IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 1041/2009

In the case between:

MOVE ON UP 254 (PTY) LTD	**Applicant**
And	
MARTIN KRUGER ASSOCIATES CC	**First Respondent**
MARTIN KRUGER	**Second Respondent**

JUDGMENT: 18 November 2009

MEER, J

1. The crisp issue that this judgment is concerned with, is whether an erstwhile principal agent, appointed in terms of a building contract, is under an obligation once its mandate is terminated, to furnish further explanations about the contract as are reasonably required by the employer. Put simply, is an agent under an obligation to provide information to his principal, upon the termination of his mandate. Applicant, the employer as identified in a building agreement ("the JBCC agreement") seeks a declaration that the First Respondent who was principal agent in terms of the contract, until December 2008, is obliged to account to Applicant for his administration of the project

and his actions as principal agent, and for purposes of such accounting to –

> "deliver such further explanations of the contract administration and the performance of its function as principal agent as are reasonably required by the Applicant."

2. The Respondents oppose the application, contending that the prayer for the declaration is bad in law and that no such claim exists in South African law.

Background facts

3. In 2006 the Applicant concluded a written contract, namely a JBCC Series 2000 Principal Building Agreement ("the JBCC agreement") with Naumann Construction ("the contractor"), in terms of which the latter was engaged to construct a dwelling on Applicant's property in Llandudno, Cape Town..

4. The Second Respondent, an architect was initially appointed in 2004 to provide the required architectural services for the project in the name of his then firm, Studio Kruger Roos. The Second Respondent subsequently left Studio Kruger Roos and started the First Respondent. When the Second Respondent, Martin Kruger, began practising through the First Respondent as Martin Kruger Associates CC, the latter became both the Applicant's architect and the principal agent under the JBCC agreement. At all material times the Second Respondent was the person who performed the functions of principal agent, initially on behalf of Studio Kruger Roos and subsequently on behalf of First Respondent.

5. In December 2008, the Applicant terminated the First Respondent's appointment as principal agent, and a new principal agent, SBDS Western Cape (PTY) Ltd ("SBDS") was appointed in its stead.

6. The works which form the subject matter of the JBCC agreement have not yet been completed. It would appear that a dispute has arisen between the Applicant and the contractor, in respect of which an arbitration had commenced. For purposes, *inter alia* of litigation with the contractor which, it seems may continue, the Applicant requires the First Respondent to account to it for its administration of the project and furnish explanations as to certain actions taken by Respondents.

7. The Applicant initially also sought certain documentation and all architectural plans, drawings and diagrams prepared by Respondents. The Respondents eventually provided these after the institution of legal proceedings. The remaining issue pertaining to the relief sought on this aspect, is one of costs.

Preliminary issues

8. As preliminary issues Respondent attacks Applicant's *locus standi* and applies to strike out the replying affidavits filed by Applicant on the basis that these consist largely of argument and new matter.

Applicant's *locus standi*

9. Respondents attack Applicant's *locus standi* on the basis that Applicant did not contract with either Respondent and its claim against both Respondents should therefore be dismissed with costs.

The JBCC contract, contend Respondents, was between Applicant and Naumann Construction, the contractor who are the signatories to the contract. Neither Respondent is a signatory nor party to the JBCC contract. The Applicant, it is therefore submitted did not have a contractual relationship with either Respondent.

10. Mr Burger, for Respondent argued with reference to paragraph 12 of the founding affidavit that on Applicant's version a different contract appointing First Respondent as architect, was concluded and came into being between Studio Kruger Roos, (First Respondent's predecessor), and Mr Thaxton, (who subsequently became a director of Applicant, and is the deponent to Applicant's founding affidavit), in 2004, with a letter of appointment dated 23 November 2004, appointing Studio Kruger Roos. It is common cause that the rights and obligations of Studio Kruger Roos were assigned to Firsts Respondent and that much is not disputed by Respondents. It is also common cause that in November 2004 Thaxton was not a director of Applicant but became one shortly thereafter. Respondents contend that in November 2004 it was Thaxton and not Applicant who was the contracting party with First Respondent.

