



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

Case Number: 446/2017

In the matter between:

CITY OF CAPE TOWN

Applicant

and

NAMASTHETHU ELECTRICAL (PTY) LTD

First Respondent

JAMES ROBERT GARNER N.O.

Second Respondent

Delivered: 12 November 2018

JUDGMENT

BOQWANA, J

Introduction

[1] This is an application to declare an agreement concluded between the applicant (“the City”) and the first respondent (“Namasthethu”) in November 2014, pursuant to the award of Tender no 240Q/2013/14 (“the tender”) to Namasthethu, void *ab initio*; alternatively that the agreement was validly terminated by the City on 15 March 2016; to set aside the determination made by the second respondent (“Mr Garner”) on 24 August 2016 in favour of Namasthethu; to extend the time period permitted for the setting aside of the aforementioned determination under Section 38 of the Arbitration Act 42 of 1965 (“the Arbitration Act”), insofar as may be necessary; and to direct Namasthethu to pay the costs of this application, including the costs of two counsel, on an attorney and own client scale.

[2] The application is opposed by Namasthethu; Mr Garner abides the decision of the Court.

Background

[3] On 7 March 2014, the City advertised a tender for the supply, retrofit and installation of energy efficient luminaries at the Cape Town Civic Centre. Having been the successful bidder, Namasthethu was awarded the tender on 19 August 2014. The estimated value of the tender award was R33 329 498.00, inclusive of VAT.

[4] On 17 September 2014, an unsuccessful bidder, Citrine, lodged an appeal in which it claimed that Namasthethu and its directors had been convicted of fraud in August 2013. The appeal was not entertained by the City due to its lateness. The City went ahead to conclude a written agreement with Namasthethu on 25 November 2014, which was to run for 18 months, until 31 July 2016.

[5] On the same day, the City wrote a letter to Namasthethu informing it that it had come to the City's attention that Namasthethu and/or its directors had been found guilty on charges relating to fraud or corruption during August 2013. The letter further stated that the City had been referred to a case in the Pietermaritzburg High Court where Namasthethu was cited as a respondent in a matter brought in terms of the Prevention of Organised Crime Act 121 of 1998 ("POCA"). The City then requested Namasthethu to respond by no later than 28 November 2014, as to whether these allegations were true and if they were, to provide full particulars thereof, and notwithstanding that, the City would still conduct its own investigations on the matter. It reserved its rights to take action which may affect any contract Namasthethu had with the City.

[6] On 27 November 2014, Namasthethu responded to the City's letter, through one S Chetty who was indicated to be its Chief Executive Officer ("CEO"). The reply went, *inter alia*, as follows:

"We confirm that NAMASTHETHU ELECTRICAL (PTY) LTD t/a NATIONWIDE ELECTRICAL and its sole Director, S Chetty have not and have never been convicted of fraud and corruption during August 2013. We further confirm that NAMASTHETHU ELECTRICAL (PTY) LTD t/a NATIONWIDE ELECTRICAL and S Chetty have never been convicted of any other charge during any other period and that the conduct of the party that forwarded to you the false information, was clearly malicious.

...

We confirm that NAMASTHETHU ELECTRICAL (PTY) LTD t/a NATIONWIDE ELECTRICAL was cited as a Respondent in civil proceedings and record that these proceedings were consequently [sic] finalised before Court and that no Order was made against NAMASTHETHU ELECTRICAL (PTY) LTD t/a NATIONWIDE ELECTRICAL in the finalization of the Application.”

[7] The Senior Legal Advisor, of the City, R Hassiem wrote a further letter to the Namasthethu on 3 December 2014 wherein he drew Namasthethu to the following information from the Construction Industry Development Board (“CIDB”) pertaining to it:

“Contractor/director/s were found guilty in terms of a Plea Agreement in terms of Section 105[sic] of the Criminal Procedure Act on 13 August on various charges of fraud and corruption.

- Contractor/director/s were sentenced with a fine of R200 000.00 and five years imprisonment, the latter which was suspended.”

[8] Hassiem further informed Namasthethu that the matter would be referred to the City’s Forensic Services Department for further investigation. Notwithstanding the proposed investigation, he invited Namasthethu to provide him with a reply of the said allegations within 7 days of the letter.

[9] On 5 December 2014, the City asked the CIDB’s Manager: Legal and Compliance, Bongiwe George (“George”), to confirm whether Namasthethu had been found guilty of fraud and corruption to which she replied:

“Yes, guilty finding on charges of fraud and corruption related to Namasthethu Electrical (Pty) Ltd t/a Nationwide Electrical.”

[10] On 9 December 2014, the City’s Legal Services Department requested its Forensics Ethics Integrity Department (“FEID”) to investigate the position of Namasthethu and to establish whether the allegations against it were well founded. In this request the legal department stated that “[t]he Procurement Law Unit does not have all the information necessary to verify the allegations ... hence the matter was referred to the [FEID]”.

[11] On 12 December 2014, Namasthethu replied to the City’s letter of 3 December 2014, under the name and signature of one PS Govender (“Govender”). In this letter Govender stated that:

“The Bidder on this project (Contract No: 240Q/2013/14) is NAMASTHETHU ELECTRICAL (PTY) LTD t/a NATIONWIDE ELECTRICAL. The sole Director for NAMASTHETHU

ELECTRICAL (PTY) LTD t/a NATIONWIDE ELECTRICAL at time of Tender was Mrs Shamla Chetty.

*I have attached current proof of registration with the CIDB. I have attached the CIPRO document which confirmed that Mrs Shamla Chetty is the sole Director and the letter from **SAPS- Office Of The Anti-Corruption Task Team** confirming that no criminal charges were obtained against NAMASTHETHU ELECTRICAL (PTY) LTD t/a NATIONWIDE ELECTRICAL or its Director, Mrs Shamla Chetty.*

We trust this meets your approval.”

[12] On 18 December 2014, the City handed over the site to Namasthethu and subsequent thereto Namasthethu began with the work as agreed.

[13] Meanwhile, the FEID, which had been conducting forensic investigation into Namasthethu, completed its work during the beginning of 2016. In its report to the City Manager it stated the following findings under paragraph 8:

“ 801 ...

802 *We established that Namasthethu and its directors (S Chetty and R Chetty) were criminally charged with fraud and corruption. Namasthethu, under the trading name of Nationwide Electrical and R Chetty, who at all relevant times acted as a director, were convicted in the Commercial Crimes Court in Pietermaritzburg on 7 November 2013, less that [a] year prior to the date of the tender application on 240Q/2013/2014.*

803 *We established from the above that S Chetty made a prima facie misrepresentation to the City when she stated in the negative on the tender declaration to the question whether any of the directors or the company/entity has been convicted by a court of law for fraud or corruption during the past five years. This amounts to fraud.*

804 *We established that S Chetty made a further prima facie misrepresentation to the City, when she included the CIDB certificate in Namasthethu’s tender application knowing that her husband admitted during the above-mentioned criminal proceedings that the certificate was obtained through fraud and corruption.*

805 *We established that S Chetty in her tender submission provided the City with a local business address for Namasthethu as 7 – 15 Avenue Kensington which was discovered to be false. Furthermore it was established that the service provider operates from 3 containers located at the Civic Centre parking area Hertzog Boulevard Cape Town.*

806 *We found that the CIDB grading for Namasthethu was upgraded on 9 February 2012 from a grade of F 1CE PE to 7EB PE of which the latter was fraudulently and/or corruptly obtained. They misrepresented to the City in submitting the same CIDB certificate as part of their tender proposal in tender 240Q/2013/2014.*

807 *Due to the fact that misrepresentations were made in the tender documents of the tenderer the tender were incorrectly awarded to Namasthethu.*” (Own emphasis)

[14] FEID then made the following recommendations in paragraph 9 of its report:

“901 *We recommend that the Executive Director Corporate Services and Compliance, in conjunction with the Legal Services consider:*

- *Subject to the procedures contained in the City’s Combating Abuse of Supply Chain Management (SCM) System Policy, to list the directors, former directors as well as the entity on the City’s Register of Tender and Contract Defaulters in that, prima facie evidence exist, that they abused the City’s SCM System and/or committed improper conduct, during the procurement process and/or during the execution of the contract, as defined in the said Policy; and*
- *The termination of the contract.* (Own emphasis)

903 *It is further recommended that FEID lodge a criminal case of fraud with SAPS against S Chetty, R Chetty, Naidoo and the entity, Namasthethu, for the misrepresentations relating to information contained in the tender submission.”*

[15] FEID’s report also recorded that Namasthethu was a Durban based company whose directors had previously been husband and wife: Ravan Chetty (‘R Chetty’) and Shamla Chetty (‘S Chetty’). R Chetty resigned as a director on 12 May 2011. S Chetty resigned as a director on 14 November 2014. On the same day as S Chetty resigned, Lumendrie Naidoo (‘L Naidoo’) became the sole director of Namasthethu. L Naidoo had been with the company since 2010 and had been responsible for the company’s accounts, purchasing and project management. According to FEID, L Naidoo was only prepared to meet with FEID on a without prejudice basis and was not prepared to answer certain questions.

