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IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES:
~~YES~~ / NO.

(3) REVISED.

DATE 2/8/13

SIGNATURE

CASE NO: 32796/08

DATE: 5/8/2013

In the matter between:

HOLM, JORDAAN & PARTNERS CC

Plaintiff

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Defendant

JUDGMENT

J W LOUW, J

[1] On the night of 3 March 1997, the greater part of the west block of the municipal headquarters of the City Council of Pretoria, known as

Munitoria, was destroyed by fire and the south block seriously damaged. This resulted in a huge disruption of personnel and the functions of the City Council. With the assistance of the public and private sector, the personnel of the various departments were re-established in alternative accommodation. The west block was subsequently demolished and the south block renovated and upgraded.

- [2] During November 1998, the City Council launched a design competition, which was called Project Phoenix, for the building of a new municipal headquarters on the Munitoria site. Architects firms practicing in Pretoria were invited to participate. The competition brief provided that the final floor area had to be 46 000 m², with a permissible variance of 5 000 m² either way. The total cost was not to exceed R160 million. The competition was conducted in two stages. For the first stage, the entrants had to communicate the key concepts of their proposed design for the new complex as a whole. Detailed planning was not required. Each of the stage one finalists would receive an amount of R10 000.00 to defray costs incurred in the submission of a second stage entry. Finalists in the second stage had to produce, *inter alia*, full design concept (sketch) plans of all levels and sections. The winner of the competition would be announced at an awards ceremony at the end of the second stage.

- [3] Clause 2.16 of the competition rules and conditions provided the following:

"Subject to his/her compliance with the conditions contained herein, the finalist of the scheme placed first shall be commissioned as architect for the project, which commission shall constitute the first prize. The Promotor¹ shall enter into an agreement with the winner, the terms of which shall be the standard terms of agreement between the City Council of Pretoria and architects for a service including design, contract documentation, contract administration and inspection of the works. The R10 000,00 award made to the winner as a stage one finalist shall form part of the design concept (sketch plan) fee. Should the project not be proceeded with after the adjudication of the second stage, the winner will be paid the design concept (sketch plan) fee.

While it is the intention of the Promotor to proceed with the final design and documentation and with the construction of the new complex should the go-ahead be obtained from the City Council, the promoter is under no obligation to do so."

- [4] The plaintiff was, and still is, an incorporated firm of architects which practices in Pretoria. It entered the competition and was one of the finalists of stage one. It thereafter produced the work which was required for stage two. During July 1999, the City Council of Pretoria announced that the plaintiff was the winner of the

¹ The City Council of Pretoria is referred to in the competition rules as "the Promotor".

competition. The plaintiff became aware of the City Council's decision and on 30 August 1999 it wrote the following in a letter to the City Council under the heading "Phoenix Project":

"With reference to competition brief rules and conditions for the above architectural design competition, we hereby confirm our appointment in terms of clause 2.16 of the above document.

We also confirm that our appointment will be in terms of the Standard Terms of Agreement between the City Council of Pretoria for architectural services."

- [5] The plaintiff was informed by the defendant in writing on 13 September 1999 that its entry had been adjudged the winning entry. On 26 October 1999, the plaintiff confirmed in writing that its appointment as architect for the project would only follow once the City Council of Pretoria had taken a decision to proceed with the project.
- [6] On 27 September 2000, before any decision was taken by the City Council of Pretoria, the defendant became the successor in law of the City Council of Pretoria in terms of the provisions of the Local Government: Municipal Structures Act, 117 of 1998. The defendant also became the successor in law of twelve other municipalities. As a result, the need for accommodation escalated dramatically. In

2001 or early 2002, the defendant approached the plaintiff to assist it with a new needs assessment which had to be carried out, to which the plaintiff referred as a bulking exercise. The plaintiff obliged. On 14 April 2003, the plaintiff wrote the following in a letter to the defendant's executive mayor:

"Further to our meeting and presentation on 10 April 2003 with yourself, Amanda Kruger and members of the Executive Committee, we hereby confirm the following:

- 1. That the explanation of the concept and the intent of the competition was in principle acceptable to the meeting.*
- 2. At the meeting it was confirmed that the 46 000 m² bruto (sic) floor area could increase to 76 000 – 80 000 m²."*

[7] The letter proceeds to refer to the fact that the plaintiff was asked at the meeting whether it would be prepared to work in a joint venture with a BEE company and that the plaintiff had indicated that it would be prepared to do so in view of the increase in the scope of the project.

