure (DPWI) succinctly explained the process of procurement of services by his department. He emphasised that his

department was the custodian of all contracts with the responsibility to sign and enter into lease agreements on behalf of other government departments. No department was authorised to enter into a lease agreement for instance without the involvement of his department. This evidence was left uncontradicted.

- [17] It was the responsibility of his department to enter into discussions from the beginning to conclusion of any intended lease agreement. He denied the existence of any person called “J Marais” in his department. Confronted with the letter on page 64 of Exhibit A dated 21 January 2015, he testified that on perusal of the letterhead and its format, his conclusion is that it does not originate from his office. He was convinced that it was a fraudulent document because matters of this nature are brought to his attention. In this case, this did not serve before him.
- [18] Under cross examination he confirmed that he had exchanged correspondence with Andrews in the past, but only physically met him for the first time on 28 March 2019. Although he was extensively cross examined, his evidence remained uncontradicted and uncontested. The cross examination centred largely on what Noluthando Ngcizela would testify on under oath. These are facts which he could not have been expected to have knowledge of them.
- [19] Jonas Nhlapo, a member of Lefa Construction CC, confirmed that he received an instruction from Norman Nichols, an office manager of the plaintiff, to effect some improvements on the property. Together with his personal assistant they prepared a quotation appearing on pages 136 – 139 of Exhibit “A”. He rendered the services as agreed

and payments were made to his business as tabulated on page 140 of Exhibit A although he was still owed some amount of money.

- [20] It was his evidence that during the time that he was working there, each room of the property had some office furniture and equipment. He was also instructed to remove them to the church premises known as Sasko building. Together with his employees they carried out the task on 29 November 2014. There was a reverend and his people who were also assisting in the process. According to him everything proceeded smoothly until the fourth load when he was telephoned by Nicholas with an allegation that they have damaged the property. He was pleasantly surprised because he had been present all the time when the removal was under way.
- [21] At one stage he saw Noluthando Ngcizela holding a brick in an angry mood damaging the items. They were no longer packed in the manner he had left them. In his wisdom he found it prudent to report the matter to the police.
- [22] The evidence of Norman Nicholas corroborates the evidence of Andrews and Nhlapo in material aspects. Simpson and Noluthando Ngcizela were closely involved in the project to effect the improvements. The latter was more involved and interacted with him more frequently at each and every stage of the works. He is the one who cashed the cheque of R2 500.00 at the bank and handed the cash to her meant to cover removal costs of the items from the property to the Sasko premises.



[23] Cross examination revealed that the trimmer was given to the defendant. In any event it was never used at the offices of the plaintiff. It was put to him that there was no request to do any electrical repairs. His response was that prior to engaging Shava Electrical there was a Harmony Mine employee who was doing the electrical repairs. Because he was progressing at a snail pace, it was agreed to engage the business entity that he appointed to render the services. The only clear mandate was not to do any repairs in the reception area. It was his observation that the items to be removed were old files and nothing that was in current use. They were removed from a building that was old and not utilised for a long period. He conceded that the state they were in at Sasko premises was in disarray.

### **Evidence for the defendant**

[24] Only one witness namely Noluthando Ngcizela testified on behalf of the defendant. The property was leased to the Department of Sports, Arts and Culture until 2013 when their lease agreement expired by effluxion of time. They started with the clean-up and embarked on some improvements.

[25] In August 2014 they received a letter purported to be from Eliah Masopha, Head of the Department of Social Development expressing interest in purchasing the property. It is common cause that the services of Andrews were procured to obtain a Valuation Report and subsequently mandated to handle all legal aspects to facilitate the transaction.

- [26] The mandate to Andrews was to conclude a lease agreement between the defendant and the relevant government department with a rental of R1,3 million per month. The idea was to lease the property for at least six months and eventually sell it. The paperwork was deferred to Andrews to finalise and she delivered the copy of the lease agreement to the department.
- [27] On an appointed day in the company of Nicholas, they went to inspect the building. Apparently Andrews commented that it was huge and needed a lot of maintenance. Nicholas arranged another inspection and on this occasion accompanied by Simpson Ngcizela. Andrews intimated that the ceiling needs to be replaced but they were against it because they needed the money to be paid first. According to her the property needed minor “touch ups” and it was leased voetstoots. The department agreed that they will lease out the property as it is.
- [28] The only proviso was that the reception area must be fixed. It was at this point that Andrews “volunteered” to do the improvements. At some stage Nicholas mentioned to her that he had purchased a trimmer. She considered it a great idea but she was not of the view that it was for her own account. On occasions that she had requested to use it, it was always returned to the plaintiff.
- [29] The contract of the electrician from Harmony mine was terminated by Andrews. The improvements done on the reception area was actually a downgrade from its previous state. The property was opened and she noticed that expensive cameras were missing from where they left them. The contractors were slow to complete the

works. The excuse about the storms was a concocted narrative in order to placate the department. This line worked because occupation date was delayed to 18 November 2014.

