IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 34746/15

In the matter between:

BRIAN HEINEBERG AND ASSOCIATES (PTY) LIMITED Plaintiff

7/3/18

(1) REPORTABLE: YES / ~~NO~~

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

and

07/03/18
DATE

SIGNATURE

PURPLE PLUM PROPERTIES (PTY) LIMITED Defendant

JUDGMENT

Tuchten J:

1 The plaintiff has sued the defendant for its fee pursuant to professional services rendered by the plaintiff to the defendant.

2 The plaintiff is a firm of quantity surveyors. The defendant is a property developer. The parties were represented throughout by Mr Heineberg and Mr Christodoulou respectively. Mr Christodoulou's main business is operating supermarkets. In 2009, Mr Christodoulou decided to branch out into property development. Through a company

called Biprops he created a development in Secunda which during the trial before me was called the Village development. This was the first development undertaken by Mr Christodoulou. Mr Heineberg, however, was an experienced quantity surveyor and had acted as such in bringing numerous developments to completion. Mr Christodoulou had a partner in his property development business but the partner played no part in these proceedings. In all matters relevant to this judgment, Mr Heineberg and Mr Christodoulou respectively acted as the controlling minds of the parties.

3 The defendant employed the plaintiff as its quantity surveyor for the Village development. When the plaintiff was first employed as such, it agreed to work "on risk". This expression was not expressly given further content by the parties but the nature and content of the risk undertaken caused no problems as such during the currency of the Village development.

4 As Mr Heineberg understood the notion of risk, it meant the risk that the development would not go ahead. Mr Christodoulou, however, understood the risk to include the risk to Mr Heineberg that if the development did go ahead, the plaintiff would not necessarily be appointed. On Mr Christodouou's understanding of *risk*, if the plaintff

were not appointed after he had decided to go ahead with the development, the plaintiff would not be entitled to any remuneration.

5 The parties are agreed that, in terms of their agreement, if the development did not go ahead the plaintiff would not be entitled to a fee. They are not agreed about what was to happen if the development *did* go ahead but the plaintiff was not formally appointed to the project once that decision had been made.

6 But the Village development did go ahead and was completed. When Mr Christodoulou decided to go ahead with the Village development, the plaintiff entered into a formal written agreement with the defendant on 11 June 2012 in terms of which the plaintiff was formally appointed the plaintiff's quantity surveyor for the Village development and the plaintiff's fee was agreed at the amount of R2 150 380. This agreement was referred to during the trial as a "PROCSA", the acronym which is printed on the first page of the agreement. PROCSA means Professional Consulting Services Agreement Committee. This committee was formed by members of several associations active in the property development and allied industries. One of this committee's constituents was the Association of South African Quantity Surveyors, which at that time was the name of the body which represented the interests of the quantity surveyors' profession.

7 The Village development proceeded to completion and the plaintiff was paid its agreed fee.

8 While the Village Development was proceeding, Mr Christodoulou decided to undertake another development in the Secunda central business district. This latter development was referred to in correspondence as the Secunda Mixed Use Development, because at inception a development was contemplated comprising an hotel, shops, a restaurant, a supermarket and a drive through retail facility. I shall call this development the CBD development.

9 The defendant appointed a number of consultants, including the plaintiff, to formulate the concept of what was hoped by all would become a viable development. All the consultants agreed to be retained on risk. Again, what "on risk" entailed was never further clarified as between the plaintiff and the defendant.

10 The CBD development went through a number of visualisations as the defendant and its team of consultants worked toward the conception of a development which would be viable. This involved convincing a financier that the development would be viable.

11 On 12 September 2011, the plaintiff employed Ms Belinda Burger as one of the professional quantity surveyors on its staff. Ms Burger got married during the progress of the visualisations of the CBD development to Mr van den Heever and took his name. I shall henceforth refer to her as Ms van den Heever.

12 Mr Heineberg instructed Ms van den Heever to work on the CBD development. She did most of the work and developed a good professional relationship with Mr Christodoulou.

