IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

26/8/16

Date of hearing: 10 August 2016

Case number: 34336/2015

(1) REPORTABLE: YES / NO

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

(3) REVISED.

23/8/2016
DATE

SIGNATURE

In the matter between:

CITY OF TSHWANE **Applicant**

and

THEMBA CONSULTANTS (PTY) LTD **Respondent**

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

BRENNER AJ

1. This is an application by the applicant for leave to appeal against my judgment granted on 6 June 2016.

2. For ease of reference, I will refer to the applicant, (being the respondent in the main application), the City of Tshwane Metropolitan Municipality, as "the COT". I will refer to the respondent (being the applicant in the main application), Themba Consultants (Pty) Ltd, as "Themba".

3. The judgment pertained to a claim by Themba for payment for a balance owing in respect of engineering services rendered to renovate roadworks and pedestrian areas in the inner city of Tshwane, to facilitate safer areas for vehicular and pedestrian movement, the project being called "Operation Reclaim". It was split into two amounts, namely, the sum of R3 782 283,66, and the sum of R1 109 715,79, plus mora interest and costs.

4. The notice of application for leave to appeal differed in several respects from the arguments raised in the heads of argument produced at the hearing. I was informed by Counsel for the COT at the hearing that certain points which were not traversed in the heads of argument but which were dealt with in the notice were to be considered as being abandoned. For the sake of convenience, I had regard to the arguments adduced in the heads of argument, and no objection was preferred by Counsel for Themba.

5. I will proceed to traverse ad seriatim the grounds advanced by the COT in the heads of argument.

6. The first ground pertained to the jurisdiction of this Court to entertain the application in the first place. This because, according to the COT, Themba should have employed the dispute resolution mechanisms set out in the tender document initially submitted by Themba in 2012. I was referred to clause C.1.2.1 relating to the General Conditions of Contract set out in the tender document, read with paragraph 5 of the COT's answering affidavit. I

will quote verbatim from the operative paragraphs of the COT's answering affidavit on the subject:

"4. The applicant claims payment of certain amounts from the respondent. The amounts so claimed are alleged to arise from a written agreement namely Contract CB117/2011 concluded between the applicant and the respondent for the provision of professional engineering services.

5. Although the contract CB117/2011 provides for dispute resolution by adjudication in clause 12 of the General Conditions of Contract applicable to the contract, the applicant acted prematurely by referring this dispute to court.

6. Numerous requests by the respondent to meet with the applicant and negotiate must be noted see letter dated 29 November 2014.

7. The dispute, from the respondent point of view, crystalizes into two crisp issues to wit: the liability to pay the applicant and the determination of the amount so payable, if any.

8. in the main, the respondent due to the applicant's unwillingness to meet the respondent; the respondent does not know the correct amount to be claimed and the respondent denies that it is liable to pay any of the amounts claimed by the applicant. In consequence whereof, the respondent seeks an order dismissing the application."

7. The above assertions should be read with the following allegations made subsequently in the same affidavit:

"42. The applicant was awarded Tender CB117/2011 from the period starting in April 2012 until 28 February 2015.

43. The foresaid various appointments are, for the purpose of determining the dispute in the current proceedings irrelevant. The only appointment pertinent to these proceedings is the appointment of 06 December 2013.

44. The appointment is evidenced by annexure FA 3.7 (and FA 3.8) to the founding affidavit. The essential terms of which are clearly articulate and to the extent that it may be necessary to re-cast them, they are as follows:

44.1 The applicant is appointed to render Professional Civil Engineering Services for the OPERATION RECLAIM PHASE 1 WITHIN THE INNER CITY OF TSHWANE;

44.2 Such services are to be rendered in accordance with the Guidelines on Scope of Services and Tariff of Fees for Registered Professional Engineers, as stipulated in Government Gazette no 34875 dated 20 December 2011;

44.3 The appointment was 3 fold:

44.3.1 Normal service;
44.3.2 Engineering Management Service
44.3.3 Principal Agent of the Client

44.4 The appointment further provides for the appointment of other sub consultants to wit:

44.4.1 Electrical Engineer;
44.4.2 Heritage Impact Assessment Practitioner;
44.4.3 Urban Designer; and
44.4.4 Traffic Engineer.

44.5 The fee payable is estimated to be an amount of R8 290 400, the amount includes 10% for contingencies and excludes value added tax and is subject to the conditions of contract, the discount offered and availability of funds; and

44.6 The fee estimate is based on the project value of R33 871 155. The final fee is to be based on the final project cost and is to be calculated in accordance Guidelines on Scope of Services and Tariff of Fees for Registered Professional Engineers, as stipulated in Government Gazette no 34875, Notice 206 of 2011.

45. The Honourable Court will note that Regulation 3 of Gazette no 34875, Notice 206 of 2011 details scope of services and that regulation 3.2 sets out, with particularity the nature and scope of the normal services.

46. The nature and scope of services, as provided for in Gazette no 34875, Notice 206 of 2011, were incorporated into the appointment by both the letter of 06 December 2013 and/pr by operation of law.