[8] Ten days later, on 24 April 2003, a report by the defendant's then acting municipal manager, Mr. E R du Toit, served before the defendant's council in which it was proposed that certain resolutions

be adopted. The relevant resolutions which were adopted, were the following:

1. *That the building of a new Municipal Headquarters for the City of Tshwane Metropolitan Municipality on the Munitoria site, be approved.*
2. *That the winning firm of the competition, Messrs Horn (sic) Jordaan & Partners, be commissioned to render the architectural services required for the building of a new Municipal Headquarters on condition that such services are rendered through a joint venture partnership with a BEE appointed by Council on its (Council) own terms and condition (sic).*
3.
4.
5. *That the various funding options for the rebuilding of a Municipal Headquarters be investigated by the Municipal Manager in consultation with the Chief Financial Officer.*
6.
7. *That funds for professional fees payable for consultants for work done in the pre-implementation phase be approved in the CTMM's 2003/2004 operating budget."*

[9] On 24 March 2003, before the abovementioned resolutions were adopted, the plaintiff rendered an interim account to the defendant

which was based on an escalated construction cost of R222 192 960.00. The needs analysis subsequently, in August 2003, indicated that the defendant required a building of 114 031 m². Ms. Kruger, an employee of the defendant, estimated that the construction cost thereof would be R1,231 billion.

[10] By letter dated 14 May 2003, the defendant informed the plaintiff of its council's resolution confirming the plaintiff's appointment as architect for the project. The letter further quotes the resolution requiring that the services be rendered through a joint venture partnership with a BEE firm appointed by council on its own terms and conditions. The letter then proceeds to state the following:

"Further meetings with the Municipality and yourself regarding the above requirement for the appointment will be held regarding the selection and details of the BEE component in this contract.

The final terms and conditions regarding the appointment, brief and remuneration details of this contract will follow after agreement of the above details by all parties concerned."

[11] On 4 June 2003, the plaintiff responded by letter in which it confirmed its acceptance of the appointment and also that it was prepared to accept the condition of BEE involvement. Steps were thereafter taken, in which the plaintiff took part, with a view to the

appointment of a BEE partner for the plaintiff. It is common cause that such appointment was never made and that no agreement was concluded in that regard. The reason for this is to be found in a letter which the defendant wrote to the plaintiff on 15 October 2003 in which the plaintiff was requested not to proceed with any further work on the project until further instruction. The reason given in the letter was that the plaintiff was considering various options to finance the project, that tenders had been invited for a financial consultant to advise the Council on this matter and that a decision would be taken once the consultant's report had been considered.

[12] The appointed consultant concluded that the Phoenix project was unaffordable to the defendant. The defendant then, in October 2004, initiated a new study into the feasibility of a so-called Public Private Partnership ("PPP") model and concluded that a PPP model, which would mobilise private sector capital at private sector risk while providing a stable and predictable accommodation cost environment over a long period, was the only viable option for completing the project.²

[13] On 25 January 2007, the defendant wrote a letter to the plaintiff, the relevant part of which reads as follows:

² This information appears from the report of Mr. Peter Aborn on the defendant's feasibility study, dated 16 December 2005, annexure "I" to the plaintiff's particulars of claim.