11. With regard to Applicant's standing in relation to Second Respondent, Respondents, argue that as it was Studio Kruger Roos and not Second Respondent that was appointed as architect in November 2004, Applicant has no claim against Second Respondent. There is no basis, so the argument goes, to find that there was an appointment of Second Respondent in his personal capacity. The JBCC contract, contend Respondents, cannot confirm rights and obligations upon Respondents

because they are not a party to it. Nor does the law of agency apply, as no obligations on the part of Respondents flow from the contract.

12. Paragraph 12 of Applicant's founding affidavit does not suggest to me that it is Applicant's version that a contract was concluded in 2004 between Thaxton and the First Respondent and that the letter of 23 November 2004 being annexure MT3 to Applicant's founding affidavit constituted such contract. The status attributed to the letter, in Applicant's founding affidavit, is at best that of a purported letter of appointment. On close scrutiny Annexure MT3 is a letter from Studio Kruger Roos addressed to Thaxton thanking him for considering the firm as architects. It sets out the fees of Studio Kruger Roos and requests Thaxton to sign "this document if you decide to appoint us". At best MT3 is a letter discussing an appointment and expressing First Respondent's willingness to be appointed.

13. It is to be noted also that Thaxton in his replying affidavit stated that at all times he intended to act and acted not in his personal capacity but on behalf of Applicant. It is not disputed that Applicant was in existence on 23 November 2004 and that Thaxton became a director of Applicant approximately two weeks thereafter.

14. The only contract relied upon by Applicant is the JBCC building contract. Paragraph 41.1 of such contract under a heading "**Contracting and other parties**" describes Applicant as the employer and Studio Kruger Roos as principal agent. Applicant's averments regarding the appointment of the principal agent in terms of the JBCC agreement as contained in the founding affidavit, are nowhere denied by the Respondents. Nor is it anywhere denied by

Respondents that Second Respondent initially provided the required architectural services for the project in the name of Studio Kruger Roos and that when the Second Respondent began practising through the First Respondent, the latter became both the Applicant's architect and the principal agent under the JBCC agreement. It is also not denied that to all intents and purposes the functions of principal agent were throughout attended to by the Second Respondent. The replying affidavit of Thaxton states that at all times Thaxton dealt with Second Respondent, Martin Kruger, who as far as Thaxton was concerned was principal agent and architect. Thaxton states it was not drawn to his attention that the principal agent was to be a corporate entity and not Kruger himself.

15. I am aware of no principle in law for the proposition that in order for a principal agent to be validly appointed under a building contract, the principal agent is required to be a signatory to the contract, nor was I referred to any authority in this regard. It was submitted on behalf of Applicant that standard JBCC building contracts are concluded regularly and make no provision for signature by the principal agent appointed under the contract. Nor am I aware of any principal of the law of agency which requires the appointment of a principal agent to be in writing or signed. In the chapter titled "Building and Engineering Contracts" in LAWSA[1] Volume 2 (1) at paragraph 459 Nienaber,states:

"No formalities are in general prescribed by law for the conclusion of construction contracts. They can be concluded, like agreements

[1] Butterworths, Durban 2003

generally, expressly or tacitly, by implication or incorporation, by conduct, and orally or in writing"

16. That the principal agent is a party to the contract appears from the contract itself, in the instant case. The appointment of principal agent appears at paragraph 41.1.2 of the contract under the heading **"Contracting and other Parties"**. The principal agent is clearly a party with obligations under the contract. In addition Clause 5.0 of the principal building agreement under the heading "Employer's Agents" reads as follows:

5.0 EMPLOYER'S AGENTS

5.1 The employer shall appoint the principal agent as stated in the schedule. The employer warrants that –

5.1.1 The principal agent has full authority and obligation to act in terms of the agreement".

It is not disputed that First and Second Respondents did indeed perform as principal agents under the contract.

