IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION, MTHATHA] *[Not reportable]*

CASE NO: 1946/09

Delivered on: 20/11/18

In the matter between:

MAQHAWE CONSTRUCTION CC Plaintiff

and

O. R.TAMBO DISTRICT MUNICIPALITY Defendant

JUDGMENT ON SPECIAL PLEA

NHLANGULELA DJP

[1] The issue for decision in this matter is whether a special plea of lack of *locus standi* should succeed so that, it if does succeed, the plaintiff's claim is dismissed without a need of a trial action for contractual damages that the plaintiff has instituted against the defendant.

[2] Although the *onus* of proof of *locus standi* rests with the plaintiff – *Kommisaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at 1057 G-H, it was on the election of both parties that the defendant led evidence first. Mr Thandwefika Watson Mgidlana and Mr Hendrik Pretorius testified on behalf of the defendant.

[3] Mr Mgidlana was a Director in the Municipal Legal Services department of O.R.Tambo District Municipality, attached to the headquarters of the defendant in Mthatha.

[4] Mr Pretorius is a professional civil engineer who is in the employ of Thuso Development Consultant (Thuso), a firm of civil engineers.

[5] The evidence adduced on behalf of the defendant is, to a large extent, common cause. Both witnesses for the defendant testified that on 19 June 2006 Maqhawe Construction CC and Kwakhiwe Construction CC, as a Joint Venture (the JV) was awarded a tender contract by the defendant for the construction of Nkonzo/Mhlumba Bulk Water Supply under contract No. 1217C, Flagstaff at a tender amount of R6 334 601,70. Mr Pretorius served as a site engineer. Mr Mgidlana was the legal adviser for the defendant, and playing an oversight role over the tender project. Mr Victor Moyisi Matsheke and Mr Vuyisa Kwakhiwe are the representative members of the JV charged with the task of constructing air valve manholes, scower manholes, normal gate valve, supply and laying of pipes as well as works associated therewith. Mr Matsheke and Mr Kwakhiwe were also members of the two JV partners respectively.

[6] Mr Mgidlana stated that the tender contract did not permit of any alterations without the defendant and the JV having agreed to it in writing. Neither does the tender contract permitted any of the JV partners abandoning the contractual obligations without termination of the entire contract and a fresh tender being advertised for a new and a suitably qualified party being engaged. On payments for work done and the certificates having been issued thereon by Thuso, he testified that the contract permitted payments by the defendant to the JV, not to any one of the members thereof. When a third person has to be allocated a payment on the request of the JV, a deed of cession would, without exception, have to be made to authorise a payment. This arrangement is inclusive of a payment to the CCs which were for all intents and purposes together, collectively and inseparably the JV entity. He testified about the internal arrangement of the JV that Maqhawe Construction CC (Maqhawe CC) would perform 75% portion of the tender and Kwakhiwe Construction CC (Kwakhiwe CC) to perform 25% of the remaining tender. This he said was

permissible in terms of the tender contract in that the obligations of the tender had to be discharged by the JV partners irrespective of the extent of the individual's participation in the performance of work and as long as both partners remained in the JV.

[7] Mr Mgidlana testified that although he was not the direct supervisor of the works on the site, the duty of Thuso as the Agent of the defendant, he had knowledge of the fact that the problems ensued between the JV partners well before the commencement of implementation of the tender in January 2007 so much so that on 03 April 2007 Mr Matsheke addressed a letter to the defendant asking that Maqhawe CC be permitted to take over the tender contract of the JV. On 26 June 2006 the defendant replied by refusing the request on the basis that the separation of the JV partners would have the effect of terminating the JV itself without the tender being advertised. That attitude was again conveyed to the JV on 30 October 2006. The refusal came up consequent upon a series of meetings having been held. A written response was given at a time when Kwakhiwe CC had already left the site in December 2006. It never returned.

[8] According to Mr Mgidlana, in March 2007 the defendant had to accept Kwakhiwe CC's abandonment of the site because the JV had not performed its duties in terms of the tender contract. The JV itself was in due course dismissed from the site by reason of non-performance of its contractual obligations.

[9] Under cross examination Mr Mgidlana denied that the defendant had paid Maqhawe CC for work performed under the tender contract without a duly signed cession agreements having been made by the JV. He also denied that the tender agreement was novated by non-performance of work or abandonment of the site by Kwakhiwe CC. He also denied that Maqhawe CC's remaining on the site alone became a substitution of the JV.

[10] Mr Pretorius confirmed that Thuso was the site Agent for the defendant and that it was responsible for, amongst other duties, the issuance of payment

certificates to the JV. He denied that Maqhawe CC was ever paid by the defendant without a deed of cession. He stated that he worked with one Mr Clement Bukako, and that both of them were on the site during the time when the upheavals emerged between the JV partners. Since Mr Bukako was a trainee engineer he was accountable to Mr Pretorius about everything pertaining to the implementation of the tender project, including the meetings that Thuso was involved in to assist the JV partners to sort out their differences. He denied categorically that Thuso, through Mr Bukako, had agreed that Kwakhiwe CC should leave the JV. His version is that Kwakhiwe CC left the site on its own accord without having built even a single manhole.

