Reportable:	YES/**NO**
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	YES/**NO**
Circulate to Regional Magistrates	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case No: 2622/1016
Heard On: 24/08/2018
Delivered: 16/11/2018

In the matter between:

JORIAN CONSTRUCTION CC	**Plaintiff**
AND	
TSHENOLO RESOURCES (PTY) LTD	**1st Defendant**
RENOSTERBERG LOCAL MUNICIPALITY	**2nd Defendant**

JUDGMENT

PAKATI J

[1] The plaintiff, Jorian Construction CC ("Jorian Construction"), a close corporation with its main place of business at 33 Specery Street, Kwaggafontein in Bloemfontein, applies for default judgment against the second defendant, Renosterberg Municipality ("the Municipality"), under Case Numbers 1217/2015 and 2622/2016 for services rendered. The amended particulars of claim in respect of the two case numbers combine the separate actions and will be dealt with as such. The Municipality does not oppose the application. No relief is sought against, the first defendant, Tshenolo Resources, but it opposes the application. Tshenolo Resources is presently under business rescue in terms of section 129 (3) (b) of the

Companies Act[1] at the request of certain of its creditors due to the alleged inability to pay its debts.

[2] Tshenolo Resources and the Municipality concluded a written agreement encompassing written changes to the general contract data and the general provisions of the general conditions of the 2004 contract document. According to the written agreement Tshenolo Resources secured a tender with the Municipality for the upgrading of dirt roads and streets to paved streets in Petrusville and Philipstown areas. It is common cause that the plaintiff was not a party to this agreement; hence it did not attach the written agreement in its founding affidavit.

[3] According to the written agreement Tshenolo Resources would submit monthly claims for work done to the Municipality who in turn would pay such claims within 28 days after date of receipt of any invoice issued in terms of the contract accompanied by a payment certificate issued by its consulting engineers. The work was scheduled to be completed in eighteen months. The Municipality would also be entitled to withhold 10% of claims submitted and on the value as determined by the consulting engineers as a retention amount, up and until such time as the agreed upon defects liability period had been completed. On completion of the construction work it would be certified by the Municipality's consulting engineers and 50% of the total amount of retention up to then withheld would be paid to Tshenolo Resources and the remaining 50% would be paid after the expiry of one year after the stage of practical completion had been reached and all latent defects in the construction work corrected by Tshenolo Resources.

[4] On 07 August 2013 Tshenolo Resources represented by Mr ET Bozwana, and Jorian Construction, by Mr HJP Steyn, entered into a written agreement (Annexure "A") in which Tshenolo Resources appointed Jorian Construction as its sub-contractor to perform the construction work. This was after Jorian Construction had challenged the award of the tender to Tshenolo Resources. The defendants were the respondents in the matter under Case Number 954/2013. Jorian Construction and Tshenolo Resources concluded the agreement based on the knowledge of the

[1] Act 71 of 2008

express, alternatively implied and alternatively tacit terms of the agreement which I summarise as follows:

4.1 That Tshenolo Resources had secured a tender with the Municipality for the upgrading of dirt roads and streets to paved streets in Petrusville and Philipstown areas.

4.2 Jorian Construction would perform all the works for the upgrading of the dirt streets to paved streets in the mentioned areas as a sub-contractor.

4.3 Jorian Construction would be entitled to submit monthly statements to Tshenolo Resources for the work done.

4.4 A retention amount of 10% would be deducted from Jorian Construction's monthly claims submitted, on the same terms and conditions as it existed between Tshenolo Resources and the Municipality as to its eventual payment terms.

4.5 Tshenolo Resources would include such payment certificates rendered to it by Jorian Construction into its own certificates to be rendered to the Municipality.

4.6 Tshenolo Resources would pay Jorian Construction for work so performed within 24 hours after Tshenolo Resources received payment from the Municipality.

[5] It is undisputed that Tshenolo Resources paid the first eleven payment certificates to the total amount of R9 618 440-72. On 21 November 2014 and 02 February 2015 Jorian Construction issued two invoices to Tshenolo Resources (Annexures "B" and "C") to the amounts of R3 208 904-69 and R2 065 776-89 respectively, each invoice with interest calculated at 9% per annum *a tempora morae* and costs for services rendered to Tshenolo Resources. The invoices describe the work done as **"Project ref nr 54630YNA – UPGRADING OF DIRT STREETS TO PAVED STREETS IN PHILLIPSTOWN AND PETRUSVILLE PHASE 2"**. On 10 December 2015 the plaintiff issued an invoice numbered payment certificate to the amount of R 890 908-34 (Annexure "B"). Notably, the three invoices clearly show that they were prepared by Jorian Construction for payment by to Tshenolo Resources.

