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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 14209/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

NURCHA DEVELOPMENT FINANCE (PTY) LIMITED

Applicant

And

RANDFONTEIN MUNICIPALITY

Respondent

J U D G M E N T

MAKUME, J:

INTRODUCTION

[1] In this matter the applicant is suing the respondent for payment of an amount of R2 597 915,85.

[2] The applicant alleges that it has suffered damages as a result of breach of an agreement between the respondent and an entity known as Mkwanazi Construction (Pty) Ltd (hereinafter referred to as the principal debtor).

FACTS

[3] During or about July 2011 the respondent awarded a tender for bulk water supply in the area of Droogheuwel and Middelvlei to the principal debtor (Mkwanazi Construction (Pty) Ltd).

[4] Subsequent to the tender having been awarded the principal debtor needed bridging finance to enable it to carry out the work awarded and approached the applicant. A loan agreement was entered into between the principal debtor and the applicant in terms of which the applicant advanced money to the principal debtor.

[5] The loan agreement is attached to the founding affidavit and is marked Annexure "A". The principal debtor signed on the 26th August 2011 whilst the applicant signed on the 10th September 2011. I need to state that the respondent is not a party to that agreement.

[6] On the 19th August 2011 the principal debtor addressed a letter titled “*Irrevocable Payment Instruction*” to the respondent in which letter the principal debtor directed the respondent to pay all and any payments due to it arising from the tender contract into a specified bank account held in the name of the principal debtor at First National Bank.

[7] I deem it necessary to quote paragraph 2 of this irrevocable payment instruction in full as it is at the heart of the dispute between the parties. It reads thus:

“As the contractor has entered into a loan agreement with Nurcha Development Finance (Proprietary) Limited (‘Nurcha’) and provided security in terms of which Nurcha has agreed to advance bridging finance to the contractor in respect of the above named project and whereas the contractor has appointed Tusk Construction Support Services (Pty) Ltd (Registration Number 99/001303/07) to amongst other things provide financial administration and construction support services to the contractor in respect of the above named project, you are hereby advised that this irrevocable instruction to the employer and bank account may only be changed with the written consent of Tusk Construction Support Services (Pty) Ltd.”

[8] The instruction letter is signed by one John Reginald Stopforth a director of the principal debtor and below the signature appears the following note:

“Noted and accepted by employer. The employer hereby confirming that all terms of this instruction shall be complied with fully.”

The note is signed on the 7th September 2011 by a Mr Linda Philemon Ivan Mashego the Chief Financial Officer of the respondent.

[9] All seems to have been going well and according to plan until during May 2012 when the principal debtor addressed a letter to the respondent. That letter is attached to the answering affidavit as Annexure "RM1". It is dated the 10th May 2012 and reads as follows:

"This serves to advise you that Mkwanazi Construction (Pty) Ltd has changed its operating bank account to:

Standard Bank, Delmas with account number [4.....] and branch number [0.....]. Please make all future payments due to Mkwanazi Construction (Pty) Ltd to this account."

The letter is signed by Mr J R Stopforth.

[10] On the 14th February 2013 at the instance of Absa Bank Ltd as an applicant against the principal debtor as first respondent and the applicant as the third respondent an order was granted perfecting the general notarial bond registered in favour of Absa Bank in respect of the principal debtor's movable property and effects.

[11] In that matter emanating out of the North Gauteng High Court under case number 70872/12 the principal debtor was ordered to pay the applicant an amount of R2 925 124,54.

[12] Although it does not appear from the papers I was informed by counsel for the applicant that the principal debtor was placed in provisional liquidation on the 14th May 2013 and finally liquidated on the 3rd September 2013.

[13] In paragraph 7.15 of the founding affidavit the applicant says that it obtained judgment for payment of the sum of R2 925 124,54 against the principal debtor and refers to Annexure "F" being a copy of the judgment order. Annexure "F" did not form part of the papers however I accept that the judgment order does exist seeing that it is the applicant that says so.

