

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 3959/2008

In the case between:

IGNATIUS MPAMBANI

Applicant

and

SEKUNUNU CONSTRUCTION AND TRADING CC 1st Respondent
(Registration No.: 2002/03546/23)

SAMUEL SELIKOE

2nd Respondent

TSWELOPELE MUNICIPALITY

3rd Respondent

ABSA BANK LTD

4th Respondent

STANDARD BANK LTD

5th Respondent

JUDGMENT: VAN DER MERWE, J

HEARD ON: 31 JULY 2008

DELIVERED ON: 14 AUGUST 2008

[1] This is one of those cases, encountered all too often in my experience, where a contract following on a tender involving public funds or public services is awarded to one party (here the 1st respondent), but by private or secret arrangement the contract is in actual fact performed for the financial gain of another party (here the applicant). As is often the case in these circumstances, disputes arose between these parties,

resulting in delay and prejudice to the public that the contract was intended to benefit.

[2] On 14 June 2008 the applicant obtained a *rule nisi* with partial interim effect on semi urgent basis but after service of the papers on the 1st and 2nd respondents. On the extended return date of the *rule nisi* the applicant moves for confirmation thereof. The matter is opposed only by the 1st respondent and the 2nd respondent. The 2nd respondent is the sole member of the 1st respondent. Unless indicated otherwise, a reference herein to the respondents must be read as referring to the 1st respondent and the 2nd respondent. The 3rd respondent is the local municipality within which the areas of Tikwana and Hoopstad fall. The 4th and 5th respondents are registered banks where the accounts mentioned below, are held.

[3] On 14 March 2007 the applicant and the 1st respondent entered into a written agreement (“the contract”). In terms of the contract the 1st respondent granted to the applicant “... the right of first refusal” to manage any project awarded to the 1st respondent during the duration of the contract. The

contract further provides that when the applicant elected to manage any such project, all capital needed for the project shall be provided by the applicant and the applicant shall be entitled to all profit and bear all losses from such project subject to the payment by the applicant to the 1st respondent of a commission equivalent to 4,5% of the net profit in respect of the project or R500 000,00, whichever is the greater. Clauses 5.1.1 to 5.1.3 of the contract provide for a procedure to be followed for accounting after completion of a project and calculation of the net profit for purposes of determination of the commission payable to the 1st respondent. Clause 5.1.1 of the contract provides that the project shall be deemed to be completed when the 1st respondent receives notification of completion of the project from the person who awarded the contract to the 1st respondent. Clause 5.1.2 then provides that within 30 days thereafter the applicant shall cause an income and expenditure statement to be prepared by auditors, in terms whereof the total net profit derived from a project will be reflected and on the basis of which the commission due and payable to the 1st respondent shall be determined. In terms of clause 5.1.3 the outstanding commission due and payable

to the 1st respondent shall be paid within 14 days after completion of the aforesaid income and expenditure statement, after deduction of all drawings made against such commission. In terms of clause 6, the 1st respondent shall operate its current account held at the 5th respondent for every project managed by the applicant and the applicant shall have signing rights in respect of that account. The clause further provides that all expenses in respect of a project shall be paid from this account and all income derived from a project shall be deposited into this account. It is common cause that the account referred to is the account held at the 5th respondent with number 040177793. In terms of clause 17 of the contract any party thereto has the right to cancel the contract in case of breach of the contract and failure to remedy such breach within 7 days after having been required to do so by written notice.

- [4] During April 2007 and as a result of the acceptance of the 1st respondent's tender, the 3rd respondent and the 1st respondent entered into contract number NS29/2007 for the construction of a sewerage network for 1145 erven in Tikwana near Hoopstad and the construction of two

wastewater pumpstations ("the project"). It is common cause between the applicant and the respondents that the project was managed by the applicant in terms of the contract. It is also common cause that the project is not yet completed. It is admitted by the respondents that monies received from the 3rd respondent in respect of the project after March 2008 have not been paid into the aforesaid account with the 5th respondent. These are amounts of R539 367,34, R703 813.45 and R158 753,34. It is not disputed that these amounts were paid into the 1st respondent's account with the 4th respondent with number 4068885278. In its notice of motion in this regard the applicant however referred only to the amount R698 120.68, that is the aforesaid amounts of R158 753,34 and R539 367,34. The applicant and the respondents are further agreed that further amounts are payable by the third respondent in respect of the project and will be payable upon completion of the project.

