



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

CASE NUMBER: 27017/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

Thapi

DATE 25 November 2022

SIGNATURE

In the matter between:

RAFT CRETE CC

APPLICANT

and

**PRO TEAM CONSTRUCTION (PTY)LTD
EYAL MARINBERG**

FIRST RESPONDENT
SECOND RESPONDENT

JUDGMENT

TLHAPI J

INTRODUCTION

[1] This is an opposed application for the payment of an amount of R350 350.25 plus interest at the rate of 7.5% per annum *a tempore morae*, it being the balance allegedly due to the applicant by the first respondent who is the principal debtor and the second respondent as surety.

BACKGROUND

[2] Mr JG Ehlers (“Elhers”) contended that during November 2019 the applicant and the respondents entered into a written agreement which contained the express, alternatively tacit, further alternatively implied terms of the said agreement. He represented the applicant and the second respondent represented the first respondent. The first respondent chose 4 Heyneke Place, Benmore Gardens, Johannesburg as its *domicilium citandi et executandi*. The agreement comprised of a quotation and written acceptance annexed as **R1** and **R2** and the terms and conditions of the written quotation would be incorporated into the agreement.

[3] The agreement was to provide raft foundation construction material for the double volume warehouse for an estimated amount of R444 314. 70 excluding VAT; additional 50mm concrete slab for an estimated amount of R41 280.00 excluding VAT; sixteen column bases for an estimated amount of R 9 289.00 excluding VAT; power floating for an estimated amount of R15 138.00 excluding VAT; and concrete pump establishment and rates. The latter amounts excluded services for additional work, the creation or construction of platforms and any increase in the design for columns and steps.

[4] The applicant would render invoices or proforma invoices to the first respondent and the payment method was split 50% for deposit at the beginning of the project; 45% before concrete is placed and 5% seven days after the completion of the project and a signed surety. Keeping of retention monies and deductions by

the first respondent had to be by written agreement with the applicant. The agreement provided for price change to any unforeseen changes to the design of the raft foundations as determined by the supplier Raft Foundation Solutions (“RFS”). The design of the raft foundations was also subject to the terms and conditions as stipulated in annexure **R3**.

[5] The applicant contended that it performed all its obligations in terms of the agreement and completed the project as stated in paragraph [13] of the founding papers. Pro forma invoices were handed over to the first respondent, **R4** and **R5**.

[6] The applicant submitted two invoices VAT inclusive in the amount of R675 350. 25. The respondents made the following payments on 22 November 2019 (R100 000.00); on 28 November 2019 (75 000.00) and on 11 December 2019 (150,000.00). A sum of R325 000.00 was therefore paid and the first respondent was in breach of the agreement for failing to pay the outstanding balance of R350, 350.25.

[7] It is further contended that on 3 December 2019 the second respondent bound himself jointly and severally as surety in solidum for and as joint and several co-principal debtor in favour of the applicant. The suretyship agreement is annexed as **R6**, wherein the second respondent renounced the legal benefits of excussion and division, that as a result of non-payment by the first respondent, the second respondent is liable and that the applicant was entitled to recover the amount owed plus mora interest and legal costs.

[8] It is contended that during March 2020 the second respondent undertook to engage a proposal to pay the outstanding amount with the attorneys of the applicant but failed to pay. Copies of the emails were annexed as **R7**. Furthermore, even though not applicable to the agreement notices **R8** and **R9** in terms of section 129 of the National Credit Act 34 of 2005 (NCA) were delivered to the respondents.

[9] The second respondent concedes that the first respondent requested a quotation as set out in R1. An amount of R325 000.00 was paid but denies the averments in the founding papers which suggest that an agreement was concluded with the applicant including the alleged indebtedness of R350 350. 25 and of providing a *domicilium citandi et executandi*.

[10] The documents relied upon as constituting the agreement do not appear to be signed by the applicant and/or first respondent and that they lack particulars of the first respondent. Further that it could not be alleged the written instrument contained tacit and or implied terms which terms are not clear and evidence from the alleged written agreement. It was denied that the applicant or RFS provided the first respondent with any designs of the raft foundations as described in R3 and, that this was contrary to what appeared in R2 where 'Ultimate Raft Foundations Designs Solutions' were named as the providers. The second respondent denies seeing R3 annexed to the founding papers.

