

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 3489/2012

In the matter between:-

TERRA GRAPHICS (PTY) LTD t/a TERRA WORKS

Applicant

and

**THE MEC: DEPARTMENT OF POLICE, ROADS
AND TRANSPORT FREE STATE PROVINCIAL
GOVERNMENT**
SSI/TSHEPEGA JOINT VENTURE

1st Respondent
2nd Respondent

JUDGMENT BY: MATLAPENG, AJ

HEARD ON: 29 NOVEMBER 2012

DELIVERED ON: 7 FEBRUARY 2013

INTRODUCTION

[1] This matter came before me by way of Notice of Motion. The applicant seeks the following relief:

- “1.1 *The first respondent be ordered to pay an amount of R1 540 123.54 to the applicant, as payment for works done and services rendered by the applicant to the first respondent;*
- 1.2 *Alternative to prayer 1, that the first respondent be ordered to effect payment of the above mentioned to the second respondent, and that the second respondent be ordered to*

immediately and by no later than 7 days after receipt thereof, effect payment to the applicant of this amount”.

In addition to these two main prayers, the applicant is claiming ancillary relief of interest and costs. It however, does not claim the said interest and costs from the second respondent.

BACKGROUND

[2] The factual background of this matter is common cause between the parties. About 19 April 2010 the first and the second respondent entered into a written agreement in terms of which the second respondent was appointed as a project manager (consultant) in respect of the rehabilitation and repairs of the Free State Road Network Programme.

[3] Insofar as it is relevant to this matter the Agreement provided that the second respondent would *inter alia*:

“8.2 establish a contract that met the first respondent’s requirements and needs and would include mechanisms such as QA plans and programmes to monitor and control the project, including contracts between the first respondent and contractors appointed to carry out the construction, alternatively, repair work on the roads to which the second respondent was appointed as the managing consultant;

8.3 manage the construction of the roadworks:

8.3.1 to achieve the stipulated quality;

8.3.2 to ensure completion within the agreed time period and to the first respondent’s needs; and

8.3.3 to maintain cashflow to meet the payment schedule;

- 8.4 manage the first respondent's responsibility for the safety, social and environmental aspects of the works;
- 8.5 ensure a constant channel of communication between all stakeholders; and
- 8.6 shall not initiate or terminate any sub-contract for performance of all or part of the services without the written consent of the first respondent; and in this regard, where the first respondent has required the second respondent to appoint selected consultants as the second respondent's sub-consultants, fees owed to those sub-consultants shall be due to the second respondent in addition to the second respondent's own fees."

[4] Pursuant to the agreement aforesaid, the second respondent invited tenders for Environmental Assessment Practitioners registered with the Interim Certification Board to act as Independent Environmental Control Person for the proposed upgrades and improvements of the Free State Road Network Programme in order to ensure that the programme met with environmental specifications and legislative requirements.

[5] The applicant submitted and tendered successfully for an amount of R1 593 997.79 for the estimated duration of the project of 24 to 30 months. It is noteworthy that the tender documents in issue displayed the first respondent's logo (The department of Police, Roads and Transport, Free State Province) and furthermore were even issued under the direction of its head. Of even great significance is the fact that even though the letter of appointment of the applicant was typed on the second respondent's letterhead, it makes it clear that the applicant was appointed on behalf of the first respondent.

- [6] Following upon the acceptance of the appointment by the applicant, the second respondent concluded a sub-consultancy agreement with the applicant. Pursuant to this sub-consultancy agreement the applicant performed its obligations and submitted its invoices through the second respondent. Although there is still some outstanding balance it is not in dispute that some of the invoices were duly paid.
- [7] The applicant has now issued a Notice of Motion claiming the outstanding balance due and owing. The second respondent is not before this court. Instead it has issued a separate summons against the first respondent in this court. That matter is still pending. In this matter, although the applicant has joined the second respondent, it contends that in terms of the agreement it still retains the right to claim the money for the work done directly from the first respondent even though the work was done under the management of the second respondent.

DEFENCES BY THE FIRST RESPONDENT

- [8] The first respondent denies liability based on the following:
1. The application is premature as the agreement provides for arbitration and none was held.
 2. There was no compliance with the provisions of the Institution of Legal Proceedings against certain Organs of the State Act 40 of 2002.
 3. There is no privity of contract between the applicant and the first respondent.

4. The agreement does not comply with peremptory statutory obligations.
5. The main agreement is invalid and unenforceable therefore the other agreements flowing therefrom are also invalid.

[9] The first respondent abandoned the first two grounds of its defence. I therefore proceed to deal with the three remaining grounds.

LACK OF PRIVITY BETWEEN THE APPLICATION AND THE FIRST RESPONDENT

[10] Essentially the first respondent submits that the sub-consultancy agreement was between the applicant and the second respondent. It contends further that as it was not part of this agreement, there can be no privity between itself and the applicant. As against this contention, the applicant submits that if proper regard is had to the manner of the appointment of the applicant, and the circumstances surrounding the execution of the project, the appointment was in fact intended to be on behalf of the first and not the second respondent.