- [5] It appears from the papers that the 3rd respondent is in the process of extending contract number NS29/2007 by the addition of further work to be performed, namely the

upgrading of the Hoopstad wastewater treatment works and associated works at an estimated costs R6,84 million. The initial contract price in respect of the project was approximately R8,765 million. The applicant claims that the aforesaid extension is or should also be regulated by the provisions of the contract. I disagree. Clause 3 of the contract provides that the contract commence on the signing thereof and shall continue and endure for a period of 12 months terminable by either party giving the other party 3 calendar months written notice. The parties before me are agreed, correctly so in my view, that this clause must be interpreted to mean that the provision in respect of 3 months written notice only applies during the period of 12 months and not thereafter. I think that it is plain that the contract cannot apply to contractual rights obtained by the 1st respondent only after the expiry of the period of 12 months aforesaid. On the evidence of the respondents which must be accepted for purposes of decision of this application, the 1st respondent obtained no contractual rights in respect of extension of contract number NS29/2007 before 13 March 2008.

[6] The applicant in essence now moves for a final interdict. Therefore, on the principles applicable to the establishment of facts in application proceedings, the onus is on the applicant to show on a balance of probabilities that he has a clear right, that infringement of that right is taking place or is reasonably apprehended and that he has no other suitable remedy to protect the right. The case for the applicant is essentially that the contract remains applicable to the uncompleted project, that the respondents fail to adhere to the provisions of the contract in respect of the project to the prejudice of the applicant and that normal civil action for enforcement of contractual rights and/or damages would not provide an adequate remedy in the circumstances.

[7] The case for the respondents in the first place is that the contract came to a complete end upon expiry of the period of 12 months after 14 March 2007. This cannot be correct. The parties to the contract did contemplate the situation of an uncompleted project managed by the applicant at the time of the expiry of the aforesaid period of 12 months and in clause 5.1.4 specifically agreed in this regard. It follows in my view that the period mentioned in clause 3 of the contract

is the period during which the applicant has the right to elect to manage a project awarded to the 1st respondent.

[8] Clause 5.1.4 of the contract provides as follows:

“If this Agreement is terminated or cancelled for any reason whatsoever before completion of the PROJECT paragraph 5.1, 5.1.1, 5.1.2 and 5.1.3 shall *mutatis mutandis* apply, provided that all damages suffered by Mpambani due to the termination or cancellation and/or all expenses payable to third parties to complete the commission payable to Sekununu Construction And trading. Deductions made in terms hereof shall in no way affect any claim which Mpambani may have against Sekununu Construction and Trading for damages suffered as a result the termination of this Agreement.”

[9] The wording of the first part of clause 5.1.4 of the contract, that is before the *proviso* thereto, is clear in my view. It provides that if the contract is terminated or cancelled for any reason whatsoever before completion of a project managed by the applicant in terms of the contract, clauses 5.1 including 5.1.1 and 5.1.3 shall apply *mutatis mutandis*, that is, with the necessary changes. This necessarily means that the

applicant must complete the project. The 1st respondent is then entitled to payment of its commission mentioned in clause 5.1, calculated in terms of clauses 5.1.1 to 5.1.3. I do not find it possible in these proceedings however to give any meaning to the *proviso* to clause 5.1.4 nor to the last sentence thereof. It appears that some wording was lost in the process of drafting of the contract. What can be established with reasonable certainty however (see **PATTINSON & ANOTHER v FELL AND ANOTHER** 1963 (3) SA 277 (D) at 280 B) is that the said *proviso* and last sentence deal with damages suffered by the applicant for which the 1st respondent is liable. Clearly however, the applicant can have no claim for damages against the 1st respondent as a result of the termination of the agreement by effluxion of time in terms of clause 3 thereof nor as a result of the cancellation of the contract by the 1st respondent in terms of clause 17 thereof following on breach of contract by the applicant. It is therefore established with reasonable accuracy that whatever the exact meaning thereof, the *proviso* and the last sentence can only apply in the event of cancellation of the contract by the applicant as a result of breach of contract by the 1st respondent. Seen thus the *proviso* and the last sentence do not detract from the

application of the first part of clause 5.1.4 where, as is the case here, the contract is terminated by effluxion of time. I am satisfied therefore that clauses 5.1.1, 5.1.2 and 5.1.3 of the contract remain applicable to the project until after completion thereof.

