

SOUTH AFRICA / JUDGMENT

African Information Technology Bridge 1 v The MEC for Infrastructure Development Gauteng Province (134/2014) [2015] ZASCA 104 (2 July 2015) [2015] ZASCA 104

COURT

Supreme Court of Appeal

BEFORE

Maya, Bosielo, Schoeman, Fourie, Mayat

CASE / FILE NUMBER

134/2014

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 134/2014

In the matter between:

AFRICAN INFORMATION TECHNOLOGY

BRIDGE 1 (PTY) LTD

APPELLANT

and

THE MEMBER OF THE EXECUTIVE

COUNCIL FOR INFRASTRUCTURE

DEVELOPMENT (formerly part of PUBLIC

TRANSPORT, ROADS AND WORKS)

GAUTENG PROVINCE RESPONDENT

Neutral citation: African Information Technology Bridge 1 v The MEC for Infrastructure
Development Gauteng Province (134/2014)

[2015] ZASCA 104 (2 July 2015)

Coram: Maya and Bosielo JJA and Schoeman, Fourie and Mayat AJJA

Heard: 5 May 2015

Delivered: 2 July 2015

Summary: Tender procedure - contracts vitiated by fundamental justus error and therefore invalid and unenforceable - appeal dismissed

ORDER

On appeal from: North Gauteng High Court, Pretoria (Makgoka J sitting as court of first instance).

The appeal is dismissed with costs, including the costs of two counsel.

Schoeman AJA (Maya and Bosielo JJA and Fourie and Mayat AJJA concurring)

- [1] The issue in this appeal is whether the Member of the Executive Council for Infrastructure Development, Gauteng Province, (the MEC) entered into contracts with the appellant, a company named African Information Technology Bridge 1 (Pty) Ltd (AITB 1), and if so, whether AITB 1 rendered services to the MEC and suffered damages relating to three tenders. These were tender GC 1417/05/2006 (tender 1417), GC 1418/05/2006 (tender 1418) and GC 1419/05/2006 (tender 1419), for six projects. The court below granted judgment in a diminished amount in favour of AITB 1 in respect of one of its five claims against the MEC, but dismissed the further claims. AITB 1 appeals with leave of the court below.
- [2] Five witnesses testified during the trial, but the documentary evidence spoke louder and clearer than any of the witnesses.

The parties and the background.

- [3] AITB 1 is a company that was formerly known as Crestwell Trading 9 (Pty) Ltd (Crestwell). By a special resolution of the company, dated 8 June 2006, the name of Crestwell was changed to African Information Technology Bridge 1 (Pty) Ltd (AITB 1). Furthermore, the main business and main object of Crestwell was changed from 'General trading in all aspects' to 'Information technology'. These changes were registered with the Registrar of Companies on 9 June 2006. The sole director of AITB 1 was Mr N H Tucker.
- [4] Another main role player is African Information Technology Bridge (Pty) Ltd. The acronym this company used in all its dealings relevant to this matter was AITB, but to prevent confusion I will refer to it as African Bridge. The latter company had three directors, Mr N H Tucker, his wife Mrs G Tucker and Ms N Rose-Dukhie.
- [5] The Gauteng Department of Transport and Public Works (the department) was involved in the development of Construction Contact Centres and for that purpose a pilot project was initiated in January 2006.

- [6] African Bridge was invited to complete a pilot project for the department in conjunction with another company, iNathi Technology

Holdings (Pty) Ltd (iNathi). The role of African Bridge was to provide services and 'soft-skills' while iNathi was responsible for turnkey presentations and infrastructure.

- [7] This pilot project was successfully completed. It was a precursor to the six projects that formed the subject matter of the three tenders referred to earlier, tenders 1417, 1418 and 1419. In May 2006 the department invited the three tenders.

- [8] Ms Rose-Dukhie was the sister of one of the senior managers in the department, Ms Rose-Frazer, who was to be part of the project

management and the responsible person for the roll-out of the project. This connection would have disqualified African Bridge from

the tender process. Negotiations between the directors of African Bridge to buy out Ms Rose-Dukhie's shares in African Bridge

were unsuccessful as they could not agree on a price for Ms Rose-Dukhie's shares.