[16] As a result of this report, the City wrote a letter to Namasthethu on 15 March 2016 informing it that their contract was being cancelled with immediate effect on the basis that Namasthethu had “*committed fraudulent acts during the tender process*”, which had resulted in the tender being awarded to it. The letter also specifically referred to Namasthethu’s failure

to disclose a conviction for fraud and corruption, and the fact that it had given a local physical address which was fictitious. The letter referred to clause 53 of the City's Supply Management Policy ("SCM Policy") which, according to the letter, stated that:

"53. The City Manager must provide measures for the combating of abuse of the supply chain management system and is able to:

53.6 cancel a contract awarded to a person if:

53.6.1 the person committed a corrupt or fraudulent act during the bidding process or the execution of the contract;"

[17] The letter also indicated that this also in accordance with Regulation 38(1)(f) of the Municipal Supply Chain Management Regulations ("the Regulations"). The significance of these references to the SCM Policy and the Regulations are important for the Respondent's case which shall be discussed shortly. In its third paragraph the letter states that the City had received the information that Namasthethu was convicted of fraud "*[d]uring the execution of the contract*" which according to Namasthethu is incorrect, this information was received long before the contract was concluded.

[18] Namasthethu disputed the cancellation in a letter sent by its attorneys, Anand-Nepaul, by email on 16 March 2016. The letter stated the following:

"Without admitting any of the allegations in your letter under reply, we are instructed as follows:

- 1. Client disputes your right to cancel the contract.*
- 2. Client is exercising its lien over the site in respect of the labour and improvements."*

[19] Anand-Nepaul called for an undertaking that the City "*will refrain from interfering with Clients' Lien and further that you will be withdrawing the cancellation*" and threatened an urgent application with costs.

[20] The City refused to accede to the requested undertaking and maintained that the termination of the contract was valid. Anand-Nepaul responded that their client "*resists the City's purported cancellation and insists on its right to perform the outstanding balance of the works.*" He also indicated that Namasthethu wanted the "*disagreement ... between the City and our client regarding the determination of the contract*" resolved in accordance with the dispute resolution contained in the JBCC Series 2000 Principal Building Agreement as revised ("the JBCC Agreement"). He indicated that the dispute was "*essentially of a legal*

nature, and it certainly does not raise any construction issues requiring the appointment of a construction professional as the arbitrator. We suggest that should it become necessary to appoint an adjudicator, that a suitably experienced advocate or attorney take up the appointment.” (Own emphasis)

[21] The City responded by asking whether Namasthethu disputed *“the fact that they committed fraud and/or corruption during the tender process or execution of the contract ... [i]f this is the case then please provide us with their reasons why they dispute the termination in light of the overwhelming evidence against them.”* The City advised that on receipt of any such reasons, it would give consideration to whether it would be appropriate to convene a meeting with Namasthethu.

[22] Anand-Nepaul responded on 29 March 2016 by stating that *“[o]ur client vehemently denies any allegation of fraud and/or corruption, as alleged or at all.”*

[23] The City then replied on 4 April 2016, as follows:

“We note that your client refused to provide any further details pertaining to their alleged fraudulent and/or corrupt conduct during the tender process or execution of the contract. This is despite the overwhelming evidence against them and they are disputing the termination.

Furthermore with reference to your letter dated 17 March 2016, it seems that your client is following the dispute settlement procedure in the contract. In light of your client’s bare denial of the allegations against them, we reiterate that the disagreement with regard to determination cannot be resolved.”

[24] Namasthethu continued to insist that the dispute surrounding the cancellation of the agreement be adjudicated. It suggested as potential adjudicators three senior counsel at the Cape Bar, whilst the City persisted with their contention that the agreement was validly terminated in March 2018.

[25] Anand-Nepaul stated further that Namasthethu would proceed to have an adjudicator appointed by the Association of Arbitrators Southern Africa (‘AASA’). ASSA appointed Mr Garner, a construction consultant and surveyor, as the adjudicator.

[26] The City wrote an email on 19 May 2016 reiterating that it considered that *“this contract has been validly terminated and the entity, Namasthethu Electrical must approach the High Court for relief”*. It also added that it would not participate in any adjudication process and noted that *“Mr Garner has no legal background which is imperative in this*

instance as the matter relates to legal interpretation. Even if the City elected to participate in the adjudication, we would have objected to his appointment.” It further stated that: “[s]hould they continue with the adjudication, without participation of the City, the City will have no option but to take any ruling made by the arbitrator to the High Court to be set aside. ...the City deems this matter closed and will not entertain any further correspondence in this regard.”

[27] Having been appointed and in an email dated 22 May 2016, Mr Garner stated, *inter alia*, that in the absence of any amendment to the adjudication provisions of the principal building agreement:

- “1. Clause 40.0 entitles either party to refer a dispute to adjudication.
2. Clause 40.9 of the Agreement provides that the provisions of clause 40.0 survive the termination of the agreement.
3. The nominating body to appoint an adjudicator and/or arbitrator is the Association of Arbitrators (Southern Africa)”

[28] In a further email dated 29 July 2016, Mr Garner advised that:

- “
 - a. Clause 40.9 of the specified Agreement provides that “the termination of this **agreement** shall not affect the validity of this clause 40.0
 - b. The Changes made to the Standard JBCC Agreement do not affect either clause 40.2/ 40.2.1 of clause 40.9.
3. It therefore appears to me that the Contractor is entitled to refer dispute for adjudication, notwithstanding termination of the Agreement (the validity which is in any event disputed by the Contractor) and has in fact done so.”

[29] Namasthethu then sent a Statement of Claim and other documents, including an assessment of damages report by Johan Richards and a CIDB document titled “Decision and Reasons” dated 1 August 2016, which apparently found Namasthethu not guilty on all charges. In an email dated 10 August 2016, the City informed Mr Garner that it would not participate in any adjudication process but informed him about a written ‘Plea of guilty’ (allegedly made by Namasthethu) and sent it to Mr Garner at his request.

[30] Mr Garner then prepared a determination on the basis of the Statement of Claim and further documents sent to him by Namasthethu. No oral evidence was led. His determination was delivered on 24 August 2016, in which he upheld various claims by Namasthethu and

found the City liable to Namasthethu for the amount of R516-671.04 inclusive of VAT; R1-483-304.42 inclusive of VAT; and R499-599.40 inclusive of VAT. The summary of the determination went as follows:

“14.1 Claim for Final Account value outstanding R490,519.95 (excluding VAT)

This claim is dismissed in its entirety.

14.2 Claim is for profit on outstanding work

This claim is valid, and in the amount claimed of R451,465.83 plus VAT (including VAT the total is R516,671.04) and this amount should be paid to the Contractor in addition to amounts already paid.

*14.3 Claim for repayment of the amount retained under the **agreement** as security for performance. This is claimed in the amount of R1,350,645.28 excluding VAT.*

The contractor is entitled to be paid the sum of R1,303,144.23 plus VAT = R1,483,304.42.

14.4 Claim for Incorrect Deductions of Penalties in the sum of R438,210.00.

The claim for refunding the incorrectly deducted penalties is valid. This entitles the Contractor to the sum of R438,210.00 to which VAT is to be added. This is because VAT payable is calculated from the value certified for payment after deduction of penalties. Once the penalty deduction is removed the increase in payment due to the Contractor is the amount of the incorrectly deducted penalties, plus VAT.