[11] The second respondent denied knowledge that the estimated amounts would exclude services that would be rendered; that payment would be made in terms of invoices based on the percentages as alleged; that there was an agreement pertaining to retentions and deductions as alleged or that there would be price changes if the design changed; it was also denied that these terms which were denied were incorporated into the alleged agreement

[12] Furthermore, the second respondent contends that although the amount which the applicant alleged is owing is not stated in any correspondence under R7, the emails exchanged were dispute settlement negotiations which were made without prejudice and should be struck. It was also denied that notices in terms of section 129 of the NCA were delivered.

[13] In reply Ehlers gave the context of the circumstances within which the agreement was concluded. It was contended that the first respondent requested a quotation from the applicant for the construction of a warehouse foundation for a client. After continuous interaction the foundation was erected and accepted by the first respondent and a factory is presently in operation. It was necessary to require the second respondent to specifically sign a suretyship because there was no upfront payment of the full amount due to the applicant. The second respondent signed the suretyship and initialled annexures on R1 and R2

[14] Ehlers contended that the second respondent did not dispute the following:

- a) that the first and second respondents received R1 and R2 after a request for a quotation and indicated acceptance by initialling the relevant pages;
- b) it was not disputed that there was no agreement at all or that R3 was made available on the express terms in R1 and R2;
- c) that the applicant would render invoices; the allegations in 12.2, 12.4, 12.5 and 12.6 are contained in R1 and R2;
- d) that the applicant performed on the agreement

[15] The first respondent admitted receipt of invoices annexed to R4 And that payment was made in three instalments.

[16] The applicant denied that there were any settlement negotiations. It was contended that what transpired were discussions wherein the second respondent admitted liability and 'gave an undertaking to make a firm proposal of down payment and that was what was reflected in correspondence where the second respondent was pleading for more time to effect payment on what was admitted.

SUBMISSIONS

[17] The applicant's counsel argued that specific essential allegations were made in the founding papers which were not disputed in the answering papers. It was contended that there was no attempt by the respondents to deal 'seriously and unambiguously' with the allegations in the founding papers and that if any disputes of fact were raised by the respondents, these were without factual basis, that is, the allegations in the founding papers were not 'answered by way of primary facts'.

[18] The applicant's counsel listed various factors why there were no disputes of fact arising from the papers. It was contended that while the indebtedness in the amount of R350 000.00 due by the first respondent was disputed, the pertinent issue was the second respondent's failure to dispute the existence of the suretyship which he executed in favour of the applicant on 3 December 2019.

[19] Furthermore, there was the respondents' failure to dispute that R1 and R2 were quotations received by the first respondent and, which were initialled by the second respondent; the respondents' failure to explain why they requested and accepted the quotations, and yet failed to deny that the payment in the amount of R325,000.00 was made after the quotations were received by them. It was contended that such payment would not have been made if there was no agreement and a duty rested on the respondents to explain why the payment was not made. The respondents denied that the applicant had performed all of its obligations in terms of the agreement and failed to explain in the answering in what respect the applicant's failed to perform its obligations

[20] The repeated undertakings by the second respondent that a 'payment schedule' would be provided, as seen from emails exchanged between the parties were not settlement negotiations but could be considered as a proposal for down

payment. The emails would not have been addressed if there was a denial of indebtedness and in one of them the second respondent gave as reason for not being able to pay, was because of the fact that COVID-19 had impacted on all industries. It was contended that specific allegations were made regarding (i) the conclusion of the agreement (ii) proper performance of the agreement (iii) part payment by the respondents (iii) express undertaking to provide payment schedule,

[21] The respondents' counsel contended that the same standard of principles were applicable to both the applicants and respondents when pleading their individual cases in motion proceedings. In as much as the respondents were criticised for pleading bare denials, the applicant, apart from allegations relating to the citation of the parties and non-compliance with the NCA, had failed to make out a case in the founding papers for the relief sought.

[22] Counsel argued that the applicant had pleaded elements necessary to sustain a cause of action (*facta probanda*) without primary facts, (*facts probantia*) to support the claim. As a result, the application was defective and respondents could not be faulted for pleading bare denials where the founding papers were exclusively based on conclusions and were akin to particulars of claim in an action.