46. In as the Engineering Profession Act 46 of 2000 provides, the applicant's entitlement to payment of the project fee is dependent upon fulfilment of the obligations imposed, at the bare minimum, by Regulation 3.2 of Gazette no 34875, Notice 206 of 2011.

48. This is the case for the respondent. Has the applicant complied with the provision of Regulation 3 of Gazette no 34875, Notice 206 of 2011, so as to be entitled to payment of the project fee?"

8. I interpose to mention that annexures FA3.7 and FA 3.8 are duplicates of the same letter which is an appointment letter to Themba dated 6 December 2013 for a project value of R8 290 400,00.

9. I refer to clause C.1.2.1 of the tender document, the heading being "GENERAL CONDITIONS OF CONTRACT." It reads:

"The general conditions of contract applicable to this contract shall be the CIDB Standard Professional Services Contract (September 2005, Second Edition of CIDB document 1015), read together with the Variations, Additions to the Conditions of Contract as well as the Data provided by the employer."

10. The clause proceeds to state that tenderers are required to obtain their own copies of the document CIDB Standard Professional Services Contract.

11. In argument I was also referred to a page of the tender document which had a tick mark aside a line item which provides for the adjudication of disputes in construction works where GCC is used.

12. Nowhere in the papers produced by either party is there a copy of the CIDB Standard Professional Services Contract, nor even an extract therefrom which outlines the alternative dispute resolution procedures.

13. This notwithstanding, for the reasons advanced in my judgment, there was no genuine bona fide dispute advanced by the COT in the first place, in other words, no dispute which could form the subject matter of any alternative dispute resolution process. And no satisfactory evidence was produced to the contrary. In addition, and purely by way of aside, a bona fide attempt was indeed made by Themba to resolve matters extracurially. To no avail.

14. Moreover, on the version advanced by the COT, the agreement with Themba was confined to the allegations made at paragraph 7 of this judgment. In several material respects, these allegations are consistent with

the terms averred by Themba. I have addressed this more fully in my judgment.

15. In the final analysis, therefore, I am satisfied that this point is without substance.

16. The second point pertains to my interpretation of the Guidelines as not being peremptory. In the view of the COT the phrase "in accordance with" the Guidelines sufficed to make them obligatory in nature so that they had to be strictly complied with. I have addressed the reasons for my interpretation of the Guidelines at paragraphs 122 et sequitur of my judgment. Moreover, to compound matters, the COT never provided any detail of the respects, if any, in which the Guidelines were not complied with by Themba, whether substantially or at all.

17. Thirdly, it is argued that I erred in finding that Themba had proved its claims, this because all of the appointment letters contained suspensive conditions which were not fulfilled. The suspensive condition (under the heading "Programme") referred to is quoted below:

> *"The appointment is subject to submission of an acceptable programme of works to COT by the consultant within 7 days from date of receiving this letter. COT reserves a right to either approve or disapprove of such programme and in the case of the latter the consultant shall revise and resubmit the programme within 48 hours."*

18. This argument is res nova. It was never raised by the COT whether prior to the application or in its answering affidavit. In any event, the COT plainly waived this condition, to the extent pertinent, by never invoking same during the course of the agreement, and indeed, it made part payment under same. None of the cases quoted by Counsel for the COT to support this argument is applicable to the facts in casu.

19. It was further argued that I erred in accepting that Themba had delivered the deliverables. This point is unsustainable, because the COT advanced

no evidence to controvert the assertions made by Themba that it did so, and Themba's assertions were substantiated by a plethora of documentary evidence. The works ultimately provided by Themba for the COT were indeed functional and were used, this therefore confirming substantial completion of the contract. This was not in dispute. This is fully addressed in my judgment.

20. The final point was that I applied the wrong rule in my adjudication of the "disputes raised in the answering affidavit." In reliance on this argument, Counsel for the COT quoted from the case of **NDPP v Zuma 2009(2) SA 277 (SCA),** in which the Plascon Evans rule was traversed. In my assessment of the facts, I remained at all times fully cognisant of the terms of the Plascon Evans rule, as enunciated in **Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 SCA**.

21. I am further fortified in the stance which I adopted by the decision in **Wightman t/a JW Construction v Headfour (Pty) Ltd and another 2008(3) SA 371 (SCA),** at paragraph 13:

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirements because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader factual matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There

is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

22. In the premises, I am of the view that the applicant, being the COT, does not enjoy a reasonable prospect of success on appeal, this because no genuine bona fide dispute was raised to the claims against it. Leave to appeal should accordingly be refused, with costs following the result.

23. My grounds for granting judgment are more fully adumbrated in my written judgment dated 6 June 2016.

24. The following order is granted:

    a. the applicant's application for leave to appeal against the judgment granted on 6 June 2016 is dismissed;

    b. The applicant is directed to pay the costs of this application.

T BRENNER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
23 August 2016

Appearances

For the Applicant:	Advocate Mofokeng
Instructed by:	Attorneys Dyason Inc
Counsel for Respondent:	Adv M Novitz
Instructed by:	Attorneys Nochumsohn and Teper