



**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 number: 4787/2016

In the matter between:

FBS ELECTRONICS BK
(Registration number: 92/02415/23)

Applicant

and

HSH CONSTRUCTION AFRICA (PTY) LTD
(Registration number: 2004/008250/07)

Respondent

HEARD ON: 15 DECEMBER 2016

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 24 MAY 2017

[1] These are motion proceedings. The applicant sues the respondent for payment of an amount of R213 993.67 together with interest thereon at the rate of 10,25% per annum plus costs. The claim is based on the work done and services rendered. The

amount is said to be the balance of the debt owed, by the respondent to the applicant. The respondent opposes the application.

- [2] On 15 December 2016 I granted the application. I ordered the respondent to pay the capital claim plus interest thereon with costs. On 6 January 2017 the respondent filed notice in terms of Rule 49(1)(c) whereby I was called upon to give reasons for the order. The notice was brought to my attention but I inadvertently neglected to note the matter on my list of reserved judgments as I usually do. It was not until Thursday 11 May 2017 that my secretary brought the file to my attention following an enquiry she received from one of the parties. I apologise for the awful delay. It is not a reflection of how I ordinarily do business.
- [3] The respondent invited public tenders. The tender invitation was signed on 25 July 2013. On 5 August 2013 the tender document was completed and signed on behalf of the applicant. The applicant's quotation also dated 5 August 2013 was submitted to the respondent – see “anx fbs2”.
- [4] The respondent accepted the applicant's tender. The respondent notified the applicant about the acceptance of the tender in writing on 15 May 2014. Later on two of the three types of the agreed installations were cancelled by agreement between the parties. After such cancellation, the applicant performed certain works in connection with the supply, delivery and installation of the required fire detection electronic system.

[5] On 19 February 2015 the applicant certified that it had installed the required electronic system – see “anx fbs4”, a document described as an installation certificate.

[6] The applicant billed the respondent on a few occasions. The respondent paid the first two bills but refused to pay the following three bills:

Invoice No. 3477 dated 15 April 2015 R75830.46

Invoice No. 3494 dated 11 May 2015 R58346.34

Invoice No. 3521 dated 8 June 2015 R79816.87

[7] The respondent’s refusal was based on two defences. In the first place it alleged that the fire detectors installed by the applicant were defective and that the applicant was informed about the defects during the course of July 2016. The essence of the defence was that, the applicant failed to comply with its contractual obligations to that extent. See par 13.1 of the answering affidavit.

[8] The applicant furnished the respondent with the certificate of completion way back on 19 February 2015. Upon receipt of the certificate the respondent did not immediately complain to the applicant that, contrary to the import of the certificate, the applicant had rendered defective performance. Instead the respondent’s case was that the applicant was informed about the defective fire detectors during July 2016, some 17 months after the applicant had completed the project and had accordingly notified the respondent. The respondent did not venture to

explain why it had taken such a long time to complain about the alleged defective performance, if indeed there was any.

[9] The applicant's third invoice was rendered to the respondent on 15 April 2015, the fourth on 11 May 2015 and fifth and last on 8 June 2015. The respondent admitted receipt of all those three invoices. Notwithstanding receipt of each invoice, the respondent did not complain about the alleged defective fire defectors. Those three further lost opportunities of protesting about the alleged shoddy work done by applicant, were inconsistent with the respondent's belated complaint.

[10] On 14 April 2015, Mr Willem Meintjies, acting on behalf of the respondent, wrote and circulated an email which reads:

"Dear all

Please provide us with your claims for Careline by not later than 12H00 on Monday 20 April 2015.

Regards

Willem Meintjies
Cell: 082 498 7880"

Among those that Mr Mentjies had emailed was a certain Tersia Stevenson, of the applicant. The email was more important for what it did not say than what it actually said. Instead of raising any query, however trivial, about the respondent's performance,

the applicant was called upon to submit its claim before 20 April 2015.

