NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between: **Case No: 2814/2011**

WESTSIDE TRADING 78 (PTY) LTD **Plaintiff**

And

THE MEMBER OF THE EXECUTIVE COUNCIL

OF THE PROVINCE OF THE EASTERN CAPE

RESPONSIBLE FOR HUMAN SETTLEMENT **Defendant**

Coram: **Chetty, J**

Heard: **20 November 2012**

Delivered: **6 December 2012**

Summary: ***Contract*** *- Multimillion rand housing project – Oral agreements - Whether concluded – Written contract concluded in respect of first phase of development – No written contract in respect of second phase – No such agreement concluded – Absolution granted.*

JUDGMENT

Chetty, J

[1] It is apposite to commence this judgment by iterating the correct approach to an application for absolution as propounded by Harms J.A, with reference to various authorities, in **Gordon Lloyd Page and Associates v Rivera and Another**[1] where the learned judge of appeal said the following: -

> "[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel*1976 (4) SA 403 (A) at 409G - H in these terms:
>
> '. . . (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson (2)*1958 (4) SA 307 (T).)'
>
> This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff*1972 (1) SA 26 (A) at 37G - 38A; Schmidt *Bewysreg* 4th ed at 91 - 2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff' (*Gascoyne (loc cit*)) - a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the

[1] 2001 (1) SA 88 @ p92 para [2]

> issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice."

[2] This is precisely the type of case where, despite counsel for the plaintiff's protestations to the contrary, not only the paucity of the evidence adduced on behalf of the plaintiff but the interests of justice itself invite a judgment of absolution from the instance given the anomalies between the plaintiff's pleaded case and the evidence adduced on its behalf by its managing director and sole witness, Mr *Keith Thomas* (*Thomas*).

The Pleadings

[3] In its particulars of claim, the plaintiff alleged that during November 2004, the parties concluded an oral agreement, the material terms of which were articulated as follows: -

> "3.1 The Defendant approved subsidies for the construction of 850 dwellings and services (internal reticulation) on erven in Ocean View, Jeffreys Bay, in the area of jurisdiction of the Kouga Municipality ("project").

3.2 The Plaintiff was appointed as the Support Organisation (the developer) for the project and would be responsible for the construction of the dwellings and services (internal reticulation), which, subsequent to construction, would be transferred to selected beneficiaries.

3.3 The Plaintiff would be remunerated for the construction of the dwellings and services (internal reticulation) in accordance with the Defendant's subsidy quantum effective at the time of the commencement of the project.

3.4 A written agreement would be signed by the parties, which document would confirm the terms of the agreement (as set out above) and would include ancillary terms relating to the implementation of the project."

[4] It then alleged that the oral agreement metamorphed into a **"binding agreement"** not only by a resolution dated 26 November 2004 annexed to the summons as "A" and signed by the defendant's then incumbent, Mr *G.E Nkwinti*, but was moreover confirmed in a letter addressed to the Kouga Municipality by the Deputy Director: Housing Secretariat of the Department of Local Government and Housing of the Province of the Eastern Cape. The latter document, annexure "B" to the summons, merely repeats the recommendations encapsulated in "A", an extract from the minutes of a meeting where various entities, including the plaintiff, made presentations to the Eastern Cape Human Settlements department concerning the proposed housing settlement at Ocean View, Jeffreys Bay.

[5] The aforementioned recommendations, suitably amended, read as follows: -

"(a) 850 subsidies be approved in terms of Peoples Housing Process, for the Support Organisation, Westside Trading 78 (Pty) Ltd, as calculated below: -

(b) **850 subsidies @ R25 800.00= R 21 930 000.00**
SCCCA variance @ R3900 x 850 = R 3 315 000.00

TOTAL R 25 245 000.00

(c) An Establishment Grant be approved as calculated below: -

850 subsidies @ R 570.00 = R484 500.00

(d) An amount of R500.00 for town planning and survey (P2) be deducted as historical cost.

(e) The top structure conforms to the minimum Provincial norms and standards

(f) Westside Trading 78 (Pty) Ltd be approved as Support Organisation.

(g) Kouga Municipality be approved as Accounts Administrator

(h) Kouga Municipality with a representative of the MMP be approved as Certifier

(i) The costs of the land be clarified

(j) The Support Organisation submit a project implementation plan within seven (7), after the signing of the agreement after signing of the agreement.

(k) The beneficiary application forms be submitted to the department within 30 days after project approval.

(l) The Support Organisation enters into an agreement with the MEC"

The question which arises is whether these recommendations in fact constitute a record of the oral agreement which the plaintiff contends was concluded at the presentation referred to hereinbefore. I shall in due course state my reasons for finding against the plaintiff but am constrained to return to the pleaded case.

[6] The plaintiff then alleged that during March 2005 the defendant sought its consent to a variation of the agreement by reducing the number of houses to be built and thereafter, during July 2005, concluded a further oral agreement, varying the terms of the previous oral agreement as follows: -

> "6.1 The project would be implemented in two phases.
>
> 6.2 In the first phase 360 dwellings would be constructed.
>
> 6.3 In the second phase, which would be undertaken when subsidy funds were available, 490 dwellings would be constructed.
>
> 6.4 The Plaintiff would be remunerated for the first phase of construction in terms of the Defendant's subsidy quantum effective at the time of the commencement of the first phase of the project.
>
> 6.5 The Plaintiff would be remunerated for the second phase of construction in terms of the Defendant's subsidy quantum effective at the time of the commencement of the second phase of the project.
>
> 6.6 The parties would sign a written agreement in respect of the first phase of the project, which document would confirm the terms of the agreement (as set out above and varied as set out above) relevant to the first phase and

would include ancillary terms relating to the implementation of the first phase of the project.