THE APPLICANT'S CASE ON THE PAPERS

[14] The basis of the applicant's claim as gleaned from the founding affidavit is to be found in paragraphs 7.14, 7.15 and 7.16 which read as follows:

"7.14 As a result of the respondent's breach the applicant has suffered damages in the sum of R2 597 915,85 being the balance of the amount due and owing to the applicant in terms of the loan agreement.

7.15 Notwithstanding a judgment order for the payment of the sum of R2 925 124,54 against the principal debtor in favour of the applicant the applicant is unable to recover the aforesaid amount from the principal debtor. A copy of the judgment order is attached hereto marked 'F'.

7.16 Following a single payment by the principal debtor the sum of R2 597 915,85 together with interest thereon at the prime rate of 2.5% from 16th May 2013 remains outstanding."

[15] What appears in the paragraph is the initial basis of the claim which is based on breach. When the principal debtor defaulted in payments on the loan agreement the applicant obtained default judgment for the full amount

against the principal debtor and then the principal debtor made a single payment leaving the balance owing of R2 597 915,85. It is this amount that the applicant now claims from the respondent. The applicant says because the principal debtor has failed to pay that amount despite a judgment it now turns onto the respondent to pay the amount.

[16] The applicant says the respondent breached the agreement by not paying money due to the principal debtor into the account stated as Annexure “B” namely the irrevocable instructions document.

[17] When the applicant read the respondent’s answering affidavit in which the respondent disavows liability based on the irrevocable instructions and raised a number of points *in limine* the applicant in its replying affidavit raises a new ground and basis for its claim based on the *stipulatio alteri*.

[18] The applicant contends that the irrevocable instruction document between the principal debtor and the respondent was to its benefit and hence the respondent is bound by the terms thereof.

THE RESPONDENT’S CASE

[19] The respondent has raised a number of points *in limine* which I will deal with later. Besides the points *in limine* the respondent denies that it is a party to the so-called irrevocable payment instructions, secondly that it has paid in full its obligations arising from the tender awarded to the principal

debtor and lastly that the applicant's founding and replying affidavits failed to disclose any cause of action and stands to be dismissed with costs.

WHAT IS IN ISSUE

[20] There are two issues before me. They are the following:

First issue

Whether the irrevocable payment instructions document was an agreement between the applicant and the respondent.

Second issue

If the answer to the first issue is in the positive then I have to determine whether the respondent breached such agreement so as to entitle the applicant to claim or sue the respondent for damages arising therefrom.

THE LEGAL PRINCIPLES

[21] It is common cause that the respondent was not a party to the loan agreement. I say this despite the fact that the loan agreement refers in its definition clause to the "*irrevocable payment instruction*" (see clause 1.20).

[22] The applicant argues that the loan agreement should be read together with the “*irrevocable payment instruction*” for a proper understanding and conclusion that a contract for the benefit of a third party the so-called *stipulatio alteri* came into effect.

[23] It is trite law that in a *stipulatio alteri* the stipulator does not contract in the name of the third person but intends to bind the other party to himself or herself and to confer a right on the third person which the latter can accept or reject. Acceptance of the benefits is crucial as was held by F S Steyn J in the matter of *Avondale Trust (Pty) Ltd v Wouda* 1975 (2) SA 444 (TPD) at page 445H wherein the following was said:

“It is common cause between the parties and abundantly clear from the evidence of Mr Brink and documents handed in that the plaintiff company was not a party to the settlement of 16 September 1967. Consequently the plaintiff could only become entitled to the benefits conferred upon it by agreement if it subsequently adopted the agreement and accepted the benefits and obligations and advised the party obliged to render the benefit the defendant in this case of the ratification of the agreement.”

[24] In the present matter the applicant is not a party to the irrevocable payment instruction and never informed the respondent that it accepts the benefits. This is demonstrated by the fact that when the principal debtor breached the loan agreement the applicant proceeded with a claim against the principal debtor and obtained judgment for the full amount without reference to the respondent.

