



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: **533/2024**

In the matter between:

NTEMA INVESTMENT / SEDTRADE (PTY) LTD JOINT VENTURE
NTEMA INVESTMENTS CC

1st Applicant

(Reg No. 2002/007929/23)

2nd Applicant

and

DEPARTMENT OF HUMAN SETTLEMENTS, FREE STATE
PROVINCE

1st Respondent

SEDTRADE (PTY) LTD

2nd Respondent

(Reg No. 2004/014721/07)

Coram: DAFFUE J

Heard: 31 OCTOBER 2024

Delivered: 28 JANUARY 2025

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 16H00 on 28 JANUARY 2025.

Summary: Two parties entered into a joint venture agreement in order to bid to be appointed as contractors for a large housing development. The Department of Human Settlements, Free State Province awarded the contract to the joint venture. The joint venture could not comply with its contractual obligations and eventually, the leading joint venture party agreed with the Department to terminate the contract. The joint venture could not meet its business objective. Consequently, the Department appointed a third party to continue with the works. The other joint venture party, being dissatisfied with the events, inter alia sought an order directing the Department to allow it to continue with the contract. The Department opposed this application. The newly appointed contractor was neither identified, nor joined in the proceedings. The court

held that the joint venture agreement automatically lapsed when the contract with the Department was cancelled. It held further that the party claiming relief in its own name could not succeed insofar as the Department had appointed a new contractor who was in the process of executing its contractual obligations. The application was dismissed with costs.

ORDER

1. The application is dismissed with costs, such costs to include the costs of counsel taxed on scale B.
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JUDGMENT

DAFFUE J

Introduction

[1] The critical issues to be considered in this opposed application are whether a joint venture (JV) is still in existence and entitled to an order for specific performance based on an approved bid for the building of 2614 houses granted by the Department of Human Settlements, Free State Province (the Department) as long ago as 2017 and/or whether one of the JV parties is entitled to carry on with the project. The Department has already instructed a new contractor to continue with the project. This contractor is not a party to the proceedings.

The parties

[2] Ntema Investments CC/Sedtrade (Pty) Ltd JV is cited as the first applicant. Its business address is alleged to be the same as that of the second applicant, to wit Ntema Investments CC (Ntema). Adv TD Ledwaba drew the initial papers on instructions of Ramusi Attorneys in Polokwane. Adv N Tshidigimisa appeared for the applicants before me, instructed by Ramusi Attorneys.

[3] The Department is cited as the first respondent. Adv L Tlelai appeared for it on instructions of the State Attorney. Sedtrade (Pty) Ltd (Sedtrade) of Duncanville, Vereeniging is cited as the second respondent. Sedtrade, being one of the parties to the JV cited as the first applicant, did not oppose the application.

The relief sought

[4] I shall refer to the history of the litigation hereunder, but for purposes hereof it is appropriate to quote the relief sought in the notice of motion, excluding paragraph one pertaining to condonation which has been dealt with earlier.

'1. ...

2. That the 1st Respondent be ordered to comply with the appointed (sic) letter dated 21 August 2017 regarding the construction of houses: REFENGKGOTSO 2614 HOUSES, as well as the contents of the Approved Bid No: **RFH-HS-B01/2016/2017**.
3. That the 1st Respondent be ordered to include the Applicant back to the project and that the 1st Respondent liaise with the Applicant in all matters regarding the site known as REFENGKGOTSO 2614 HOUSES in writing.
4. That the 1st Respondent be ordered to comply with order number 2 & 3 above.
5. That the time lost due to the 1st Respondent's failure to appoint project engineers; covid-19; inability to have project plans approved by the municipality and non-payment of the contractors, be factored back into the project.
6. That the present quantum approved by the National Department of Human Settlements be applied on the project.
7. Alternatively, should the 1st Respondent wish to terminate the Applicants' appointment on the project, then they be ordered to pay 30% of the remaining amount of the project on present rate/quantum of the Department of Human Settlements which would have been the applicants' profit on the project.
8. The costs of this Application be paid by any party who opposes same on an attorney and own client scale.' (emphasis added)

[5] During oral argument Adv Tshidigimisa emphasised that the applicants did not seek relief in terms of paragraph 6 of the notice of motion, but insisted that they were entitled to the remainder of the relief in paragraphs 2 to 8. His submission must be considered in light of all the evidence placed before the court. Paragraph 3 obviously refers to a single applicant and not to both applicants as cited. More about this later herein.