[11] The email was a spontaneous declaration of a debtor's intention to make an unconditional payment provided a creditor's claim was submitted before the specified deadline. Well, Ms Tersia Stevenson, acting on behalf of the applicant, did just that on 15 April 2015 – see “anx fbs5”. The question has to be asked. Why did the respondent volunteer to call upon the applicant to submit its claim if the applicant was in material breach of the contract? Nowhere in the respondent's answering affidavit, could I find a semblance of an answer to that question. The email was telling against the respondent's belated defence concerning the alleged defect in the fire detectors.

[12] The respondent's defence about the alleged defect was, according to the applicant, raised for the very first time in the answering affidavit filed on 15 November 2016. Mr Cronje attacked the respondent's claim that in July 2016 he informed the applicant about the defective fire detectors. Indeed par 13.1 of the respondent's answering affidavit contained dry bones without any flesh. There was no indication as to who on behalf of the respondent complained? who on behalf of the applicant received the complaint? precisely where, when and how the complaint was conveyed to the applicant? The defence of the defective fire detectors was cast in disturbingly vague terms.

[13] The applicant's last and still unpaid invoice was issued on 8 June 2015. The applicant was never informed that the respondent was

withholding payment pending proper completion of the work. The applicant's case was that every invoice became due and payable within 30 days after the rendering thereof and not after the completion of the work or project. The applicant previously invoiced the respondent on 7 July 2014 for R12654 and the respondent paid. Even though the respondent made that first payment on 12 December 2014, more than five months later, it did so before the applicant had completed the project.

[14] On 13 March 2015 the respondent also made another payment less than 30 days after the applicant's invoice of 19 February 2015. Again there was no explanation as to why the respondent paid invoice 3439 in spite of the alleged breach of the contract by the applicant. All these are material considerations. They compel the conclusion that the respondent's defence concerning the fire detectors was a belated afterthought. In view of all these considerations, I am inclined to dismiss the respondent's first defence.

[15] In the second place, the respondent alleged that the applicant did not comply with the contract in that the applicant failed to give the hospital personnel the necessary training in connection with the fire alarms.

[16] At par 13.2 of the answering affidavit, the respondent's deponent said the following:

“13.2 Die Applikant versuim het om die nodige opleiding aan personeel van die hospitaal te verskaf ten aansien van die brandalarms, wat deur Applikant

ge-installeer is, soos meer volledig blyk uit paragraaf 9 van Aanhangsel “FSB1”, waar sodanige opleiding deur die Applikant in die tenderdokument vervat is.”

- [17] At par 11.2 of the replying affidavit, the applicant’s deponent replied as follows:

“11.2 Ek verwys die Agbare Hof ook na aanhangsel “**RFS5**” op ‘n dokument wat ‘n uiteensetting gee van die Applikant se kwotasie, die bestelling wat die Respondent geplaas het en die Applikant se bestelling bevestiging welke per e-pos ontvang is, die hof sal bemerk dat daar onder by “5 Bill Nr 4 Commissioning and training (Phase 1 + 2)” geen bedrag ingevul is nie. Daar is dus geen bestelling vir die opleiding geplaas nie.”

- [18] The respondent’s version was not supported by any confirmatory affidavit by the maintenance manager or any responsible senior functionary of the careline clinic. On the contrary, the applicant’s version was supported by the respondent’s terrain foreman, Lazarus Sekele. During the course of argument, Ms Collins could not combat the contention that in terms of “anx rfs5” the applicant was not contractually bound to render the alleged training in fire alarms.

- [19] As earlier indicated, the applicant furnished the respondent with the required certificate of completion on 19 February 2015. In addition to the certificate, the applicant also furnished the respondent with the installation information sheet and the site information sheet – vide “anx fbs4”. Twenty three days later, on 13 March 2015 to be exact, the respondent paid. The respondent did not refuse to pay. The respondent did not withhold payment

on the ground that the applicant, in breach of the contract, had neglected to provide the training as agreed. The respondent simply paid without any protest. It is important to stress that the respondent paid after having been provided with the certificate of completion. The document presupposed that the applicant had done and finished all its contractual obligations. That would, of course, have included personnel training, if the applicant was contractually bound to render such training.