[23] It was denied that the deponent to the founding papers had personal knowledge in that it is not stated that he was party to the alleged agreement or represented the applicant. It is contended that the denial is not contested in reply therefore, the allegation in the founding papers amounts to hearsay. This contention is supported by the irreconcilable conflicts pertaining to dates. Where in the founding papers it is alleged from the annexures that the agreement was concluded during November 2019, the alleged 'written agreements' R1 and R2 are dated 26 September 2019. The same applies to when payment was alleged to have been made after receipt of R4 which is dated 28 November 2019 whereas the first payment of a R100 000 was made on 22 November 2019.

[24] It is contended in respect of R1 that it was not pleaded who signed on behalf of the applicant or whose initial it was and whether it was made on behalf of the first respondent and, an explanation in this regard in reply was impermissible; furthermore, three options were initialled in R1, it was not pleaded which option was agreed upon and the first respondent is not reflected as a contracting party in R2.

[25] It was argued that it was not pleaded and there was no evidence to show how the quantum was calculated or what amounts were agreed upon. The claim was illiquid in several respects and, therefore it could not be pursued in motion proceedings. The amount claimed had to be proven by credible evidence as to what rates were applicable and relied upon. Certain terms in R2 were given as examples of illiquidity, in clauses 2.2 and 2.3 it is not pleaded which standard rates were applied and the document relied upon was not annexed; it is not mentioned whether the claim was subjected to a rate escalation (4.1) or a price increase (4.5). The amount of R10 510.50 in R4 and R77 964.25 in R5 do not appear in R1 and R2. With regard to the former amount it is not explained in the founding affidavit and with regard to the latter which is an amount for “*extra concrete use due to the imported fill usedFill material not suitable for raft beam excavations*” It is contended that nowhere are the additional charges explained in the founding papers and why they were required. Having regard to the founding papers at 12.1 what was pleaded as prices were estimations of amounts not agreed upon by the parties. It was contended that on applicant’s own version no charges were set for amounts of R1 having regard to R4 and R5.

[26] It was also contended that in the correspondence which exchanged hands where the respondent undertook to make payment, no reference is made to the sum of R350 350.25 and that in as far as it is alleged in reply that liability in that amount was not disputed, the applicant was not allowed to make out its case in reply as it had done in several respects by supplementing the case in the founding affidavit.

Furthermore, that such correspondence contained settlement proposals which were not supposed to be disclosed to the court.

[27] It was also contended that the applicants cause of action was based on the *locatio conductio operis*. The applicant pleaded what it was required to do in terms of the contract and that it had complied with its obligations. However, it failed to prove that it had complied with the terms of the agreement and, that the respondents had accepted such performance when the structure was handed over. The applicant failed to prove the 'standard rates and estimated charges were reasonable

ANALYSIS AND THE LAW

[28] It is trite that in motion proceedings the evidence for or against the relief sought is stated in the three affidavits allowed, namely, the founding and answering affidavits and to a limited extent from the replying affidavit. The evidence in the founding affidavit should consist of primary 'factual averments' 'sufficient to support the cause of action' and any further facts like secondary facts relied upon would only have evidential value if supported by primary facts.¹

[29] The applicant in this matter chose to proceed by way of motion proceedings, and it is trite that all the evidence it requires to establish its case should be made in the founding affidavit, which the respondents must refute in the answering affidavit by either admitting or denying the allegations against it. In the founding papers all the essential evidence that could have been testified to at a trial should be averred so as to enable the respondent to know what case it has to meet.² An applicant 'stands or falls by the facts alleged in its founding papers'.³ An applicant with very limited exceptions and in the discretion of the court is not allowed to make up its case in reply.