17. Given that Applicant's allegations regarding the appointment of the principal agent in terms of the contract, and the respective roles of the First and Second Respondent thereunder are not denied, the Applicant's version that Respondents as principal agent appointed by Applicant, had obligations under the JBCC agreement and were bound thereby to Applicant as employer under the contract, must be upheld. See Plascon-Evans Paint v Van Riebeeck Paints 1984 (3) SA 623 AD at 634 I.

18. In the circumstances it cannot be said that Applicant has sought relief against the incorrect parties or that Applicant lacks *locus standi*. From the above I am satisfied that the Applicant enjoys the requisite *locus standi* in relation to both Respondents.

Application to strike out

19. Respondents applied to strike out the replying affidavit of Michael Thaxton and the confirmatory affidavit of Clinton Bush in their entirety on the basis that they were filed three months late, consist largely of argument and contain new matter. Alternatively, Respondents sought an order that the affidavit of Bush and the following paragraphs of the affidavit of Thaxton be struck out:– Paragraph 8 (new matter), paragraph 10 (new matter), paragraph 12 & 13 (new matter) paragraph 17 (last sentence new matter), paragraph 22 (new matter), paragraphs 23-26 (new matter), paragraph 31 (new matter), paragraph 33 (new matter) paragraph 34 (new matter, scandalous and vicarious) paragraphs 56.1 and 56.2 (new matter).

20. Respondents however conceded that if the affidavits were allowed, there would be no prejudice to them apart from the fact that they had not responded to them. On perusal of the affidavits, none of the matter objected to appears to be new matter, but comprises instead averments which were entitled to be made in response to allegations in the answering affidavit. Nor do I find the contents of paragraph 34 to be scandalous and vexatious. I note that the confirmatory affidavit of Bush is relevant to matters raised in Thaxton's replying affidavit concerning the contents of a CD-Rom furnished by Second Respondent. The averments made by Thaxton in reply, in turn respond

to those made by Second Respondent in his answering affidavit, concerning the production of documents.

21. In view of the above the application to strike out cannot succeed.

Application for condonation in respect of the late filing of Applicant`s replying affidavit

22. The replying affidavits were due to have been filed and served on 10 August 2009 in accordance with the provisions of an agreed order taken on 11 June 2009. These affidavits were however only served on 1 October 2009. Respondents seek condonation for the delay, explaining that such was not wilful and occurred in the following circumstances –

    1. The documentation ultimately provided to Applicant by Respondents was voluminous and required the input of the new principal agent and architect, a time consuming exercise.

    2. The situation was compounded by the fact that Thaxton, the deponent to the principal replying affidavit filed on behalf of the Applicant, resides in Los Angeles and it is often difficult to obtain urgent instructions from him. The filing of affidavits by Thaxton is in addition a complicated undertaking at the South African Consulate General in Los Angeles.

23. Applicant submits also that Respondents were not prejudiced by the late filing of the replying affidavits which they received some 19 ordinary days before the hearing of the application, and that both

Applicant and Respondents were able to file heads of argument timeously.

24. I am satisfied from the above that there is just cause and condonation is accordingly granted.

Urgency

25. Respondent seeks the costs of the postponed urgent hearing on 11 June 2009, as against Applicant. The notice of motion issued on 25 May 2009, seeking the urgent set down for 11 June, called for the filing of opposing affidavits by 5 June 2009. As Mr Kruger was out of the country he filed a provisional answering affidavit on that date. He was in effect given only one week to file such affidavit. Respondents contend it was unfair to put Kruger under such pressure given that the hearing on an urgent basis was postponed on 11 June. Respondents also emphasise that Applicant took three months to launch these urgent proceedings.

26. Applicant counters that the urgent set down for 11 June 2009 and the costs thereof were necessitated by Respondent's refusal to produce documents and account to Applicant as requested before the commencement of these proceedings. On that date, by agreement the application was postponed to 20 October 2009 and Respondents were given the opportunity to file further answering affidavits by 20 July 2009 which, they did.

