



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: 293/2015

Heard on: 01/11/2018

Delivered: 19/02/2019

In the matter between

SCHALK MELCHIOR GROBBELAAR H/A

AFRIPLAN TOWN AND REGIONAL PLANNERS

Plaintiff

And

TREMAINE CRAWFORD PROPERTY PORTFOLIO

Defendant

JUDGMENT

PAKATI J

- [1] The plaintiff, Schalk Melchior Grobbelaar t/a Afriplan Town and Regional Planners, issued summons against the defendant, Tremain Crawford Property Portfolio (the developer of the land), a company registered in terms of the statute of the Republic of South Africa with its registered place of business at Riverton Road 1, on 17 February 2015 for services rendered amounting to R350 000-00. The summons was served by affixing a copy at the principal door at the company's registered address on 17 February 2015.

- [2] The plaintiff's claim is based on a partial written and partial oral agreement entered into by the parties around June 2013. The plaintiff represented himself and the defendant, by Mr Tremain Crawford. The partial written agreement which is undisputed reads:

'APPOINTMENT AS REGISTERED TOWN PLANNER

AFRIPLAN TOWN AND REGIONAL PLANNERS

I, Tremain Crawford, in my capacity as director of TCPP, hereby appoint AFRIPLAN TOWN AND REGIONAL PLANNERS to design a new layout for consolidated Erf 36926, Kimberley.

Both parties understand that the existing township layout on Erf 36926, Kimberley is fraught with design errors and cannot be successfully implemented. Afriplan Town and Regional Planners is therefore mandated to design a completely new township layout that would replace and cancel the existing design.

The layout should conform to the conditions as stipulated in attached council resolution.

In terms of this appointment you must ensure that the layout is submitted to and approved by the local Municipality.

Both parties agree to a fee of R350 000-00 (Three hundred and fifty thousand rand) inclusive of VAT, if applicable, as full and final payment. The fee is payable as follows:

50% on appointment (within 7 days after signing of this appointment letter)

50% on submission (within 7 days after signing of this appointment letter)

The administration and application costs are for the owner.

Your appointment is valid from date of signature hereof.'

- [3] The plaintiff alleges that it complied with its obligations in terms of the agreement and despite demand the defendant has failed to pay the amount agreed upon by the parties.
- [4] In its plea filed on 04 June 2015 the defendant states that the material explicit, alternatively tacit terms of the agreement were that 50% of the professional fee would be paid to the plaintiff on the following conditions:
- 4.1 That the plaintiff's township plan in respect of the township development complied with the entire town planning requirements

and other resolutions and decisions that the Sol Plaatje Municipality imposed in respect of the town planning;

4.2 That the plaintiff's plan had to maximise the use of Erf 36926 in that the maximum amount of erven possible had to be developed on the Erf; and

4.3 That the plaintiff had to exercise reasonable care and skill in the performance of its mandate in accordance with the generally accepted standards and with due professional care required of a town planner.

[5] The defendant alleges that the plaintiff failed to perform in terms of the agreement in that:

5.1 A proper site inspection as would be expected from a town planner was not done;

5.2 The plaintiff breached the agreement and the conditions for payment were not met;

5.3 The plaintiff is not entitled to his professional fee.

The defendant requested that the plaintiff's claim be dismissed with costs.

[6] On 08 April 2015 the plaintiff filed a notice applying for summary judgment accompanied by an affidavit verifying the cause of action and the amount claimed. The matter was set down for hearing on 24 April 2015. The defendant filed a notice of opposition dated 15 May 2015. On that day the matter was postponed to 29 May 2015 and the defendant was ordered to pay the wasted costs. The defendant filed his opposing affidavit dated 27 May 2015.

[7] In its affidavit opposing summary judgment the defendant stated at paragraph 7.1 that he would have to appoint another town planner to perform the mandate and draft an amended plan that would have

to be submitted and approved. In para 7.2 he stated that the plaintiff had breached the agreement to such an extent that it would have a counter-claim against it due to failure to exercise the necessary care. He then claimed to have a *bona fide* defence hence the order granted by Erasmus AJ on 29 May 2015.