- [9] To overcome this dilemma, Mr Tucker changed the name of Crestwell to AITB 1. The similarities in the names of AITB 1 and African Bridge are striking, and, as will become apparent quite clearly deliberate. AITB 1 signed the bid documents on 10 June 2006, the day after the name change from Crestwell to AITB 1 was registered.

- [10] On 28 June 2006 a meeting of the Departmental Acquisition Council (the DAC) of the department was held. This body was inter alia vested with the authority to adjudicate on the tenders submitted in the instant matters. The minutes of the meeting recorded that tender 1417 be awarded to 'AITB Inathi JV' with certain conditions pertaining to a reduction of the tender price, which was subsequently effected. The DAC decided to award the tender in respect of 1418 to 'AITB and Inathi JV' as it 'was the second highest tender to specification and on points claimed basis.' In respect of tender 1419 it was decided that the appointment of 'AITB/ Inathi JV' would be conditional on the conclusion of a detailed joint venture agreement between African Bridge, iNathi and Royal Yard Holdings.' The latter was a wholly female owned company.

- [11] It is common cause that the acronym AITB was used for African Bridge in dealings between the department and African Bridge. The abbreviation on the letterheads of African Bridge refers to AITB and African Bridge referred to itself as AITB.

- [12] After the meeting of the DAC, on 28 June 2006, letters of acceptance for tenders 1417 and 1418 were written and signed by Mr Maabane on behalf of the Director: Procurement and BEE. These letters were addressed to African Bridge (AITB) and iNathi. In respect of tender 1417 the conditional acceptance as provided for in the decision of the DAC was set out.

[13] On 5 July 2006, an employee of AITB 1, Mr Zikalala, on the instruction of Mr Tucker, went to the department and requested that

the letters of appointment be changed to reflect that the tender of AITB 1 had been accepted. Ms Mokgoro, an employee of the department,

signed the letters in the absence of the Director: Procurement and BEE and Mr Maabane. It is common cause that the DAC did not meet to discuss the amended letters of award.

[14] On 6 July 2006 Ms Rose-Frazer had a meeting with Mr Tucker and Mr Keshwar, the sole director of iNathi. At this meeting Ms Rose-Frazer presented documents wherein the respective responsibilities of iNathi and African Bridge were set out with regard to tenders 1417 and 1418. Mr Tucker was dissatisfied as he believed that the monetary values allocated to the respective responsibilities favoured iNathi. These letters by the department, in respect of tenders 1417 and 1418, were addressed to African Bridge and not AITB 1. Furthermore, both documents made provision for Mr Tucker to sign on behalf of African Bridge, which he did in respect of tender 1418, although he did not sign at the designated space in respect of 1417. However, he did sign an addendum in respect of each of these documents wherein Mr Tucker and Mr Keshwar 'on behalf of their respective companies agreed to . . . amendments to their teaming agreements'. These addenda recorded arrangements between Mr Keshwar's company and Mr Tucker's company inter se. Mr Tucker did not alert the department or anybody else that the agreement was not between African Bridge and the department, but that the department was contracting with AITB 1. The contracts referred only to African Bridge and not to AITB 1. I will refer to these agreements as 'the 6 July agreements'.

[15] On 7 July 2006 a meeting was held between the parties in respect of tender 1419 to carry into effect the condition imposed by the DAC, for acceptance of the tender, on condition that a tripartite joint venture agreement had to be concluded between African Bridge, iNathi and Royal Yard Holdings. Mr Tucker refused to sign the agreement as there was a further requirement that Royal Yard Holdings would also be a party to tenders 1417 and 1418. However, iNathi and Royal Yard Holdings signed the contract with the department in respect of tender 1419.

[16] Later, after difficulties arose between the parties relating to the execution of the tenders, the department became aware that it had not contracted with African Bridge, but with AITB 1. Despite this, the department continued to negotiate with AITB 1, knowing it was AITB 1 and not African Bridge, in an attempt to complete the tender. This, however, came to nought.

[17] It is common cause that AITB 1 performed work in respect of tender 1417 and the department paid an amount of R220 000 to AITB 1. Furthermore, the court below granted judgment in favour of AITB 1 for the amount of R617 894,40 in respect of the first claim, relating to tender 1417, with ancillary relief relating to interest and costs.

