THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 830/2013

Not reportable

In the matter between:

Holm Jordaan & Partners CC **APPELLANT**

and

City of Tshwane Metropolitan Municipality **RESPONDENT**

Neutral Citation: *Holm Jordaan v City of Tshwane Metropolitan Municipality* 830/13 [2014] ZASCA 105 (3 September 2014)

Coram: Lewis, Maya, Wallis, Willis JJA and Dambuza AJA

Heard: 21 August 2014

Delivered: 3 September 2014

Summary: Where an architect's commission in respect of the design of a building is conditional upon a decision to proceed with the project, and final terms are not agreed by all parties concerned, no contract comes into existence; the decision to proceed does not amount to a repudiation.

ORDER

On appeal from: North Gauteng High Court, Pretoria (J W Louw J sitting as court of first instance):

The appeal is dismissed with costs including those of two counsel.

JUDGMENT

Lewis JA (Maya, Wallis and Willis JJA and Dambuza AJA concurring)

[1] At issue in this appeal is the question whether there was a contract between the parties on the terms alleged by the appellant, Holm, Jordaan & partners CC (HJ), a firm of architects, and the City of Tshwane (the City), the respondent, for the design and supervision of new municipal headquarters for the City. HJ had won a competition run by the City's predecessor, the City Council of Pretoria, for the design of new municipal headquarters. Several years later, and after much negotiation and many changes to the original arrangement between the parties that I shall discuss in due course, the City advised HJ that it was not proceeding with the project originally envisaged. HJ regarded this as a repudiation of an enforceable contract and sued for damages in excess of R4 million, being the fees it claimed it would have earned had the project gone ahead. The North Gauteng High Court (Louw J) found that there was no contract on the terms alleged by HJ and dismissed the action. Leave to appeal to this court was granted by the high court. I shall discuss briefly the background to the running of the competition, the history of the parties' negotiations and then the contractual terms.

The history

[2] The personnel and departments of the City Council of Pretoria (I shall refer to it as the Council to distinguish it from the City, the respondent) were, until March 1997, accommodated for the most part in a building known as Munitoria. On 3 March

1997 the west block of Munitoria was razed to the ground by a fire, and the south block was severely damaged. The building could no longer be occupied and the personnel were moved to other accommodation rented by the Council on a temporary basis. The south block was rebuilt, but the remains of the west block had to be demolished.

[3] In November 1998 the Council decided to hold a competition for an architectural design of a new municipal building on the site of the west block. The competition was referred to as Project Phoenix (presumably because the building would arise from the ashes of the old building) and was open to architects practising in Pretoria. The first prize for the competition was that the winner would be commissioned as the architect for the rebuilding of the municipal headquarters, and its brief would include the design, contract documentation, contract administration and inspection of the works. HJ entered the competition and in July 1999 the Council announced that it was the winner. HJ considered that it was entitled to commission on the entire project. When the project was abandoned by the City, HJ considered that it had repudiated the contract with HJ, on the terms it alleged. HJ accepted the repudiation and sued the City for damages for breach of contract.

[4] Before dealing with the 'conditions' of the competition and other documents that bear on the contractual arrangements between the parties, it should be noted that the requirements for a new municipal building grew exponentially after the competition had been held and initial work done. The Council was absorbed by a newly created metropolitan municipality – the City – in December 2000 and new policies and strategies regarding transport and development of the City, for example, required more space for personnel and created new requirements for new functions.

The competition brief

[5] The competition brief described in broad terms the area in which the new building was to be erected, its surrounds and the urban design considerations to be taken into account, and indicated that the floor area was variable within a range of 41 000 and 51 000 square meters. In addition it specified the facilities that were required and a maximum cost for office construction (R125 million) and for parking (R35 million) – a total of R160 million. The brief ended with a statement in relation to financing proposals: 'Since the City Council does not have the finance to erect the

new office building, finance for the project will have to be sourced elsewhere. Entrants may submit financing proposals if they so choose. However such proposals will not be taken into account in the evaluation of design proposals.'

The competition rules and terms

[6] The Council, as the 'promoter', invited entries from Pretoria architectural firms. Entrants had to register and pay an entry fee. The names of the assessors were listed, and it was stated that a Competition Registrar would be appointed. Several requirements were set out for the way in which designs and documents should be submitted. Clause 2.16, on which much turns, read:

'Each of the stage one finalists shall receive an amount of R10 000 . . . This award is to defray costs incurred in the submission of a second stage entry . . . .