[6] After Jorian Construction completed the construction work it was certified accordingly and handed over to the Municipality who received and retained it. Jorian Construction claims that it duly performed in terms of the agreement and rendered payment certificates as well as claims to Tshenolo Resources. Despite receipt of the completed construction work the Municipality failed to pay the full

amount of the contract price to Tshenolo Resources in order for it to pay Jorian Constrution.

[7] Jorian Construction issued summons against Tshenolo Resources in Case Number 1217/2015 dated 17 June 2015 and later joined the Municipality in its notice of amendment of its particulars of claim. On 22 September 2015 Tshenolo Resources filed a notice of intention to defend the action and a plea on 18 May 2016. On 29 November 2016 Jorian Construction issued other summons dated 17 June 2015 in Case Number 2622/2016 against Tshenolo Resources as the first defendant and the Municipality, the second defendant. The summons was served upon Ms Nguka, a person in charge of the Municipality on 10 February 2017.

[8] Jorian Construction filed an application for default judgment in terms of Rule 31 (5) (a)[2] dated 09 March 2018 (Case Number 1217/2015) and was also served upon the Municipality on 29 March 2018 by leaving a copy with Ms Dick, the Municipal Manager, in respect of both cases. On 24 May 2018 Tshenolo Resources filed a notice to oppose the application accompanied by an affidavit deposed to by Mr Werner Cawood, the business rescue practitioner, on behalf of Tshenolo Resources. The matter was then set down for hearing on 25 May 2018. On that date it was postponed by agreement to 24 August 2018 when it was heard. There was no appearance for the Municipality on both occasions.

[9] Tshenolo Resources alleges that its opposition is based on the fact that it holds an interest in the application. It submits that it filed its plea to the summons representing the combination of the separate claims initially instituted against the defendants.

[10] Mr Grobler, on behalf of Jorian Construction, submits that Jorian's invoices rendered to Tshenolo Construction were subsumed in the invoices of Tshenolo Resources rendered to the Municipality. He submits further that the plaintiff's claim is set out in this fashion because there is no privity between the plaintiff and the Municipality. It is therefore based on an admission that it was a sub-contractor and he maintains that the order sought is competent. It is common cause that the relationship between Tshenolo Resources and Jorian Construction is a contractual

[2] Uniform Rules of Court

one. According to Mr Grobler there is no reason why the Court could not order the Municipality to pay Tshenolo Resources and in turn Tshenolo Resources be ordered to pay Jorian Construction.

[11] Tshenolo Resources alleges that Jorian Construction's application is premature taking into account that its claim has not become due and payable. Jorian Construction would only be entitled to payment once Tshenolo Resources receives payment from the Municipality. Tshenolo Resources states that the reason why the Municipality has not fulfilled its obligation towards it for the services rendered was as a result of the alleged defective nature of the construction work done which is not according to the agreement. It states further that this dispute forms the basis of the litigation between Tshenolo Resources and the Municipality. It acknowledges though, that the application for default judgment is against the Municipality only. However, the granting of judgment would be detrimental to it, hence its opposition.

[12] Mr Van der Merwe, for Tshenolo Resources, submits that the court has discretion to grant or refuse the application for default judgment taking into consideration all the relevant facts. In this regard he relies on **WASHAYA v WASHAYA**[3]. In this matter the court in deciding whether a party is truly in default in the sense of not pursuing the litigation, should have regard to all the documents in the court's file.

[13] Mr Werner Cawood, the business rescue practitioner, deposed to the first defendant's opposing affidavit. He argues that Tshenolo Resources provided services to the Municipality in terms of a tender awarded to it by the Municipality. He argues further that granting judgment against the Municipality would have an adverse effect on Tshenolo Resources, its creditors and the ongoing business rescue proceedings. He claims it would not be in the interests of Tshenolo Resources as Jorian Construction and Tshenolo Resources have to share the funds equally as they become available within the business rescue.

[14] Mr Van der Merwe argues that Jorian Construction's enrichment claim cannot stand taking into account the first defendant's allegation that the plaintiff did not complete the work up to the standard and specification as it was required to do. He argues further that the requirements for enrichment have not been complied with.

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[3] 1990 (4) SA 41 (ZH)

He submits that should Jorian Construction be directly paid by the Municipality Tshenolo Resources would lose its mark-up and the amount due to it in terms of the agreement between Tshenolo Resources and Jorian Construction. He adds that Tshenolo Resources would be at a disadvantage as the Municipality would pay the plaintiff directly and circumvent its obligation towards Tshenolo Resources.