This the additional amount due to the Contractor in respect of this claim is R438,210.00 plus VAT = R499,559.40.

14.5 The claim for Variation Orders executed in the sum of R308,396.69.

For the reasons explained in 13.5 above this claim is dismissed in its entirety.

14.6 The claim is for Standing Time, in the amount of R974,518.94.

For the reasons explained in 13.6 above this claim is dismissed in its entirety.

14.7 In the Statement of claim the Contractor also requests a determination that interest is payable from a date to be set by the adjudicator, and for an award of legal costs for the referral and the adjudication itself. In these respects my determination is as follows:

14.7.1 The Employer is required to pay the amounts determined above within five working days from receipt of this determination, and that interest will be

payable if this is not done, from the date five working days from receipt of this adjudication at the legal rate.

14.7.2 The Adjudication Rules applicable do not make any provision for costs of representation and submissions made by the parties. Accordingly no charges are admissible for such costs.

14.7.3 The Rules do provide, in Rule 4.3 for the Adjudicator to direct that a party is to pay the adjudicators fees. On the basis that the Contractor has succeeded to a substantial degree in its claims, I direct that my fees are to be paid by the Employer (the City).

14.7.4 Further in accordance with Rule 4.1.4 I exercise my lien on the Determination, pending receipt of the remainder of my fees, which are notified to the parties together with notice that this Determination has been completed.

14.7.4.1 I direct and determine that if one party pays fees that are directed to be paid by the other party, to obtain the Determination, that party may forthwith recover such amount from the party that has been directed to pay the fees.”

The City’s case

[31] Firstly, the City seeks the determination to be set aside on the basis that Namasthetu’s invocation of the adjudication clause was impermissible. According to the City, the tender agreement was procured by Namasthetu’s fraud and as a result the whole agreement was invalid from the outset. For this reason the dispute resolution clause 40 could not be relied upon after the City had exercised its right to bring the contract to an end. That clause, like the rest of the agreement, was also void from the outset, notwithstanding clause 40.9 (relied on by Mr Garner), which was also void.

[32] In the alternative, and in any event, even if clause 40 were to have survived, sub-clause 40.2.1 and 40.3 do not contemplate a legal dispute (such as the validity of a termination of a contract) being referred to adjudication. (Clause 40.2.1 was intended to apply to expert determinations by quantity surveyors, architects and so forth, relating to matters within their own spheres of competence). A dispute of a legal nature had to be the subject of litigation as envisaged in sub-clause 40.2.2.

[33] Secondly, any adjudication which was permissible had to be done by a legal expert not a surveyor such as Mr Garner. There was therefore no expert adjudication as

contemplated by clause 40 of the JBCC Agreement and Mr Garner could not validly or competently consider the question whether the tender agreement had been validly terminated by the City.

[34] Thirdly, to show that Mr Garner was demonstrably unsuited to consider a legal question he found in his determination:

“This claim is based on the determination [sic] not being lawful. The Contractor has claimed that it was not lawful and submitted documentation to support that claim.

As the City has maintained that the termination was lawful it has the obligation to prove that (the onus of proof lies on he who asserts).

The City has not submitted such proof, either in any submission in terms of the adjudication (having refused to take part), or otherwise.

In these circumstances I determine that this claim is valid, and in the amount claimed of R451,463.83 plus VAT.”

[35] There were furthermore irregularities and misdirections regarding the amounts awarded to Namasthethu in a number of respects.

[36] Fourthly, Namasthethu falsely represented the factual position in its Statement of Claim to Mr Garner. It stated that “*grounds for termination as asserted by the respondent were in fact incorrect and did not exist*”, which led to Garner making the same finding. This was a further false misrepresentation to secure a determination. Thus Mr Garner’s award was vitiated by gross irregularities and was also improperly obtained.

[37] Fifthly, even if Mr Garner’s determination were to be held to be an arbitration award, and section 33 (1) of the Arbitration Act to set it aside applies, the six weeks period within which to bring the application could be extended on good cause shown. Thus, whilst the City did not bring the application for review within six weeks of the award, it has shown good cause why the period should be extended and application to set aside Mr Garner’s award be allowed.

Namasthethu’s case

[38] Namasthethu contends that this application is not competent because the City has not established the legal basis for the judicial review of the award of the adjudicator; it has conceded that the adjudicator’s award is not an arbitral award, in terms of the Arbitration Act but relies on “common law applicable to expert adjudicators”. Even if that were to be

competent, none of the grounds advanced by the City meet the threshold applicable in such cases, namely: fraud, collusion, capriciousness or manifest unjustness of the determination.

[39] Secondly, the provisions of the JBCC Agreement do not provide for a dissatisfied party to approach a court for a judicial review of the adjudicator's award. It requires such party to give notice to the other of its intention to refer the dispute to litigation for the revision of the award by the court. The City should have therefore launched action proceedings.

[40] Thirdly, the City has not made out a case that the contract was void. In any event, the purported termination was unlawful and of no force and effect for a number reasons, namely, that the City failed to investigate the allegations made against Namasthetu in the appeal, instead it proceeded to conclude a contract with Namasthetu and handing over the site, thereby waiving its entitlement it may have had to cancel the contract. Alternatively, on the basis of the doctrine of election, it forfeited any entitlement to cancel by unduly delaying in purporting to cancel it, having waited approximately 16 months, from the time the allegations of fraud were brought to its attention. By the time it cancelled the contract on 15 March 2016, it had been 92% complete and the City had paid Namasthetu an amount of R24 721 740.44.

[41] In addition to that, the City relied upon clause 53 of its SCM Policy and Regulation 38(1)(f) of the SCM Regulations (which is given effect to in the SCM Policy) as a basis for cancelling the contract. Given its reliance on the latter provisions, it was unlawful for it to terminate the contract without having followed the procedures in the SCM Policy.

[42] Furthermore there was no intention on the part of Namasthetu and its directors to commit a corrupt and fraudulent act during the bidding process and finally the City did not comply with clause 36 read with clause 36.2 as no notice was given to Namasthetu, nor was it placed in default and given an opportunity to cure the defect.

[43] Fourthly, the City's contention that the contract is void *ab initio* is not in accordance with the relevant statutory scheme, policies and express terms of the contract. In that event, the contract would be voidable and not void *ab initio*.

[44] Fifthly, the City has failed to establish that fraudulent conduct occurred during the bidding process. None of those who were directors of Namasthetu *at the time of the bidding process* had been convicted of fraud during the five years. Therefore, Namasthetu was correct when it ticked "No" to that question in the Declarations section of the tender document.

[45] Sixthly, Namasthethu has never been convicted of fraud, R Chetty pleaded guilty in his own capacity and on behalf of the sole proprietor, (Nationwide Electrical) and not Namasthethu. In its allegation that Namasthethu was the third accused, the City relied on an incomplete charge sheet. The payments to bribe a CIDB official were made on 7 August 2007 and 18 August 2007. This was before Namasthethu was incorporated. Furthermore, they were made in the verification and/or assessment of the CIDB grades of the sole proprietorship of “Nationwide Electrical” not Namasthethu. The first time Namasthethu made an application to the CIDB was during November 2011 and that date was after the periods relevant to the charges – the latest being 25 July 2011.

[46] A copy of the “manuscript notes” of the magistrate shows that no conviction or sentence was imposed on Namasthethu. The letter from Colonel K Naidoo and a further part of George’s email which states that “*he was sentenced with a fine of R200 000-00 and 5 years imprisonment, the latter which was suspended*” clearly confirm or indicate that no criminal convictions were obtained against Namasthethu. Namasthethu also relies on the CIDB panel’s findings of 2016 that Namasthethu was not guilty on all the charges. Mr Bouwer, who investigated the criminal allegations, testified at the CIDB proceedings that Namasthethu was not charged of criminal proceedings but Nationwide Electrical was.