[11] It is trite that the test to determine whether there was privity of agreement or not is a factual one. This requires a careful consideration of the factual matrix. The following facts are therefore relevant:

[11.1] After the awarding of the tender, the first respondent appointed the second respondent as “*programme manager to manage the rehabilitation and repair of Free State Road*

Network". Furthermore the second respondent was appointed to render the following professional services:

- "(a) 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.*
- (b) Your appointment is limited to Road 12 to Road 23 as per the department's priority list."*

[12] In terms of one of the appendices to the agreement entered into by the two respondents the scope of the services to be rendered by the second respondent is described as follows:

"General

The SSI/Tshepega Joint Venture as programme manager, will ensure that the Department of Police, Roads and Transport's Programme for the Rehabilitation and Repair of the Free State Road Network and its individual project components are initiated, planned, executed, monitored, controlled and closed-out according to International Standard for Programme Management (PM) as well as the South African Council for Project and Construction Management Professional (SACPCMP) standards and guidelines.

..... The Programme Managers will also be responsible for setting up and managing the Programme Management Office (PMO) and its resources (as per Organogram) for the duration of the Roads Programme".

[13] Furthermore under heading called Project Deliverables the following are set out as some of the responsibilities of the second respondent:

- “(a) *Project manage the construction of the roadworks such as the maintain cashflow to meet the payment schedule.*
- (b) *Project manage the client’s responsibility for the safety, social and environmental aspects of the work.”*

[14] It is abundantly clear from the above that the second respondent was appointed by the first respondent to be its manager. As such the first respondent was not involved in the physical building and repair of roads *qua* a contractor. The second respondent was required and did in fact act as a representative/agent of the first respondent in the execution of the project.

[15] In order for the first respondent to achieve its goals of rehabilitating the roads it was required to ensure compliance with the relevant legislation relating to the environment. The first respondent had outsourced this task through a tender process. As a responsible project manager, the second respondent was required to supervise the tendering process.

[16] Of importance in the resolution of this dispute is the letter of appointment of the applicant written by the second respondent wherein it stated clearly that the applicant is appointed “*on behalf of the Free State Department of Police, Roads and Transport*” being the first respondent. It is furthermore noteworthy that the invitation calling for tenders has the first respondent’s logo prominently displayed. This letter although written by second respondent has a clear qualification that it is written “*under the direction of the head of the department, Police, Road and Transport*”. In addition even the tender documents state that the

second respondent was inviting tenders “*on behalf of the Free State Department of Police, Road and Transport*”.

- [17] The first respondent being an organ of the state was obliged to comply with the statutory requirements set out in the Preferential Procurement Policy Framework Act 5 of 2000, as the court in **Viking Pony African Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd and Another** 2011 (2) BCLR 207 at paragraph 26 categorically stated. The second respondent, who is not an organ of the state is ordinarily not obliged to comply with these requirements. However, as the second respondent was in terms of the agreement acting for and on behalf of the first respondent as its project manager, it had to comply with the statutory requirements which pertain to the first respondent. To my mind, this is sufficient evidence that the applicant was appointed on behalf of the first respondent.
- [18] According to the agreement, payment due to the applicant had to be made by first respondent to the second respondent. This would then enable the second respondent to pay the applicant. The intention was to avoid an untenable situation where all the parties involved in the project would all individually claim from the first respondent. To avoid a possible administrative nightmare, the second respondent as a manager was conveniently used as a conduit. Based on the peculiar facts of this matter any reliance by first respondent on the matter of **Minister of Public Works and Land Affairs v Group Five Building Ltd** [1999] 3 all SA 467 (SCA) at 471b-e is misplaced.

[19] Having given this matter careful consideration, I am satisfied that the applicant has proved that there was privity between itself and the first respondent and not the second respondent who for all intents and purposes was a project manager.

NON COMPLIANCE WITH THE PEREMPTORY STATUTORY OBLIGATIONS AND INVALIDITY AND UNENFORCEABILITY OF THE MAIN AGREEMENT.

[20] The first respondent attacks the validity of the main agreement on the grounds that because of its failure to comply with the peremptory provisions of sections 66 of 68 of Public Finance Management Act, no 1 of 1999 and further that no budgetary allocation had been made by the Free State Provisional Government in respect of the main agreement that such an agreement was *void ab initio* and could not satisfy a cause of action. This issue is the subject matter of a pending case in this court under case number 393/2012. As a result I find it improper to pre-empt the decision of another court.

[21] In the circumstances I make the following order:

1. The first respondent is ordered to pay an amount of R1 540 123,54 to the applicant representing payment for work done and services rendered by the applicant to the first respondent.
2. Alternatively the first respondent is ordered to effect payment of the amount mentioned in 1 above to the second respondent and that the second respondent is ordered to

immediately and by no later than seven days after receipt of the said amount to effect payment to the plaintiff of the said amount.

3. The first respondent is ordered to pay interest on the amount mentioned in 1 above at the rate of 15,5% per annum *a tempore morae* calculated from the date of issuing this application until the date of first payment.
4. The first respondent is ordered to pay the costs of this application.

D. I. MATLAPENG, AJ

On behalf of the applicant:	Adv. S. Grobler Instructed by: Peyper Sesele Inc. BLOEMFONTEIN
On behalf of the first respondent:	Adv. L. T. Sibeko SC Instructed by: Office of the State Attorney BLOEMFONTEIN