



Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 11087/2022

Before: The Hon. Ms Acting Justice Hofmeyr

Date of hearing: 16 August 2023
Date of judgment: 17 August 2023

In the matter between:

AMANDLAGCF CONSTRUCTION CC

Applicant

and

TRESSO DEVELOPMENTS (PTY) LTD

First Respondent

DECA CONSULTING ENGINEERS CC

Second Respondent

ANTON OBERHOLZER

Third Respondent

JITW DEVELOPMENTS (PTY) LTD

Fourth Respondent

JUDGMENT

Judgment handed down electronically by circulation to the parties' legal representatives on email and released to SAFLII.

HOFMEYR AJ:

Introduction

- 1 Between October and December 2021, the applicant conducted earthmoving works on a property in Wellington, Western Cape. The property is owned by the first respondent, Tresso Developments (Pty) Ltd.
- 2 The applicant thought it had a contract with Tresso to conduct the works. But when it asked for payment, none was forthcoming.
- 3 It then sent a demand to Tresso under section 345 of the Companies Act 61 of 1973. In response, Tresso denied that it had any contract with the applicant and said that it was not liable on any basis to the applicant. It then went on to explain that what appeared to have happened is that the third respondent, Mr Anton Oberholzer, had presented himself as a representative of Tresso, when he was not one.
- 4 In a subsequent letter, Tresso further explained that Mr Oberholzer was, in fact, the representative of the fourth respondent, JIWT Developments (Pty) Ltd, and that JIWT Developments had been trying to buy the shares in Tresso for some time but the sale of shares agreement between the shareholders of Tresso and JIWT Developments had fallen through. It then said that it had managed to establish that Mr Oberholzer had been holding himself out as a representative of Tresso and purporting to negotiate on behalf of Tresso when he had no authority to do so. The second letter concluded on the basis that the applicant's claim lay against Mr Oberholzer and/or JIWT Developments and any attempt by the applicant to sue Tresso would be opposed.

5 The applicant clearly did not accept Tresso's denial of liability and so launched proceedings against Tresso, Mr Oberholzer, JITW Developments and the Engineer on the works, Deca Consulting Engineers CC.

6 It did so on motion. I shall refer to the application it launched as "the main application". The notice of motion claimed R1,553,682.17 from Tresso, alternatively the Engineer. The quantum was made up by the amounts in four payment certificates that had been issued by the Engineer. Quite remarkably, despite citing Mr Oberholzer and JITW Developments as the third and fourth respondents respectively, the applicant claimed no relief against them. It said that it was citing them for "any interest they may have in the proceedings".

7 The founding affidavit set out a case of an alleged written contract that was entered into between the applicant and Tresso. In the alternative to the written contract, the applicant claimed that either "a valid agreement came into being, on the same terms and conditions of the Contract, but for the fact that it was tacitly concluded" or such contract was ratified by Tresso.

8 The claim against the Engineer was pursued in the alternative to the claim against Tresso and was based on an alleged breach of an implied warranty of authority.

9 There was also one sentence in the founding affidavit to the effect that if the contractual claim against Tresso was not upheld, then Tresso was "unjustly enriched in the equivalent amount as that set out in the payment certificates".

10 It is well established in our law that an application may be dismissed with costs when the applicant should have realised when launching the application that a serious dispute of

fact was bound to develop.¹ The court has a wide discretion when it determines such a matter.²

11 Tresso opposed the main application and filed an answering affidavit consistent with the line it had taken in the prior correspondence. It said there was no contract between it and the applicant. It said none of its directors lived near the property on which the works had been undertaken and that it did not know about the earthworks until after they had been completed. It emphasised, again, that any claim the applicant may have would lie against Mr Oberholzer and JITW Developments. It took issue with the fact that the case had been brought on motion when the applicant clearly knew there was a material dispute of fact prior to launching the case.

12 In response, the applicant did not file a replying affidavit. Instead, it brought an application for a referral to oral evidence. It also sought to amend its notice of motion to pursue an alternative claim against Mr Oberholzer and JITW Developments. However, it did not seek to file any further affidavit despite the fact that the existing founding affidavit did not set out any factual basis for a claim against Mr Oberholzer or JITW Developments.