Issues to be Determined

[47] The issues to be determined by the Court are the following:

- (a) Whether Mr Garner’s determination should be allowed to stand and become enforceable at the instance of Namasthethu. In this regard, the question is whether the adjudication clause in the contract between the City and Namasthethu survived cancellation of the contract by the City for fraud; or
- (b) Whether, if the dispute resolution clause survived, Mr Garner’s determination should nevertheless be set aside;
- (c) Whether fraud existed, and whether the contract between the City and Namasthethu was void, alternatively voidable at the instance of the City as a result of fraudulent misrepresentations.

Discussion

Applicable case law on the effect of fraud on arbitration clauses

[48] The issue of enforceability of an “arbitration clause” in an instance where a contract is said to be void or voidable has been discussed in a number of cases. The decision that articulates the principles that are relevant and useful to this case is that of *North East Finance (Pty) Ltd v Standard Bank of South Africa Limited*.¹

[49] Parties in that case had entered into a settlement agreement, which contained an arbitration clause stating, inter alia, that: “[i]n the event of any dispute of whatsoever nature arising between the parties (including any question as to the enforceability of this contract), such dispute will be referred to arbitration in the manner set out below.” The issue accordingly was whether the arbitration clause would compel the parties to submit to arbitration in the face of allegations that the settlement had been induced by North East’s fraud. In other words, did the arbitration clause survive the demise of the contract in which it was included.

[50] Standard Bank alleged that North East had failed to disclose all the irregularities and by doing so, it induced the bank to conclude the contract. As a result, so Standard Bank argued, it elected to resile from the contract and to regard it as void *ab initio*. It refused to submit the question of whether there had been fraud inducing the contract to arbitration on the basis that the arbitration clause fell with the contract and claiming that the clause had been included in the contract as part of a fraudulent strategy.

[51] The High Court there found that the matter contained numerous disputes of fact and as such could not be resolved on the papers before it. It further held “*that the arbitration clause was part of the agreement and had no separate existence; that the allegations of fraud were not wholly unfounded on the bank’s version; that the arbitration clause did not refer to fraudulent misrepresentations inducing the contract specifically such that this was an issue to be determined by arbitration; that the agreement to arbitrate was not severable from the rest of the settlement agreement; and that accordingly the Court would not compel the bank to comply with it.*”²

[52] The Supreme Court of Appeal (“SCA”) confirmed the judgment of the High Court. In the first instance it held that: “*if a contract is void from the outset then all of its clauses,*

¹ 2013 (5) SA 1 (SCA).

² As summarised by the SCA, *ibid* at para 8.

*including exemption and reference to arbitration clauses fall with it.*³ It referred with approval to the findings made by the same Court in another important decision of *North West Provincial Government and Another v Tswaing Consulting CC and Others*,⁴ wherein it held that an arbitration clause embedded in a fraud-tainted agreement could not stand. The SCA then referred to the decision of *Heyman v Darwins Ltd*,⁵ which stated that:

“An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, the issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.”

[53] Whilst agreeing with that principle, North East argued that the contract in their case, itself, provided that the dispute as to enforceability of the settlement agreement had to be determined by arbitration, given the phrase *“including any question as to the enforceability of the contract.”*

[54] The SCA observed that the general position as regards fraud induced contracts is that they are regarded as voidable. In this regard, *“the aggrieved party may elect whether to abide by the contract and claim damages (if it can prove loss) or to resile – to regard the contract as void from inception, and to demand restitution of any performance it may have made, tendering return of the fraudulent party’s performance.”*⁶ Based on this principle, the Court found that Standard Bank had elected *“to treat the settlement agreement as void from inception, and when it made that election the contract effectively ceased to exist. It did not have to be cancelled or rescinded: it was void.”*⁷

[55] It found further that the term ‘enforceability’ which appeared in the relevant clause referred to both void and voidable contracts, and that if parties had intended that the question whether fraud inducing the contract should be determined by an arbitrator then the arbitrator will determine whether the contract was valid and enforceable, or voidable or void. The Court

³ *North East* (above n 1) at para 12.

⁴ 2007 (4) SA 452 (SCA) at para 13.

⁵ [1941] 1 All ER 337 (HL) at 343 F.

⁶ *North East* (above n 1) at para 14.

⁷ *North East* (above n 1) at para 15.

held further that it is possible in principle for parties to agree that the question of the validity of their contract may be determined by arbitration even though reference to arbitration is part of the agreement being questioned.

[56] Referring to English authority, the Court stated that if the parties “*foresee the possibility of a particular dispute arising as to the validity of their contract, they may provide that it be referred to an arbitrator for resolution*” but it should be determined only by having regard to the context in which the contract was concluded.⁸ In this regard a court must ascertain what the parties intended the contract to mean by looking at the words, the contract as a whole, whether or not there is any ambiguity and the factual matrix or of the agreement or context in which the agreement was concluded. In addition it must be given a commercially sensible meaning.⁹

[57] Having considered arguments by North East and Standard Bank regarding the foreseeability of fraudulent conduct by North East at the time of the conclusion of the contract, the Court held at para 30–

“...in the light of the purpose of the agreement and having regard to what the parties envisaged (because it was what they could foresee then), at the time of concluding the agreement it was not intended that the validity or enforceability of the contract induced by fraudulent misrepresentations and non-disclosures would be arbitrable.”

[58] Having found that, the Court then went on to determine whether the allegations made by the Bank in the answering affidavit were sufficiently substantiated such that the High Court should have refused to compel it to arbitration?

[59] The Court held that the High Court was correct: the allegations made by Standard Bank were sufficient to found and justify the conclusion that the settlement agreement was probably induced by fraud and that it could not be compelled to refer the questions of fraud to arbitration.

[60] The question that I have to determine first therefore is whether parties in the instant case intended the question of the validity of the contract allegedly induced by fraud to be referred to adjudication.

⁸ *Ibid* at para 23.

⁹ *Ibid* at para 25.

The interpretation of the dispute clause in question

[61] Clause 40 of the standard JBCC document stipulates as follows:

“DISPUTE

40.0 SETTLEMENT OF DISPUTES

40.1 *Should any disagreement arise between the **employer** or his **principal agent** or **agents**, and the contractor arising out of or concerning this agreement or its termination, either **party** may give notice to the other to resolve such disagreement.*

40.2 *Where such disagreement is not resolved within ten (10) **working days** of receipt of such notice it shall be deemed to be a dispute and shall be referred by the party which gave such notice to either:*

40.2.1 *Adjudication [40.3] where adjudication shall be conducted in terms of the edition of the **JBCC** Rules for Adjudication current at the time when the dispute was declared,*

or

40.2.2 *Litigation where the institution of such action shall be commenced and process served within one (1) year from the existence of the dispute, failing which the dispute shall lapse.*

40.3 *Where a dispute is referred to adjudication the following shall apply:*

40.3.1 *The **adjudicator** shall be appointed in terms of the Rules [40.2.1]*

40.3.2 *Adjudicator’s eligibility to arbitrate*

(No clauses)

40.3.3 *The **Adjudicator’s** decision shall be binding on the **parties** who shall give effect to it without delay unless and until subsequently revised by a court of law.*

40.3.4 *Should either **party** be dissatisfied with the decision given by the **adjudicator**, or should no decision be given within the period set in the Rules, such party may give notice of dissatisfaction to the other **party** and to the **adjudicator** within ten (10) **working days** of receipt of the decision or, should no decision be give [sic], within ten (10) **working days** of expiry of the date by which the decision was required to be given, the dissatisfied **party** shall refer the dispute to litigation.*

40.4 *Arbitration*

(No clause)

40.5 *The above provisions [40.2-4] shall not be construed as a waiver of the parties' entitlement to resolve a dispute by mediation at any time.*

....

40.7 *Recording of a dispute [40.1] shall not relieve the **parties** from liability for the due and timeous performance of their obligations*

....