¹ Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others 2003(4) 207 (C) para [28]

² Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T) at 323-5 ; Venop 275 (Pty) Ltd and Another 2016 (1) SA 78 (GJ) at paragraph [8] " In motion proceedings affidavits serve a dual function of both pleadings and evidence..";

³ Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635-636

On the respondents, side bare denials to the applicant's material averments will not suffice unless it is shown that there is a genuine dispute of facts and sufficient averments should be made to enable the court to examine whether the denials are not mala fide. It is not unheard of that in motion proceedings a respondent denies knowledge of facts alleged by an applicant and puts the applicant to the proof of such facts. It is therefore the court's discretion to determine how the matter is to proceed.⁴

[30] The second respondent conceded that a quotation was requested and that it made payment in the amount of R325 000.00. However, it is denied that a contract was concluded. A proper analysis of R1, R2 shows that it is a quotation of 26 September 2019. In my view nowhere do I find that this quotation was accepted as constituting the agreement between the parties as alleged in the founding papers. The last sentence to this quotation states "*We trust that the above meets with your approval and look forward to hearing from you in due course,*" which, in my view, although initialled by the second respondent clearly meant that an acceptance of the quotation was expected by the conclusion of the written agreement which was annexed as R3, which document is relied upon as the written agreement, which document does not bear any signature either signed on behalf of the applicant or the respondents.

[31] The terms of the agreement should have among other requirements stated the identity of the client. The agreement has many clauses and, in my view if it was signed by the respondents the founding affidavit could have identified which clauses were applicable in this instance and pleaded them. Despite R4 not being signed I find that the founding affidavit is lacking in identifying which of the terms were agreed upon and applicable. The second respondent contends that there were irreconcilable versions having regard to the documents attached as to what constituted the agreement.

⁴ Room Hire Co (Pty) v Jepee Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1162

[32] I have already alluded to the dates on which it is alleged the agreement was concluded; then there is contradiction about when payment was effected, the question is a sum of R100 000.00 was paid before the invoices were issued. According to Mr Ehlers payment was made after the invoices R4 and R5 were issued. There is no explanation in the founding affidavit what this first payment was for. Furthermore if one

has regard to the quotation and the fact that three options are stated, it is not clear which one of the three was applicable to the respondents. I have already given reasons why the quotation cannot be viewed as the actual contract entered into.

[33] Further, where it is pleaded that there were implied or tacit terms, these constituted unexpressed terms which should be inferred from the express terms of the contract and in the conduct of the parties in their implementation of the agreement, being the surrounding circumstances. They may apply by 'operation of law, by custom or trade usage, and from the facts surrounding the agreement'⁵ The applicant has failed to prove what these terms were in its founding affidavit. In my view, in the absence of primary facts, proving these terms, it cannot be expected of the respondents to give an answer to what has not been proven by the applicants.

[34] The applicant alleges that the suretyship was signed on 3 December 2019. In the founding affidavit the allegation is made that the suretyship agreement was signed pursuant to the agreement being entered into, "*....for the due and punctual payment by the first respondent to the applicant of any amount which was owing at signature date, or which may thereafter become owing by the first respondent*". It is only in reply where the applicant explains the circumstances which prompted the signing of the suretyship which was not the day when the quotation was initialled 26 September 2019 or November 2019 when it is alleged the agreement was concluded. These were facts known to Mr Ehlers when he deposed to the founding

⁵ Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 531D ; City of Cape Town (CMC Administration v Bourbon-Leftley and Another NNO 2006 (3) SA 488(SCA) [19]

affidavit and should not be allowed to bolster its case in reply.⁶

[35] It was argued for the applicant that before launching the application, emails were exchanged where the second respondent expressly undertook to provide a payment plan and that there was no dispute about the indebtedness then and these emails were annexed to the papers. The respondents contend that these alleged negotiations were not admissible. It is established law that as a general rule these negotiations and admissions made before the launch of legal process are not admissible.⁷

[36] In the result the following order is made:

1. The application is dismissed with costs.



**V.V.
TLHAPI**

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

⁶ Titty's Bar and Bottle Store (Pty) Ltd v ABC Garbage (Pty) Ltd and Others 174 (4) SA 362 (T) at 369A-B

⁷ Absa Bank v Hammerle Group 2015 (5) SA 215 (SCA) at para 13: "It is true that as a general rule negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure. This is regardless of whether or not the negotiations have been stipulated to be without prejudice"

HEARD AND RESERVED ON : 18 AUGUST 2022
FOR THE APPELLANTS : Adv. APJ ELS
INSTRUCTED BY : KRONE & ASSOCIATES

FOR THE RESPONDENT : Adv. C VAN DER MERWE
INSTRUCTED BY : FLUXMANS INC
DATE OF JUDGMENT : 25 November 2022