Approved bid number: RFP-HS-B01/2016/2017

[6] The JV was the successful bidder under bid number RFP-HS-B01/2016/2017. Consequently, the Department concluded a written agreement (the agreement) with the JV in respect of the construction of 2614 housing units in Refengkgotso.¹

[7] This project was not completed notwithstanding the expiry date having been surpassed. It is in dispute whether the agreement was legitimately terminated, but more will be said in this regard later herein. It has not escaped my attention that the JV's address for the purposes of receiving any notices in terms of the agreement was

¹ The written document is attached as annexure HS1 to the answering affidavit, pp 77 - 108.

recorded as 2 Leeuwenhoek Street, Duncanville, Vereeniging, it being Sedtrade's registered address.²

History of the litigation

[8] Ntema as the only applicant brought an urgent application under case number 62/2024 against the Department as first respondent and Sedtrade as second respondent. This is confirmed by Ms Ramusi in her founding affidavit.³ No answering affidavits were filed in that application, but on 18 January 2024 Van Zyl J made an order by agreement between the parties.⁴ In terms thereof the parties agreed that the Department would pay an amount R585 433.30 into the registered business account of the JV. Clearly and contrary to Ntema's insistence on payment to it, the parties agreed otherwise.

[9] A few days later, on 29 January 2024, the present application was issued in terms whereof the two applicants, allegedly represented by Ramusi Attorneys, intended to apply for urgent relief on 8 February 2024. On that day Van Zyl J heard the urgent application. She delivered judgment on 18 June 2024. The learned judge was not convinced that the matter was urgent and struck it from the roll, Ntema to pay the costs of the application.

[10] In her judgment the learned judge pointed out that some of the orders in the two applications were identical. She mentioned paragraph 3 in particular. In terms thereof Ntema sought an order directing the Department to include Ntema only, and not the JV, 'back to the project and that the 1st Respondent [Department] liaise with the Applicant [Ntema] in all matters regarding the site known as REFENGKGOTSO 2614 HOUSES in writing'.

[11] In paragraph 17 of her judgment the learned judge referred to Ntema's letter of demand dated 30 November 2023. Clearly, Ntema believed that money was owing to it, but as it transpired, the parties agreed that the amount claimed had to be paid into the JV's account. This letter of demand is annexed to the founding affidavit *in casu*.⁵

² Record: p 9, para 5.3 of the founding affidavit.

³ Record: p 14, founding affidavit para 8.12.

⁴ Record: p 119, para 12.2 of the replying affidavit and annexure NIT10 on p 126 of the record.

⁵ Record: pp 43-46, annexure NIT8.

Evaluation

[12] I decided not to set out the common cause facts or the facts in dispute under separate headings, but will deal with that under this heading. No doubt, the JV was the successful bidder in respect of the construction of 2614 houses at Refengkgotso. This appears from the Department's letter dated 21 August 2017, referring to the appointment letter of 19 January 2017.⁶ As mentioned, the agreement between the Department and the JV is attached as annexure HS1 to the answering affidavit. The JV parties accepted Sedtrade's address for purposes of receiving all relevant notices.⁷ The letter of 21 August 2017 referred to above is addressed to the postal address of the JV in Vereeniging. On 14 November 2017 Ms Ramusi addressed a letter to the Department under a Ntema letterhead, stating that the JV partners 'have now reached a working agreement and that Sedtrade(Pty)Ltd will now be a leading partner in the project and the information flow will be through Sedtrade(Pty)Ltd and all claims will be paid into a Sedtrade(Pty)Ltd bank account'.⁸

[13] I have no doubt that Ramusi Attorneys at all relevant times acted on the instructions of Ntema and not the JV. The letter of demand to the Department dated 19 January 2024 makes this abundantly clear.⁹ I quote from the letter:

'1. We wish to state and confirm that we acting (sic) on behalf of Ntema Investment CC, our client hereof, upon who's (sic) instructions we are addressing this letter to your office.....