Subject to his/her compliance with the conditions contained herein, *the finalist of the scheme placed first shall be commissioned as architect for the project, which commission shall constitute the first prize.* The Promoter shall enter into an agreement with the winner, the terms of which shall be the standard terms of agreement between the City Council of Pretoria and architects for a service including design, contract documentation, contract administration and inspection of the works. The R10 000 award made to the winner as a stage one finalist shall form part of the design concept (sketch plan) fee. *Should the project not be proceeded with after the adjudication of the second stage, the winner will be paid the design concept (sketch plan) fee.*

While it is the intention of the Promoter to proceed with the final design and documentation and with the construction of the new complex should the go-ahead be obtained from the City Council, the Promoter is under no obligation to do so.' (My emphasis.)

Winning the competition

[7] On 13 September 1999 the executive director of city planning and development wrote to HJ confirming that it had submitted the winning entry 'subject to the Competition Brief, Rules and conditions with which you are fully conversant'. The letter continued that it was the Council's intention to 'commission your firm as Architectural Consultants for the new building, *should it be decided to proceed with the project*. As explained to you . . . the Council's decision whether or not to proceed with the Project *is dependent on a variety of factors*, the most important of

which are acceptable financing proposals and clarity with regard to the effect of the new uni city on accommodation requirements in a new building.' (My emphasis.) HJ responded in due course stating that it eagerly awaited the decision to proceed with Project Phoenix, and said: 'We understand that our formal appointment as Architects in terms of the Competition Brief, Rules and Conditions follows on this decision.'

Events after 1999

[8] Nothing of consequence happened in the next couple of years, save, as I have said, that the City was established, incorporating the former Council and 11 other municipalities, as a result of which the need for additional accommodation in the municipal headquarters grew substantially. In January 2002 the City approached HJ and requested it to assist with a new needs assessment – a bulking exercise. And on 14 April 2003 HJ wrote to the City stating that further to a meeting with a City official, it confirmed that the concept of the competition was in principle acceptable to people at the meeting and that the floor area would increase to 76 000–80 000 square meters. The letter continued: 'We were asked at that meeting whether we are prepared to work in a joint venture with a BEE company. We confirm that since the project is to increase in scope, we are prepared to work in a joint venture with a BEE company.' But it also set out the requirements that would have to be met by such an entity before it would enter into a joint venture with it, and stipulated that it would do the selection of the entity in partnership with the City.

[9] Some ten days later the City resolved at a meeting:

'1 That the building of a new Municipal Headquarters for the City of Tshwane Metropolitan Municipality on the Munitoria site, be approved.

2 That the winning firm of the competition, Messrs Holm Jordaan & Partners, be commissioned to render the architectural services required for the building of a new Municipal Headquarters on condition that such services are rendered through a joint venture partnership with a BEE appointed by Council on its (Council) own terms and condition. . . . .

5 That the various funding options for the rebuilding of a Municipal Headquarters be investigated by the Municipal Manager in consultation with the Chief Financial Officer. . . .'

[10] The City advised HJ of the resolutions by letter on 14 May 2003, and stated that: 'The final terms and conditions regarding the appointment, brief and

remuneration details of this contract will follow after agreement of the above details by all parties concerned.' HJ accepted the appointment on 4 June 2003, writing to the City that they had noted the condition in relation to a 'BEE appointed company'. It said that although this had not been a requirement of the competition 'we are prepared to accommodate BEE involvement'. It continued to say that to avoid 'fruitless expenditure' it and the City would have to agree on the BEE requirement, the payment of outstanding fees and the confirmation of the programme.

[11] HJ did further work in evaluating the project to which the City had agreed. The requirements for the new headquarters of the City had increased very substantially. The work done by HJ on the bulking exercise and on the re-evaluation of the requirements of space was also substantial. Even prior to the meeting of the City in April 2003, it had sent to the City a second interim account, dated 24 March 2003, for payment of a fee of R3 080 207.35. HJ was eventually paid these fees.

[12] In a report that HJ sent to the City on 6 August 2003 it estimated that the total new project cost would be in excess of R1.2 billion. And it sent a further invoice for R1 117 373.73 for the work it had done already. It also wrote to the City, on 18 July 2003, reminding it of the statement in the appointment letter that the final terms and conditions regarding appointment, brief and remuneration details of the contract would follow after agreement between 'all parties concerned'. The letter continued: 'We are of the opinion that the appointment of the BEE architectural joint venture partner has progressed to the extent where a proper Client/Architect agreement can now be signed between the parties.' The writer thus enclosed the standard client/architect agreement recommended by the Institute of South African Architects (the Institute) with the letter.

