



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: **D15083/2024**

In the matter between:

RODS CONSTRUCTION (PTY) LIMITED

APPLICANT

and

KWAZI MSHENGU N.O.

FIRST RESPONDENT

KARABO SIYILA N.O.

SECOND RESPONDENT

REHANA PARKER N.O.

THIRD RESPONDENT

LUFUNO NEVONDE N.O.

FOURTH RESPONDENT

KRISHNA SUKDEV N.O.

FIFTH RESPONDENT

MPILO MBAMBISA N.O.

SIXTH RESPONDENT

LIDELWA DLAMINI N.O.

SEVENTH RESPONDENT

NTHABISENG MKHWANAZI N. O.

EIGHTH RESPONDENT

DEREK NAIDOO N.O.

NINTH RESPONDENT

MATODZI RATSHIMILANI N.O.

TENTH RESPONDENT

Coram: MOSSOP J

Heard: 12 February 2026

Delivered: 12 February 2026

ORDER

The following order is granted:

Judgment is granted in favour of the applicant against the Independent Development Trust for payment of:

1. The amount of R3,530,276.30;
2. Interest on the abovementioned amount at the rate of 11.75% per annum, from 23 February 2024 to date of final payment;
3. The applicant's costs of suit, which shall include counsel's fees, and which may be taxed on scale B.

JUDGMENT

MOSSOP J:

Introduction

[1] The applicant is a private company involved in the construction industry. The first to eighth respondents initially cited in this application are alleged by the applicant to be trustees of the Independent Development Trust (the Trust) and have consequently been cited in their representative capacities.¹ It is not in dispute that the Trust is a public entity listed in Schedule 2 of the Public Finance Management Act 1 of 1999,² and that it is an organ of State. It apparently involves itself in implementing projects on behalf of various government departments.

[2] The applicant seeks a money judgment against the Trust in the amount of R3 530 276,30 arising out of a contract that it concluded with the Trust.

The relationship between the parties

[3] The respective orbits of the applicant and the Trust coincided when the applicant was appointed by the Trust as the main contractor to perform certain

¹ It will be noted that there are, in fact, 10 trustees cited in the heading to the application. The ninth and tenth respondents were initially not part of the application when it was launched. They were joined much later and only after the respondent delivered its answering affidavit in which it took issue with the identity of the trustees. That issue is considered later in this judgment.

² It is the tenth entity mentioned in that schedule.

construction upgrades to, and additions at, Cosmo Primary School, which is located near Howick within the uMgungundlovu municipal district of this province (the project).

[4] The Trust and the applicant formalised their relationship by concluding a written contract. The contract was in the form of the Joint Building Contracts Committee Principal Building Agreement Series 2000 Edition 5.0 (the contract).

[5] In terms of clause 5.0 of the contract, Excellence at Work Consultants (EWC) was appointed as the agent of the Trust and as the principal agent for the project.

Interim payments

[6] The applicant was entitled to receive interim payments from the Trust as the project progressed in terms of clause 31 of the contract and as it rendered partial performance in performance of its obligations. I need not describe in any great detail how the interim payment process was intended to operate for there is no issue in this matter relating to any interim payments.

[7] It is sufficient merely to state that EWC issued the applicant (and the Trust) with 67 interim payment certificates. All these payment certificates were paid by the Trust, without demur. The issue in this matter arises out of the 68th payment certificate, which was the final payment certificate.

Payment certificate 68

[8] The mechanism prescribed by the contract regarding the issuing of, and the payment of, the final payment certificate is relatively simple and straightforward.

[9] Clause 34.1 of the contract provided that EWC would issue the final account to the applicant within 90 days of the date of practical completion of the project. Once the applicant accepted the correctness of the final account, EWC would issue the final payment certificate within seven calendar days of that acceptance. The final payment certificate could not be issued before EWC had issued the final completion certificate.