13 By August 2014, the defendant was still not in a position to make the decision to proceed with the CBD development. The consultants became restless. Although they (or at least, certainly, the plaintiff) knew that they were not at that stage entitled to any remuneration, they asked the defendant to pay them each something. Mr Christodoulou considered himself to be under a moral obligation to pay the plaintiff something. Mr Christodoulou and Mr Heineberg agreed on a payment of R250 000 plus VAT. The plaintiff raised an invoice dated 1 September 2014 for this amount. In the invoice, Mr Heineberg noted that the agreed fee for the CBD development was "[t]o be agreed" and described the "Total Claimed To Date" as being R250 000, exclusive of VAT, for "Professional Quantity Surveying Services Fees Due: Work done to date".

14 In his evidence, Mr Heineberg said that his description of the money he was claiming was "unfortunate" because what he really meant was that the claim for R250 000 was on account and not dispositive of the plaintiff's claims for fees for work done to date. In the light of the issue as it crystallised, I consider this evidence to be self-serving and improbable.

15 There is an aspect of Mr Christodoulou's evidence with which I shall deal later that I find equally self-serving and improbable. Aside from these two aspects. I found both these principal witnesses to be honest and reliable about matters viewed from their individual perspectives. But nothing turns on their credibility because the dispute which crystallised is a matter of law which must very largely be decided independent of any factual evidence other than that which bears upon the context in which and the purpose for the measure giving rise to the dispute must be interpreted.

16 On 20 January 2015, the plaintiff issued estimate no. 17 for the CBD development. This was the costing-based last of the visualisations which had been developed during the visualisation stage. At that stage the development was visualised to provide for premises for shops, apartments and restaurants. The hotel was eliminated. The total cost was estimated to exceed R100 million.

17 But on 2 February 2015, Ms van den Heever resigned from the plaintiff's employ. She was at this stage pregnant and told Mr Heineberg that she felt that the pressure of working in the plaintiff's busy practice was too much for her and that she intended to open her own practice.

18 Shortly thereafter, Mr Heineberg travelled to OR Tambo airport on two occasions. He met Mr Christodoulou there. Mr Christodoulou told him that he had learnt that Ms van den Heever had resigned and that he had appointed her company as the quantity surveyor for the CBD development, with which he had finally decided to proceed.

19 Ms van den Heever and Mr Christodoulou then came to terms. The defendant entered into a PROCSA with Ms van den Heever's company, VdHeeverQS (Pty) Limited, which records the date of the agreement as 20 March 2015. Ms van den Heever did not give evidence although she was present throughout the trial. Mr Christodoulou testified that the PROCSA was indeed concluded with Ms van den Heever on that date; but his evidence in this regard became vague on this question when an email he had written dated 26 February 2015 was put to him. This email was written in response to one of the same date sent by Mr Heineberg to Mr Christodoulou and the members of the professional team, recording Ms van den

Heever's resignation and asking that all correspondence, minutes and the like be sent to Mr Heineberg.

20 I think that Mr Christodoulou was uneasy about his conduct in dropping the plaintiff and employing Ms van den Heever. It made sound business sense for him to do so. Employing Ms van den Heever enabled Mr Christodoulou during the critical implementation phase of the CBD development to achieve the continuity of a continued professional relationship with someone he trusted. If the defendant had stayed with the plaintiff during the implementation phase, Mr Christodoulou would have had to develop a relationship with another member of the plaintiff's staff. Ms van den Heever promised that she would devote all her professional time to the CBD development, which effectively meant to Mr Christodoulou that she was always available to him. And, I think more to the point, Ms van den Heever convinced him that her fee would result in a bottom line saving to him of over R2 million. This was because the PROCSA between the defendant and VdHeeverQS (Pty) Ltd was specified at R3 014 844 inclusive of VAT. In another clause in the PROCSA, the fee was described as being "As per the permissible fee scales for the Quantity Surveying profession, Less 40% discount". The plaintiff's fee, if it had been retained for the implementation phase of the development, would have been some R5,1 million.