[13] At this stage no BEE entity had been identified and, as the letter from HJ showed, it was anticipated that a formal agreement had still to be concluded. I shall revert to this issue when dealing with the legal principles that determine whether a contract has been concluded.

[14] The response of the City, written by the Deputy Manager, Architectural Services on 15 October 2003, was that the final terms of the contract had yet to be negotiated – as HJ had itself said. It confirmed the work that HJ had performed already and stated: 'At this stage my Council is considering various options to

finance the project. . . . You are therefore requested not to proceed with any further work on the project until further instruction.'

[15] The City then commissioned various feasibility studies for the project and called on interested parties to comment on the studies. It suggested a different project entirely. HJ did comment, pointing out the report's failure to mention its earlier involvement and that as a result of winning the competition it was entitled to be appointed as the architect for the new municipal headquarters. On 25 January 2009, the acting municipal manager wrote to HJ explaining that it was contemplating a Public Private Partnership (PPP) which would have to be approved by National Treasury, and advised that, as a result of the public process of calling for comment on the feasibility study, the council of the City had rescinded the council resolution of 24 April 2003, and that the City had given its approval in principle to a PPP. He said that 'your appointment to Phoenix was subject to the condition, amongst others, that [the City] had reserved the right not to proceed with the Project'. He advised that HJ was entitled to participate in the PPP procurement bidding process.

[16] HJ regarded this as a repudiation of the contract between it and the City, accepted the repudiation through a letter sent by its attorneys, and advised that it would take legal action – hence the action for damages that was brought before the high court. The issues for determination, as they were crystallised at the hearing of the appeal, are thus whether a contract between HJ and the City ever came into existence, and if so, whether it was repudiated. (I shall not deal with the various defences that were raised by the City during the course of the trial – and which occasioned considerable delay in its hearing – that are no longer relevant.)

Did a contract between HJ and the City, on the terms alleged by HJ, ever come into existence?

[17] HJ contended before the high court and before this court on appeal that a contract in terms of which it was commissioned as architect for the entire project was concluded in three stages: on 24 April 2003 when the City adopted the resolutions that I referred to earlier; on 14 May 2003 when those resolutions were communicated to HJ and on 4 June 2003 when HJ accepted the offer made when the resolutions were communicated. This was, of course, preceded by the

competition held in 1998, where HJ had won the right to be commissioned for the project that was the subject of the competition.

[18] But, as Louw J found, the right to be commissioned as architect for the remaining stages of the project (the first two having been completed as part of the competition) was conditional on funding being found, and was also conditional on the Council, and later the City, proceeding with the project. HJ's response to that on appeal is that the right may have been conditional on the decision by the City to proceed, but that that condition was fulfilled – and the decision made – when the City passed the resolution to appoint HJ as the architect.

[19] However, that resolution was itself conditional on HJ entering into a joint venture partnership with a BEE entity and it was implicit in the resolutions passed and the letter communicating them that funding for the project had still to be found. As the correspondence referred to earlier shows, no BEE entity was ever identified. So a party to the alleged contract was not known and other material terms of the contract were not agreed. The terms of the competition rules had long become irrelevant. Project Phoenix was no more.

[20] An entirely different project was contemplated when the City passed the resolutions, and indeed, much of the work that HJ had done in the 'bulking' exercise and subsequently showed that the project was infinitely bigger in scale and cost than that originally anticipated. The area of the municipal headquarters was considerably greater and the estimated cost had gone from R160 million to an amount in excess of R1.2 billion.

[21] The terms of the contract had thus still to be agreed to identify not only a party to it (the BEE entity) but the way in which HJ was to be remunerated, and the respective roles of HJ and the unidentified BEE entity, amongst other things. HJ in effect argued that there was a contract with an unknown entity and on uncertain terms that would have been material.

