REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case Number: 37223/11

25/7/2011

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

23/7/2010
DATE

SIGNATURE

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA

2011 -07- 25

GRIFFIER VAN DIE NOORD GAUTENG HOË HOF, PRETORIA

In the matter between:

ME AQUA CIVILS & MAINTENANCE CC (IN LIQUIDATION)	**1ST APPLICANT**
TIM TRADING (PTY) LTD t/a HANNES HARDWARE & TILE CENTRE	**2ND APPLICANT**
ON SITE TOOLS CC	**3RD APPLICANT**
BONUSWAY 9 (PTY) LTD t/a ROAD STONE CRUSHERS	**4TH APPLICANT**
VS	
NO 17 METALLURGICAL CONSTRUCTION CO t/a READIRA PROJECTS JOINT VENTURE	**1ST RESPONDENT**
BASE MAJOR CONSRUCTION (PTY) LTD	**2ND RESPONDENT**
READIRA REFUSE SERVICES CC	**3RD RESPONDENT**
THE PREMIER FOR THE PROVINCE OF MPHUMALANGA	**4TH RESPONDENT**
THE MEMBER OF THE EXECUTIVE COMMITTEE,	**5TH RESPONDENT**

DEPARTMENT OF ROADS AND TRANSPORT, MPHUMALANGA PROVINCE

THE DEPARTMENT OF ROADS AND TRANSPORT, MPHUMALANGA PROVINCE **6TH RESPONDENT**

JUDGMENT

Delivered on: 25 July 2011

POTTERILL J,

1. The applicants are applying for the following relief:

"1. That this Application be entertained as one of urgency and that the normal rules relating to time periods and service be dispensed with in terms of Rule 6(12) of Uniform Rules of Court; 2 The Fourth, Fifth and Sixth Respondents are ordered not to make any further payment to the First, Second and/or Third Respondents in respect of any remuneration payable to First, Second and Third Respondents relating to the project numbers RTT/129/08MPs and RTT/130/08MPs;

3. That the Respondent be committed to jail for a period of three months or such other and / or on such conditions as the Court may deem appropriate, but which Order should be suspended on condition that the Respondent hence forth comply with the Order of this Honourable Court referred to above;

4. *That the Applicants are ordered to institute action against First, Second and Third Respondents and any other party they may be advised to within 30 days from date of this Order, failing which this Interim Interdict will lapse and be of no further force and effect and the Applicants become liable to pay the costs of this Application;*

5. *An Order that the cost of this Application be cost in the action referred to hereinafter in the event of it being unopposed, but in the event of any Respondent/Respondents opposing this Application that such Respondent/Respondents be ordered to pay the costs of this Application.*

6. *Further and/or alternative relief."*

2. The first, second and third respondents are opposing the application.

3. The following common cause facts set out the background to the application:

3.1 The second and third respondents formed a joint venture which cumulated in the first respondent, hereinafter referred to as the" Joint Venture."

3.2 The Provincial Authority granted the joint venture two contracts with numbers RTT/129/08/MP and RTT/130/08/MP which related to roads

and bridges being constructed or upgraded around the Mombela Soccer Stadium in Nelspruit for the 2010 Soccer World Cup.

3.3 The first applicant was appointed as sub-contractor by the first respondent under contract number RTT/120/08/MP as reflected on "KV6" attached to the applicants founding affidavit.

3.4 In terms of the contract the Joint Venture had to pay to the First Applicant an amount of R51 723 100.55.The Joint Venture paid an amount of R46 914 834.15 to the First Applicant. A balance of R4 808 266.40 remained unpaid.

3.5 The relationship between the First Applicant and the Joint Venture soured in that the First Applicant accused the Joint Venture of non-payment of the amounts owing to it and visa versa the Joint Venture accused the First Applicant of defective workmanship. The Joint Venture instructed the First Applicant to vacate the construction site by 3 December 2009. It is common cause that a bridge that the First Applicant built had collapsed.

3.6 The First Applicant was placed in voluntary liquidation.

3.7 The Second, Third and Fourth applicants were appointed by the First Applicant to either render services and/or supply material for the contract.

4. The Applicant seeks interim relief and must thus establish:

4.1 a clear right or if not a clear right that it has a prima facie right

4.2 that there is a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief (by way of the summons issued) is eventually granted

4.3 that the balance of convenience favours the grant of an interim interdict; and

4.4 that applicant has no alternative remedy.