"RE: NEW MUNICIPAL HEADQUARTERS PROJECT:
TERMINATION OF THE PHOENIX PROJECT

1. We refer to the above matter and to various correspondences (sic) between yourselves and City of Tshwane Metropolitan Municipality ("CTMM") in which inter alia the possible termination of the Project Phoenix as well as your purported appointment to serve as Architect thereto were discussed.
2. As outlined in the correspondence referred to above, CTMM has undertaken (sic) an analysis of its options including a Public private partnership ("PPP") framework with a view to selecting the most feasible means of obtaining accommodation and associated service delivery requirements iro the New Municipal HQ Project.
3. In light of this options analysis referred to above, CTMM has determined that the establishment of a new and sustainable service delivery environment ("required services") by way of a PPP framework in terms of Part 1 and Part 2 of the Municipal Finance Management Act 56 of 2003 ("MFMA") and the regulations thereof, represents the only feasible option among those set out for review by National Treasury, these options including Project Phoenix.
4. In the circumstance, following a process of public participation and cognizance taken by Council of representations by affected parties, including yourselves, Council adopted a resolution on 24 August 2006 in terms of which inter alia:

- 4.1 *Council resolution of 24 April 2003, is rescinded;*
 - 4.2 *The procurement of CTMM's required services by way of a PPP was given in principle approval to proceed to procurement.*
5. *It must be indicated that the above determination was reached based on consideration inter alia of the following factors:*
- 5.1 *the Phoenix Project, for which scheme you were appointed, was found to be unaffordable to the CTMM;*
 - 5.2 *National Treasury, on review of the CTMM's project feasibility study, prepared according to Treasury guidelines, recommends that the PPP option was affordable to the City;*
 - 5.3 *In view of the fact that the PPP framework option requires transfer much of the project risk to the private party, notably including design risk, CTMM cannot impose either a particular design scheme or a predetermined Architect (including your design) on bidders for the project; and*
 - 5.4 *Your appointment to Phoenix project was subject to the condition, amongst others, that CTMM had reserved the right not to proceed with the Project.*
6. *In light of the foregoing, CTMM takes the opportunity to hereby notify Holm Jordaen and Partners of the Council's*

decision of 24 August 2006 as expressed in the resolution to rescind Phoenix project, and that the CTMM will consequently no longer proceed with appointment of Holm Jordaan and Partners."

[14] The plaintiff responded by letter on 28 March 2007 in which it is stated that the defendant's letter of 25 January 2007 constituted a repudiation of the agreement between the parties, which it accepted, and that the plaintiff intended to proceed with legal action against the defendant for the damage which it suffered. This is that action. The plaintiff claims damages in the amount of R44 152 190,31 and interest. At the commencement of the hearing and by agreement between the parties, I ordered that the *quantum* of the plaintiff's claim against the defendant be separated and postponed *sine die*, and that all other issues be adjudicated in the present hearing.

[15] The plaintiff's case is that it was appointed as architect for the rebuilding of the municipal headquarters, including the design, contract documentation, contract administration and inspection of the works (which are work stages 3, 4 and 5 of an architect's appointment) in accordance with the initial competition brief, rules and conditions and the "*increased output specifications*". The increased output specifications is a reference to the increased spatial requirements of the defendant above the original 46 000 m².

It was submitted by Adv. Wagener SC, who appeared for the plaintiff, that the plaintiff's appointment in April 2003 was not for the original 46 000 m², but for some larger area.

[16] It was argued by Mr. Wagener that the appointment of an architect was not a *mandatum* which could be terminated by the client at any stage, as in the case of other professionals such as attorneys, advocates and doctors, but that it was contract of *locatio conductio operis*.³ In such case, it was submitted, there is no automatic right of termination, and, unless it was agreed that the client would be entitled to terminate the contract after the appointment of the architect, a termination by the client would constitute a repudiation of the agreement which would entitle the architect to claim damages from the client.

[17] I shall assume that an architect's appointment is usually one of *locatio conductio operis* and that Mr. Wagener's submissions in regard to the termination thereof are correct. The defendant, however, pleaded⁴ that it was a term of the plaintiff's appointment that, even if the City Council of Pretoria decided to proceed with the construction of the proposed new complex, it would be under no obligation to proceed with the final design and documentation or with the construction of the new complex and that, should the

³ He relied, *inter alia*, on the judgment in Marais v Bezuidenhout, 1999 (3) SA 988 (WLD) at 994F

⁴ Par. 3.3.4 of the defendant's plea.

project not be proceeded with, the competition winner would be entitled to payment of only the design concept (sketch plan) fee. This plea is obviously based on the contents of the last paragraph of paragraph 2.16 of the competition rules. It is convenient to quote it again:

"While it is the intention of the Promotor to proceed with the final design and documentation and with the construction of the new complex should the go-ahead be obtained from the City Council, the Promotor is under no obligation to do so."