40.9 *The termination of this **agreement** shall not affect the validity of this clause 40.0"*

[62] Clause 36.1 allows for termination in the case of a contractor committing a corrupt or fraudulent act during the procurement process or the execution of the contract as follows:

*"36.1 **The employer** may terminate the **agreement** where:*

36.1.1 The Contractor fails to comply with [12.2, 14.1, 15.1, 3], or

36.1.2 The Contractor refuses to comply with a contract instruction [17.1] subject to 17.2.

36.1.3 The Contractor committed a corrupt or fraudulent act during the procurement process or the execution of the contract."(Own emphasis)

[63] In terms of clauses 36.2 and 36.3:

*"36.2 Where the **employer** considers terminating this agreement, the **principal agent** shall be instructed to notify the contractor of such default [36.1]. The issuing of such notice shall be without prejudice to any rights that the employer may have*

36.3 The employer may give notice of termination should the contractor remain in default for ten (10) working days after the date of receipt of such a notice of default"

[64] According to Namasthethu, in the first instance the City incorporated an aspect of the statutory and policy framework governing municipality supply chain management into the contract, such that it may terminate this agreement where the contractor committed a corrupt or fraudulent act during the procurement process or the execution of the contract. It was therefore foreseeable, both in terms of the contract itself and the applicable statutory and policy framework that the contract may be terminated on the basis of fraudulent conduct during the building process.

[65] In that regard, changes were made in the JBCC tender documentation. Therefore, when the dispute clause is read together with clause 36.1, it could only have been the intention of the City that any dispute arising from the termination of the contract in terms of clause 36.1 of the contract could also be referred to adjudication.

[66] According to Namasthethu in terms of clause 40.1 parties agreed that a disagreement concerning termination of agreement should be adjudicated upon, if the disagreement is not resolved. Where a disagreement is not resolved within the time frame, either party has an election whether to refer the dispute to adjudication or litigation, irrespective of the nature of the dispute. Further that clause 40.9 provides that the termination of the agreement will not affect the validity of clause 40.

[67] Had the City intended to narrow the scope of disputes that may be referred to adjudication so as to exclude termination of the contract due to fraud, it would surely have included provisions to that effect in the changes that it stipulated in the tender document to the standard JBCC document.

[68] Namasthethu therefore contends that if the adjudicator had the power to determine the issue of termination that is the end of the enquiry; his award cannot be challenged except on limited grounds. The Court may only intervene if the decision of the adjudicator is capricious, fraudulently obtained, or so manifestly unjust or inequitable that the Court must intervene, which according to it, is not the case in this instance.

Was it contemplated by the parties that the validity of the contract (alleged to have been induced by fraud) would be an issue to be adjudicated upon?

[69] The City contends that it never contemplated that the validity of the agreement would be submitted to adjudication. Counsel for the City submitted that clause 36.1 was in fact not in the contract when clauses 40, 40.1 and 40.9 were framed. It was introduced later by way of changes to the JBCC document in order to deal with a particular context which was to allow the City to terminate the contract on those specific grounds, whilst clauses 40.1 and 40.9 had always been there. Therefore, on proper interpretation when clause 40 was framed, it was not introduced with any contemplation of dealing with termination resulting from fraud, which makes the contract void or voidable.

[70] Clauses 40.1 and 40.9 can therefore not get a different meaning by virtue of the introduction of clause 36.1, which was to ensure that the City could cancel the contract

because of fraud in line with the SCM Policy and the Regulations. Furthermore clause 36.2 is quite clear that the issuing of the notice contemplating termination “*shall be without prejudice to any rights that the employer may have.*” Therefore the piecing together that Namasthethu seeks to make between clauses 36.1 and 40.1 is unsustainable. It could not have been foreseen by the parties at the conclusion of the agreement.

[71] As postulated in *North East*, interpretation of the clause should be done in the context in which the contract was concluded. Consideration of the words used by the parties and the contract as a whole as well whether there is any ambiguity is important. Added to that, the contract must be interpreted so as to give it a commercially sensible meaning.

[72] Starting with the words used in the dispute clause, it is clear that the words “*arising out of or concerning this agreement or its termination*” have been used as regards matters that can be referred to adjudication in terms of clause 40. A contract can be terminated for various reasons not only for reasons relating to the committal of fraud, which in general has the effect of making a contract voidable. Indeed clause 36.1 lists instances where the City may terminate, including instances of non-compliance with the agreement. It seems to me that termination resulting from those instances may uncontroversially be referred to adjudication.

[73] It can however not be confidently stated that reference to matters arising from termination of the agreement would necessarily include adjudication of the validity of the contract in instances where the employer regards the contract as void from inception or one which is voidable.

[74] Viewing the context of the agreement, in as much as Namasthethu contends that the changes made in clause 36 reflected a clear intention on the part of the City that the dispute clause would survive termination of the contract, including of the contract that was terminated as a result of alleged fraud during the tender process, I am not sure if context is necessarily supportive of that view.

[75] What is suggested by the City, that changes were inserted in a different and factual matrix to deal with clause 36.1, which was intended to allow the City to terminate the contract upon fraud being committed and not on clause 40, makes sense. The dispute clause itself remained unchanged. Clauses 40.1 and 40.9 were not extended or amended, to widen the types of disputes to be submitted to adjudication as those having to do with the validity or enforceability of the agreement. Whilst it may be argued that termination must include any

issues concerning termination of the contract, context is important; the question primarily is what was foreseeable when the parties concluded the contract. Whilst they intended that a contract may be terminated when fraud has been committed, they left clause 40 unchanged. Absent clause 36.1, there is no indication or suggestion that clause 40 was intended for the determination of the validity or enforceability of the agreement. I therefore prefer the City's interpretation in this regard as it is also more commercially sensible.

[76] It seems to me in order for the validity of the contract to be determined by reference to adjudication, the contract must “*specifically say so*” or in other words, the contract must clearly indicate as much. This is because the general position is clear that if there is a dispute as to whether the contract which contains the arbitration clause has ever been entered into at all, then the issue cannot go to arbitration under that clause. This position only changes if the parties make a provision in the contract for such referral, such as for instance “*if a dispute should arise as to whether there had been such a fraud, misrepresentation or concealment in the negotiations between them as to make the purported contract voidable, that dispute should be submitted to arbitration. It may require very clear language to effect this result.*”¹⁰ (Own emphasis)

[77] Clause 36.1 in the agreement allowing the City to terminate when fraud occurred during the procurement process or execution of the contract, did not, in my view, change the meaning of clause 40.1 and 40.9 so as to cover disputes that had to do with validity. I do not think that the dispute clause “*specifically says so*” in the sense debated in *North East supra*. The intention must be clear. In *North East*, despite a clause with a phrase that ‘*any question as to the enforceability of this contract*’, the Court found that it was not envisaged by the parties at the time of concluding the contract that the validity or enforceability of the contract induced by fraudulent misrepresentations and non-disclosures would be arbitrable.¹¹ So in this case too whilst the term in clause 40.1 “*or its termination*” appears to be all embracing, the question of the validity of the contract induced by fraudulent misrepresentations and non-disclosures is not clearly stated as one which can be referred to adjudication in terms of clause 40.

[78] On another issue though, clause 36.2 does not seem to suggest what the City's counsel submitted. It does not reserve rights in relation to the issuing of the termination notice but

¹⁰ *Heyman supra* at 357 B-D. See also *Gutsche Family Investments (Pty) Ltd v Mettle Equity Group* 2007 (5) SA 491 (SCA) at para 14, where it had been argued that an arbitrator was empowered to finally determine his own jurisdiction, the Court held that the agreement must provide so specifically and in the clearest terms.

¹¹ *North East* (above n 1) at para 30.

rather to the issuing of the notice of default. I say so because clause 36.3 that follows states that notice of termination can be issued ten days after a notice contemplated in clause 36.2 (i.e. notice of default) has been issued. Clause 36.2 does not assist the City in my view. The rights spoken of in that clause could be rights to terminate, not rights regarding the course to be taken upon termination.

[79] To bolster the City's argument that validity of the agreement was never an issue to be referred to adjudication, counsel for the City argued that clause 40.7 which provides that "*Recording of [40.1] shall not relieve the parties from liability for the due and timeous performance of their obligation*" gives an impression that the parties envisioned that the agreement would still be alive or valid whilst the dispute was being referred. I agree with this view.

[80] From clause 40.7 read with the entire clause 40, and the rest of the agreement, it does not appear that the parties anticipated an agreement whose validity could be determined on adjudication. It follows therefore that the adjudicator was not empowered to deal with the question of the validity of the agreement.

Can the Court in any event interfere with the award?