As set out in **Reckitt & Coleman SA (Pty) Ltd v S C Johnson & Son (SA)(PTY)Ltd** 1995(1)SA 725 on 730B the Court must approach the application as follows:

> "*When the applicant cannot show a clear right, and more particularly where there are disputes of fact relevant to a determination of the issues, the Court's approach in determining whether the applicant's right is prima facie established, though open to some doubt, is to take the facts set out by the respondent which the applicant cannot dispute , and to consider whether, having regard to the inherent probabilities, the applicant should (not could) on those facts, obtain final relief at the trial in the main action. The facts set out in contradiction by the respondent*

must then be considered and if serious doubt is thrown upon the case of the applicant it cannot succeed."

5. The applicant submitted that the applicant did in the application set out triable issues in whether there was breach of contract and whether the second, third and fourth applicants were given an undertaking by Ndlovu that they would be paid by him, i.e. the Joint Venture. It was also submitted that their prospects of success at trial are good.

6. It is in dispute whether the first applicant was appointed as sub-contractor under contract number RTT/130/08/MP. "KV6" attached to the First Applicant's papers indicate that it was appointed for RTT/129/08MP and there is no indication of appointment on RTT/130/08MP. The First Applicant's reply to the Joint Venture's denial of First Applicant's appointment on RTT/130/08/MP is set out in the replying affidavit paragraph 8.2 which reads as follows:

"*These contracts ran conjointly* ***in any event.*** *Alternatively a further revision and/or extension of the first contract was agreed to between the Provincial Government and the Joint Venture, alternatively concluded in respect whereof the existing contract was extended in an amount of approximately R50 million."* [my bolding]

Paragraphs 23.3 and 23.3 of the replying affidavit then later follows with:

"I vehemently deny that ME Aqua was not appointed in respect of both contracts, but only in respect of contract with No RTT/129/08/MP. ...

These two paragraphs contradict each other; I was appointed versus I was not appointed, but both contracts in any event run conjointly or two further alternatives to its appointment are forwarded. On these facts and their own document not substantiating their appointment on RTT/130/08MP I can not find that the First Applicant has a prima facie right though open to some doubt, that it was appointed on contract RTT/130/08MP. They would accordingly not be entitled to interdict monies payable to that contract number.

7. It was submitted that the *prima facie* right of the First Applicant flows from the strong case that the Joint Venture must make payment to the First Applicant and that the funds must be preserved in order to ensure that the First Applicant will be able to execute against the Joint Venture.

   The First Applicant averred that the Joint venture owes the First Applicant the amount of R25 610 217.80. In this regard a quantity surveyor's "summary of claims against the main contractor" is attached in support of this contention. The respondent denies that it owes the First Applicant this amount or any amount. Nowhere in the founding affidavit is it set out how a contract that was worth R51.7 million to the First Applicant of which it was paid an amount of R46.9 million has now escalated to a further odd R20 million. The attached quantity surveyor's summary indicated that all knowledge pertaining to the matter and the figures were obtained from the First Applicant. From the report itself the court can perhaps *prima facie* accept the calculation of the amount [from documents supplied by the First Applicant] as correct, but not on what basis the Joint Venture's liability for this amount is based. Where the founding affidavit is silent on the cause of action for this amount I can not accept that

they should be successful in the institution of a claim. In response to the Joint Venture's denial that there is a basis for such a claim the First Applicant in the replying affidavit sets out in paragraphs 22.3 and 22.4 as follows:

"*Only in respect of the re-design according to the Bridge-Engineer, clearly indicates that further amounts were authorized by means of certificates.*
More over I have been informed that there was in any event an extension of approximately R50 Million in respect of only this one project pertaining to the bridge. However, these and other aspects pertaining to which amounts are outstanding can be dealt with at trial. "

The First Applicant must set out facts in the founding affidavit on which a Court can consider whether, having regard to the inherent probabilities, the applicant should on those facts, obtain final relief at the trial in the main action. The First Applicant is relying on hearsay evidence that there was an extension of the contract. No facts are set out that this was the *de facto* situation and on what basis the First Applicant would be entitled to R25 odd million of the R50 million.

As for the re-design of the bridge it is averred that it is clear that the engineer authorized further amounts by means of certificates. This is however not in the founding affidavit set out as the cause of action on which the First Applicant should be entitled to monies and what amount of monies. The amount to be interdicted is so open to doubt that in the reply to the Joint's Ventures denial of any further amounts owing the First Applicant replied in paragraph 23.3 as follows:

"At the very least an amount of R9 miliion should be interdicted in respect of payments confirmed by the Respondents...."

The first applicant however does not set out a prima facie right for 9 million being owed.

In argument it was submitted that at the very least the second third and fourth's applicants claims plus the R4 808 266.40 must be interdicted.