[10] Once the final payment certificate had been issued by EWC, the Trust would pay the amount certified as being due to the applicant within seven calendar days of

the date of issue of the final payment certificate. If payment was not made as agreed, the amount certified by EWC would attract default interest which would accrue on the unpaid amount at the rate determined by the Minister of Finance (the Minister) in terms of s 80(1)(a) and (b) of the Public Finance Management Act 1 of 1999.³

The certificate of completion

[11] EWC determined that the project was finally completed on 25 January 2024 and issued a certificate of completion stating this to be the case on that date.⁴

[12] On 19 February 2024, EWC issued payment certificate 68, being the previously mentioned final payment certificate. A copy was sent to the applicant. It recorded that a final amount of R3 530 276.30 (including VAT) was due by the Trust to the applicant. The applicant considered the certificate and agreed with what it recorded and, accordingly, issued a tax invoice in the amount certified in payment certificate 68 and delivered it to the Trust. In terms of the contract, payment was due by the Trust within seven days.

[13] The payment was not made as required and has never been made. Demand for payment was, however, made by the applicant but that demand failed to propel the Trust into making payment.

No dispute known

[14] In its founding affidavit, the applicant stated that it was unaware of any dispute that would permit the Trust to avoid making the final payment due to it and, further, mentioned that the applicable rate of interest determined by the Minister was at that time 11.75 percent per annum.

The Trust's defence

[15] The Trust's defence to the applicant's claim is advanced by its attorney, Mr

³ The applicant stated in its founding affidavit that the Minister who would determine the interest rate was the Minister of Justice. A proper reading of the Public Finance Management Act, however, makes it clear that this is a function performed by the Minister of Finance. Nothing turns on this inaccuracy.

⁴ The founding affidavit states that the Final Completion Certificate was signed by EWC on 19 February 2024. This is incorrect, as a perusal of the Final Completion Certificate reveals that it was signed on 25 January 2024.

Tawana (Mr *Tawana*), who has deposed to the answering affidavit. Mr *Tawana*, according to him, is based in Randburg, Gauteng and is ordinarily not within the boundaries of this province. He is a director of Sibanda Bukhosi Attorneys. While Mr *Tawana* claims that the facts to which he deposes are within his personal knowledge, he makes no overt claim to having been involved in any way in the project.

[16] The mere fact that this is the chosen deponent to attest to the answering affidavit would consequently suggest that Mr *Tawana* has no ability to speak to the facts of the matter.⁵ This suspicion is heightened by the content of the answering affidavit, which is devoid of any facts relating to the merits of the matter. Where some facts are mentioned, they relate only to irrelevant episodes that have no real bearing on the essential issues in this matter. As a consequence, Mr *Tawana* has largely confined himself to advancing technical, legal objections to the relief claimed by the applicant.

[17] It need hardly be stated that in adopting this approach, the Trust has voluntarily chosen to don a metaphorical straitjacket: in so doing, it is restrained from venturing into the heart of the matter because of the lack of personal knowledge of any facts possessed by its deponent. Thus, it cannot advance an alternative factual hypothesis, nor can it dispute facts proposed by the applicant. Instead, as far as I am able to discern, its version is advanced simply to place legal obstacles in the path of the applicant securing the relief that it claims.

[18] Mr *Tawana* discloses that there are three points *in limine* upon which the Trust relies, which are:

‘... prefatory, crucial, and fatal to this case.’

The three points *in limine* are that this application is premature, this court lacks jurisdiction to hear the application, and there has been non-compliance with the prescripts of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. There is a fourth point raised by Mr *Tawana*, which is not raised *in limine*, namely that not all of the trustees cited by the applicant are presently still trustees of the Trust. I will deal with each of these issues sequentially.

⁵ *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* [2010] ZAKZPHC 15; 2010 (5) SA 112 (KZP); [2011] 1 All SA 427 (KZP) para 7.

The first point in limine

[19] The first point taken is that this application for judgment is premature because the applicant was obliged, according to Mr *Tawana*, to follow a dispute resolution process prescribed by the contract before it could approach this court.