[81] Assuming that the dispute clause obliged the parties to submit the question of the validity of the agreement to adjudication, the following still remains to be determined: whether the Court could nevertheless interfere with the adjudicator's determination.

[82] Namasthethu submits that the Court cannot. Both parties are *ad idem* that an adjudicator does not have the powers of an arbitrator. Clause 40 refers to adjudication as a dispute resolution process to be followed when there is a disagreement. There is also an option of litigation, but no option of arbitration. In fact under the heading of arbitration there is a blank space.

[83] Clause 1.1 of the JBCC Rules for adjudication refers to adjudication as "*an accelerated form of dispute resolution in which a natural person determines the dispute as an expert, not as an arbitrator and where determination is binding unless and until varied or overturned by an arbitration award.*" (Own emphasis)

[84] The reference to the adjudication being overturned by an arbitration award is in conflict with clause 40.3.3 of the JBCC contract applicable here, which states that the Adjudicator's decision "*shall be binding on the parties who shall give effect to it without*

delay unless and until subsequently revised by a court of law”; and the latter provision would prevail.) Clause 5.4.1 of the JBCC Adjudication Rules is to the similar effect, as it provides that: “*The adjudicator shall ... [a]ct as an expert and not as an arbitrator in determining the dispute*”.”

[85] According to Namasthetu, the Court therefore cannot review Mr Garner’s award as it could under the Arbitration Act. Its powers are limited. In *Chelsea West (Pty) Ltd v Roodebloem Instants (Pty) Ltd*¹² it was held that, unless there is fraud, collusion or capriciousness, or a manifestly unjust valuation, the parties are bound by the valuer’s determination. This was also confirmed in *Civair Helicopters CC v Executive Turbine CC and Another*:¹³

“It is trite that an expert may consult other persons when necessary and if required in order to decide the matter submitted, and may even adopt views of the persons consulted as his own. Furthermore, the determination of an expert can be set aside in limited circumstances only. The principles determining the circumstances in which a Court would review and set aside a valuer’s determination have been applied in respect of the determination of other expert umpires. According to these principles, the determination of an expert can be set aside only in the case of fraud, collusion or capriciousness or in the event of the issuing of a manifestly unjust valuation. Otherwise the parties are bound by the expert’s determination” (Own Emphasis)

[86] Whilst I accept the view expressed in the judgments that the expert’s determination can be interfered with only on a limited basis, such as fraud, collusion or capriciousness, there seems to be a nuanced issue, which is that experts are appointed on the basis of their skills and experience.¹⁴

[87] In this case the expert, who is a professional construction surveyor consultant not only determined issues in which he had expertise, he also went into questions of law that fell outside his experience and knowledge. It seems to me that the deference that should be accorded to experts is based on them being clothed with expert knowledge on a particular

¹² 1994 (1) SA 837 (C) at 856 C-D.

¹³ 2003 (3) SA 475 (W) at para 34.

¹⁴ This dicta in *Chelsea* (above n 12) at 845E-F is apposite : “*It is clear then from these authorities that the valuer’s duty is not to hear and determine a dispute, but to decide the question submitted to him by the exercise of his honest judgment and skill without a judicial inquiry. See Joubert (ed) The Law of South Africa vol 1 sv ‘Arbitration’ para 462 at 620. Obviously the valuer/expert must act honestly, impartially and fairly, but that does not mean he is to be treated as a judge or an arbitrator. See Sutcliffe v Thackrah and Others [1974] 1 All ER 859 (HL) at 864b-c, 870c-d, 882j. The position of an arbitrator in the true sense is very different. He acts in a quasi-judicial capacity and must conduct himself accordingly...*”

aspect, such as valuation experts. I do not think, in this particular case, that clauses 40.1 and 40.2 went as far as to allow any expert to be appointed as an adjudicator in relation to any subject in dispute.¹⁵

[88] Even if I am wrong as to my understanding of why interference in expert awards is restricted, besides them being binding on the parties, there seems to be enough before the Court to suggest that the determination was manifestly unjust at least on one ground, being that a dispute of a legal nature was determined by a person who was not a legal expert and the determination clearly demonstrates that.

[89] When it initiated the dispute, Namasthetu itself stressed that the disagreement concerned termination of the contract, and that it was “essentially of a legal nature, and certainly does not raise any construction issues requiring the appointment of a construction professional as the adjudicator.” It suggested that a suitably qualified advocate or attorney take up the appointment, should it be necessary. It thereafter proposed names of three senior counsel and indicated that should an agreement not be reached it will approach AASA. AASA appointed, Mr Garner, who is not a legal expert, but a surveyor and a construction expert. Strangely, Namasthetu did not request AASA to appoint a different expert with legal expertise. The City stated that it would have objected to Mr Garner’s appointment, although it did not participate. The adjudication nevertheless proceeded. I accept that the JBCC rules may not permit an objection to the appointment of the adjudicator appointed by AASA. That however could not mean that AASA could not be approached to appoint an appropriately qualified expert.

[90] Clearly the issues to be determined by the adjudicator were issues of law. Whilst the Statement of Claim submitted by Namasthetu to Mr Garner expanded on the issues that had to be determined, it also referred to issues of a legal nature, being, *inter alia*, the termination of the contract and its effect. Issues of whether the termination constituted repudiation of the contract as Namasthetu contended, as well as its entitlement to the heads of damages claimed, amongst others, were all material matters of a legal nature.

[91] Even if it were to be accepted that the dispute also contained construction issues, it cannot be disputed that it arose or was concerned with the termination of the contract, the validity of which was placed in dispute. The premise of the adjudication was evidently legal

¹⁵ It is also worth noting that clause 40.3.3 of the agreement provides that the adjudicator’s decision shall be binding unless and until revised by a court of law.

in nature, because, it is only when a determination was made that the adjudicator was empowered to proceed, that he could so proceed. Thereafter, the issues of the validity of the contract, lawfulness of termination, and the effect thereof became important. On that score, it was manifestly unjust to have legal issues determined by a non-legal person.

[92] In any event, even if Mr Garner was empowered to look at questions of law. It does not appear that he engaged at all with the legal effect of a contract that was placed in dispute. There is no indication that any evidence relating to the allegations of fraud was interrogated and considered, and if it was, how it was treated is not clear in the determination. Although the City did not participate, it sent the Plea statement. It appears that the determination was largely devoted to the claims for damages. The legal basis for those claims was hardly examined, except a mentioning repeatedly of the fact that the claims were valid. Reliance was placed on the Estimated Damages attached to the Statement of Claim with no further indication of how they were assessed by the adjudicator.

[93] As to the issue of termination, only a single mention is made that Namasthethu claims the termination to have been unlawful, whereas the City claims it was lawful. The adjudicator states that the City had the onus to prove the lawfulness and failed to do so as it did not submit such proof.¹⁶ This can hardly be regarded as giving the issue any treatment. Although Namasthethu had initially indicated that it disputed the cancellation of the contract during its correspondence with the City, in the Statement of Claim it stated that the cancellation of the contract by the City amounted to repudiation of the contract, which it duly accepted and accordingly cancelled the contract. How the City's conduct amounted to repudiation is not dealt with in the determination.

[94] It seems that the determination is arbitrary in the many respects highlighted above. It therefore falls to be set aside as being manifestly unjust.

[95] In view of that finding, I do not need to consider the issue of whether it can be considered as an arbitral award, which should be set aside in terms of the Arbitration Act. I am consequently of the view that the Court is at liberty to consider the issue of whether the agreement was void *ab initio*, voidable, or otherwise cancelled on valid grounds.

¹⁶ See para [34] above.

Was the agreement void ab initio /voidable/ or otherwise cancelled on valid grounds?

[96] The City relied on the forensic investigations report to terminate its agreement with Namasthethu on the basis that “*NE has committed fraudulent acts during the tender process and as a result the contract was awarded to them.*” It relied primarily on two grounds, namely, that Namasthethu failed to disclose that it and its director(s) were convicted of fraud in the past five years as required in the tender documents, and secondly, it falsely claimed to having a Cape Town address whilst that was not true. A third ground is stated on the papers (in line with FEID’s findings) as the use of a fraudulently obtained grading certificate to tender for the contract.