27. The reasons for the three month delay in commencing the proceedings, is explained in the affidavit of Brian Aranoff, Applicant's attorney. These comprise *inter alia* problems associated

with Thaxton, being out of the country and the attendant logistical difficulties pertaining to consulting and finalising the founding affidavit. The affidavit, it would appear also took some time to clear customs upon arrival in South Africa.

28. I note that Respondent does not attack the urgency of the application. The period of one week to file an answering affidavit in the urgent application, was in all of the circumstances not unfair, especially given that Respondents were afforded an opportunity to file a further affidavit which they did. I am accordingly not inclined to award costs in favour of Respondents for the postponed hearing of 11 June 2009.

Is the relief framed in paragraph 4 of the notice of motion competant? Is First Respondent obliged to account to Applicant and furnish further explanations as are reasonably required by Applicant?

29. In essence, Applicant submits it requires the First Respondent to account to it for the work that it did on the building project, in order properly to asses *inter alia* the instructions issued by it to the builder. Applicant explains that it requires the explanations and accounting for purposes, of pending litigation with the contractor and the further administration of the JBCC contract.

30. It is trite that a principal is entitled to be informed by an agent of matters which are of his or her concern. See Mead v Clarke 1922 EDL 49 at 51.

31. The duty of the agent extends to accounting to his principal for all that he knows and all that he has done in the execution of the mandate. See

Kerr The Law of Agency 3rd edition Butterworths Durban 1991 at 188. This is a substantive legal duty which requires the agent, *inter alia* to justify his or her actions and conduct. In Doyle v the Board of Executors 1999 (2) SA 805 (c) Slomowitz AJ stated at 813 G – J:

"Inextricably bound up with this by no means exhaustive compendium of obligations is the agent's duty to give an accounting to his principle of all that he knows and has done in the execution of his mandate and with his principle's property. I have chosen to emphasise the obligation to give an accounting because I in no way read the authorities to contain this duty within generally accepted bookkeeping principles. That is the least of it. What is owed is, as I have already said, a substantive legal duty. The agent must explain himself. He must justify his actions and conduct. If this, by circumstance, falls to be done in court, then, to put it in evidential terms, he bears the *onus* of demonstrating the proper discharge of his office. This, in turn, expresses the remedy as opposed to the right"

32. An agent is thus obliged to account in good faith to the principal for everything that he or she has done See Kerr *supra* at 186. This obligation would extend to the obligation to account for what has already been done by the agent. See Lawsa Volume 1 Agency and Representation paragraph 184 Butterworths Durban 2003. By implication the obligation applies after the termination of the mandate in respect of work done during the mandate.

33. A case in point is the English decision of *Yasuda Fore and Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] 3 All ER 211 at 219. There, similar to the instant

case, a principal (an insurance company) sought a declaration that it was entitled to inspect and copy its erstwhile underwriting agent's documentary and other records relating to the business underwritten on behalf of the principal. The records had been requested to enable the principal to continue to manage claims under the risks written by the agent, but the latter claimed that the termination of the agreement discharged their duty to afford inspection facilities. Colman J, in finding that in the absence of an express agreement to the contrary, the agent's duty to provide records continued, notwithstanding termination of the agent's authority, made the following apposite comments at 219-220:

"That obligation to provide an accurate account in the fullest sense arises by reason of the fact that the agent has been entrusted with the authority to bind the principal to transactions with third parties and the principal is entitled to know what his personal contractual rights and duties are in relation to those third parties as well as what he is entitled to receive by way of payment from the agent. He is entitled to be provided with those records because they have been created for preserving information as to the very transactions which the agent was authorised by him to enter into. Being the participant in the transactions, the principal is entitled to the records of them……."