[11] Mr Matsheke testified on behalf of Maqhawe CC. He stated that the JV partners took over the site on 19 June 2006 upon it had been awarded the tender project. Maqhawe CC and Kwakhiwe CC amended their JV agreement to reflect a 75% - 25% split of the work that each was going to do. He told the Court that Maqhawe CC alone completed 75% of the work whilst Kwakhiwe CC did nothing; Maqhawe CC was paid for work done through certificates issued by Thuso. The payment that was withheld by the defendant was for a reason that the full scope of work tendered for had not been done. As a result the defendant prevailed upon Maqhawe CC to complete 25% of work that Kwakhiwe CC was supposed to do; and to do so not as a JV, but as Maqhawe CC. Mr Matsheke told the Court that Maqhawe CC indeed completed the balance of 25% work outstanding but it was not paid for that. He stated that at a meeting held in March 2007 Mr Bukako had permitted Maqhawe CC to amend the JV agreement such that Kwakhiwe CC was excluded from the tender. He said that Kwakhiwe CC was present in that meeting. Another meeting was held late in March 2007 between Mr Matsheke, Mr Bukako of Thuso and Mr Aubrey Katsana from the office of the defendant. At that meeting not only did Mr Katsana dismiss Kwakhiwe CC from the project but Maqhawe CC was authorised to complete the 25% work that Kwakhiwe did not do. Further, Mr Katsana gave Maqhawe CC an additional project in terms of which it would lay a 1,5m pipe line into

Mzimkhulu. However, Thuso later on stopped Maqhawe CC from doing the additional work for a reason that the JV had been terminated for failure to perform its obligations. Mr Matsheke stated that he went on to approach Mandisa and Nduko of the office of the defendant to intervene.

[12] It emerged from the cross examination of Mr Matsheke that Maqhawe CC had been paid directly for work done with cheques that had been accompanied by cession agreements under certificate No. 3 dated November 206 in the sum of R940 576,77; certificate No. 6 dated 4 April 2077 in the sum of R229 938,18; and certificate No. 7 dated 13 July 2007 in the sum of R260 877,59. Those payments were conceded by Mr Matsheke, *albeit* against the backdrop of his evidence in chief that Maqhawe CC was never paid under cover of deeds of cession.

[13] The following undisputed facts that emerged from the oral evidence bear repeating , namely:

(1) the parties to the tender contract No. 1712C, Flagstaff were the defendant, as the employer, and the JV, as the successful tenderer.

(2) Maqhawe Construction CC and Kwakhiwe Construction CC were the JV partners recognized as the JV entity.

(3) The plaintiff, Maqhawe Construction CC, was not the contracting party in terms of the tender contract.

(4) Maqhawe Construction CC had only received direct payments from tender contract No. 1712C through cession agreements.

(5) The defendant did not authorise Maqhawe Construction CC to take over the obligations of the JV.

[14] That said, it is not proved by the evidence that a term(s) of the tender contract was novated. More must be said about the concept of novation:

[15] In *Tauber v Von Abo* 1984 (4) 482 (E) at 485 C-D Van Rensburg J said the following about novation.

> "Novation can be described as the replacing of an existing obligation by a new one, the existing obligation being discharged by the new obligation. Cf Caney *The Law of Novation (supra* at 4 and 21*) Voet* 46.2.2; Wessels *The Law of Contract in South Africa* 2nd ed vol 2 paras 2369, 2374, 2375, 2379 and 2395; De Wet and Yeats *Kontraktereg en Handelsreg* 4th ed at 239. However, … if the parties intended the new contract to operate as a novation, it will only constitute a valid and enforceable contract if the contract which it was intended to novate was legally valid."

[16] The contentions advanced on behalf of the plaintiff, shown in paragraph 22.2 of the heads of argument, are that the evidence adduced proves novation of the original tender contract and/or the original obligation of the defendant to pay the JV for work completed. In elucidation, it was argued that the performance by Maqhawe CC of 25% of work that the JV had allocated to Kwakhiwe CC became a novation of the tender contract. On the issue of the original obligation of direct payments to the JV, it was argued that payments, with or without a deed of cession, made by the defendant to Maqhawe CC after 13 April 2007 novated the original obligation that payments be made only to the JV.

[17] Since the tender contract permitted alteration of its terms in writing only, which fact is common cause, the plaintiff ought to have proved novation by exhibiting to the court a legally valid written agreement between the defendant and the JV. That did not happen in this case. I am alive to the principle that novation of a term(s) in a written contract may be novated orally. However, in this case, a verbal alteration of a term of the tender contract is impermissible. Even if the court is wrong in so finding, it still cannot be gleaned from the evidence that the defendant and JV exhibited by conduct an intention to novate

the original tender contract. The evidence of Mr Mgidlana shows that as early as in March 2007 the JV, through Mr Matsheke, asked Thuso to recommend for the dismissal of Kwakhiwe CC from the site and/or the JV itself. When that request was refused Maqhawe CC approached the defendant, through Mr Katsana, Ms Nomlala and Ms Msebi with a similar request. Over and above that the JV wrote a letter to the defendant addressing the same issue. With the request having been considered by the defendant in various meetings, the defendant declined the invitation to dismiss Kwakhiwe CC in recognition of a binding provision(s) of the tender agreement that stand between the parties involved in it. In my opinion it is not proper to conflate the tender contract with the JV agreement because the defendant was never a party to the JV. In that context there was nothing untoward in defendant insisting that the JV partner, Maqhawe CC, was obliged to perform the 25% of work that the JV had allocated to Kwakhiwe CC.

[18] It is quite discernible from the evidence adduced that the plaintiff has an interest in the matter, but that cannot be elevated to a legally enforceable right to sue on the tender contract against the defendant simply because the defendant has a legal obligation of performance only towards the JV. In the circumstances the special plea of lack of *locus standi* raised by the defendant must succeed.

[19] The costs of the matter should be paid by the plaintiff as a losing party.

[20] In the result the following order shall issue:

The defendant's special plea is upheld with costs.

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Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

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