Referral to oral evidence

13 The applicant's referral application asks for the following issues to be referred to oral evidence:

¹ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1162; *Conradie v Kleingeld* 1950 (2) SA 594 (O) 597; *Blend v Peri-Urban Areas Health Board* 1952 (2) SA 287 (T) 291H-292B, 292C-F; *Adbro Investment Co Ltd v Minister of the Interior* 1956 (3) SA 345 (A) at 349-350, 352; *Seloadi v Sun International (Bophuthatswana) Ltd* 1993 (2) SA 174 (B) 191H-192D

² *Food & Nutritional Products (Pty) Ltd v Neumann* 1986 (3) SA 464 (W) 470A-C

- 13.1 whether Tresso expressly or tacitly agreed to, or ratified the contract referenced at paragraphs 13 to 19 of the founding affidavit and/or any other agreement which relates to the works conducted by the applicant;
 - 13.2 whether Tresso expressly or tacitly mandated or ratified the Engineer acting as its representative in respect of the Engineer's interactions with the applicant;
 - 13.3 whether Tresso should be held liable for the applicant's claim; and
 - 13.4 if the answers to the questions above were in the negative, whether the Engineer, Mr Oberholzer or JITW Developments should instead be held liable for the applicant's claim.
- 14 Tresso opposed the referral to oral evidence. It seeks the dismissal of that application, as well as judgment in its favour in the main application.
- 15 The remaining respondents – the Engineer, Mr Oberholzer and JITW Developments have not opposed either the main application or the referral application.
- 16 The issues before me at this stage of the proceedings are twofold:
- 16.1 whether to grant the application for the issues identified by the applicant to be referred to oral evidence; and
 - 16.2 whether to grant judgment in favour of Tresso.
- 17 I have not been asked to determine the main application in relation to the other respondents and I make no findings in that regard. Where I refer to the case against the

other respondents, I do so in order to set out the factual background against which the referral application must be determined.

Referrals to oral evidence

18 In *Herbstein and van Winsen's The Civil Practice of the High Courts of South Africa*, the learned authors give the following description of the types of cases in which a court will refuse an application for referral to oral evidence:

- “when it is clear that the sole purpose of personal examination would be a fishing expedition designed to elicit admissions that might supplement the allegations in the supporting affidavit”;
- “when to accede to a request that oral evidence should be heard would be to direct a roving inquiry with very loose and vague terms of reference”; and
- “when oral evidence would enable an applicant to amplify affidavits by additional evidence where the affidavits themselves, even if accepted, do not make out a clear case but leave the case ambiguous, uncertain, or fail to make out a cause of action at all”.³

19 Any one of these grounds would be sufficient to dismiss an application for referral to oral evidence. This case is a remarkable example of all three.

20 To explain why this is so requires an analysis of the affidavits in the main application.

³ Ciller's et al *Herbstein & van Winsen's The Civil Practice of the High Courts of South Africa* 5th ed (2009) 463-464

Analysis of the affidavits

21 The applicant's case against the Tresso in the founding affidavit amounts to the following:

21.1 The founding affidavit begins with the averment that at some point in 2021, Tresso called for tenders to conduct infrastructure works at its property in Wellington. However, when Tresso called for a copy of this alleged advertisement under Rule 35(12), the applicant said it did not have it.

21.2 The applicant then said that it had responded to Tresso's advertisement and submitted a tender. However, when Tresso called for a copy of the applicant's tender under Rule 35(12), the applicant said that it did not have a copy.

21.3 The applicant then stated that it signed a written agreement in the form of "Contract Data" which included the General Conditions of Contract Works (Second Edition, 2010). However, what precisely "Contract Data" is, is never explained in the founding affidavit and when Tresso called for this document in terms of Rule 35(12), the applicant could not produce it. Instead, it provided an unsigned copy of that portion of the "Contract Data" that comprised the General Conditions of Contract Works – a standard form agreement.

21.4 The Contract Data and General Conditions of Contract Works were said to comprise "the Contract". No other details were given about "the Contract". There was also no averment dealing with who concluded the Contract on behalf of Tresso. Although the founding affidavit said that the Engineer issued a letter of award on behalf of Tresso, the founding affidavit did not explain who, representing Tresso, concluded the contract that followed the letter of award.

