

31/3/2009
NOT REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH DIVISION PRETORIA

CASE NUMBER: A 966/2006

In the matter between:

HEINZELMANN DILL

And

ELS ENSLIN BOUKONTRAKTEURS CC

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	☒ YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	☒ YES
(3) REVISED:	☒ YES
30/3/09 DATE	 SIGNATURE

Appellant
Respondent

JUDGMENT

INTRODUCTION

1. The respondent engaged the professional services of the appellant through an oral agreement entered into at Nelspruit during November or December 2000.
2. The appellant is a partnership of quantity surveyors and the respondent a construction business.
3. The terms of the oral agreement form the subject of one of the disputed issues in an action for damages instituted by the respondent against the appellant.
4. It is appellant's case that the original oral agreement was amended, orally or by implication, to exclude the appellant's liability for damages

arising from a failure to perform its mandate professionally and expertly in regard to the civil portion of the bill of quantities of the second tender.

5. It is common cause that the appellant was originally engaged to price the bills of quantities for three tenders for construction work to be executed for the Mpumalanga Provincial Government at or in connection with the Barberton Correctional Institution. This agreement was entered into orally and the only point the court *a quo* had to decide when the matter came before it, as agreed by the parties in terms of Rule 32 (4), was the question whether this agreement was amended as alleged by the appellant.

THE PARTIES

6. The appellant is Heinzelmann Dill, a partnership of quantity surveyors, practicing as such at Suite 804, The Pinnacle, 1 Parkin Street, Nelspruit, Mpumalanga. At all relevant times hereto, the partnership was represented by Mr Saunders, a duly registered and admitted quantity surveyor and a partner of the appellant.
7. The respondent is Els Enslin Boukontrakteur CC, a close corporation engaged upon the building trade, with registered address at 20 Kruger Street, Constantia Building, White River, Mpumalanga. At all relevant times the respondent was represented by Mr MacDonald, one of its two members.

THE CONTRACT

8. The parties entered into an oral agreement in terms of which the appellant agreed to price the bills of quantities forming part of tender documentation of three tenders the respondent intended to submit to the Mpumalanga Provincial Government for certain repair and maintenance work at the Barberton Correctional Facility.
9. The appellant agreed to obtain the necessary bills from the consulting engineers advising the building owner, the Provincial Government, and to price the bills in time for the three tenders to be submitted before the deadlines determined by the latter. The deadline for the submission of the second tender was 6 December 2000.
10. The pricing of the bills of quantities was to be undertaken in an expert and professional fashion.

THE ISSUE

11. The appellant alleges that the agreement was amended by an oral communication to the effect that the appellant would not accept liability for any potential damages that might arise for the respondent as a result of the fact that the civil work in the bill of quantities for the second tender, by far the largest of the three tenders, was not priced by Mr Saunders, but was completed by the latter by copying the estimated prices that the engineers had earlier prepared for the

building owner onto the tender documents. The civil work constituted about 82% of the second tender's work.

12. This amendment, Mr Saunders alleges, was agreed upon during the afternoon of the 5th December 2000 at the partnership offices when Mr MacDonald collected the tender documents that had to be submitted in Pretoria the next morning.
13. Mr Saunders testified during the proceedings before the court *a quo* that he informed Mr MacDonald, as the latter was about to leave, that the appellant would not accept liability for any damages that might be suffered as a result of the way in which the tender documents for the second tender had been prepared.
14. His evidence was to the effect that MacDonald did not answer when this communication was made to him – and that quiescence therefore became acquiescence.
15. MacDonald vigorously disputed this averment in the witness stand. He denied that such a discussion ever occurred.
16. The court *a quo* decided in the respondent's favour.
17. The appellant appeals with leave of the Supreme Court of Appeal against this finding.

THE ONUS

18. It was common cause that the *onus* to persuade the court on a balance of probability that the oral agreement was amended rests on the appellant.
19. If the court cannot come to the conclusion that this *onus* has been discharged, the decision must go in the respondent's favour.