Did the department contract with AITB 1?

[18] It is the case of AITB 1 that valid contracts were concluded with the department upon the award of the tenders to AITB 1 in respect thereof. The court below found that the 6 July agreements constituted the contracts between AITB 1 and the department in respect of tenders 1417 and 1418. I will first deal with the award of the tenders. The defence raised by the department was that no contracts were entered into. In this context the defence was in fact that there was a unilateral mistake on the part of the department.

The award of the tenders, the subsequent contracts and the unilateral mistake

[19] In respect of tender 1419, the conditions imposed by the DAC were not complied with, and Mr Tucker did not sign any contract with the department as he admittedly refused to do so when requested. It is not clear on what basis AITB 1's claim is founded in respect of tender 1419 as the evidence clearly established that no contract was ever concluded between AITB 1 and the department. It is therefore not necessary to further deal with tender 1419.

[20] In respect of tenders 1417 and 1418 the department pleaded that it intended to contract with African Bridge and not AITB 1 and therefore no contracts were entered into in respect of those tenders.

[21] One of the primary requirements of any contract is that there must be a meeting of the minds regarding the essentials of the contract that the parties intend concluding. As a result:

'Mistake, whether caused by misrepresentation or not. . . is generally regarded as a defect of the will, thus vitiating the consent or assent of the parties . . . [F]or the formation of a valid agreement the concurrence of the will of the parties is necessary and essential, and. . . the will can be vitiated by defects as e.g. mistake, misrepresentation, fraud and duress.'[1]

[22] For the purposes of this appeal, the only defence that we are concerned with, which was raised by the department in denying the validity of the contracts between the parties (with reference to tenders 1417 and 1418), amounts to a unilateral error in persona by the department. It is a unilateral mistake because it is only the department that mistakenly thought that it had contracted with

African Bridge, as Mr Tucker knew that the tender documents were completed in the name of AITB 1. Such a defence, which avoids the contract, has been said to be difficult to establish. In *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board*, [2] the following was said:

'Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (justus) and it would have to be pleaded. In the present case the plea makes no mention of mistake and there is no basis in the evidence for a contention that the mistake was reasonable.'

[23] However, if a mistake is a fundamental mistake, and a justus error, in other words a reasonable mistake,[3] it has the result that the contract is void ab initio.[4] In *Bird v Sumerville*[5] this court held that where a seller addressed an offer to sell a block of flats to a specific person (the buyer), a valid contract was not concluded when the offer was accepted by the buyer and a person of whom the seller was not aware. *Kok v Osborne*[6] was a matter where the seller accepted an offer ostensibly made by two buyers jointly. However, the offer was actually from only one buyer. It was clear that the defendant in that instance would not have accepted the offer had he known the true position. There Jones J said:

‘ . . . [H]e is not bound by his apparent acceptance of it if he was genuinely mistaken, even though his mistake is unilateral, provided

that he acted reasonably in the circumstances and his mistake was justus.’[7]

[24] In *Beyers v Mckenzie*,[8] de Villiers CJ referred with approval to a decision of the House of Lords and said the following:

‘ . . . [I]t was held that if B, a person of no credit, gets goods from A by trading under a name and address closely resembling those of C, who is known to A as a respectable trader, . . . [because] A believed he was dealing with C, there was no contract with B. . . ’

[25] In *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis*,[9] it was held, in a case of unilateral mistake, that:

‘ . . . the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? . . . To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? . . . The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?’

[26] Having determined the general principles relating to a unilateral error in persona, I now turn to the facts to determine whether the department's mistake was justus, thereby avoiding the contract, or conversely, whether the department's expressed intention to be bound could be reasonably relied upon by AITB 1 with the effect that the contract would be regarded as valid and enforceable, notwithstanding the existence of the material mistake.

The representation.