21 Mr Christodoulou was asked to explain why he had dropped the plaintiff. One of the reasons he gave was that Mr Heineberg had rendered poor service which caused time overrun and extra expense in both the Village and the CBD developments. This is the aspect of his evidence which I find implausible. The errors which he attributed to Mr Heineberg would, if they were true, have demonstrated risible incompetence on the part of Mr Heineberg. Given Mr Heineberg's obvious expertise and the good impression he made on me in this regard from the witness box, I think it was unlikely that Mr Heineberg behaved as Mr Christodoulou said he had done. To compound the improbability, Mr Christodoulou was quite a prolific and articulate correspondent to the plaintiff via email during the course of the projects. Yet there is not the slightest reference in the correspondence to the alleged egregious errors he described in evidence. Had there been any truth in this aspect of his evidence, I should have expected at least some reference to them in the record and some attempt to achieve a financial adjustment in the plaintiff's favour.

22 I think that it is more likely that the reason the defendant dropped the plaintiff was that a professional relationship with Ms van den Heever represented both continuity and a significant saving for the defendant.

23 Mr Heineberg was aggrieved when he discovered the circumstances in which the plaintiff's association with the CBD development had been terminated. His response was to send the defendant an invoice for R1 421 389 plus VAT. The defendant ignored this invoice. After an attorneys' letter, the contents of which were not proved in evidence, the plaintiff sued the defendant for a different amount.

24 The claim which the plaintiff ultimately brought before me for adjudication renders it unnecessary to resolve any of the factual conflicts which presented in the evidence. Nor is it necessary to discuss in any depth the evidence of the reputable quantity surveyors who gave expert evidence. It is important though to remember that the plaintiff did not bring a claim in enrichment or for its usual fee. The reasonableness or otherwise of the plaintiff's fee as claimed and the morality of the defendant's treatment of the plaintiff, while touched upon - and, indeed, discussed at some length in the evidence despite counsel's acceptance throughout of the point I am about to make - are not relevant to the proper determination of the issue raised by the plaintiff in its declaration as it served before me in amended form.

25 The plaintiff sued the defendant for payment of R887 050. It alleged in paragraph 3.2 of the amended declaration that the plaintiff

> ... agreed to carry out the services at risk (i.e. on the basis that no fee would be charged unless the project was proceeded with) in accordance with the Guideline Tariff Of Professional Fees in Respect of Services Rendered By A Quantity Surveyor in Private Practice as published from time to time pursuant to s 34(2) of the [Quantity Surveying Professions Act, 49 of 2000] ... .

26 The plaintiff then pleaded that it was a term of the agreement between the parties that

> If the project was proceeded with within two years of the completion of the services at risk and the Plaintiff had not been appointed as the quantity surveyor on the project, the Plaintiff would be entitled to be paid 20% of the fee it would have earned if it was so appointed which fee was to be calculated in accordance with the guideline.

27 I need say no more about the defendant's plea than that it denied that the alleged implied term was a term of the agreement between the parties.

28 During argument, counsel for the plaintiff made his case exclusively on the basis that the applicability of the guideline was an implied term in the strict sense, ie one imported into the contract by operation of law. Counsel correctly did not contend for a tacit term, one to which

the parties would unanimously have assented if the fabled meddlesome onlooker had raised the topic during their negotiations.

29 The issue for determination is therefore squarely whether the plaintiff has proved that the guideline is binding on a quantity surveyor in private practice, such as the plaintiff, and its client. The case for the plaintiff is that the guideline is binding in a default sense; it must apply unless the parties agree consciously to depart from its terms.

30 To resolve this issue, one must interpret the guideline. As was so trenchantly observed in *Potgieter v Olivier and Another*,[1] the Supreme Court of Appeal provided in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[2] an exposition of the principles of interpretation. It is a unitary exercise that requires the consideration of text, context and purpose.