> "If, as I have held, the obligation to provide records arises from the fact that the principal, having entrusted the making of transactions binding upon him to the agent, is entitled to know what his position is, both in relation to third parties and to the agent, it can in logic make no difference to whether such a duty exists, that the agency is or is not founded on contract. Indeed, so far as my researches have

> gone, there is no suggestion in any authority—decided case or textbook—that, if there is merely a gratuitous agency, there is no duty to provide records or accounts. Because the agents' duty to provide records of transactions to the principal is founded on the entitlement of the principal to the records of what has been done in his name, termination of the agent's authority to enter into further transactions should have no bearing on the continuance of the duty to provide pre-existing records pertaining to the period when transactions were authorised. Accordingly, in the absence of express agreement to the contrary, the agent's duty to provide to his principal the records of transactions effected pursuant to the agency must subsist notwithstanding termination of the agent's authority. That, as I have held, is a duty that is imposed by law in consequence of the existence of the agency relationship and is not founded on the existence of a contract of agency……

The rights and obligations arising as a matter of law from the existence of duty-creating relationships… are not in principle displaced by contractual rights and obligations unless the contract provides that such rights and obligations are to be excluded or includes terms which are inconsistent with the duties attributable as a matter of law to the relationship……

the agent's duty to keep and produce records of his transactions on behalf of his principal can co-exist with a contract of agency".

34. Logic dictates that the same principles should hold true of instructions issued by an architect as principal agent under a building contract, to relevant construction companies and others in the exercise of his or her mandate as project manager. Such instructions potentially bind the

principal to the construction company. The information is therefore pertinent to the successful completion of the project. If the agency agreement with the architect is terminated prior to the completion of the project, the principal, due to the nature of the architect's duties in terms of the agreement, is entitled to full disclosure of all relevant instructions and decisions. The Respondents as architects on the project, thus have a duty to account to Applicant for the work they did on the project as principal agent.

35. I do not accept Respondents' argument with reference to the words " as are reasonably required by Applicant", that the relief at paragraph 4.1 of the notice of motion seeking the delivery by Respondents of "such further explanations of the contract administration and performance of its function as principal agent as are reasonably required by the Applicant," is too vague. Relief formulated as "reasonable" is regularly granted in a range of situations, an order for reasonable access in the case of minor children being one such instance drawn to my attention. Labour fora can also give expression to a union's right to reasonable access to the workplace. See UPUSA v Komming Knitting [1997] 4 BLLR 508 (CCMA); SAPU/South African Police Services [2004] 12 BALR 1505 (SSSBC). It is so that what is reasonable may have to be determined before court in the event of a dispute arising. That, *per se* can be no bar to such relief being granted. Nor does the fact that Applicant can always at a later stage supoena the Respondents to give evidence at arbitration proceedings, constitute a bar to the relief sought.

36. Finally I reject also the argument that further services of Respondents are not covered by the agency mandate and that such cannot be

obtained free of charge under the guise of a duty to account. As the further explanations required pertain to what occurred during the currency of the mandate, Respondents are, as stated above, under an obligation to account and explain, and to do so for no additional payment.

37. In view of all of the above Applicant is entitled to the remaining relief it seeks, namely the further explanations as set out at prayers 4 and 4.2 of the Notice of Motion,

Costs

38. I have already dealt with the costs occasioned by the postponement of the urgent application in June 2009. The costs attendant on the relief sought at prayers 2 and 3 of the notice of motion, for delivery of documents, remains to be determined. It was necessary for Applicant to launch these proceedings in order for delivery of those documents to occur. Its requests for the documents prior thereto yielded no results. Applicant is accordingly entitled to those costs as against Respondent. Applicant's request for the costs of two counsel was not objected to, and I believe such is justified in this matter.

39.I accordingly grant the following order-

1. The First Respondent is obliged to account to the Applicant for its administration of the building project on Applicant's property in Llandadno and its actions as principal agent, and for purposes of such accounting to:

Llandadno and its actions as principal agent, and for purposes of such accounting to:

1.2 deliver such further explanation of the contract administration and the performance of its function as principal agent as are reasonably required by the Applicant.

2. The costs of this application including the costs of two counsel shall be paid by First and Second Respondents jointly and severally, the one paying the other to be absolved.

MEER, J