- [8] On 29 May 2015 Erasmus AJ granted the following order by agreement between the parties:

- '1. Die aansoek om summiere vonnis word van die hand gewys;
- 2. Verlof word aan die respondent verleen om die aksie te verdedig;
- 3. Dat 29 Mei 2015 geag word as die datum waarop die verweerder die aksie verdedig het;
- 4. Dat die koste van die aansoek, koste in die aksie sal wees.'

- [9] On 15 June 2015 the plaintiff's attorneys, Van De Wall Incorporated, withdrew as attorneys of record and Duncan & Rothman took over as the plaintiff's attorneys on 28 August 2017. On 10 November 2017 Engelsman Magabane Incorporated withdrew as attorneys of record of the defendant.

- [10] The plaintiff set the matter down for trial to be heard on 01 November 2018. On 08 and 09 October 2018 the Deputy Sheriff attempted to serve the notice of set down but did not find anyone at the defendant's business address. On 10 October 2018 the notice could still not be served. Ms Crawford, Mr Crawford's mother, informed the deputy Sheriff that he had left the address and that his current address was Swanns Street. On 24 October 2018 the Deputy Sheriff served the notice of set down by affixing it at the post-box at the defendant's registered address because the defendant's mother refused to receive a copy from him stating that the defendant never comes home or call. The Companies and Intellectual Property Commission ("CIPC") document shows that the defendant's company was still active on 23 October 2018 and that the director's registered business address was Riverton 1, 8301.

- [11] On 01 November 2018 neither the defendant nor his legal representative were at court. The defendant's name was called outside the court room three times but there was no response. Mr Steyn, on behalf of the plaintiff, indicated that attempts had been made to call the defendant but to no avail.
- [12] On 01 November 2018 Mr Grobbelaar testified that after passing Matric he acquired a three year national certificate in engineering survey in Pretoria. He joined the municipality in Kimberley where the councillor at the time, approved that he study town and regional planning in Cape Town. He completed a higher diploma equivalent to a B-Tech Degree after 1992. At the time he was working as a Municipal Manager at Dikgatlong Municipality. He studied his Master's Degree in Town and Regional Planning at the University of Free State and qualified in 2000. He became a part-time lecturer at the same University lecturing planning law. He assisted Professor Van Wyk from University of South Africa in town and regional planning when she wrote her book. His name appears in the preview of the said book. In 2003 he worked at COCSTA as the only town and regional planner. He was also registered as a professor in Town and Regional Planning and considers himself as an expert in the field. When he placed his qualifications and experience on record it was clear that he was undoubtedly an expert.
- [13] Mr Grobbelaar testified further that he was approached by the defendant who had a plan drawn up by a Town Planner from Stables Engineering & Town Planning Firm in Kimberley. He stated that there were mistakes in the said plan and he was asked to perform professional services for another layout of the plan. According to him the original plan had already been approved by the Council. He testified that he retired in 2015 but currently does private work. He has been doing this professional work since 1976.

[14] Mr Grobbelaar testified further that he redrafted the township layout plan and was on board all the time. The defendant was present throughout and was satisfied with his progress. He testified that he did site-seeing and inspection a couple of times. He showed the difference between the original and the redrafted plan (Exhibit "B"). He also pointed out a green part on the existing plan that shows a stormy water trench and stated that no houses could be built there as they would be damaged by the trench. He then opened the trench surface drainage in the new draft plan. The previous layout was revised in a letter (Exhibit "C") that he addressed to the Municipality accompanied with photographs to neutralise it. It reads thus:

'REDESIGN OF ERF 36926, KIMNDUSTRIA, KIMBERLEY

The development and design (layout plan) of erf 36926, Kimberley had been approved by Council C54 dated 6 February 2008. During the implantation phase, it was found that the proposed layout did not take into account the storm water trench that runs from South to North, as can be seen on the following photos, map and topographic analysis.

Extension was given to redesign the layout till 19 July 2015. Attached find copies of the new layout (smg/2013/2).