[20] The clause relied upon by Mr *Tawana* is clause 40 of the contract. It reads, in part, as follows:

‘40.1 Should any disagreement arise between the employer, including his principal agent or agents, and the contractor arising out of or concerning this agreement or its termination, either party may give notice to the other to resolve such a disagreement.

40.2 Where such disagreement is not resolved within ten (10) working days of receipt of such notice it shall be deemed to be a dispute and shall be referred by the party which gave such a notice to either:

40.2.1 Adjudication ...

40.2.2 Arbitration ...’

[21] There is a singular difficulty in accepting Mr *Tawana*’s submissions on this first point. This difficulty arises primarily from the fact that he has not identified the existence of any disagreement. He cannot do so because he knows of no facts. Perhaps this is the first evidence of the pinch of the metaphorical straitjacket previously mentioned. Because he lacks any personal knowledge of the project, he cannot advance any facts that would establish the disagreement that he appears to rely upon. Nowhere in the answering affidavit is the disagreement mentioned, or defined, nor is an attempt made to explain, if it does exist, how it came about or to what it relates. This morning, Mr *Tawana* admitted this to be the case.

[22] The fact of the matter is simply that, having previously paid 67 interim payment certificates, the Trust has not paid the applicant the final payment certificate. This past conduct does not suggest the presence of a disagreement: indeed, it would appear to be the antithesis of a disagreement and would seem to demonstrate consensus and contractual harmony. Moreover, a failure to pay the 68th certificate does not in itself equate to the existence of a disagreement over the right of the applicant to receive that payment, or the obligation on the part of the Trust to make that payment. For example, non-payment could simply arise out of a lack of immediately available funds.

There is simply no detail in the answering affidavit whatsoever of what the alleged disagreement encompasses.

[23] There is, furthermore, no suggestion by Mr *Tawana* that the Trust has given the notice required by clause 40.1. That clause obliges a party who claims a disagreement has arisen to give notice of the existence of the disagreement. In this instance, there is no likelihood of the applicant giving that notice because, as previously mentioned, it states that it knows of no such disagreement. It is proper, however, that the actual words used by the applicant in this regard be mentioned and considered. They are to be found at paragraph 30 of the founding affidavit, where the deponent to that document states that the applicant was:

‘... unaware of any dispute concerning the amount certified in payment certificate 68 and submit that there is none.’

[24] In its answering affidavit, the Trust answered the just quoted paragraph 30 as follows:

‘AD PARAGRAPH 30

36. The contents of these paragraphs are noted, serve (sic) to put the Applicant to proof thereof.’

[25] In my view, that is not an appropriate response to paragraph 30 of the founding affidavit:

(a) Firstly, the answer is inaccurate, in that it is not directed at more than one paragraph as it states: it only answers paragraph 30 of the founding affidavit. It appears that the response is simply a cut and paste exercise utilising either the answer to paragraphs 1 or 3, both of which employ the identical words, together with the incorrect use of grammar.

(b) Secondly, it is clear from paragraph 30 of the founding affidavit, that the applicant does not hold the view that a disagreement exists. Accordingly, for clause 40 to be invoked, as it must be when a disagreement arises, the Trust itself must believe that a disagreement exists, and it, not the applicant, must drive the contractually agreed and prescribed disagreement resolution process. There is no suggestion at all that the Trust has issued such a notice.

(c) Thirdly, if a disagreement did exist, then the appropriate response would not be to coyly assert that the applicant must prove something which it has already said that it does not know of, but to set out fully the facts that establish the subject, and ambit, of the disagreement. This was not done by the Trust.

[26] The end result is that the assertion of the applicant that no disagreement exists was not denied by Mr *Tawana* for 'noting' an allegation does not amount to a denial of the allegation.⁶ That being the case, the disagreement resolution process cannot be invoked and relied upon because no disagreement has been shown to exist. The first point in limine must consequently fail.