[22] It sought to avoid this seemingly insurmountable problem by relying on this court's decision in *Command Protection Services (Gauteng) Pty Ltd t/a Maxi Security v South African Post Office Ltd* 2013 (2) SA 133 (SCA). In dealing with the

principle that not all terms of a contract need be determined before a contract is concluded, Brand JA said (paras 12 and 13):

'It frequently happens, particularly in complicated transactions, that the parties reach agreement by tender (or offer) and acceptance while there are clearly some outstanding issues that require further negotiation and agreement. Our case law recognises that in these situations there are two possibilities. The first is that the agreement reached by the acceptance of the offer lacked animus contrahendi because it was conditional upon consensus being reached, after further negotiation, on the outstanding issues. In that event the law will recognise no contractual relationship, the offer and acceptance notwithstanding, unless and until the outstanding issues have been settled by agreement. The second possibility is that the parties intended that the acceptance of the offer would give rise to a binding contract and that the outstanding issues would merely be left for later negotiation. If in this event the parties should fail to reach agreement on the outstanding issues, the original contract would prevail (see eg *CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) at 92A – E; *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd*1997 (2) SA 548 (A) ([1997] 1 All SA 191) at 567A – C).

Illustrations of cases that were held by this court to be manifestations of the first possibility are to be found in *Namibian Minerals Corporation* and in *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) ([2000] 3 All SA 247), while the facts in *Alsthom Equipment* and in *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) were held to demonstrate the second (see also *Lewis v Oneanate (Pty) Ltd and Another* 1992 (4) SA 811 (A) at 820I – 821E). The criterion as to whether the facts of a particular case indicate the one or the other was succinctly summarised thus by Corbett JA in *Alsthom Equipments* at 92E – F:

"Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement and the surrounding circumstances. . . ."

[23] In my view it is clear that, whatever HJ's intention is now said to be, the City regarded the terms that had still to be determined as crucial to the conclusion of the contract. That appears from the documents that I have referred to. Moreover, it was HJ's view too, communicated by its letter sent to the City on 18 July 2003 requesting that a proper agreement be concluded on the terms of the standard agreement

approved by the Institute. The parties simply could not have intended that material terms of the contract would be negotiated in the future. There was nothing to fall back on if those terms were eventually not agreed.

[24] Moreover, as the City argued, no agreement had been reached on the scope of the work; the allocation of responsibilities; the limitation of responsibilities; the fees or methods of calculating them; the provisions for termination; the details of professional indemnity insurance and the provisions for dispute resolution. These terms are essential to an architect's commission in terms of rule 3 of Board Notice 28 of 2004 (*GG* 26143 of 19 March 2004), promulgated under the Architectural Profession Act 44 of 2000, which sets out the code of professional conduct for architects.

[25] I find, accordingly, that no contract commissioning HJ as the architect for the building of municipal headquarters, contemplated when the City resolved to appoint HJ, together with a BEE entity in a joint venture, ever materialized. The action had to fail on this basis alone.

Repudiation

[26] However, I think it important to say something about the claim that the City had repudiated the contract and was liable for damages as fees lost by HJ as a result. If the court had found that there was in fact a contract concluded between HJ and the City, it was always the prerogative of the City not to go ahead with the project. No owner is ever obliged to continue with building or even to commence building simply because it has commissioned an architect to design one. The commissioning of an architect does not entail an obligation to build. The architect is entitled to fees for work done: not to fees for the building project as a whole where the project is not commenced or is stopped.

[27] I do not think it necessary to discuss the nature of an architect's contract with an owner, given the conclusion to which I have already come. But for the sake of completeness I refer to the standard terms of appointment used by the City, and of those that were suggested by HJ (approved by the Institute), in terms of which the City (as the owner) has the right to suspend the project, in which case the architect was entitled to full remuneration for services rendered and disbursements made up

till the date of suspension. The Institute terms provide also that if a project is resumed or reinstated after a year, the project is to be regarded as a 'new commission' and fees must be negotiated.

[28] While HJ argued that these terms refer to a suspension, which must be temporary in nature, and not to a project that is not commenced, the same principle, in my view, must a fortiori apply. As the high court found, a suspension must include an indefinite suspension. And I do not accept the argument of HJ that although the building for which it was commissioned was stopped its mandate continued. Accordingly, even if a contract had come into existence, the City would not have been liable for damages for repudiation.

[29] Regrettably, the record prepared on behalf of HG did not comply with the rules of this court. No core bundle was provided although it was clearly warranted: the documents that I have referred to were scattered in the various volumes. To add insult to injury, numerous irrelevant documents were included. The full transcription of the oral evidence was said to be necessary for the purpose of the hearing of the appeal although much was inadmissible and very little was referred to in the heads of argument. Non-compliance with the rules of court by legal representatives is to be deprecated.

[30] The appeal is dismissed with costs including those of two counsel.

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C H Lewis

Judge of Appeal

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