

## CONSTRUCTION LAW BULLETIN

### PROFESSIONAL SERVICES AGREEMENT – NO PRICE NO PAY?

#### **INTRODUCTION**

If an engineer, architect, or any professional for that matter, agrees to do work for a client and there is no agreement on the remuneration payable, does that mean that the professional is not entitled to payment for any work done?

This is the question that the KwaZulu-Natal High Court, Durban, had to answer earlier this year.<sup>1</sup>

#### **BACKGROUND**

The plaintiff in the case, being a firm of engineers with specialist knowledge in concrete and its rehabilitation, was requested by the defendant, a body corporate of a high rise building on the KwaZulu-Natal South Coast, to investigate and advise on the deterioration of the concrete in the building. Extensive spalling was occurring in the concrete.

The parties agreed on a fixed fee for the plaintiff's investigation of the problem. However, the parties' agreement was less precise with regard to how the plaintiff would be remunerated in relation to the repair work that would inevitably flow from the plaintiff's investigation and the recommendations made.

The plaintiff offered to draw up a specification in respect of the required remedial work as well as a bill of quantities, invite specialist contractors to tender for the work, prepare appropriate contract documentation, assess and adjudicate the tenders and make a recommendation as to who the defendant should employ. The plaintiff also offered to supervise the execution of the required works.

The plaintiff proposed that it should be paid a fee equal to 11% of the successful tenderer's contract price payable in stages, 35% upon completion of the drawing up of the specifications and tender documentation, 10% upon completion of the adjudication and contract award by the defendant and the balance of 55% for supervision as the works progressed.

After the plaintiff had completed its investigation, the agreed fee for which was paid, the defendant instructed the plaintiff to proceed with the preparation of the documentation and the calling for tenders which the plaintiff duly did.

The plaintiff adjudicated the various tenders received and made its recommendation to the defendant as to who it should appoint to carry out the work.

At this point the trustees of the defendant, who had undergone a change in composition, took fright at the cost and decided to abandon the project.

The defendant then took the rather uncharitable view that it was not obliged to pay the plaintiff any further fees for the work performed by it.

The defendant's attitude was predicated on the notion that the plaintiff had been working on risk, despite that never having been discussed between the parties, and on the basis that as no contract had been awarded, there was no means of calculating any amount payable to the plaintiff based on the plaintiff's fee proposal.

After terminating the plaintiff's services, the defendant employed a third party to do a less extensive and accordingly much cheaper repair exercise.

<sup>1</sup> Structest CC v Body Corporate of High Tide

## THE LAW

The situation is not a novel one. It first arose in a Transvaal case in 1903<sup>2</sup>.

The facts in this case were similar in that an architect had at the request of a client prepared various drawings for a proposed structure that the client wished to erect. The client in this case decided to sell his property and not proceed with the construction of the proposed buildings. He also took the view that he did not have to pay the architect for the work that the architect had done.

The judge in the case said:

*“Now the general principle is uncontested that where one man hires the service of another to perform work he is liable to pay, where no stipulation is made as to the amount, such sum as will fairly remunerate the person whose services he takes advantage of, unless there are circumstances or special terms negating clearly any idea of payment.”*

In other words, in these circumstances, in the absence of clear proof that a professional is undertaking work without a requirement that he be paid for the work, the professional will be entitled to payment.

The law implies a term into the contract entitling the professional to be remunerated.

The next question of course is what amount the professional is entitled to be paid in these circumstances.

The professional is entitled to be paid a fair and reasonable remuneration for the work done. This amount is determined by the court with reference to the available evidence having regard to the general norms in the field concerned.

## THE DECISION

The judge determined that there was no evidence put forward by the defendant which could establish that the plaintiff had been working on risk and did not expect to receive payment for work done if the project failed to proceed to finality.

The judge found that the express terms of the agreement between the parties were insufficient to fix the remuneration payable to the plaintiff. However, he concluded that despite this the plaintiff was entitled to be paid a reasonable fee for the work done up to the point when the defendant decided to abandon the process.

In calculating the amount of the fee which he considered

appropriate, the judge used the amount of the lowest tenderer's price which the plaintiff had recommended for acceptance. He calculated the total fee on that amount at 11% and then took 45% of that as representing a fair estimate of the amount of work done by the plaintiff up to the stage when the plaintiff's services had been terminated.

In the result the court gave judgment in favour of the plaintiff for the amount of its fee calculated as aforesaid.

## CONCLUSION

In the absence of clear evidence to the effect that a professional is undertaking work on risk, a professional will be entitled to be remunerated in circumstances where:

- a project fails or is left incomplete after part of it has been carried out; or
- the contract between the parties is insufficiently precise to fix the remuneration payable to the professional for the work done.

The same considerations apply in circumstances where a building or civil engineering contractor undertakes work without there being agreement on the contract price payable. The contractor will similarly be entitled to be paid on a fair and reasonable basis.

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<sup>2</sup> De Zwaan v Nourse 1903 TS 814