The second point in limine

[27] The second point in limine taken by Mr *Tawana* is that this court lacks jurisdiction to determine the application. This point is inextricably linked to the first point *in limine*, because the basis for this submission is the alleged necessity for the contractually prescribed disagreement resolution procedure to be invoked first before this court may be approached.

[28] I have already found the disagreement resolution procedure to not be applicable in the absence of a properly identified disagreement and the second point *in limine* must therefore suffer the same fate as the first point *in limine*.

The third point in limine

[29] The final point *in limine* is that the applicant has not given notice in terms of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act) of its intention to sue the Trust for a debt due by the Trust to it.

[30] Mr *Tawana* submits in the Trust's answering affidavit that the applicant is a creditor of the Trust, and that the Trust is an organ of State. In this he is correct, and his assertions in this regard are not contentious. The applicant was, so the argument

⁶ *Recycling and Economic Development Initiative of South Africa NPC v Siweya* [2023] ZAGPJHC 1496 para 17.

goes, therefore obliged in terms of s 3(1) of the Act to give the Trust the statutorily prescribed notice.

[31] Sections 3(1) and (2) of the Act read as follows:

- '(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless -
- (a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or
 - (b) the organ of state in question has consented in writing to the institution of that legal proceedings -
 - (i) without such notice; or
 - (ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).
- (2) A notice must -
- (a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1); and
 - (b) briefly set out -
 - (i) the facts giving rise to the debt; and
 - (ii) such particulars of such debt as are within the knowledge of the creditor.'

[32] Mr *Tawana* submits that the applicant did not give the notice prescribed by the Act and the Trust has not waived its entitlement to receive such notice. This, so he concludes:

'... is fatal to the Applicant's claim'.

[33] Sections 3(1) and 3(2) of the Act just quoted refer to the word 'debt' several times. A proper understanding of what the Act defines that word to mean reveals the fallacy in Mr *Tawana*'s conclusion just mentioned. The Act defines 'debt' to mean:

- '... any debt arising from any cause of action -
- (a) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any -
 - (i) act performed under or in terms of any law; or
 - (ii) omission to do anything which should have been done under or in terms of any law; and

- (b) for which an organ of state is liable for payment of damages, whether such debt became due before or after the fixed date;⁷

[34] Mr *de Jager*, who appeared for the applicant this morning, correctly pointed out in his heads of argument that the Act applies when the debtor is an organ of State from whom damages is claimed.⁸ What the applicant claims in this instance is not damages: it is the contractually agreed, and certified, final amount that the Trust is obliged to pay it for the services that it rendered to the Trust. It thus seeks specific performance of the Trust's contractual obligations, and not damages. There was, therefore, no obligation on the applicant to act in accordance with the requirements of the Act. The conclusion drawn by Mr *Tawana* that the failure to give such notice is fatal to the applicant's claim is simply wishful thinking and is legally unsustainable.

The final issue

[35] The final point taken by the Trust is that some of the eight trustees initially cited by the applicant are allegedly no longer trustees of the Trust. How this proposition is framed and advanced by Mr *Tawana* is crucial to the determination of this point. What he states is the following:

'I submit that the Applicant has mis joined (sic) and also failed to join parties to these proceedings by incorrectly citing the trustees of the IDT. Some of the parties cited in these proceedings have no standing to be cited on the matter as they are no longer the trustees of the IDT and some of the current trustees were not joined in the proceedings.'

[36] The inference to be drawn therefrom is that Mr *Tawana* submits that the true trustees must be joined to the application and that until such joinder occurs, the application cannot successfully be advanced by the applicant.

[37] As regards this issue, the applicant explained in its replying affidavit that it acquired the details of the trustees initially cited by it in this application as respondents from the Trust's own website prior to bringing the application. In its view, the trustees cited are the trustees in office at the moment that this application was launched. It

⁷ See s 1 of the Act (Definitions).