[30] It was her evidence that she placed a call to the current Premier of the Province then Member of the Executive Council for Social Development to weigh in on her behalf on the officials that they should give her more time. The reason(s) advanced to her is that they were hard at work to transform the property to make it look fresher. Unknown to them she was denied access to it on the orders of Andrews and could not determine the progress (if any). Around 8 December 2014 she chased out the contractor from the property because the work was not yet completed. In January 2015 she approached Samuel Mashinini the Member of the Executive Council for Public Works and Infrastructure, Free State to leverage on the officials not to terminate the agreement with the defendant and extended the date of occupation to the end of January 2015.

[31] The instructions to Lefa Construction to remove the items did not originate from her but Andrews. She had already told them not to do it because of the importance of the documents covering the entire activities of the business of the defendant. These included and not limited to records of the defendant and students who received tuition from them in the past. Andrews removed the goods on his own without authorisation.

[32] The removal was not properly co-ordinated. She observed employees of Lefa Construction sitting on the computers at the back of the bakkie. When she saw this, she grabbed a brick and only

dropped it when the motor vehicle stopped next to her. Undoubtedly she was in a furious mood when she realised such damages caused to their documents. Andrews admitted that the removal was not done properly.

- [33] She testified that Andrews did not act as per mandate and as such the defendant lost the rental income of approximately R7,8 million. Even though he did not act per instructions, the defendant did not terminate the mandate of the plaintiff. The defendant was party to the improvements pertaining to the reception and the expenses incurred by the plaintiff were not refunded.

### **Onus of proof**

- [34] In this matter the plaintiff bears the onus of proof regarding the main claim and the defendant bears the onus of proof concerning the counterclaim.

- [35] As alluded to in the preceding paragraphs the parties are ad idem that they interred into an oral agreement mandating the plaintiff to act as a Managing Agent in respect of the property. The crux of the dispute is in relation to improvements and the amount payable thereof.

### **Analysis of evidence**

- [36] I had the opportunity to listen to and observe the witnesses as they gave evidence in court. I was impressed by the witnesses on behalf of the plaintiff. I found them to be credible and honest witnesses.

They readily made concessions where appropriate and narrated their version in a candid and lucid manner. To that extent I have no qualms to accept the veracity of their evidence. Noluthando Ngcizela on behalf of the defendant was a poor witness whose evidence was fraught with contradictions and improbabilities. I formed the impression that she was supremely arrogant, self-absorbed and disruptive person with very little respect for court processes. On a number of occasions she will burst out into laughter or pulled faces when there was nothing amusing. I had to reprimand her repeatedly to preserve the decorum of the court. Perhaps that was a lame way of distracting the witnesses and disrupting the proceedings. She did not respond to questions asked and instead gave irrelevant and convoluted answers. I reject her evidence.

[37] The evidence of Andrews confirmed by her is that it was a term of agreement that the expenses incurred in the improvements will be deducted from the first rental received from the tenant. Therefore there can be no talk about the defendant not being liable to pay the plaintiff. The only difference between the two is that Andrews refers to all the improvements whereas the defendant refers only to the reception area. The pertinent question is whether there was an agreement between them that he effect all the improvements claimed.

[38] The evidence of Andrews and Nicholas was unequivocally clear that the decision to improve the property was an agreement entered into between the parties. The defendant was represented by Simpson and

Noluthando Ngcizela. The plaintiff contracted Lefa Construction to proceed with the works. Other contractors were engaged to deliver different services.

[39] There are contradictions in the case for the defendant. In paragraph 2 of the Plea, the defendant even denies the conclusion of the agreement that appointed Andrews as the Managing Agent. No mention whatsoever regarding the improvement of the reception. The evidence is that the tenant wanted to lease the property as it is. The other version is that only the reception had to be improved. In paragraph 11.3 of the defendant's closing arguments, the submission is that the plaintiff undertook to renovate the property with payment to be deducted from rental. I have already alluded to the submission of defendant's counsel in the opening address. There is no doubt that these versions are contradictory.

[40] At all times Noluthando Ngcizela was aware that there were improvements taking place. If Andrews was acting beyond his mandate, nothing was done to stop him. He was even allowed to terminate the contract of the electrician from Harmony Mine and replace him with his own. Again Simpson and Noluthando Ngcizela stood idle when all this was taking place under their watch. I am implored to accept her version that Andrews even went to the extent of barring her to enter the property despite being a *de facto* owner of it. All this happening to jeopardise a multi-million deal. The improbabilities of this version are outweighed by the probabilities that there was an agreement to improve the property as explained by Andrews and Nicholas.