[15] Mr Grobler submits that the granting of the judgment against the Municipality would not have any negative effect on Tshenolo Resources' mark-up as nothing prevents it from claiming it. Regarding the absence of a legal relationship between Jorian Construction and the Municipality Mr Grobler relied on **FREE STATE PROVINCE v TERRA GRAPHICS (PTY) LTD AND ANOTHER**[4] where Navsa JA (Ponnan JA, Leach JA, Sadulker JA and Zondi JA concurring) held in a similar matter:

'In the present instance TW performed work for the benefit of the Department, for which it invoiced SSI, which, in turn, invoiced the Department for the same amount in respect of the same work. It is perhaps necessary to reiterate that the Province knew that environmental services could only be provided by a sub consultant. It approved the appointment of that particular sub consultant. In terms of clause 5.1.3 of the main agreement, the Province had undertaken to SSI to pay the sub consultant's fees in addition to its (SSI's) own fees. It received the benefit of the services of TW. It is also not without significance that the MEC represents a government department which, in terms of constitutional prescripts, is required to be accountable. SSI has been joined in these proceedings, which it has chosen not to oppose. All interested parties were therefore before this court. The MEC has failed to raise any justification for its failure to pay TW through the conduit of SSI. The court below ordered the MEC to effect payment of the sum of R 1 540 123, 54 to TW (para 1 of its order). And, in para 2 (albeit wrongly couched as an alternative to para 1) it ordered that such payment be effected via SSI. There is therefore no reason in principle to interfere with those orders of the High Court.'

[16] According to Mr Grobler the Terra Graphics case is in all fours with the instant case. He submits that the plaintiff's particulars of claim went uncontested. In this case the Free State Provincial Government awarded a tender in relation to a road-infrastructure programme to the main contractor ("SSI"). SSI submitted a tender and was subsequently awarded the tender to assist the Department of Police Roads and Transport to manage the implementation of the road repairs and rehabilitation programme for the Free State road network. It therefore concluded a written

[4] 2016 (3) SA 130 (SCA) at 141G-J

agreement with the SSI to supply engineering services for a total remuneration package of R 69 million. The main agreement contemplated the appointment of subcontractors with the approval of the Provincial Government and to this end the tenders were invited. The Provincial Government sanctioned the appointment of TW as a subcontractor to provide environmental protection services for payment in an amount of R 1 593 997-75. Notwithstanding that the work was fully completed The Provincial Government accepted and retained the benefit and had already made two payments.

[17] Considering that SSI had not been paid it could not pay the subcontractor, TW, for the balance due. TW then alleged that the Provincial Government failed to make a full payment for work and services rendered in terms of the agreement. The MEC did not dispute that the work had been done in terms of the main and sub consultancy agreements. The Provincial Government raised a defence, *inter alia*, that it had made no budgetary allocation for such work. On behalf of the MEC it was argued that the claim for payment of services rendered lay against SSI and not against the MEC.

[18] The court *a quo* considered whether there was any merit to the defence that there was no contractual privity between TW (the subcontractor) and the Provincial Government. He took into account provisions of the main agreement in terms of which SSI was the Province's manager in relation to the road rehabilitation programme, including being responsible for the financial management of the project. The court *a quo* noted that payment due to TW for sub consultancy services had to be made by the Province to SSI (the main contractor) and found that there was privity between TW, the sub-contractor, and the Provincial Government.

[19] It is not necessary for me to deal with the defence of failure to comply with the peremptory provisions of section 66 and 68 of Public Finance Management Act[5] and the fact that the Provincial Government had not allocated a budget in respect of the main agreement that such an agreement was *void ab initio* and could not satisfy a cause of action as it is irrelevant in the instant case. What makes this case distinguishable from Terra Graphics is that in Terra Graphics the main and sub

[5] Act 1 of 1999

consultancy written agreements is that these two agreements were approved by the Provincial Government, which is not the case *in casu*. In the sub consultancy agreement the relevant clauses in the main and sub consultancy agreements were thus:

'2. The following documents shall be deemed to form and be read and construed as part of this Sub-Consultancy Agreement:

1. The Conditions
2. The Appended Clauses of the Main Agreement
3. Schedules 1 to 4

3. In consideration of the payments to be made by the Consultant to the Sub-Consultant; as hereinafter mentioned, the Sub-Consultant agrees to perform the Sub-Consultant's Services in conformity with the provisions of the Sub-Consultancy Agreement.
4. The Consultant hereby agrees to pay the Sub-Consultant, in consideration of the performance of the Sub-Consultant's Services, such amounts as become payable under the provisions of the Sub-Consultancy Agreement, within seven days after received money from the Department, at times and in the manner prescribed by the Sub-Consultancy Agreement.
5. The Sub-Consultant is appointed on instruction of the client, The Department of Police, Roads and Transport (hereinafter called the Client).
6. The same payment conditions between the Client and the Consultant apply between the Client and the Sub Consultant.'