[20] On 31 August 2015 the aforesaid three documents, “anx fbs4” were again mailed to the respondent. By then there were 3 unpaid invoices. The respondent did not acknowledge receipt of the applicant’s annexure consisting of three documents, among them a certificate of completion. On 10 September 2015 the respondent sent an email, “anx rfb1”, to the applicant. There was no query, complaint or protest noted as far as training was concerned. On 10 October 2015, the applicant once more furnished the respondent with the same documentation, “anx fbs 4”. Ever since then until the current proceedings were initiated on 10 October 2016 there was deafening silence on the part of the respondent in connection with the question of training. Enough about the respondent’s second defence. I am not impressed. I would, therefore, dismiss the second defence as well.

[21] Attached to the founding affidavit, was “anx fbs 8”, a summary which shows how the total sum of the applicant’s claim of R213 993.67 is made up and calculated. The applicant’s averments to this effect were set out in par 13. The respondent

admitted the *quantum* of the applicant's claim – vide par 15 answering affidavit where the respondent answered:

“Ek erken die inhoud van hierdie paragraaf. In terme van die ooreenkoms tussen die Respondent en Applikant, is die Respondent geregtig om betaling van die Applikant te weerhou, tot en met finale voltooiing van die tender. Applikant het tot op hede versuim om die dienste te lewer en toerusting behoorlik te installeer, ooreenkomstig Applikant se tender en is die Applikant bygevolg nie geregtig op die betaling van die bedrag van R213 993.67 nie.”

[22] The representatives of the parties seemingly had a telephonic conversation on 18 January 2016 – vide “anx rfs 3”. During the course of such conversation the respondent's representative advanced the dispute between the respondent and a third party as the reason for the non-payment of the applicant's outstanding balance. The respondent asked for an extension of time. The applicant acceded to the respondent's request and undertook to delay legal action until 31 March 2016.

[23] All those aspects of the conversation were confirmed by the applicant in an email to the respondent sent on 19 January 2016. The applicant's representative reminded the respondent's representative that the applicant had executed its obligations in terms of the contract and expected to be paid. The respondent did not repudiate those averments. On 17 March 2016, fourteen days before the expiry of the extension, the applicant reminded the respondent about its telephonic undertaking of 18 January 2016 to pay the outstanding balance on 31 March 2016. Yet again the respondent did not deny. It is trite that failure to answer an unfavourable letter may have adverse implications.

- [24] In the instant matter the respondent failed, not once but twice, to answer to emails whose contents were highly prejudicial to its case. According to the email of 19 January 2016 the respondent hardly ever complained about the alleged defective or incomplete performance rendered by the applicant in breach of the contract. Instead the respondent undertook to pay the applicant's claim on a specific date. All that the respondent did was to ask for an extension of time in order to pay and not in order to contest the claim.
- [25] In my view the conversation of 18 January 2016 strongly militates against the defences raised by the respondent on 15 November 2016. The whole argument relative to the respondent's defence was nothing but a storm in the tea cup. It was a classic example of a fabricated ploy to delay the finalization of the matter. The sole purpose of the respondent's opposition of the relief sought, is to frustrate the applicant. On the merits, I am satisfied that the applicant has an unassailable case. I would, therefore, be inclined to grant the relief as set out in the notice of motion.
- [26] Now I turn to the preliminary points taken by the respondent. As regards the first preliminary point, the respondent contends that this court does not have jurisdiction to entertain the matter.
- [27] The foundation of the contention is to be found at par 3 of the respondent's answering affidavit.

“3.3 Die Applikant se kwotasie is aanvaar te Kimberley en is alle werk wat verrig is deur die Applikant, ten aansien van die kwotasie/tenders, het

geskied binne die jurisdiksie van die Noord-Kaap en was die Applikant bygevolg nie geregtig om bogemelde Hof te nader vir die regsverligting, soos uiteengesit in hierdie aansoek nie.”

