FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 4302/2012

In the matter of:

UMZANI PLANT & SALES BK Applicant

and

ICEBURG TRADING 717 BK t/a
PRIDE ROCK DRILLING & BLASTING Respondent

JUDGEMENT BY: MOLOI, J

HEARD ON: 21 FEBRUARY 2013

DELIVERED ON: 28 FEBRUARY 2013

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[1] In this matter the applicant sought an order in terms of which the respondent is ordered to pay to the applicant a contractual amount of R297 828,84.

[2] During April 2012, the applicant rented out four tipper trucks and an excavator to the respondent for purposes of conveying crushed stone used in road construction. It was agreed that the applicant would render a bill (invoice) on a monthly basis to the respondent and that the latter would effect settlement thereof within seven days of its receipt. Several such bills (invoices) were delivered to the respondent by the applicant and only a few were settled. This led to certain negotiations taking place between the parties to have the issue resolved

amicably. The respondent failed, however, to settle the other invoices, none the less.

[3] Eventually on 3 October 2012 in the presence of certain witnesses an agreement was reached to finally settle the applicant's claim at an amount of R297 828,84. This settlement was reached after the applicant made significant concessions to the respondent. On 10 October 2012 the respondent confirmed the settlement amount agreed to and offered to liquidate the amount in three monthly instalments of R99 276,28 which was, of course, not part of the settlement reached.

[4] The respondent raised several defences why it should not pay the agreed amount. In its conjuncture, the respondent alleged the existence of factual disputes that necessitated the matter being referred to trial. To support this fallacy, the respondent took issue with the operational hours the vehicles were actually in use; he queried the accuracy of the monthly invoices sent to him and brought into question the breakdown of the excavator, etc. The respondent subsequently made own calculations and argued that its indebtedness to the applicant was in the amount of R199 439,57. With regard to its own letter confirming the agreement reached on 3 October 2012 the respondent alleged the letter was written and sent by its accountant without the director's authorisation and that the director (member) had no knowledge thereof. The respondent

also raised the question of absence of a signature on the said letter. On the eve of the hearing the respondent filed additional heads of argument suggesting the letter in question was an offer was not accepted and consequently there was no basis for claiming the amount mentioned in it relying on **Kotze v Suid-Westelike Transvaalse Landbou Koöperasie** 2005 (2) SA 295 SCA on 301G – I.

[5] The alleged dispute of fact raised by the respondent cannot fly and is illusionary. The dispute need to be genuine and *bona fide* to demand referral to a hearing: **Parker v GWB Kinsey & Co (Pty) Ltd** 1988 (1) SA 42 ZS at 51E and **Von Steen v Von Steen** 1984 (2) SA 203 (T) at 206B. The court needs to analyse the evidence and apply its discretion to determine whether a genuine dispute of fact existed or not: **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 115 (T) at 1162. Moreover all the disputes had been cleared when an agreement was sealed on 3 October 2012. The court is of the view that this defence and the request to refer the matter to trial does not hold water as it is artificial in character. The facts before the court are of sufficient clarity to make a ruling.

[6] As to the hours the vehicles were in actual use as indicated above, the applicant during the meeting of 3 October 2012 made certain adjustments that were accepted by all present. Equally the breakdown of the excavator was dealt with during that meeting. The personal calculations made by the

respondent fixing the amount owing at R199 439,57 were done after the agreement was reached on 3 October 2012 and were not discussed with anybody. These calculations were made without consultation and cannot alter the agreement reached on 3 October 2012. The letter written to confirm the settlement reached on 3 October 2012 allegedly written by the accountant without authority is key to the determination of this matter. The person who wrote and transmitted the letter to the applicant was part of the meeting that was holding on that day. If there was no such meeting held or if she was not present when the agreement was reached, how would she have arrived at exactly the amount claimed by the applicant? The respondent confirmed the meeting was held on 3 October 2012. The said letter was written on 10 October 2012 and the respondent stated that it only became aware of its existence when opposing papers were drawn. The said opposing papers were attested to on 23 November 2012. The likelihood of this not being disclosed to the members of the close corporation by the accountant is remote and near impossible. Moreover, in the said letter the method of payment, viz three monthly instalments of R99 276,28 was raised and it is impossible that the accountant, on her own and without knowledge of the members, can decide how to expend the funds of the close corporation.

[7] What bedevils the respondent’s ease further is the confirmatory affidavit of the accountant to the effect that she

did not have the authority nor permission to write and dispatch the said letter. Such is impossible in a business environment as an accountant cannot act without mandate or take decisions without being authorised to do so either by policy directives or the members of the close corporation itself. Furthermore it is easy for her to be influenced or even dictated to how to depose failing which she could be relieved of her responsibilities. The contents of the said letter were, however not denied. The fact that the respondent questioned the validity of the letter in that it was not signed can equally not be sustained. On the contrary it showed that the respondent was prepared to clutch at every straw and having to avoid liability. The counsel for the respondent was asked to cite one authority requiring a letter to be valid only if signed but could not. A letter on the respondent's own letterhead, is not a contract or a will that cannot be binding if not signed. What further confirmed the attitude of the respondent was to later include, as a defence, the fact that the letter contained an offer and by refusing to accept the instalment payments made in it, the applicant rejected the offer leaving nothing to base the claim on. This assertion contradicted what was said above, viz that the letter was written without authority and that the respondent did not know about it.

[8] The court is more than satisfied that the applicant's claim must succeed and the respondent's defences must be dismissed. The frivolous nature of the defences raised in order to frustrate the applicant's claim should rightfully be visited with a

punitive cost order. The defences are diverse and contradictory.

ORDER

[9] The following order is made in the premises:

9.1 The respondent is ordered to pay the amount of R297 828,84 to the applicant;

9.2 The respondent is ordered to pay interest on the said amount of R297 828,84 at the rate of 15,5% p.a. calculated from 3 October 2012 until the full amount shall have been paid.

9.3 The respondent is ordered to pay the costs of the application on an attorney and client scale.

K. J. MOLOI, J

On behalf of the applicant: Adv. D M Grewar
Instructed by:
L & V Attorneys
BLOEMFONTEIN

On behalf of the respondent: Adv. MDJ Steenkamp

Instructed by:
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