[25] The irrevocable payment instruction itself does not direct the respondent to make payment to the applicant it directs that payment be made to the principal debtor. This instruction is in line with the agreement between the principal debtor and the respondent as per the tender that the principal debtor will perform certain specific works for and on behalf of the respondent for which the respondent shall remunerate the principal debtor into a nominated bank account.

[26] In paragraph 7.5.2 the applicant alleges that “*Tusk Construction Support Services (Pty) Ltd*” were appointed as the applicant’s agent to provide financial administration of construction support services to the principal debtor. A proper reading of paragraph 2 of the document titled “*Irrevocable Payment Instruction*” does not say that Tusk was appointed the applicant’s agent it says that the contractor referring to the principal debtor has appointed Tusk to provide financial administration duties and construction support services to the contractor in respect of the project. Tusk was accordingly an agent of the principal debtor not the applicant.

[27] There is nowhere in the applicant’s papers where it is said that when the principal debtor issued fresh directives in respect of further payments to it that Tusk did not consent thereto. The respondent did not do anything outside what it agreed on with the principal debtor.

[28] Paragraph 2 of the irrevocable payment instruction reads that:

“As the contractor has entered into a loan agreement with Nurcha Development Finance (Pty) Limited.”

The fact of the matter is that when this document was issued and signed by the principal debtor no loan agreement had been signed it is therefore inconceivable that the payment instruction should be interpreted to mean that payments referred to payments in terms of the loan agreement because at that stage it was non-existent. Accordingly payment could only be interpreted to refer to payments in terms of the tender agreement to which the applicant was never a party.

[29] I can accordingly not find that the irrevocable payment document created any agreement or obligation between the applicant and the respondent. A more or less similar situation arose in the matter of *Country Cloud Trust v MEC Department of Infrastructure Development* 2015 (1) SA (CC) a judgment by Khampepe J. The matter concerned a delictual claim for pure economic loss arising out of the following facts as summarised by Brand J when the same matter served before the Supreme Court of Appeal reported as *Country Cloud v Department of Infrastructure Development* 2014 (2) SA 274 (SCA).

[30] In that matter during the year 2006 the respondent awarded a tender to a construction company known as Illima Projects (Pty) Ltd (“*Illima*”). In terms of that contract Illima undertook to complete a construction of the partially built Zola Clinic in Soweto at a contract price of R450 million. In order to comply

with its obligation under the contract Illima borrowed R12 million from Country Cloud.

[31] The Department was aware that Illima was in need of financial assistance in order to complete the contract hence the Department made various concessions to assist Illima in obtaining a loan so as to facilitate the expeditious completion of the hospital. First the Department undertook as part of the construction contract to pay Illima a so-called site establishment and mobilisation fee equal to 5% of the contract price of R480 million that is R21,5 million within 30 days of concluding the contract. Secondly, the Department allowed its managing agent Tau Pride (Pty) Ltd to give a formal undertaking to Country Cloud that the loan of R12 million be paid directly to it out of the site rehabilitation and mobilisation fee of R21,5 million when Illima became entitled to this fee.

[32] Shortly after Country Cloud had paid R12 million to Illima the Department cancelled the construction agreement with Illima even before payment of the agreed R21,5 million site establishment fee. Illima was then liquidated. Country Cloud instituted action in this Division against the defendant for delictual damages in an amount of R20,5 million.

[33] Both the High Court and the Supreme Court of Appeal dismissed the claim albeit on different grounds. In the Constitutional Court Khampepe J identified the issue for decision by that court at page 8 paragraph [19] as follows:

“[19] The sole issue is whether the department should be held delictually liable for Country Cloud’s loss. The answer to this question rests on important questions namely was the department’s conduct in cancelling the completion contract wrongful. The issue is not whether the department’s conduct was wrongful in some general sense or wrongful towards Illima. It is whether its conduct was wrongful vis-à-vis Country Cloud.”