31 The guideline was published pursuant to s 34(2) of the Quantity Surveyors Profession Act (the QSP Act). The long title of the QSP Act describes its purposes:

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1 2016 6 SA 272 GP para 30

2 2012 4 SA 593 SCA

> To provide for the establishment of a juristic person to be known as the South African Council for the Quantity Surveying Profession; to provide for the registration of professionals, candidates and specified categories in the quantity surveying profession; to provide for the regulation of the relationship between the South African Council for the Quantity Surveying Profession and the Council for the Built Environment; and to provide for matters connected therewith.

32 The QSP Act provides for the establishment of the South African Council for the Quantity Surveying Profession. The powers of the Council include the registration of members, of promoting education in quantity surveying and generally; to take any steps it considers necessary for the protection of the public in their dealings with registered persons; for the maintenance of the integrity, and the enhancement of the status of the quantity surveying profession; and to take any steps it considers necessary for the improvement of the standards of services rendered by registered persons.[3] The Council must draw up a code of conduct for registered persons[4] and investigate and discipline improper conduct by registered persons.[5]

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3 Sections 14(g) and (h)

4 It has in fact done so; see BN 142 of 2013 in Government Gazette 36663 of 12 July 2013

5 Sections 28-32

33 Professional fees (implicitly of quantity surveyors) are dealt with in s 34:

> (1) The council must, in consultation with the voluntary associations, formulate recommendations with regard to the principles referred to in section 4 (k) (v) of the Council for the Built Environment Act, 2000.
>
> (2) The council must annually, after consultation with the voluntary associations, representatives of service providers and clients in the public and private sector, determine guideline professional fees and publish those fees in the Gazette.
>
> (3) The CBE may review the guideline professional fees published by the council, and refer the fees back to the council for reconsideration.
>
> (4) If the council, after review by the CBE of the guideline professional fees, is aggrieved about that review, it may refer the matter to the Minister for a final decision.
>
> (5) Any person who is aggrieved by the guideline professional fees published in terms of subsection (2), may bring the matter to the attention of the CBE within 60 days from the date of publication.

34 The clear language of s 34 proclaims that the Council, after following a prescribed process, is empowered to determine "guideline professional fees" and publish them in the Gazette. There is nothing in this language that empowers the Council to *prescribe* fees, even in

the limited sense of creating a default position, as contended for by counsel for the plaintiff.

35 The version of the guideline applicable to the present case is that which became effective on 1 April 2011. This version, as are all other versions, are amendments or developments of a version which initially was determined and published pursuant to the predecessor to the QSA Act.[6]

36 In 2000, the then Minister of Public Works published a "recommended tariff of professional fees". In 2002, the Council published a tariff of professional fees, warning that its tariff had not yet been approved for use in the public sector. The Council described its tariff as "the recommended fees". It concluded its preface to its tariff with a warning that the Association accepted no responsibility for any loss or damage suffered due to the use of its tariff. Hardly the kind of language one would expect from a body laying down the law!

37 From 2001 through to 2015, the Council published sets of "guideline professional fees". The guideline applicable when the defendant appointed the plaintiff on risk to the CBD development was that amended by Board Notice 69 of 2011 and published in Government

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6 The Quantity Surveyors Act, 36 of 1970, repealed by s 43 of the QSA Act.

Gazette 34185 of 8 April 2011, expressed to become effective on 1 April 2011.

38 It was clear from the evidence that some members of the profession believe that the guideline has the force of law. Perhaps it was for that reason that the Council inserted a preamble to the 2015 guideline. There is no suggestion of a change in policy or purpose. It may therefore safely be accepted that this preamble reflects the purpose which the measure was designed to achieve as it has gone though its several amendments:

> This Guideline Tariff of Professional Fees provides an equitable basis for determining the scope of work required for any particular building or engineering project and the associated remuneration comprising the fee and disbursements to be paid for professional quantity surveying services. This approach serves as a guideline only and does not preclude the use of any other basis appropriate to the particular situation at hand in order to arrive at an agreed fee and claimable disbursements for the services to be provided. The South African Council for the Quantity Surveying Profession acknowledges that there are clients who may not be conversant with the development procedures of building or engineering projects, nor with the professional expertise required by a quantity surveyor to provide the services required. This guideline will assist in such circumstances. Competition in respect of fees payable within the quantity surveying profession is healthy for both the profession and clients. This Guideline Tariff of Professional Fees is not

prescriptive, but merely a guideline of what is deemed to be fair and reasonable for the services rendered.