The design makes provision for the following facilities:

Erf Numbers	Erven	Land Use	Area	%
1 to 462	462	Single Residential	210646	45.8
463 to 464	2	General Residential	20717	4.5
465 to 467	3	Church	4786	1.0
468	1	Crèche	1090	0.2
469	1	Clinic	1051	0.2
470	1	School	23661	5.1
471 to 473	3	Business	11475	2.5
474 to 496	23	Public open space	53067	11.5
497 to 498	2	Sewer Servitude	4586	1.0
		Roads – 20m	48442	10.5
		Streets	81478	17.7
	498	Total	460999	100.0

The facilities provided, match the facilities provided for in the original layout. The 20m collector roads gather the traffic from internal streets and provide easy access to the existing road pattern. There is no crossing in the layout.

A 18m street provide easy access to and from the school, clinic and crèche, as well as the business sites and connect the 20m roads. The general residential site was design to give pedestrian access to the community facilities. The design creates the feeling of a central business area and the placing of the facilities compliments the principle.

The existing storm water trench, servitude and public open space design create a green feeling and the street system provide for a pleasant and safe residential atmosphere due to the fact that there is no traffic passing through the suburb.

The design creates a holistic unit for a pleasant township to live in.

For the allocation of erf numbers with the Surveyor-General and the final design of the infrastructure, your urgent approval will be appreciated."

[15] Mr Grobbelaar stated that the plan he drew up complied with all the requirements of Sol Plaatje Municipality as far as planning is concerned. He testified further that he performed according to the agreement and with the accepted standards and with due professional care required of a professional planner. He stated that he did not receive payment from the defendant after he complied in terms of the agreement. He stated further that he made several calls and sent a number of emails to the defendant and he always said he would make payment in seven days' time. One of the emails he forwarded is dated 06 April 2014 (Exh "D"). At his home they gave the defendant a nickname namely, 'seven days'. The defendant's legal representative also made the seven days' promises which never came to fruition. Exhibit "D" reads:

'Ek is regtig teleurgesteld veral as in ag geneem word wat ek alles die afgelope 7 maande deur gegaan het. Daar is egter nou maar druk op my as voorheen. Dit noop my om stappe te doen soos in my vorige e-pos verwys.

Nog steeds antwoord jy nie my oproepe of my e-posse nie.

So indien die fooie met rente nie teen die 15de April [2014] inbetaal is nie, moet ek ongelukkig 'n hof interdik kry om die projek te stop totdat my fooie betaal is.

Ongelukkig dink ek nie dis in jou of my belang om sulke drastiese stappe te neem nie, maar alles in die lewe het 'n begin en 'n einde.'

[16] Rule 39 (1)¹ provides that if, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he has discharged such burden. In **IRISH & CO (NOW IRISH & MENELL ROSENBERG INC) v KRITZAS**² Levy AJ held:

'It has long been recognised that where in an ordinary action a party chooses not to appear at the trial or, having appeared, withdraws from the trial the other party remaining need not content himself with an order for absolution from the instance but may elect to lead evidence in order to satisfy the Court that he is entitled to a judgment on the issue raised by those claims.'

[17] After summary judgment was refused the defendant had an opportunity to testify and defend the action but failed to do so. The plaintiff gave *viva voce* evidence thereby proving his claim to the satisfaction of the Court. In my view, it is entitled to judgment with costs.

In the circumstances I grant the following order:

- 1. The defendant, Tremaine Crawford Properties Portfolio, is ordered to pay to the plaintiff, Schalk Melchior Grobbelaar t/a Afriplan Town and Regional Planners, an amount of R350 000-00 plus interest *a tempore morae*.**
- 2. The defendant is ordered to pay costs of the application on a scale as between party and party.**

BM PAKATI

¹ Uniform Rules of Court

² 1992 (2) SA 623 at 632I

JUDGE-NORTHERN CAPE DIVISION, KIMBERLEY

On behalf of the Plaintiff: Mr JG Steyn
Instructed by: Duncan & Rothman

On behalf of the Defendant: No Appearance