6.7 The parties would sign a written agreement in respect of the second phase of the project, which document would confirm the terms of the agreement (as set out above and varied as set out above) relevant to the second phase and would include ancillary terms relating to the implementation of the second phase of the project."

[7] In amplification of this further oral agreement it annexed a letter addressed to the Kouga Municipality by the Department of Local Government and Housing, Eastern Cape, incorporating a resolution by the defendant to the effect that: -

"(a) the project approval i.r.o. Jeffreys Bay 100 hectares, with Westside Trading 78 (Pty) Ltd as the Support Organisation, be reduced from 850 subsidies to 360 as a first phase with the following financial value:

360 subsidies @ R31 929.00	**=**	**R11 494 440.00**
360 subsidies @ R 3 900.00 (SCCCA variance)	**=**	**R1 404 000.00**
360 subsidies @ R 4 790.00	**=**	**R1 724 440.00**
TOTAL		**R14 622 840.00**

(b) the agreement between the MEC and the respective Support Organisation be amended accordingly."

[8] It is common cause that the parties concluded a written agreement, annexure "D" to the particulars of claim, during December 2006 for the construction of 360 homes at Ocean View and that both the plaintiff and the defendant duly complied with their obligations thereanent. In essence the dispute relates to whether the parties initially concluded an agreement involving the construction of 850 homes which was subsequently varied into a two phased project, the first, the construction of 360 homes and the second, the construction of 490 homes. The adjudication of that issue must perforce commence by considering the parties' other housing project agreements. It is not in issue that during February 2005 the parties concluded three written agreements viz, Hankey 160, Hankey 150 and Hankey 40. Each of those written agreements was signed by *Thomas* on behalf of the plaintiff and Mr *Nkwinti*, and formed part of a bundle of documents, (exhibit "A"), handed in from the bar during the plaintiff's case.

[9] During his testimony in chief, *Thomas*, expounding upon the plaintiff's pleaded case, testified that the pleaded oral agreements had in fact been concluded and the project divided into two phases. The documentation relied upon, referred to in the preceding paragraphs, as constituting corroborative evidence in support of the plaintiff's case is however wholly inconclusive. Annexure "A" to the summons does not lend itself to the interpretation contended for.

[10] It is apparent therefrom that the recommendations recorded in the minutes of the meeting constituted a mere identification of the plaintiff as the preferred contractor. It explicitly pronounced in recommendation (L) that a binding contract

was dependent upon the conclusion of a written agreement. *Thomas* could have had no illusions to the contrary. He was the signatory on behalf of the plaintiff as regards the Hankey projects and it is inconceivable how he could have deduced that a multimillion rand contract, could validly, be concluded, orally. Neither does annexure "C" to the summons justify the interpretation contended for. It is common cause that budgetary constraints necessitated the staggering of the project into two phases, hence the notification to the Kouga Municipality encompassed in annexure "C" to the plaintiff's summons.

[11] It is evident from the terms of *Thomas'* letter to the defendant during May 2008 that whilst he bemoaned the staggering of the project, he did not labour under the impression that he had concluded a binding agreement to construct the second phase of the project. The letter pertinently states **"and we were advised that the second phase of 490 will be considered when the financial challenges have improved"**. If the agreement, as contended for, had in fact been concluded, the obvious thing would have been to record this in the letter. Its absence therefrom and in the plethora of e-mails sent to officialdom within the office of the defendant negates any suggestion that the oral agreements pleaded were concluded. Neither the documents relied upon nor the evidence of *Thomas* himself provide any basis for finding that any oral agreements were concluded.

[12] *Thomas* testified that following the meeting with Mr *Andre Muller* (*Muller*), an acting director in the defendant's Port Elizabeth Housing offices, he had **"no doubt"** that he would be constructing the remaining 490 homes. His conviction was

however, objectively viewed, not only extremely tenuous, but based entirely upon a speculative hypothesis. He was, as recounted above, aware, having previously concluded three written agreements in respect of the Hankey housing projects that the authority to contract vested in the MEC. Consequently, his evidence that he believed that *Muller* had the requisite authority to bind the defendant is improbable in the extreme. The latter's station within the hierarchy of the human settlements department viz, an acting director in the Port Elizabeth office, clearly provided no justification for *Thomas* to conclude that *Muller* had such authority. In my judgment the evidence adduced on behalf of the plaintiff is wholly insufficient to sustain its cause of action.

[13] In the circumstances the defendant is entitled to an order for absolution from the instance, with costs.

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D. CHETTY

JUDGE OF THE HIGH COURT

On behalf of the Plaintiff:	*Adv O.H Ronaasen instructed by Roelofse Meyer Inc, 29 Bird Street, central, Port Elizabeth, Ref: Lunen Meyer; Tel: (041) 585 3270*
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