I can find that the balance of R4 808 266.40 owing flowed from RTT/130/08MP. The Joint Venture set out in its opposing affidavit in paragraph 9 that the First Applicants workmanship was defective and that it was incapable of completing the project. It is common cause that a bridge fell and a report is attached to confirm same. The First Applicant does then not have a clear right to the balance owing but a prima facie right. In the founding affidavit no mention is made as to the bridge falling and in the replying affidavit there is not a single sentence denying that the bridge falling was due to their fault. In argument I was referred to a sentence in the report of the engineer attached to the Joint Venture's opposing affidavit wherein the engineer stated:

"1.2 This means that there was no **specific procedure** in existence that the Contractor was following. Similarly, the Engineer also did not have a **specific procedure** that was being monitored."

From this sentence I was asked to find that the Joint Venture could be jointly negligent in the collapse of the bridge and then there is a triable issue. On probabilities I find it a serious *lacuna* in the First Applicant's affidavits; the First Applicant is not prepared to say under oath that he is not liable for the collapse of the bridge and in view of the contradictions set up by the Joint Venture I cannot find that the First Applicant should be successful in claiming in the main action.

Certificates' 15 and 16 were not paid. The applicants do not deny that the Joint Venture had to do remedial work and had to pay the Joint Venture's workers salaries. In paragraph 16 of the replying affidavit the averments by the Joint Venture setting up probabilities favouring why payment was withheld, is responded to with it would have to be cleared up at a trial. If it is not denied there is nothing to clear up trial and the First Applicant has not established a prima facie right.

The First Applicant does deny in the replying affidavit that they were not in a position to finish the contract. The triable issue herein is that the problems between the parties started not due to their position to finish the contract but because the Joint Venture was not paying the First Applicant although such payments were already authorized by the Project Engineer. In support hereof a letter from the project engineer is attached in support of the applicant's submission that the Joint Venture had established a pattern of non-payment. This letter does not *prima facie* infer that the First Applicant was to be paid and therefore should be successful in the main action; the First Applicant is simply not mentioned in this letter. A pattern of non-payment does not found a prima facie right in view of the Joint Venture's contradictions that are not improbable. In the same vein it was pointed out that other sub-contractors had brought 3 applications to court whereupon those sub-contractors were paid. Furthermore the Joint Venture, Mr Ndlovu on their behalf, denied liability in those matters, but then paid-up when a liquidation application was brought against the Joint Venture, he thus committed perjury. I most certainly cannot on the papers before me find that perjury was committed; many factors could have played a role why payment took place. Even if in an application as such

before me I could make credibility findings, on the papers before me, I cannot find *mala fides* on the part of the Joint Venture or make an adverse credibility finding pertaining to the Joint Venture.

8. The First Applicant has not proven a prima facie right to an anti-dissipation interdict of R16 million or any amount. There is no basis set out for the R25 million odd claim, nor alternatively for 9million, nor for the balance of the monies owing. The First Applicant has another remedy, it can institute action. There is not a single averment that the Joint Venture is wasting or getting rid of such funds to defeat his creditors, or is likely to do so. There are no facts set out by the First Applicant that the Joint Venture is getting rid of the funds, or likely to do so, with the intention of defeating the claims of his creditors. In this regard **Mcitiki and Another v Maweni 1**913 CPD 684 at 687 is applicable. I cannot find any exceptional circumstances why this rule confirmed in the **Knox D'Arcy Ltd And Others v Jamieson and Others** 1996(4) SA 348 (A) matter must not be applied.

9. It was also argued that the First Applicant has a *prima facie* right because the payment to be received was earmarked for the First Applicant having been appointed as the main sub-contractor. The Joint Venture denied that the R16 million that is due to be paid is earmarked for the First Applicant. The First Applicant was earmarked to be paid R51 723 100.55.The Joint Venture paid an amount of R46 914 834.15 to the First Applicant. A further amount of R16million was not earmarked as a particular fund to which the First Applicant

is entitled. The balance of R4 808 266.40 could arguable have been earmarked if the First Applicant had set out a *prima facie* right thereto.

10. On the facts before me I can find that the First Applicant had appointed sub-contractors, however the argument on behalf of the Joint Venture is correct; there is no contractual relationship between the Second, Third and Fourth respondents and the Joint Venture. These applicants rely on a right to claim directly from the Joint Venture because the obligations of the First Applicant to pay materials and services rendered to these applicants were taken over by the Joint Venture. These applicants can never argue that the monies to be interdicted where earmarked funds. They also never contend that the Joint Venture is getting rid of the funds, or likely to do so, with the intention of defeating the claims of these applicants and is accordingly not entitled to an anti-dissipation interdict. Mr Erasmus on behalf of the applicants conceded that the First Applicant in fact is the main applicant and that the other applicants are just interested parties. Accordingly these applicants have not set up a prima facia right open to some doubt.

11. Accordingly the application is dismissed with costs.

The applicants to pay first, second and third respondents costs jointly and severally.

S. Potterill Judge of the High Court

Matter heard on: 19 July 2011

Delivered on: 25 July 2011

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