[20] TW performed work for the benefit of the Department, for which it invoiced SSi, which in turn, invoiced the Department for the same amount in respect of the same work. The Provincial Government knew that environmental services could only be provided by a sub consultant and had approved the appointment of the sub consultant. This is again not the case in the instant case. Under these circumstances the Provincial Government had no justification for its failure to pay TW through SSI, the conduit. On appeal the court a quo's finding was not interfered with except for the substitution of the amounts that was set aside and substituted with the correct amount.

[21] In the instant case no relief is sought against the first defendant. The plaintiff seeks default judgment against the Municipality which has chosen not to oppose the application. There is no indication that the Municipality was aware of the appointment of Jorian Construction as the Tshenolo Resources' sub-contractor. Only one letter was addressed to the Municipality by the plaintiff's attorneys on 19 October 2016 before summons was issued advising the Municipality of the outstanding arrears. The facts giving rise to the amount claimed was specifically

mentioned in the letter. That was the only time that the Municipality got to know about the sub consultancy of Jorian Construction.

[22] The Municipality had already paid eleven payment certificates to the total amount of R9 618 440-72 to Tshenolo Resources. It is a local sphere of government and an organ of State as envisaged in section 239 of the Constitution[6] duly established as a local municipality in terms of the Local Government Systems Act[7]. The question that arises is whether or not the Municipality is under an obligation to pay Jorian Construction when it had no knowledge of its role in the construction work. It concluded a written agreement with Tshenolo Resources. There is no indication that the Municipality was made aware of this appointment and the existence of the written agreement between Jorian Construction and Tshenolo Resources. Can it be said in the circumstances that there is privity between the two? The answer is no, hence Jorian Construction did not have the written agreement between the Municipality and Tsenolo Resources attached to its founding affidavit. It would not be easy for one to know the existence of such privity without having sight of the said written agreement.

[23] Considering the fact that the Municipality decided not to oppose the application, Tshenolo Resources cannot, in my view, be correct in opposing this application as no relief is sought against it. It is not Tshenolo Resources' place to allege that the construction work by Jorian Construction was defective but the Municipality which failed to do so. The Municipality was properly served with the application and chose not to oppose it.

[24] Jorian Construction has not established the legal obligation on the part of the Municipality to enforce any claim against the Municipality. Its claim is against Tshenolo Resources in terms of the written agreement between them. I deem it unnecessary to deal with the argument by Tshenolo Resources that if judgment is granted, it would lose its mark-up.

[25] The plaintiff alleged that the Municipality has been enriched at its expense. In this regard the plaintiff has to prove the following:

25.1 The defendant must be enriched;

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[6] Act 108 of 1996

[7] Act 117 of 1988

25.2 The plaintiff must be impoverished;

25.3 The defendant's enrichment must be at the expense of the plaintiff; and

25.4 The enrichment must be without cause.[8]

[26] Tshenolo Resources states that Jorian Construction failed to mention how the Municipality has been enriched and therefore this allegation cannot stand. The enrichment claim was also not seriously relied upon by the plaintiff during argument and was not dealt with in its heads of argument. This claim was unsubstantiated and I do not deem it necessary to deal with it in this judgment as it stands.

[27] Tshenolo Resources alleges that the claim against the Municipality is dealt with in the business rescue plan. It alleges further that the business rescue proceedings would be jeopardised because if judgment would be granted in favour of the plaintiff, it be paid by the Municipality in full while other creditors would have to wait for payment. Its claim against the Municipality would also be prejudiced.

[28] In my view the plaintiff seeks no relief against Tshenolo Resources and has no relevance to the business rescue proceedings. Its relevance is that it was just acting as a payment conduit between the plaintiff and the Municipality.

[29] The submission that this matter should be allowed to go on trial as substance considering the fact that there exists no *nexus* between the Municipality and Jorian Construction sounds reasonable. The allegations by Tshenolo Resources remain hearsay. The plaintiff would suffer no prejudice if the matter goes on trial so that all the issues are ventilated.

[30] I am satisfied that Jorian Construction has not made out a case for the relief sought. Jorian Construction is, in my view, also not entitled to default judgment granted in its favour considering the lack of privity between it and the Municipality.

In the circumstances I grant the following order:

1. **The application for default judgment is dismissed.**
2. **The second defendant is ordered to pay costs on a scale as between party and party.**

[8] McCarthy Retail LTD v Shortdistance Carriers CC 2001 (3) SA 482 at 496 para [2]

BM Pakati

BM PAKATI
JUDGE-NORTHERN CAPE DIVISION, KIMBERLEY

On Behalf of the Applicant:	*ADV D GROBLER*
Instructed by:	*ENGELSMAN MAGABANE INC.*

On Behalf of the Respondent:	*ADV L VAN DER MERWE*
Instructed by:	*ROUX WELGEMOED & DU PLOOY*