2.5 Our client was made aware that there is a new entity working on the site where Sedtrade Sedtrade (sic) (Pty) Ltd and our client were working on. If the appointment of new entity emanates from the above mentioned letter this will constitute irregular steps.' (emphasis added)

[14] This aforesaid letter of demand was written more than two months after Ntema's representatives visited the construction site on/or about 15 November 2023 and 'discovered that there is a new unknown contractor working on site'.¹⁰ Ms Ramusi attached to her founding affidavit a letter of Sedtrade dated 14 November 2023 addressed to the Department.¹¹ I quote from the letter:

'It is not economically viable to complete the project with the current quantum.

⁶ Record: pp 20&21, annexure NIT1 to the founding affidavit.

⁷ Record: p 102.

⁸ Record: p 109; annexure HS2 to the answering affidavit.

⁹ Record: pp 39-42; annexure NIT7 to the founding affidavit; see also annexure NIT8 on pp 43 – 46.

¹⁰ Record: p 13, para 8.10 of the founding affidavit.

¹¹ Record: p 38, annexure NIT6 to the founding affidavit.

As per our telephonic conversation and mutual agreement with Department of Human Settlements Free State an agreement was reached for us to terminate our contract only once our payments as mentioned below have been paid out in full; including retention.'

One of the claims referred to is claim 275 in the amount of R585 433.30 which have been dealt with in the first application and the order referred to above.

[15] It is the Department's case that the JV was established for purposes of executing works in relation to the particular project only and consequently, in the event of completion of the contract, or cancellation thereof, the dissolution of the JV would have followed automatically.¹²

[16] It is trite that joint ventures are all about bringing two or more parties together to create one business entity in order to share risks, expertise and resources and in return, profits. These agreements are concluded with a specific business objective. In *Naka Diamond Mining (Pty) Ltd v Johannes Frederick Kloppe NO & Others (Naka Diamonds)*¹³ the court was faced with a dispute relating to the consequences following upon the termination of a JV agreement. I quote:

'[23] This submission is untenable. Generally, cancellation of a contract results in termination of the obligations created thereby. 'If a contractual obligation has not yet been fulfilled, cancellation has the result that obligations from the contract are extinguished and can therefore no longer be enforced'. The continuing contributions provided for under Clause 7.8 fall under this category (as opposed to accrued rights) and therefore became extinguished on termination of the JV agreement. Furthermore, the JV being a form of a legal relationship that was created by the JV agreement, with the rights and obligations thereunder regulated thereby, could not survive on termination of the agreement.' (emphasis added)

[17] I accept that *Naka Diamonds* is not on all fours with this case. *In casu*, there is no proof that the JV agreement has been terminated expressly. Ms Ramusi attached an unsigned document to the founding affidavit, relying on it as the JV agreement.¹⁴ This is not relevant insofar as the Department accepted that the parties formed a JV in order to bid. Although the JV agreement was not formally cancelled *ex facie* the

¹² Record: p 11, para 8.2 where Ms Ramusi confirmed the purpose of the JV which should be read with paras 9.5 - 9.10 of the answering affidavit on pp 63&64 of the record.

¹³ (Case 277/2021) [2022] ZASCA 94 (17 June 2022) para 23.

¹⁴ Record: p 11 para 8.2; annexure NIT2 on p 22; para 25 of the answering affidavit on p 65; para 10 of the replying affidavit on p 118.

application papers, the objective facts point in one direction only, *ie* that the parties have not been acting in accordance with their JV agreement for a long time. The business objective of the JV cannot be achieved anymore. The two parties thereto do not work together anymore and one of them agreed with the Department that the JV could not carry on with the housing project. Bearing in mind the trite legal principles, I am satisfied that the JV agreement has lapsed and the JV has dissolved automatically; the rationale for the JV's existence – its *raison d'être* - has come to an end. I say this for the following reasons:

- a. Sedtrade, the leading partner in the project, agreed with the Department to terminate the contract as it was not economically viable to continue;
- b. the parties agreed that the Department would pay the outstanding amount claimed, specifically pertaining to Ntema into the JV's account, and this agreement was incorporated in the court order referred to above;
- c. Ntema brought this application in its own name for relief; although the JV is also cited as an applicant, it is clear that Ntema – and not the JV - is the entity that wants to continue with the project as is apparent from paragraph 3 of the notice of motion;
- d. the aforesaid conclusion is supported by the objective common cause facts insofar as Sedtrade is cited as a second respondent and Ms Ramusi failed to file the JV's a resolution, authorising her to give instructions to attorneys on its behalf;
- e. in paragraph 2 of the founding affidavit Ms Ramusi incorrectly stated that she had been 'authorised to act and depose to this affidavit for the 1st applicant [JV] by virtue of the Approved Bid No: RFP-HS-B01/2016/2017';
- f. at best for Ntema, its JV partner elected not to be further involved with it in the housing project and does not want to be associated with Ntema anymore – these two entities could not resolve their internal disputes which are evident from the evidence presented to the court;¹⁵
- g. the relief sought in paragraph 3 of the notice of motion is ample proof that Ms Ramusi is fully aware that the JV has been dissolved and for that reason she seeks an order in favour of Ntema only.

[18] The application is furthermore without any merit insofar as the Department has already appointed a new contractor to complete the housing project. This occurred on 15 November 2023, *ie* after cancellation of the agreement between the JV and the

¹⁵ Record: p 14, para 8.13 of the founding affidavit; the letters attached as annexure NIT7, NIT8 and NIT9.

Department.¹⁶ Ntema was at all relevant times aware of this. I accept that Ntema is of the view that the representative of Sedtrade did not have authority to act on behalf of the JV to cancel the contract, but it is apparent that the JV could not continue with the contract as it was not economically viable.

[19] Ntema not only failed to identify this newly appointed contractor, but more importantly, it failed to join such contractor in the proceedings. The failure to join a party that has a direct and substantial interest in the outcome of the proceedings – a legal interest - is fatal. If that was the only issue, the court could have decided to postpone the matter in order to allow Ntema to join this unknown contractor, but unfortunately for it, this is not the case. Ntema's counsel was at pains to explain that the Department had failed to follow a proper procurement process in the appointment of this unidentified contractor. I am not sitting as a court of review in order to adjudicate whether a proper and fair procurement process has been followed. In any event no case whatsoever has been made out for the relief sought. As strange as it may sound, Ntema insists on being afforded an opportunity to return to the contract works, well aware of the fact that no procurement in respect of it took place.

[20] Ntema, as a former member of the JV which is not in existence anymore, is not entitled to continue with the housing project and/or to be 'taken back on site' to play any role in finalisation thereof in light of what I have said above. On its own it has no entitlement to the project as the bid was not granted in its favour and no agreement was concluded between it and the Department. Its application is still-born. The relief sought in paragraphs 2, 3 and 4 of the notice of motion cannot be granted. Therefore, it is unnecessary to deal with the further claims contained in paragraphs 5, 6 and 7 of the notice of motion and in particular the claim for payment set out in paragraph 7.

Conclusion

[21] As mentioned, the applicants and Ntema in particular has failed to make out a case for any relief whatsoever. The application stands to be dismissed. There is no reason why the Department as the successful party and the only entity that opposed the application shall not be awarded the costs of opposing the application. Ms Tlelai

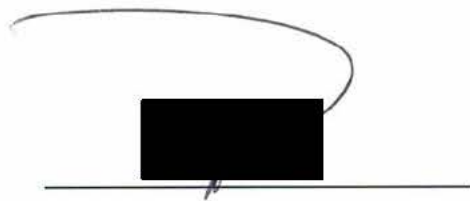
¹⁶ Record: p 65, answering affidavit para 13.

on behalf of the Department submitted that costs of counsel should be awarded on scale B. I am in an agreement.

Order

[22] The following order is made:

1. The application is dismissed with costs, such costs to include the costs of counsel taxed on scale B.



JP DAFFUE J

Appearances

For applicants: Adv N Tshidigimisa
Instructed by: Ramusi Attorneys
c/o Moroka Attorneys
Bloemfontein

For 1st respondent: Adv L Tlelai
Instructed by: State Attorney
Bloemfontein