- [28] The contrary contention is to be found at par 17 of the applicant’s replying affidavit.

“Die Respondent handel nie met die jurisdiksionele aspek van die skuldoorsaak naamlik dat betaling in die Vrystaat moes geskied nie. Ek is geadviseer dat slegs een element van ‘n skuldoorsaak binne die regsgebied van hierdie Hof hoed (sic) te bestaan ten einde aan hierdie Hof jurisdiksie te verleen.”

- [29] The respondent raised the technical defense that this court lacked jurisdiction to adjudicate the dispute. The following were the respondent’s grounds of objection:

- 29.1 that the respondent’s registered address and principal place of business were situate outside jurisdiction of this court;
- 29.2 that the agreement between the parties was concluded in Kimberley, Northern Cape Province;
- 29.3 that all the services rendered by the applicant were rendered in the said province;
- 29.4 that breach of contract was committed in that province;
- 29.5 that the amount of the applicant’s claim was justiciable in the regional court of the said province.

- [30] At par 7 of the founding affidavit, the applicant alleged, through its deponent:

“Hierdie Hof het jurisdiksie om die aansoek aan te hoor uit hoofde daarvan dat die Applikant die bestelling van die Respondent binne die grense van die Hof aanvaar het en betaling deur die Respondent aan die Applikant binne die grense van die Vrystaat geskied.”

- [31] At par 9 of the answering affidavit, the respondent alleged, through its deponent:

“Die bewerings hierin vervat word ontken en word Applikant tot bewys daarvan geplaas.

9.2 Die Respondent het die Applikant se tender (aanbod) te Kimberley aanvaar en is die Applikant daarvan in kennis gestel.

9.3 Applikant het die goedere en dienste gelewer te Kimberley ten aansien van die tender en ontken Respondent derhalwe dat die Agbare Hof oor enige jurisdiksie beskik om hierdie aangeleentheid te bereg, soos reeds hierbo vermeld.”

- [32] Ms Collins submitted that it was incumbent upon the applicant to prove, not only the conclusion of the contract and its terms but also the specific district in which the breach occurred – Jones & Buckle: Volume 1: The Act, 54-5.

- [33] Mr Cronje argued that in this particular matter the applicant was obliged to make payment into the respondent’s bank account held in Bloemfontein and not Kimberley, and that the applicant made

no such payment whatsoever. Consequently he submitted that breach occurred within the jurisdiction of this court.

- [34] I am persuaded by Mr Cronje's submission. The respondent was obliged to render performance within the jurisdiction of this court. Although the applicant was obliged to render performance outside the jurisdiction of this court, that fact alone was not decisive. **Geyser v Nedbank Limited**: In re **Nedbank Limited v Geyser** 2006 (5) SA 355 (W) at 360E – 362J.

- [35] In **Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd** 1985 (3) SA 633 (D) at 643B-D the court, per Kumblen J held:

“Turning to the other ground relied upon by Mr *Shaw* for submitting that this Court has jurisdiction, it is well established that for breach of contract a plaintiff may sue in the Court of the place where the contract was entered into, the *forum contractus*, which in the wide sense is understood to include the place where the contract is to be performed.”

- [36] In **Frank Wright (Pty) Ltd v Corticas 'BLM' Ltd** 1948 (4) SA 456 (c) at 462-3 Searle J, considering whether the court had jurisdiction or not, said:

“The only one of these which is arguable as applicable in the present case is *ratione contractus*, which covers not only the place where the contract was made but also the *locus solutionis*, where the contract has to be performed either in whole or in part - *vide Cape Explosives Works, Ltd v SA Oil & Fats Industries, Ltd. (supra)*, per KOTZE, J.P., at pp. 269, 273; *Ex parte Filen: In re The Angus* (1908, E.D.C. 51); *Ex parte Provincial Administration, O.F.S v John Adams & Co.* (1929 OPD 35 at pp. 43 - 4), etc., but the breach in respect of which the defendant is sued must be a breach of a duty which he

was bound to perform within the jurisdiction - *vide Taboryski v Schweizer & Aspirion, N.O. (supra); Walker v Taylor* (1934, W.L.D. 101)."