⁸ *Thabani Zulu & Co (Pty) Ltd v Minister of Water Affairs and Another* 2012 (4) SA 91 (KZD) para 11; cited with approval in *Vhembe District Municipality v Stewarts & Lloyds Trading (Booyens) (Pty) Ltd* (SCA) [2014] ZASCA 93; [2014] 3 All SA 675 (SCA) paras 14 and 15.

attached, in reply, print outs of pages from the Trust's website setting out who the trustees were, together with their photographs. The applicant states that all of the persons identified on the respondent's website as being trustees were cited in this application. None of the trustees so cited have come forward and indicated that they were not trustees at the time of the institution of the application.

[38] Jurisdiction over persons, both natural and juristic, must exist at the time of the initiation of legal proceedings.⁹ Once jurisdiction is established, it is not subsequently lost, and any subsequent change of facts will accordingly not defeat it. In other words, once jurisdiction is shown to exist, one party cannot attempt to interfere with, or overturn, the already established jurisdiction by way of a unilateral act by, for example, replacing a trustee or trustees with other persons. The acceptance of this principle creates legal certainty. It follows that if a Court had the necessary jurisdiction to hear a matter when the application was instituted, the Court remains seized with the matter even if the basis for the jurisdiction legitimately later falls away.

[39] In my view, the issue is unsatisfactorily raised by the Trust. It, again, coyly, raises an issue but immediately stops short and does not provide sufficient particularity. How the issue is raised by the Trust is of importance. In paragraphs 4 to 12 of the founding affidavit, the applicant identifies each of the eight respondents as being:

‘... of full legal capacity who is cited herein as a trustee of the IDT.’

To these paragraphs, all of which are dealt with simultaneously in its answering affidavit, the respondent's answer is the following:

‘The contents of these paragraphs are neither denied nor confirmed. The court is referred to the points *in limine*.’

[40] The allegations regarding the standing of the eight persons initially alleged to be trustees were thus not overtly disputed. The reference in the answer mentioned above to the points *in limine* is not understood as those points do not cover the issue of the trustees. Moreover, the allegations made by the respondent are impermissibly vague. The respondent does not identify of which trustee or trustees it speaks. Nor

⁹ *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 310D.

does it state when any of those who have allegedly ceased to act as trustees relinquished their positions as trustees. No mention is made about those who have replaced those persons who are allegedly no longer trustees. And, perhaps most significantly, the Trust does not state that any of the trustees cited were not trustees at the time of the institution of this application.

[41] The point has all the hallmarks of being purposefully undercooked: it is raised in an attempt to cast a doubt, but it is never raised with sufficient particularity to permit the point taken to be critically investigated and examined. I do not accept on such designedly flimsy allegations that the point has been properly established at all, and it must consequently fail. The fact of the matter is that the Trust knows of these proceedings and has fully participated in them.

[42] In any event, it subsequently transpired that after learning of the Trust's allegations, the applicant added two further trustees to the application, those cited as being the ninth and tenth respondents, after utilising Uniform Rule 28(1). No objection was received from the Trust's attorneys to the proposed amendment, which was then perfected by the applicant. No vestige of the issue accordingly remains. Belatedly, Mr *Tawana* indicated that he no longer relied on this point.

Analysis

[43] The applicant's case is crisply formulated and compellingly presented. It is contractually based, and it exhibits contractual compliance and performance, all of which is certified as being the case by the Trust's own agent.

[44] None of the points raised *in limine* have any substance or excite any appeal. In the absence of any factual allegations raised by the Trust, no defence to the applicant's application has been presented. The Trust's agent, EWC, has certified the project complete and has calculated and approved the final amount due to the applicant by way of the final payment certificate. That amount must now be paid by the Trust, who has received the benefit of the applicant's labours.

Order

[45] The following order consequentially issues:

Judgment is granted in favour of the applicant against the Independent Development Trust for payment of:

- (a) The amount of R3,530,276.30;
- (b) Interest on the abovementioned amount at the rate of 11.75% per annum, from 23 February 2024 to date of final payment;
- (c) The applicant's costs of suit, which shall include counsel's fees, and which may be taxed on scale B.

MOSSOP J

APPEARANCES

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