[18] Mr. Wagener submitted that the defendant could not rely on this provision after it appointed the plaintiff as architect for the project. I disagree. The paragraph must be read in conjunction with the previous paragraph in which it is stated that the winner of the competition *"shall be commissioned as architect for the project"*. The winner of the competition must therefore be appointed as the architect for the project, but his or her appointment is subject to the promotor's right to decide not to proceed with the project despite the City Council giving the go-ahead for the project. The defendant was therefore entitled to decide not to proceed with the project for which the plaintiff was the appointed architect. That is precisely what happened. The result thereof is that the plaintiff was only

entitled to be paid its fees for the design concept (sketch plan) and that it is not entitled to claim any damages from the defendant.

[19] There is a further reason why the plaintiff is precluded from claiming damages from the defendant. Clause 2.16 of the competition rules provides that the promoter shall enter into an agreement with the winner, the terms of which shall be the standard terms of agreement between the City Council of Pretoria and architects for a service including design, contract documentation, contract administration and inspection of works. Mr. Wagener accepted that such standard contract was incorporated by reference into the agreement in terms whereof the plaintiff was appointed, and that it was not necessary for the parties to have signed such standard agreement or even that the plaintiff should have had sight thereof. He submitted, however, that there was no evidence before the court of the contents of such standard agreement.

[20] During the cross-examination of Mr. van Aswegen, one of the members of the plaintiff, by Mr. S J Maritz SC, who appeared for the plaintiff with Mr. A. Vorster, he was questioned about his evidence that he never saw the defendant's standard agreement for architects. It was pointed out to him that it was one of the documents which had been discovered by the plaintiff and that

there was a stamp of the plaintiff at the top of the first page which indicated that it was received by "Deon" on 11 July 2001 and that there was also an inscription at the bottom of the first page which indicated that the document had been faxed to "Deon van Aswegen" on the same date by the defendant. Mr. van Aswegen answered that he could not remember the specific document, but the probabilities are overwhelming that he did receive it on the date indicated.

[21] It was submitted by Mr. Wagener that the plaintiff had previously done work for the defendant and that there may have been different versions of the same document. There was no evidence that the plaintiff had done any work for the defendant after it won the competition for the Phoenix project. In my view, the probabilities are overwhelming that the document discovered by the plaintiff was the operative document contemplated by clause 2.16 of the competition rules.

[22] Mr. van Aswegen was referred in cross-examination to clause 7 of the document, which provides the following:

"SUSPENSION OF THE PROJECT

The Executive Director may at any time instruct the suspension of the work on the project. The Architect shall be

entitled to full remuneration for all services rendered and disbursements up to the date of such instruction or such fee that shall be negotiated between the Council and the Architect."

Mr. van Aswegen confirmed that this clause accorded with the standard practice in the architects' profession.

[23] Mr. Wagener submitted that a distinction should be drawn between a suspension of the work and the termination of an architect's appointment, and that clause 7 of the standard agreement only dealt with the employer's right to suspend the work. Clause 7 does not refer to a temporary suspension of the work. It must therefore, in my view, be interpreted to include an indefinite or even a permanent suspension. And that is what the defendant did. It decided not to proceed with Project Phoenix. In terms of clause 7 of the standard agreement, and in terms of the standard practice of architects, the plaintiff is then only entitled to be paid for the work done and not for any damage suffered.

[24] In the result, I conclude that the plaintiff is not entitled to the payment of any damages by the defendant. The plaintiff's claim is accordingly dismissed with costs, such costs to include the costs of two counsel.

J W LOUW
JUDGE OF THE NORTH GAUTENG HIGH COURT

FOR THE PLAINTIFF: ADV. S.D. WAGENER SC

INSTRUCTED BY: COETZER & PARTNERS, PRETORIA

FOR THE DEFENDANT: ADV. S.J. MARITZ SC, ADV. A. VORSTER

INSTRUCTED BY: HUGO & NGWENYA ATTORNEYS