- [37] It was common cause that the respondent was a *peregrinus* of this court; that the respondent was *domiciled* in the Northern Cape Province; that the work had to be performed in that province and that it was the applicant's primary duty to perform the agreed work over there. The *ratione contractus* was one cardinal consideration – **Veneta Minerania**, *supra*.

It was also common cause that the applicant was an *incola* of this court; that the applicant was *domiciled* in the Free State Province; that it was the primary duty of the respondent to pay the agreed remuneration or contract price; that the respondent's acceptance of the offer was conveyed to the applicant in Bloemfontein where the business order was also placed and that the respondent had furnished the applicant with details of a bank account held within the area of jurisdiction of this court. It follows, therefore, that the contract partially had to be performed in Bloemfontein as well. The *locus solutionis* was, therefore a material consideration from which this court derived its jurisdiction to entertain the matter – **Frank Wright**, *supra*. That was another cardinal consideration.

- [38] The contractual breach complained of concerned a duty whereby the respondent was bound to perform by paying the respondent within the jurisdiction of this court. I am not persuaded, that the applicant's infringed contractual right to payment did not flow from a contract that has direct connection with the area of jurisdiction

of this court. To find otherwise would disregard the respondent's choice of an outside contractant and its tacit acceptance of the offer within the area of the jurisdiction of this court. The respondent's duty to render performance by paying at the specific or implicit place was of no less importance than the applicant's duty to render performance by doing the work at the specific place.

[39] Similarly the respondent's breach concerned an infringement of a contractual right directly connected with an area within the jurisdiction of this court. Let me assume, for instance, that the contract was concluded in Durban; that the work had to be done in Kimberley and that the respondent whose contractual obligation it was to do the work had failed to render complete performance. The applicant would have been entitled to sue the respondent out of the Northern Cape Province on the ground that the respondent's breach concerned an infringement of a contractual right directly connected with an area within the jurisdiction of the court in that Province.

[40] In those circumstances, the respondent would not have successfully raised the objection that the Northern Cape Province had no jurisdiction because Durban was the *forum contractus*. The point being that breach of the duty to render performance at a particular place, confers jurisdiction on the court of the place concerned. The court of the place where the contract was concluded is not always necessarily the court with exclusive jurisdiction to entertain a dispute. Such court may have such

jurisdiction depending on the peculiar circumstances of the particular case - **Frank Wright**, *supra*.

[41] Let me conclude the topic by pointing out that the courts, in the **Veneta Mineraria**, *supra* and the **Frank Wright**, *supra* were grappling with the issue of jurisdiction where both parties involved were foreign *peregrini*. In such situations courts are, more often than not, called upon to apply foreign law to adjudicate the dispute. To make matters worse, there may even be a preceding dispute as to which foreign law must be applied. The situation is different in this instance. The applicant is an *incola* of this court. Although the respondent is a *peregrinus* of this court, the law of the two jurisdictions is nonetheless the same.

[42] In the founding affidavit the applicant alleged:

“Op of ongeveer **15 Mei 2014** het die Respondent die kwotasie aanvaar en ‘n skriftelike bestelling met nr. **H.S.H.** (sic) **57803** uitgereik en aan die Applikant versend. ‘n Ware afskrif van die bestelling word hierby aangeheg as aanhangsel “**FBS3**”. Die Nurse Call en Security Installation deel van die bestelling is later gekanselleer en is daar net voortgegaan met die installasie van die Fire Detection deel van die order.”

[43] In the answering affidavit, the respondent answered as follows:

“12.1 Die bewerings hierin vervat word erken, behalwe ontken Respondent dat die kwotasie deur Respondent per bestelling opgevolg is.”