- [41] She was aware that a trimmer had been purchased to tender the grounds. At same stage she even utilised it. The evidence of Andrews, Nicholas and Nhlapo corroborate each other that the grounds had to be attended to as well. I reject her version that the lawn was in good condition and need not be attended to. It will not make sense that such an equipment will be purchased for any other purpose except to tender the lawn. The unequivocal evidence, which I accept, is that it remained with the defendant after the work was done.
- [42] There is a dispute regarding the amount of R2 500.00 which forms part of the claim. The evidence of Andrews is that he drew the “cash cheque” and handed it to Nicholas. The latter testified that he cashed it and handed the cash to Noluthando Ngcizela. Her evidence is just a denial. I am inclined to accept the evidence of both Andrews and Nicholas leading me to conclude that she received the money which was paid for the purpose of covering the transport costs.
- [43] Page 62 and 63 of Exhibit “A” contains a breakdown of all the moneys the plaintiff demanded from the defendant. The amount of R2 500.00 is one of the items. I was not referred to any correspondence where she is denying indebtedness in this regard. Under cross examination she could not give a plausible explanation why she did not contest this issue. I conclude that she received the money thus making the defendant liable to repay it.
- [44] There is no doubt that payments were made to different service providers for services rendered. A lengthy and pointless cross examination ensued that the documents relied upon were quotations

not invoices. On paragraph 13.2 of the defendant's closing arguments, this aspect is repeated though in a toned down fashion. The submission is that no invoices showing that services were rendered were submitted on evidence except on a few items. There is no explanation which items are specifically referred to in this assertion. The argument is further developed that quotation(s) cannot be used to justify proof of expenditure.

[45] This submission is mutually destructive to the concession on paragraph 11.5 that the plaintiff then went to do all renovations even those that were not agreed to. I fail to understand then what is still the bone of contention.

[46] Noluthando Ngcizela agreed that these improvements were effected. Further I was not referred to any evidence that they were dissatisfied with the works or there was some poor workmanship. Neither was there evidence led pertaining to which improvements were unnecessary. The payments were made in accordance with what was rendered by different service providers. Plausible explanation was provided regarding all documents be it a quotation or proof of payment to support the claim. I deem it to constitute the best evidence in the circumstances.

[47] It was conceded on behalf of the plaintiff that the amounts of R7 147.07 and R2 923.8 must be deducted from the claim. These amounts have not been paid and remain outstanding. I agree.

[48] I now turn to the counterclaim brought by the defendant. The crux of the defendant's case is that because of Andrew's ineptness in



executing his responsibilities as an agent, the department cancelled the lease agreement resulting in a loss of millions of rands in the form of rental income.

[49] The fact of the matter is that Andrews was given the information and drafted what is a standard lease agreement. It was taken to the relevant people by Noluthando Ngcizela. Even the extensions were negotiated by her through her connections with high ranking politicians. The evidence of Moletse is that the Provincial Government does not conduct its business in that manner. Furthermore as a custodian of contracts, such an agreement with the defendant did not serve in his office. In short it did not exist. The officials purported to have signed the letters were not employed by his department. The suggestion that a deviation to normal tender procedures was possible was not supported by any evidence. My view is that this transaction depended on political patronage and connections given how politicians instead of bureaucrats were allegedly involved in it. In the event that this is true and it is not just name dropping, then it constitute contravention of Section 217 of the Constitution of the Republic Act 108 of 1996 which requires an organ of State to procure goods and services with a system that is fair, equitable, transparent and competitive. This one does not pass the muster. My conclusion is that there was no such a contract from the very beginning.

[50] Even if I am wrong on this aspect, this claim will fail on another ground. There was no evidence led in respect of the alleged cancellation of the Lease Agreement between the defendant and the department. There is no evidence tendered as to who did that, where did he/she cancel it, why did he/she cancel it and when did that take

place. To compound the many problems encountered by the defendant, there is no evidence that the property was even lettable. Therefore this part of the claim ought to fail.

[51] It is so that the goods were in disarray in the room that they were packed in. This is apparent in photos 7 to 10 as well as 23 to 28 of Exhibit “B”. I have no doubt that there must have been damages suffered to some equipment during the removal. However, even though a party has established that some loss has been suffered, the quantum of damages to which it is entitled must still be proved.<sup>1</sup>

[52] In **Hersman v Shapiro** the court noted that there are cases where the assessment by the Court is very little more than an estimate. Further that “where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of damages suffered still, if it is the best evidence available, the Court must use and arrive at a conclusion based upon it.”<sup>2</sup>

[53] The case for the defendant falls short on this aspect. No evidence was either orally or documentary tendered to prove these claims. I note with interest that in the defendant’s closing arguments, this aspect is not even remotely argued. The figures as computed does not assist this Court at all. The basis for the calculation and whether indeed these are actual or estimate amounts remains the domain of the defendant alone. It cannot be classified as best evidence at all. Instead it is failure to prove a claim. Therefore it cannot succeed.

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<sup>1</sup> *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A)

<sup>2</sup> 1926 TPD 367 at 369

## Costs

[54] This brings me to the issue of costs. The principle repeatedly upheld in our courts is that, the costs follow the results. The defendant is the losing party and must pay the costs.

## Order

[55] In the premises I make the following order:-

- 55.1. Judgement is granted in favour of the plaintiff in the sum of R228 324.03 with interest thereon calculated at the rate prescribed by law from 1 January 2015 until date of final payment.
- 55.2. The defendant's counterclaim is dismissed.
- 55.3. The defendant is ordered to pay the costs of both the main action and counterclaim on a party and party scale.

**M. A. MATHEBULA, J**

On behalf of Plaintiff:

Adv. J J F Hefer SC

Instructed by:

Lovius Block

Bloemfontein

On behalf of Defendant:

Adv. S Motlounq

Instructed by:

Bokwa Inc

Bloemfontein