[97] As regards the first allegation, it is not disputed that R Chetty pleaded guilty to charges of fraud and corruption. What Namasthethu states, is that he did so in his personal capacity and on behalf of the sole proprietorship “*Nationwide Electrical*”. It is true that charges against S Chetty were withdrawn and that when the tender was submitted she was the sole director of Namasthethu. Two issues need to be determined on this score, (a) whether Namasthethu was convicted and (b) whether the disclosure required in the tender documents related to only those individuals that were directors during the tender process or any individual who was a director of the bidding entity in the past five years even if he or she no longer was during the bidding process.

[98] Starting with the first issue, the Charge Sheet that the City relies upon reflected the following: S Chetty as accused 1 and as director of accused 3 charged in her personal capacity in terms of section 332 of the Criminal Procedure Act 51 of 1977 (“the Criminal Procedure Act”); R Chetty as accused 2 and as director of accused 3 charged in his personal capacity in terms of section 332 of the Criminal Procedure Act; and Accused 3 is reflected as Namasthethu Electrical (Pty) Ltd (duly represented by S Chetty in terms of section 332 of Act 51 of 1977) on the annexure to the Charge Sheet detailing charges. Under the General Preamble of this document, it is stated that, S Chetty was a sole proprietor operating as Nationwide Electrical since May 2005. Namasthethu was registered on 1 February 2008 and later operated under the trade name, Nationwide Electrical. It is stated further that “*Namasthethu Electrical Pty (Ltd) is a company registered in terms of the Companies Act 61 of 1973 and a corporate body in terms of Section 332 (2) of the Criminal Procedure Act and hereinafter referred to as accused 3.*”

[99] The charges involved bribery of an official at CIDB where various misrepresentations using false information were made to CIDB in order to obtain higher grades which would enable the accused to qualify for being awarded tenders. The first charge related to the period of March to August 2007. The second one related to August 2007 and February 2008. Before February 2008, we know that Namasthethu was not yet incorporated. Charge 3 related to the period during October to December 2008, count 4 to the period of May to October 2009. It is also recorded that accused 3 was awarded two projects by the KwaZulu [Natal] Department of Public Works on an open tender basis between the period of November 2008 and July 2011. In addition to that accused 3 was awarded one tender by the Eastern Cape Department of Public Works in September 2009. Should it not have had the required CIDB grade specified at the time of the adjudication of these tenders, the proposed tenders would have been disregarded. Accused 3 received R12 903 033.82 in respect of the respective tenders awarded.

[100] The Plea in terms of section 112(2) of the Criminal Procedure Act relates to R Chetty, accused 2, and Nationwide Electrical (duly represented by R Chetty in terms of section 332 of the Criminal Procedure Act), accused 3. It was duly signed by R Chetty as accused 2 and on behalf of accused 3.

[101] From the reading of the Charge Sheet and the Plea statement, it could not be held that the plea of guilty was made in relation to Nationwide Electrical as a sole proprietorship, as contended for by Namasthethu. The General Preamble of the annexure to the Charge Sheet clearly mentioned Namasthethu as accused 3. Evidently the charges also referred to periods in which Namasthethu had already been incorporated. Letters from Colonel Naidoo and Adv Harispersad cannot supersede information stated in the Charge Sheet. Secondly, section 332 of the Criminal Procedure Act relates to prosecution of corporations and members of associations and not sole proprietorships. In any event, a sole proprietor is not a corporate body or a legal person spoken of in section 332 (and which can be sued or cited as a person – separate from R Chetty). R Chetty himself, in the Plea statement alleges that he is “*the duly authorised representative of accused 3*” and describes accused 3 as an “*entity*” that “*trades under the name and style of Nationwide Electrical*”. Reference to Nationwide Electrical must therefore be in the context of Namasthethu’s trading name at least from the period it was incorporated. R Chetty further admitted in the Plea both on his behalf and on behalf of accused 3, to all the charges as stated in the Charge Sheet and to charges of corruption for contravening POCA, which occurred during the period of 17 July 2006 to 11 November

2011. In this regard, it is stated that the accused acted in common purpose in relation thereto. To put the issue that Namasthethu was accused 3 beyond doubt, in the Plea and under counts 8 and 9 of corruption, reference is made to directors as follows: “*To wit being the awarding of certain grades to accused Nationwide Electrical and its directors...*”¹⁷ The periods implicated therein include the periods after Namasthethu’s incorporation.

[102] Counsel for Namasthethu submitted that the Charge Sheet that the City relied on was incomplete. He referred to a document in which the words “*Namasthethu*” and “*Pty Ltd*” were deleted and replaced with “*Nationwide Electrical*”. This, he contended should tell us that Namasthethu was replaced by Nationwide Electrical as the accused. Apart from us not knowing the circumstances upon which the deletion and insertion came to be, the phrase (‘*Represented by acc 2 ito Sec 332(1)*’) remained. Counsel for Namasthethu then referred to a handwritten document with a heading ‘*Sentence*’ where accused 3 was deleted at the bottom of the page. He contends that Namasthethu was not sentenced but only R Chetty was. These documents were apparently received from Namasthethu’s erstwhile attorneys who apparently uplifted them from the court file on 13 November 2015. Once again, how and why the deletion of accused 3 from that document came about is not clear. Strangely, the word ‘*are*’ next to the reference to ‘*accused 2*’ after the deletion of ‘*accused 3*’ is not deleted. We do not know if this is the only page on sentence, but what is clear is that on the stamped cover of the Charge Sheet it is recorded that accused 2 and 3 were found guilty as charged on 7 November 2013. Conviction of accused 2 and 3 cannot be disputed. Namasthethu’s version that it was not accused 3 is rejected as being palpably implausible, far-fetched and so clearly untenable such that it must be rejected on the papers.

[103] I am not going to spend much time dealing with the 2016 ruling of the CIDB panel as it could not erase the 2013 finding of the court that found accused 2 and 3 guilty. It was also belated, and came after all the relevant events including the cancellation of the contract. Whether or not the court in Pietermaritzburg incorrectly convicted Namasthethu, is not the issue I can determine. The point is that there is a conviction. Whether such a conviction could not have been supported by the facts is irrelevant at this stage.

[104] As regards, the question of whether on the form in the tender documents, the Declaration required information pertaining to current directors only, my view is that such interpretation of the form is unduly narrow. It is alleged that R Chetty resigned as a director

¹⁷ Own emphasis.

in 2011. He was charged as a director of, and in relation to his abuse of Namasthethu. So, clearly he was convicted for acts committed as a director of Namasthethu. The tender documents were signed on 1 April 2014. The question asked in clause 1.3 of the form is as follows: ‘*Was the Tenderer or any of its directors convicted by a court of law (including a court of law outside the Republic of South Africa) for fraud or corruption during the past five years?*’ Even though S Chetty, the remaining director, was not convicted, it was important for the City to know that R Chetty, who had been a director of Namasthethu, was convicted in the past five years. R Chetty was moreover married to S Chetty. It was therefore important for the City to know the company it was dealing with, even though the person spoken of had left. An explanation could have been given in clause 1.3.1 which provides space for further explanation.

[105] As to the second ground for cancellation, it is common cause that Namasthethu did not have a physical address in Cape Town. According to it, it had previously used services of a project manager to look for premises from which Namasthethu could operate and the project manager ascertained that those premises were available. According to Namasthethu, it did not take up those premises because the City provided space for the premises in the containers.

[106] This version does not make sense, the tender form did not ask for a future address but for Namasthethu’s address. Apart from the fact that the occupants of the stated address had no knowledge of Namasthethu, Namasthethu does not state that it had any rights to occupy such property or had entered into negotiations with a view to concluding a possible lease agreement. It was indeed a misrepresentation for Namasthethu to give an address in tender documents well knowing that it was never its address, let alone that its address was Durban based. The fact that the City provided containers on site is a different question altogether and irrelevant to the issue that Namasthethu used a false address in its tender form. Once again its version on this score must also be rejected as being palpably false.

