

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No : 3489/2012

In the matter between:-

THE MEC: DEPARTMENT OF POLICE, ROADS
AND TRANSPORT, FREE STATE PROVINCIAL
GOVERNMENT

Applicant

and

TERRA GRAPHICS (PTY) LTD t/a TERRA
WORKS

1st Respondent

SSI/TSHEPEGA JOINT VENTURE

2nd Respondent

IN RE:

TERRA GRAPHICS (PTY) LTD t/a
TERRA WORKS

Applicant

and

THE MEC: DEPARTMENT OF POLICE, ROADS
AND TRANSPORT, FREE STATE PROVINCIAL
GOVERNMENT

1st Respondent

SSI/TSHEPEGA JOINT VENTURE

2nd Respondent

JUDGMENT:

DAFFUE, J

DELIVERED ON:

23 MAY 2013

- [1] This is an application for leave to appeal against the judgment of Matlapeng AJ delivered on 7 February 2013. The matter was referred to me by the Acting Judge President as Matlapeng AJ's acting stint came to an end.
- [2] Applicant in the main application is Terra Graphics (Pty) Ltd t/a Terra Works. The MEC: Department of Police, Works and Transport, Free State Province was cited as first respondent and SSI/Tshepega Joint Venture as second respondent in that application.
- [3] In order to avoid confusion I shall refer to the parties as Terra Works, the Department and second respondent as the case may be.
- [4] The relief claimed by Terra Works was granted essentially as prayed for in its Notice of Motion, the effect being that the Department was ordered to pay R1 540 123,54 to Terra Works for work done and services rendered, alternatively the Department was ordered to pay the aforesaid amount to second respondent which was ordered to pay the amount over to Terra Works. Interest and costs orders were made as well.
- [5] The Department applies for leave to appeal to the Supreme Court of Appeal, alternatively the Full Bench of this Division, against the whole of the judgment and the orders granted.
- [6] The grounds of appeal can be summarised as follows:

- 6.1 The learned Judge erred in finding that Terra Works proved that there was privity of contract between it and the Department.
- 6.2 The learned Judge erred in finding that Terra Works' appointment was intended to be on behalf of the Department and not the second respondent.
- 6.3 The learned Judge's conclusion that second respondent was conveniently used as a conduit, is unfounded.
- 6.4 The learned Judge erred in finding that the judgment in **Minister of Public Works and Land Affairs v Group Five Building Ltd** [1999] 3 ALL SA 467 (SCA) was inapplicable *in casu*.
- 6.5 The learned Judge failed to have regard to the application of the Public Finance Management Act of 1999 and other statutory regulatory framework.
- 6.6 The learned Judge erred in finding that the obligation of second respondent to comply with statutory requirements pertaining to Terra Works was sufficient evidence that Terra Works was appointed by the Department.
- 6.7 The learned Judge erred in granting judgment for the amount claimed together with interest and costs.

[7] In further heads of argument filed by the Department's counsel on my invitation they made it clear that they stood by the grounds of appeal, but identified three key arguments which they alleged form the basis of the application to wit:

- 7.1 the learned Judge erred by not holding that the sub-consultancy agreement which formed the subject matter of Terra Works' cause of action was invalid and unenforceable;
- 7.2 although the sub-consultancy agreement may appear to be an independent contract between Terra Works and second respondent, viewed holistically it is an agreement that is inextricably linked to the main agreement between the Department and second respondent;
- 7.3 by upholding Terra Works' claim, the court by implication declared the sub-consultancy agreement to be a valid contract notwithstanding that it offended against the provisions of the statutory framework that regulated procurement by Government.

[8] In his heads of argument counsel for Terra Works indicated that the Department's discontent was confined to the following:

- 8.1 the court's finding that there was a direct *nexus* between Terra Works and the Department entitling Terra Works to sue the employer for its bargain;
- 8.2 the court's unwillingness to deal with the question of illegality of the main contract concluded between the Department and second respondent.

[9] In their further heads of argument counsel for the parties were in agreement that the matter is of considerable importance, not only for the parties *in casu*, but for others that are in the same position as Terra Works. Mr Grobler on behalf of Terra Works indicated that the main application herein was to serve as a “test case” and that there are seven other sub-contractors that are in the process of seeking similar relief by means of court proceedings. Counsel are also *ad idem* that if leave is to be granted, it should preferably be to the Supreme Court of Appeal.

[10] Mr Grobler argued that the application for leave to appeal should be dismissed, but if leave is granted, it should be on the limited ground of alleged voidness and invalidity of the main contract between the Department and second respondent only. Mr Sibeko on behalf of the Department argued that leave should be granted on the grounds set out in the application for leave to appeal and therefore against the whole of the judgment and orders.

[11] The Department put forward several defences in the main application, three of which it relied upon throughout the proceedings to wit:

- 11.1 lack of privity of contract between Terra Works and the Department;
- 11.2 the contract between Terra Works and the Department did not comply with peremptory statutory obligations;

11.3 the main contract between the Department and second respondent is invalid and enforceable and therefore all agreements flowing therefrom are also invalid.

[12] Matlapeng AJ elected not to adjudicate the dispute pertaining to the alleged invalidity of the contract between the Department and second respondent. He found that it was the subject matter of a pending case instituted by second respondent against the Department and that he did not have to pre-empt the decision of another court. In the process the learned Acting Judge did also not consider the alleged invalidity of the sub-consultancy agreement.

[13] Having studied the judgment of Matlapeng AJ, the main application including the heads of argument filed prior to the adjudication of that application, as well as the further heads of argument filed on behalf of the parties, I am satisfied that there is a reasonable possibility that another court may arrive at a different conclusion and therefore I find that there is a reasonable prospect of success on appeal for the following reasons:

13.1 the Supreme Court of Appeal may well find that second respondent did not act for and on behalf of the Department when the sub-consultancy agreement was concluded, but that this contract is indeed a nominated sub-contract as the qualities thereof are akin to those tabulated by Schutz JA in **Minister of Public Works**

and Land Affairs v Group Five Building Ltd 1999 (4) SA 12 (SCA) at 17C – 18A;

13.2 another court may well find that Mr Grobler's argument that even in the event of a finding that the main contract between the Department and second respondent is invalid, this does not mean, in the light of the **Oudekraal** principle, that the further contract entered into as a consequence of the main and invalid contract is also invalid, is not justified insofar as neither he, nor the learned Acting Judge appreciated that the Department relies not only on the invalidity and unenforceability of the main contract, but also the sub-consultancy contract for the very same reasons;

13.3 the issues raised, in particular the defences based on sections 66 and 68 of the Public Finance Management Act of 1999, is to a certain extent *res nova* and in the light of the importance of the matter it is necessary that these defences are considered by the Supreme Court of Appeal, particularly as Matlapeng AJ did not deal therewith at all.

[14] Consequently I am not prepared to adhere to Mr Grobler's request that if leave is granted it should be on a limited issue only as indicated. Leave should be granted in respect of all those issues raised by the Department in its application for leave to appeal.

[15] Therefore the following orders do issue:

15.1 Leave is granted to appeal to the Supreme Court of Appeal.

15.2 Costs of the application to be costs in the appeal.

J.P. DAFFUE, J

On behalf of applicant:

Advv L.T. Sibeko SC & V
September
Instructed by:
C/o State Attorney
BLOEMFONTEIN

On behalf of respondents:

Adv S. Grobler
Instructed by:
Peyper Sesele Attorneys
BLOEMFONTEIN

/spieterse