[44] The respondent's denial was inconsistent with "anx fbs3".

- [45] I deem it necessary to quote par 10 applicant's heads of argument.

“Die Respondent ontken dat hy die bestelling geplaas het, maar versuim om te verduidelik waarom Applikant in besit geplaas is van 'n bestelling met nommer **57803**, gedateer **15 Mei 2014**. Die ontkenning is aanduidend dat dit die finale stap van sluiting van die ooreenkoms in die Vrystaatse Provinsie wil ontduik.”

There was substance in the submission.

- [46] For the reasons enumerated above, I would dismiss the first point *in limine*. The point was not well taken, in my view.
- [47] As regards the second preliminary point, the respondent contended that, in view of the material factual dispute of which the applicant was fully aware, the applicant should have brought the matter to court by way of action instead of motion procedure.
- [48] The respondent articulated this second preliminary point as follows:

“The cause of action based on the breach of a contract entails that a Plaintiff should prove the following to become entitle to judgment in its favour: **the conclusion of the contract and the breach of contract**. Thus, a Plaintiff suing on a contract must allege and prove both the conclusion of the contract and its terms, as well as that the breach of the contract occurred within a specific district. The parties to a contract are bound to respect the agreement and to perform all the obligations that be depose upon them: *pacta sunt servanda*. If either party, by an act or omission and without lawful

excuse, fails in any way to honour his or her contractual obligations, he or she commits a breach of contract.”

[49] The applicant denied the respondent’s allegation. The denials were amplified at para 10 of the respondent’s affidavit.

[50] I deem it unnecessary to labour this point save to say that I have thoroughly considered the substantive merits of the matter. I have already determined the merits in favour of the applicant. I have found that the proven facts were against the respondent’s version. The defensive version of the respondent was unmeritorious. It dismally failed the test of real, genuine and *bona fide* measuring yardstick of dispute which delineates the defining boundary between motion proceedings and action proceedings. **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A); **Wightman t/a JW Construction v Headfour (Pty) Ltd & Another** 2008 (3) SA 371 (SCA).

[51] On the facts, I am satisfied that the former and not the latter was well-suited for the fair adjudication of the matter at hand. There was no really genuine dispute on the material facts in the instant matter. In this instance, the facts averred by the applicant which have been admitted by the respondent together with the facts alleged by the respondent justify a final order. Moreover, the denials by the respondent of material facts averred by the applicant raised no real, genuine and *bona fide* dispute of fact to warrant *viva voce* evidence - **Plascon-Evans**, supra. Therefore, decisions such as **Standard Bank of South Africa v Efrocken & Newman** 1924 AD 171; **Guggenstein v Rosenbaum** (2) 1961

(4) SA 21 (WLD) 31; **Ex Parte Spenazze & Another N.N.O** 1985 (3) SA 650 (AD) are of no assistance to the respondent.

[52] In the absence of a meritorious defence, there could have been no real, genuine and *bona fide* dispute to underpin or validate action procedure. I have considered the alleged factual dispute in the present matter. However, I could find no genuine factual dispute which could not be fairly adjudicated without recourse to the hearing of oral evidence - Plascon-Evans, *supra* at 634I; **Peterson v Cuthbert Co. Ltd** 1945 AD 420 on 428. It being the case here, the second point *in limine* cannot be sustained. It was not well-taken. I would be inclined to dismiss it as well.

[53] These are the reasons for the order that I gave *ex tempore*. I deem it necessary to repeat the order for the sake of completeness. I ordered the respondent to pay to the applicant

53.1 The capital sum of R213 993.67;

53.2 Interest thereon at the rate of 10.25% per annum and

53.3 The costs of the application.

M.H RAMPAL, J

On behalf of applicant:
Instructed by:

Adv PR Cronje
L & V Prokureurs
Bloemfontein

On behalf of respondent: Adv L Collins
Instructed by: Kramer Weihmann & Joubert Inc
Bloemfontein
and
Engelsman Magabane Inc
Kimberley