In line with the stated purpose of the Competitions Act, the publication of this guideline is to:

- promote the efficiency, adaptability and development of the economy;
- provide market transparency to consumers with competitive prices and product choices;
- promote employment and advance the social and economic welfare of South Africans;
- expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

It remains the prerogative of the client and quantity surveyor to negotiate a fee for the services to be provided. **The guideline should be used to assist the client in assessing the risks associated with a fee that is too low or too high for the services required**.[7] In the same vein, clients need to assess the risk of removing too many services to be undertaken by the quantity surveyor. Reducing the fee and/or the services to be rendered to the extent that the quantity surveyor's remuneration and input becomes insufficient to effectively attend to all aspects of the required quantity surveying services, will be detrimental to the project.

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7 My emphasis

39 The preamble puts the matter beyond doubt. It was never the purpose of the measure to bind the client to a fee regime of which he might be unaware. The purpose is rather to promote the ethic of fair dealing amongst quantity surveyors and to educate the public about the nature of the profession and the quantum of fees which the Council considered generally would be fair.

40 The specific clause in the guideline upon which the plaintiff relies has been present throughout the life of the guideline I have described. It is numbered 3.0 in the 2011 guideline. It reads:

> Where services at risk are rendered and the project proceeds within two years of completion of such services at risk, then the quantity surveyor shall either be appointed on such project for services in the relevant category ... in which the services at risk were rendered at a fee in accordance with [identified alternative parameters] ..., or if not appointed on such project on such basis, he shall be entitled, without rendering any further services, to charge a fee of 20% of the aforementioned.

41 Such a provision may in many cases be equitable. The evidence shows that at least in the private sector, quantity surveyors routinely do work on risk during the conceptualisation stage of a project. The Council built the clause into its guideline to cater for the situation where no PROCSA is concluded with the quantity surveyor who did

work in the visualisation stage and is based on the notion that such a quantity surveyor has a legitimate expectation of being appointed if the project goes ahead and should be compensated when that expectation is not fulfilled.

42 But it is not a clause, to my mind, which a developer would necessarily expect in a tariff of recommended fees. The courts have frequently discussed whether the attention of the client should be drawn to an unusual clause in a standard type agreement and on occasion have found that such clauses did not form part of the parties' consensus.[8] At the level of interpretation, it is highly unlikely, to say the least, that a Council, concerned to educate the public and promote fair dealing within the profession, would have designed such a clause to be binding upon a client who did not know that the clause existed.

43 The present situation has some similarities with the ticket cases.[9] In such cases, the minimum required of a contractor to render a customer bound to the terms of an unsigned contract is to display the terms of the contract prominently and do all things reasonably necessary to bring the terms of the contract to the attention of the customer.

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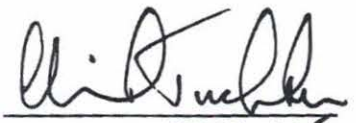
8 Kerr, *The Principles of the Law of Contract*, 6th ed, 104

9 As to which, see Christie's *Law of Contract in South Africa*, 7th ed, para 5.3.2.

44 In the present situation, at the very least, one would, before finding a client bound to the terms of the guideline, require a quantity surveyor to refer the client to the guideline, tell the client where to find its text and draw the client's attention to clause 3 and other unusual terms. None of that was done in the present case.

45 To summarise: the plaintiff can only succeed if the guideline is binding as a matter of law, such that its terms are to be incorporated into the agreement to render services on risk even though the defendant did not know when the agreement was concluded that the guideline even existed, let alone what it said. In my judgment the guideline is not so binding in law.

46 I make the following order: The plaintiff's claims are dismissed with costs.



NB Tuchtén
Judge of the High Court
7 March 2018

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