[34] In dismissing the claim her Ladyship Khampepe J writes as follows at page 16 paragraph [43]:

“[43] Country Cloud must persuade us that the department is responsible for the loss suffered. If the department acted permissibly in causing Country Cloud loss it does not matter that it did so intentionally. Nor does it matter that there is no risk here of indeterminate liability. Until we are satisfied the department wronged Country Cloud its claim does not get off the ground. Country Cloud did not allege here as in a negligent misstatement case, that the department made a representation to it that the department would honour the completion of the contract and the terms of contract between the department and Illima cannot and do not determine without more that the department owes a duty to Country Cloud.”

[35] Although the issue to be decided in the present matter is based on a breach of contract as opposed to the delictual liability arising out of a contract as in the *Country Cloud* matter I submit that the underlying facts are mostly similar. In the *Country Cloud* matter as in this matter there was an undertaking to pay the non-contracting party to the loan agreement despite this Khampepe J found at paragraph [43] in the last sentence that the terms of contract between the Department and Illima cannot and do not determine without more that the Department owes a duty to Country Cloud.

[36] The penultimate paragraph in the judgment of the Constitutional Court puts to rest this issue. At paragraph [66] the judge says the following:

“[66] While Country Cloud had no direct contractual relationship with the department it obtained certain undertakings from it including that the loan he repaid from the remobilisation fee through Tau Pride. The agreed protection did not extend to imposing liability on Tau Pride which was acting as the department’s agent for the project for any loss caused to Country Cloud if the department breached its contract with Illima. This seems to me to reinforce the notion that Country Cloud should have no claim in delict.”

[37] The second issue for determination by this Court is whether the respondent breached the agreement so as to entitle the applicant to a claim for damages arising therefrom.

[38] I have already made a finding that the irrevocable payment instruction (Annexure “B”) whether read alone or in conjunction with the loan agreement created no contractual relationship between the applicant and the respondent. In the result there is no agreement that the respondent breached. I therefore need not deal with the second issue.

[39] I turn now to deal with the various points *in limine* raised by the respondent.

[40] The first point *in limine* raised by the respondent both in the answering affidavit and in the heads is that Mr Sindiswa Ntusani the deponent to the founding affidavit lacks the necessary authority to represent the applicant in

these proceedings in that he has failed to attach a resolution by the directors of the company authorising him to depose to the founding affidavit.

[41] This point *in limine* must fail. I agree with the applicant that a deponent in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.

[42] The second and third points *in limine* raised namely no cause of action as well as no causal link need no further attention as I hold the view that same have been dealt with somewhere in this judgment.

[43] The fourth point *in limine* namely non-joinder deserves attention. It is a principle of our law that interested parties should be afforded an opportunity to be heard in matters in which they have a direct and substantial interest.

[44] The applicant's claim is based on two agreements in which the principal debtor is a party. The principal debtor is accordingly not only a necessary party to these proceedings but has an interest in the outcome thereof. The liquidators of the principal debtor have an interest in the outcome of these proceedings and should have been joined for the simple reason that if the applicant should succeed in the claim then payment to the applicant may very well fall to be dealt with in terms of the Insolvency Act.

[45] In opposing this point *in limine* the applicant has referred me in its heads of argument to the case of *Standard Bank of South Africa v Swartland Municipality* 2011 (5) SA 257 (SCA). That case does not support the applicant because the court in that matter made a finding that applicant Standard Bank should have been joined in the proceedings before the Magistrate's Court when the Municipality applied for a demolition order. I accordingly find that the non-joinder of the principal debtor and/or the liquidators is well taken as a point *in limine* and the application should have been dismissed on that point alone.

CONCLUSION

[46] In conclusion I find that the applicant has failed to show any cause of action against the respondent perhaps this could be explained by the fact that the applicant already has a judgment for the same amount against the principal debtor all that the applicant should now do is to follow its claim with the liquidators of the principal debtor.

[47] The respondent argues that because of what I have said in paragraph [46] above that applicant should be mulcted with costs on an attorney and client scale. I am not persuaded that such an order is appropriate under the circumstances.

ORDER

[48]

48.1 The application is dismissed.

48.2 The applicant is ordered to pay the taxed party and party costs.

DATED at JOHANNESBURG on this day 11th day of MARCH 2015.

M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING

DATE OF JUDGMENT