[107] As regards the allegation that Namasthethu used a grading certificate that was fraudulently obtained, Namasthethu curiously does not directly deal with this allegation in the answering affidavit. The version that Namasthethu only applied for the first time to the CIDB in November 2011 is not only hearsay but it does not accord with what is contained in the Charge Sheet as explained above. Furthermore, according to paragraph 10.1 of the CIDB document, L Naidoo stated that investigations conducted by her attorneys revealed that “[t]he first time application was made by the Respondent to the CIDB was during November 2011

for an upgrade and certain renewals.” (Own emphasis) It is further stated in the same CIDB panel document at paragraph 23 that Mr Bouwer testified that Namasthethu became a contractor in February 2011 to the CIDB. This is clearly incorrect. Not only is it contradicted by the former statement, it is controverted by the answering affidavit. Furthermore the former statement reveals that Namasthethu applied for upgrades and certain renewals in November 2011, implying that it was already a contractor by 2011. Other upgrades and renewals were applied for in 2012 and 2014 according to this document.

[108] Namasthethu’s attempts to distance itself from the fraudulent conduct are not sustainable. Even if it were to be accepted that the certificate applied for in 2011 was that which was used for the purposes of the bid in 2014 and it was possibly “untainted”, the two previous grounds constituted good grounds for rescission of the contract. It must also be remembered that L Naidoo who deposed to the answering affidavit and who is a current shareholder and sole director of Namasthethu claimed to have no knowledge of what occurred before her time in the CIDB document, but yet ventures to give details on aspects which occurred before she was in charge. It is noteworthy also that no detail was proffered to the City when Namasthethu was requested to provide details regarding the allegations of fraud on numerous occasions. It simply denied any allegations of fraud.

[109] I am satisfied that the requirements of fraudulent misrepresentation have been met, which rendered the contract voidable at the instance of the City, which validly and effectively elected to rescind.¹⁸ An incorrect pre-contractual statement was made, relating to material facts, deliberately so and with the knowledge that it was false, with the intention of inducing the contract, and which induced the contract.¹⁹ It is implausible that there was no intention to defraud the City when the misrepresentations and non-disclosures were made as Namasthethu may seem to suggest. S Chetty who completed the form on behalf of Namasthethu, in any event, has not vouched to any lack of intent. L Naidoo was not a director at the time of the bidding process and any averments as to intent cannot carry much weight.

[110] Giving effect to the Regulations, the SCM policy provides for rejection of the bid if the bidder or any of its directors had been convicted of fraud or corruption during the past

¹⁸ In *Bowditch v Peel and Magill* 1921 AD 561 at 572 it was held that “A person who has been induced to contract by the material and fraudulent misrepresentations of the other party may either stand by the contract or claim a rescission. (Voet, 4.3, secs. 3, 4, 7).” See also the discussion on the effect of misrepresentation on a contract in *Christie’s Law of Contract in South Africa*, 7th Ed, LexisNexis (2016) at 332-3.

¹⁹ See *Christie’s Law of Contract in South Africa* at 315 and *LAWSA* vol 9 3rd Edition: “Contract, Fraudulent Misrepresentation” at 318 (a) to (e).

five years.²⁰ I am persuaded therefore that because the City deals with public funds and is obliged to act in line with its statutory and legal obligations on management of public funds and combating of fraud and corruption, it would have been constrained to conclude the contract with Namasthethu had it known that it and its directors had been convicted of fraud, in the period of five years prior to the tendering process.

[111] I take note of Namasthethu's Counsel's point that the City relies on FEID's investigation report in its founding affidavit whilst no confirmatory affidavits have been attached and therefore that report constitutes hearsay. Apart from the fact that this issue was not raised in the answering papers, whilst it may be argued that the report constitutes hearsay, the Charge Sheet and Plea statement made in terms of section 112 (2) of the Criminal Procedure Act cannot be regarded as hearsay. I say so because those would be court documents and findings that exist as a matter of fact. Namasthethu has not disputed that and has not said those documents themselves constituted hearsay; it merely gives a different interpretation or explanation to that which the City offers, pertaining to the Charge Sheet and the Plea statement (particularly as to who was in fact charged and convicted). It also supplements those documents with pages it said were missing from the City's version. In the end, the Court objectively assessed the respective court documents and versions proffered thereto by itself, in order to ascertain whether Namasthethu and its director(s) were indeed convicted of fraud in the past five years, a fact that ought to have been disclosed in the tendering process.

[112] Ultimately, my view is that the City annexed information it relied on when it ended the contract, which the Court independently assessed. The issue of the incorrect physical address given by Namasthethu in the form was dealt with in the founding papers and responded to by Namasthethu. I accordingly reject the defence that the City's allegations constituted hearsay.

Waiver of right to cancel and the doctrine of election

[113] As to the issues of whether the City waived its right to cancel the contract due to its conduct and delays, in my view, the City could not have cancelled the contract simply based on allegations by Citrine. It had to investigate the allegations and take steps only when the alleged conduct of conviction for fraud had been confirmed. This is also because

²⁰ See clause 4.1.1 of the SCM policy document, for instance and sub-regulation 38 (1) (g) of the Regulations.

Namasthethu had denied any wrong-doing. I am not sure that it could stall the project for which the tender was awarded pending the investigations. Same can be said as to the time the City took in which to elect to rescind the contract.

[114] Namasthethu alleges that it was unlawful for the City to terminate the contract without having followed the procedures in the SCM Policy immediately after the complaint of fraud was laid. In terms of the SCM Policy where “*the City has obtained prima facie evidence*” of improper conduct on the part of the tenderer including fraud, certain steps should be followed to address the matter which may culminate into an adjudicative process where a Presiding Officer is appointed.

[115] In my view, the process in the policy did not need be followed for the contract to be terminated. It has also been held that “[a]fter a tender has been awarded, the relationship between the parties....was governed by the principles of contract.”²¹ Furthermore, as was held, in *Okuli Security Services CC v City of Cape Town and Others In re: Comwezi Security Services (Pty) Ltd v City of Cape Town and Another*; *In re: Command Security Services SA (Pty) Ltd v City of Cape Town and Another*²², “no substantive right to demand application of the Abuse Policy is vested in the applicants in terms of the policy”.

[116] It is useful to note that clause 4.1.1 of the SCM policy document empowers the City Manager to, after verification with a person, automatically reject the tender of such a person, if the person has been convicted of fraud and corruption during the past 5 (five) year period immediately preceding the invitation of the tender in question. The tendering procedure document contains a largely similar provision. The summary rejection of the tender when conviction for fraud is involved gives an idea of how the SCM Policy and Regulations view such conduct.

[117] In any event, it does appear that an investigation process was undertaken by the City to verify the information it received before cancellation of the contract and Namasthethu was given an opportunity to comment on the allegations of convictions and misrepresentations made in the tender documents. The correspondence between the parties and the FEID report bear such engagement.

[118] For these reasons, the City’s application must succeed. The City in its notice of motion prayed for the contract to be declared as either “void *ab initio*” or “validly

²¹ See *Government of RSA v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA) at para 18.

²² An unreported judgment of 24 June 2016 under case numbers: 19871/2015, 19872/2015, 19873/2015 at para 127.

terminated”, whereas, in its replying affidavit and argument it submitted that the agreement was “void” alternatively was voidable and had been validly voided.

[119] In keeping with the case law as to the general position²³, I have found that the contract was voidable as a result of fraudulent misrepresentations; and therefore validly rescinded by the City on 15 March 2016.

[120] Based on the nature of the case, I would award costs on a scale as between attorney and client.

[121] In the result, I make the following order:

1. The determination of the Second Respondent which was delivered on 24 August 2016 in favour of the First Respondent is set aside.
2. It is declared that the agreement concluded between the Applicant and the First Respondent in November 2014 consequent upon the award of tender no 240Q/2013/14 to the First Respondent by the Applicant was voidable and accordingly validly rescinded by the Applicant on 15 March 2016.
3. The First Respondent is to pay the costs of this application, including costs of two counsel on attorney and client scale.

N P BOQWANA

Judge of the High Court

²³ See *Christie’s Law of Contract in South Africa* at 315, fn 1 where the authors, note that “Many authorities refer to the innocent party’s right to ‘repudiate’ the contract, but in recent years it has become more common to refer to the innocent party’s right to ‘rescind’, or ‘resile from’ the contract.” See also para [109] above.

APPEARANCES

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