- 21.5 The only interactions that the applicant said it had during the time that the Contract was concluded were with the Engineer.
- 21.6 The applicant then averred that it performed the work and the Engineer certified the works.
- 21.7 The applicant then stated that when it was not paid, it sent a letter of demand to Tresso in terms of section 345 of the Companies Act.
- 21.8 The response to the demand were the two letters I referred to at the beginning of this judgment in terms of which Tresso denied any liability for the claimed amount and said that it did not have a contract with the applicant.
- 21.9 The applicant endeavoured to explain away these letters by claiming that they did not clearly set out Tresso's position. I return to this issue later, but for now, it suffices to point out that on any fair reading of the letters, it was abundantly clear that Tresso denied any liability for the works and said that it did not have a contract with the applicant.
- 21.10 That is the sum total of the case for the existence of a written agreement between the applicant and Tresso.
- 21.11 The founding affidavit then jumped to the applicant's alternative case. The applicant said that "if it is discovered that the Contract was not countersigned by Tresso", then the contract was concluded tacitly". It is important that I set out the full factual basis for the tacit contract that then appeared in the founding affidavit verbatim:

“It is beyond comprehension that [Tresso] and or its representatives were unaware of the fact that we had attended to major construction work at its property.

It is beyond comprehension that the Engineer would have taken all these steps without a mandate from [Tresso], be it in written form or otherwise.

...

By allowing the Engineer to contract with the applicant and by making no attempt to stop the applicant from attending to the works, [Tresso] had at least tacitly agreed to the industry standard agreement, as set out in the Contract. At the very least [Tresso] ratified the conduct of the Engineer, and by implication, the Contract”.

21.12 These three sentences are the entire case for a tacit agreement.

21.13 Our law is clear on the requirements for a tacit agreement. The question is whether the party alleging the existence of a tacit agreement can show unequivocal conduct on the part of the other party that proves it intended to enter into a contract with it.⁴

21.14 Missing from the averments in the founding affidavit is any indication of when the applicant, itself, entered into the tacit agreement with Tresso. The founding affidavit also gives no attention to when the tacit agreement is alleged to have been concluded and it fails to identify with any precision the act or omission, on the part of Tresso, that gave rise to the tacit contract. It also fails to identify who it was at Tresso, whose conduct is alleged to have given rise to the conclusion of a tacit contract.

⁴ *Buffalo City Metropolitan Municipality v Metgovis (Pty) Limited* 2019 (5) BCLR 533 (CC) para 26

- 21.15 The case for the conclusion of a tacit agreement is therefore a preeminent example of speculation. The tacit agreement is said to exist on the basis of what it is incomprehensible did not occur.
- 22 The founding affidavit was met with an answering affidavit from Tresso. It said it never entered into any contract with the applicant. It said it only came to learn of the earthworks in mid-January 2022 after they had been completed and when the applicant was already off site. It explained that none of the directors of Tresso lives in or near the property in Wellington.
- 23 While it is no doubt correct that Tresso might have provided a fuller account of its version of the facts, it was answering a case of the flimsiest kind. It was meeting a case that said that Tresso had concluded a written agreement with the applicant but in circumstances in which the applicant could not produce the agreement and could not identify anyone at Tresso who was alleged to have represented Tresso in concluding the agreement. In the alternative, it was meeting a case that Tresso had tacitly concluded an agreement for the works without any specific act or omission, on the part of any representative of Tresso, being identified as that which gave rise to the alleged tacit agreement.
- 24 The applicant did not file a replying affidavit in the main application. Despite this, Mr Steenkamp, who appeared for the applicant, argued that the affidavit supporting the application for referral to oral evidence also served as the replying affidavit in the main application. But the problem with this approach is that even if I were to adopt an accommodating approach and regard the affidavit supporting the referral application as the replying affidavit in the main application, it still failed to gainsay the essential pillars of Tresso's factual case.

25 The applicant did nothing to dislodge the three essential facts on which Tresso's defence was based:

25.1 it did not conclude a contract with the applicant;

25.2 it only learnt of the earthworks after they were completed; and

25.3 it was Mr Oberholzer who was holding himself out as being Tresso's representative when he was not.