THE COMMON CAUSE FACTS

20. The following facts are common cause or have not been disputed:
- a) The identity of the parties;
 - b) The nature of the parties' respective professions;
 - c) The respondent was, prior to the submission of the relevant tenders, a comparatively small builder that had never performed any building contract of which the value exceeded R 3 million;
 - d) The value of the second contract was a multiple of that sum;
 - e) The respondent's members, Mr MacDonald and his father in law, Mr Els, were very much aware of the fact that their business would take a major step into a bigger league if the second tender were to be awarded to them;
 - f) The respondent had never done any civil work prior to submitting the second tender and would engage subcontractors to perform the civil work if the tender was indeed awarded to it;
 - g) The respondent had previously engaged the services of another partner of the appellant partnership, namely Mr Dill, in respect of an earlier contract;
 - h) In order to price the bills properly, a quantity surveyor would have to obtain information from the suppliers of the items contained in the bills, of the cost at which they could be obtained and to calculate the profit margin that had to be built into the tender for the respondent;
 - i) The original contract contained an implied term that the appellant would perform its function expertly and professionally in all respects;
 - j) Mr Saunders struggled to obtain prices from the suppliers – as he testified – but by accident came into possession of the estimated prices the engineers had determined for the building owner;

- k) He decided to use these estimates, which were no more than a guideline, to complete the bill of quantities for the second tender;
- l) He did not advise the engineers in advance of his decision to do so and did not obtain their advance consent to such action;
- m) This conduct on Saunders' part was unprofessional and lacking in candour;
- n) There was no guarantee that the estimated prices would not, if accepted, cause grave damages to the respondent's profit margin;
- o) Mr Saunders did not inform Mr MacDonald of the fact that his conduct would be regarded as unprofessional and unbecoming by the engineers and the quantity surveyors' profession;
- p) The engineers were highly upset and very critical of the bills of quantity when they realized that the estimated prices had been copied by Mr Saunders, and were of the view that the respondent incurred a real risk of suffering significant losses when the tender was accepted by the Provincial Government.

THE EVIDENCE

- 21. The parties called only the two persons who were involved in the conclusion of the admitted agreement.
- 22. Mr Saunders gave the evidence that has been outlined in broad detail in the introduction.
- 23. He could not be described as a good witness. For obvious reasons, he was very uncomfortable in the witness stand, having to admit that his actions were *per se* unprofessional and smacking of deceit toward the engineers and the building owner.
- 24. Against that background, he had a very hard row to hoe in the attempt to persuade the court that the respondent close corporation, at that

stage still at the threshold of its entry into the company of bigger civil building contractors, would knowingly and without any guarantee or indemnity against future losses that might threaten its very existence, make itself a party to conduct that would, at the very least, be frowned upon by the engineers acting as agents for the biggest building owner they could hope to contract with at that stage or in the future.

25. The trial court disbelieved Mr Saunders. It cannot be faulted for having done so. Mr Saunders was often evasive, uncertain and altogether cut a most unhappy figure. He found it difficult to explain why the suppliers would not provide him with the prices he required.
26. The alleged amendment of the original contract was unusual in itself and would have been a red light to the respondent if it had been spelt out to Mr MacDonald.
27. To establish a tacit acceptance of a clause excluding the professional advisor's liability under these circumstances would have required incontrovertible evidence. Mr Saunders's evidence falls very significantly short of this standard.
28. The trial court believed Mr MacDonald. It cannot be faulted for doing so – he was a straightforward, albeit somewhat loquacious, witness who was resolute in his denial of the very existence of the alleged amendment.
29. Once the trial court's assessment of the evidence cannot be faulted, the appellant cannot succeed in discharging the *onus* resting upon it.

THE PROBABILITIES

30. Quite apart from the foregoing, the probabilities that can be distilled from the facts recorded above are overwhelmingly against the appellant.

31. It is fundamentally improbable that the respondent should have been willing to agree to the purported amendment and thereby expose itself with open eyes to the risk of its own annihilation – to say nothing of the danger of alienating the province's biggest source of building and construction work.
32. The appeal must therefore fail.

The following order is made:

1. The appeal is dismissed with costs, including the costs of senior counsel..

Signed at Pretoria on this ^{30th} day of March 2009



E Bertelsmann
Judge of the High Court

I agree.



W R C Prinsloo
Judge of the High Court

I agree.

A A Louw

Judge of the High Court

A handwritten signature in black ink, appearing to read 'A A Louw', written in a cursive style.