- [10] The second line of defence of the respondents is that the applicant ended his involvement with the project, as it was put, at the end of March 2008. I assume, without deciding, that that in itself would provide a valid defence. However, upon analysis of the admitted and undisputed facts before me, I believe that it is shown that although some disputes arose, the applicant did not terminate his involvement with the project as alleged. In this regard I refer only to the following. The respondents admit that the 2nd respondent on 10 June 2008 attended a meeting with the applicant and his attorney, convened by the applicant. It is undisputed that on this occasion the 2nd respondent gave reasons why the applicant was no longer entitled to be involved with the project. He said both that the contract had expired after the aforesaid period of 12 months and that the contract had been cancelled after written notice but he did not indicate that the applicant

ended his involvement with the project or abandoned the project. It is common cause that during 2007 the applicant appointed his brother-in-law, Mr. Sammy Motloun, as site manager in respect of the project. It is not disputed that the applicant dismissed Mr. Motloun from this position because of what the applicant perceived to be missing of deadlines and exceeding of authority by Mr. Motloun. However, the respondent's themselves say that Mr. Motloun was dismissed only on 12 June 2008. I also have before me the affidavits of Mr Ronald Sinclair and Mr Colin Enslin. Mr Sinclair states that he is a civil engineer and project manager and was consulted by the applicant with regards to the project. He is in the employ of a company trading as Sechaba Solutions which was appointed by the applicant as operating agent with regards to the project. Mr. Sinclair states specifically that he was involved with the project on behalf of the applicant in his aforesaid capacity during the period from April to June 2008 when he received reports that the 2nd respondent had instructed people on the site not to communicate with himself. Mr. Enslin states that he is employed by Sechaba Solutions, and that he was involved as site foreman with regards to the project on behalf of the

applicant until 12 June 2008 when he was informed that the 2nd respondent had instructed everybody on site not to report to himself. These affidavits were specifically put forward in answer to the allegation that the applicant had ended his involvement with the project at the end of March 2008, made for the first time in the answering affidavit. At the hearing before me the veracity of this evidence was not questioned nor was leave asked to reply thereto. In all the circumstances of this case I believe that it is justified to rely on the correctness of the contents of the affidavits of Mr. Sinclair and Mr. Enslin.

- [11] For these reasons I find that the applicant has shown a clear right that the provisions of clause 5.1., 5.1.1, 5.1.2 and 5.1.3 are applicable to the project. It is clear that the respondents have infringed this right and will continue to do so unless restrained. The respondents themselves say that only after the completion of the project and the aforesaid extension thereof will the 1st respondent be in a financial position to meet any claim for damages by the applicant. In the circumstances I am satisfied that no adequate alternative remedies are available to the applicant. In the light of my finding in

paragraph 5 above, the description of the project must be stated with greater precision than in the rule *nisi*. Paragraph 2.3 of the rule *nisi* falls away according to the terms thereof and paragraph 2.2 thereof must be amended accordingly. Costs should follow the result.

[12] In the result the following orders are made:

1. The 3rd respondent is directed and ordered to make any payments due to the 1st respondent in respect of the construction of a sewerage network for 1145 erven in Tikwana and the construction of two wastewater pump stations, contract number NS29/2007 as entered into during April 2007, directly into the bank account of the 1st respondent held with the 5th respondent (Standard Bank) with account number 040177793.
2. The 4th respondent is interdicted and prohibited from allowing any withdrawals, payments, deductions or transfers from the 1st respondent's account held with 4th respondent under account number 4068885278 which would cause the credit balance of the account to be reduced to less than R698 120,68 or, if the credit

balance in the account is less than R698 120,68, from reducing such credit balance, without written authorisation of the applicant.

3. The 4th respondent is directed and ordered to transfer the amount of R698 120,68, or, if the balance in the account under account number 4068885278 is less than the amount of R698 120,68, the amount therein held, to 1st respondent's account held with 5th respondent with account number 040177793.
4. The 2nd respondent is prohibited and interdicted from taking any steps to remove the applicant as signatory of the 1st respondent's account held with the 5th respondent with account number 040177793.
5. The 5th respondent is prohibited and interdicted from removing the applicant as co-signatory on the 1st respondent's account held with the 5th respondent under account number 040177793.
6. The 1st and/or 2nd respondents are prohibited and interdicted from withdrawing or transferring any amount from the 1st respondent's account held with the 5th respondent under account number 040177793 without the applicant's written consent.

7. The 1st and 2nd respondents are ordered to pay the costs of this application jointly and severally.

C.H.G. VAN DER MERWE, J

On behalf of the applicant:

Adv. N. Snellenburg
Instructed by:
Naudes
BLOEMFONTEIN

On behalf of the 1st and 2nd
Respondents

Adv. P. Greyling
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