26 The applicant's affidavits therefore failed to set up the most basic factual case for either a written or tacit agreement with Tresso.

27 Its case for ratification was even weaker, if that is possible. The case for ratification rested on the conclusory statement that there was a ratification. But not a single fact was advanced on the basis of which it could be concluded that Tresso had ratified the contract. On the contrary, the correspondence attached to the founding affidavit showed that Tresso had unequivocally and consistently refused to accept liability for the earthworks.

28 The fact of the matter is that the applicant's affidavits failed to set out any cause of action at all against Tresso.

Evaluation of the referral application

29 Against that backdrop, the referral application must be seen for what it is: a naked attempt to conjure a case for the applicant out of nothing.

- 30 It would be hard to find a clearer case of a fishing expedition. Having failed to set out a factual basis for a claim against Tresso, after the answering affidavit was filed, the applicant amended its notice of motion to add a claim against Mr Oberholzer and JITW Developments but then put up no factual case for why they would be liable to the applicant. Instead, it launched a referral application in the hope that it would provide the applicant with the factual case it needed to pursue a claim against these parties.
- 31 Finally, the manner in which the applicant identified the issues for referral to oral evidence, again, exposed its true motivations. It sought a referral to oral evidence on whether Tresso was liable to it and if not Tresso, then which of the remaining respondents was liable to it. But these are not discrete issues to be resolved by a focussed referral to oral evidence; they are the conclusions a court is required to reach at the end of the case.
- 32 There is no basis to grant the referral application. It violates every principle that the courts have laid down for the proper exercise of their discretion under Uniform Rule 6(5)(g).

The main application

- 33 That leaves the question whether judgment should be entered in favour of Tresso in the main application. I have set out above, the palpable inadequacies in the applicant's own case against Tresso. When those failings are considered alongside the fact that the applicant was unable to dislodge any of the pertinent facts set out by Tresso in its answering affidavit, the result is inevitable. The applicant's case against Tresso must be dismissed.

- 34 In the event of its success, Tresso sought costs of two counsel on an attorney and client scale. I do not see a basis for the costs of two counsel. The issues in the case were legally and factually simple. The applicant was represented by one counsel. I shall therefore limit the costs to the costs of one counsel.
- 35 In so far as the punitive scale of costs is concerned, in *Public Protector*, the Constitutional Court confirmed that costs on an attorney client scale are usually awarded when a court wishes to mark its disapproval at the conduct of a litigant.⁵ In this case, the applicant had received two letters from Tresso's attorney prior to the litigation in which it stated, in no uncertain terms, that it denied any liability to the applicant and informed the applicant that its claim lay against Mr Oberholzer and JITW Developments. It is clear that, at that stage, the applicant knew it had no case against Tresso because it failed to make one out in its own founding affidavit. Despite this, however, it proceeded to launch the main application.
- 36 The applicant's attempt to explain away this pre-litigation correspondence was nothing short of contrived. It claimed that the letters did not disclose Tresso's response to the case against it. However, it is not possible to read the letters and come away with any understanding other than that Tresso denied liability to the applicant, refuted the claim that it had a contract with the applicant, and pointed to Mr Oberholzer and JITW Developments as the likely defendants.
- 37 Despite this knowledge, the applicant, for reasons known best to it, did not bring a case against either Mr Oberholzer or JITW Developments. It cited them, but pursued no relief against them. It later thought that it could cure this problem by amending its notice of motion to seek relief against them, but without any factual case made out for their liability.

⁵ *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) para 223

Instead, it decided to cure the absence of any factual case against Mr Oberholzer and JITW Developments but seeking an referral to oral evidence to enable it to find a case against them.

38 This is nothing short of abusive litigation. It deserves the court's censure.

Order

39 I therefore make the following order:

- (a) The applicant's application for a referral to oral evidence is refused, with costs on an attorney and client scale.
- (b) The applicant's main application against the first respondent is dismissed, with costs on an attorney and client scale.

K HOFMEYR

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Applicant's counsel: Adv J P Steenkamp

Applicant's attorneys: Ryan Hall Attorneys

First Respondent's counsel: Adv R S van Riet SC; Adv JL van Dorsten

First Respondent's attorneys: DFG Attorneys