[27] On 5 June 2006, five days before the bid documents were submitted, Mr Tucker wrote a motivational letter in support of the respective bids. This letter referred to the successful conclusion of the pilot project by the joint venture of African Bridge and iNathi. The letter was written on the letterhead of African Bridge and had an African Bridge logo. It further referred to previous developments African Bridge had finalised for the department as proof that the bidder could successfully complete projects. This was a covering letter to a 28 page

document with the heading ‘Proposal for the Construction Contact Centre’s Pretoria & Benoni—Tender No:GC 1417/05/2006’ and ‘AITB (Pty) Ltd Consortium Proposal to Gauteng Department of Public Transport Roads & Works.’ Furthermore, at the time of the writing of the letter, the name of Crestwell had not been changed to AITB 1. The latter had not completed any projects for the department whatsoever and did not complete the pilot project of the department.

[28] Regarding the bid submission itself, it was a requirement that certain certificates be attached to the bid documents as proof that the tenderer complied with statutory prescripts. Although the tenders were submitted in the name of AITB 1, the Unemployment Insurance Fund reference numbers, the Pay As You Earn numbers and VAT registration numbers used in the bid documents, were those of African Bridge. Furthermore, the bid documents required information relating to the number of years the bidding

company had been in business; the number of employees employed by the bidding company; the assets of the company; the income of the company for the previous six months; and the value of the work performed by the bidding company for the previous three years. The information supplied in the documents relating to these aspects was that of African Bridge and not AITB 1. Further relevant questions posed in the bid documents were: ‘Do you share any facilities?’ and ‘Did the firm exist under a previous name?’ The answers to both these questions were ‘No’, whereas the true position was that AITB 1 and African Bridge had exactly the same address and as stated previously the name of AITB 1 was changed the day before the bid documents were submitted. Correspondence subsequent to the award of the tenders continued referring to African Bridge by both the department and Mr Tucker himself.

[29] The minutes of the DAC meeting make it clear that the department intended to contract with a joint venture of African Bridge and iNathi. The correspondence and further documentation shows that the intention of the department never changed.

[30] In this regard Mr Tucker had deliberately set out to create the impression that it was African Bridge and not AITB 1 that submitted

the tender bid. This is clear from the letter accompanying the bid documents that referred to African Bridge having successfully

completed the pilot project and two other projects; the name of Crestwell being changed to AITB 1, which closely resembled the name of African Bridge and the acronym used by African Bridge; and the information in the bid documents relating to African Bridge and not AITB 1. The only inference is that these actions were done solely to confuse and obscure.

[31] The court a quo found the following.

‘ On a consideration of all the facts, I am satisfied that Tucker conveniently used the name of AITB [African Bridge] instead of the

plaintiff [AITB 1] to present to the defendant that the same company that successfully completed the pilot project with Inathi, was the one bidding for tenders 1417, 1418 and 1419. He knew that had the true state of affairs come to the attention of the department, the bid by the plaintiff would not have been accepted. The plaintiff simply did not qualify in any respect for the tender.'

[32] I agree with this conclusion. It is clear that Mr Tucker deliberately misled the department to create the impression that it was African Bridge contracting with the department and not a different entity with no experience, no assets and no personnel.

[33] The department was clearly mistaken with regard to the entity with whom it thought that it was contracting. There is no doubt that the department intended to award the tenders to African Bridge, a company that it was familiar with and which had completed the pilot project and complied with all the requirements of the department in respect of the particular tenders. The department's continued reference to African Bridge and not AITB 1 bears witness to what the department intended. It was also clearly a material mistake, and Mr Tucker conceded that if the tenders were submitted with the particulars of AITB 1, it would not have been awarded the tender as it had no personnel, assets or track record with the department.

[34] Furthermore, the mistake of the department was justus as the actions of Mr Tucker were deliberately taken to mislead. It was reasonable for the department to conclude that it was accepting the tender of African Bridge as Mr Tucker had deliberately created the confusion. The minutes of the meeting of the DAC show that the department was of the view that it was African Bridge that had submitted the tenders. Such mistake in respect of the identity of the other contracting party was fundamental.

[35] Therefore, there was a material and justus error in respect of the contracts purportedly entered into between AITB 1 and the department in respect of tenders 1417 and 1418. In such a situation, there is no contract and both are void ab initio. However, there is a further matter to consider, as the court below was of the view that in spite of there being a material mistake initially, there was subsequently a valid counter-offer by the department addressed specifically to AITB 1, which was accepted, and which gave rise to valid contracts in respect of tenders 1417 and 1418.

Did the agreement of 6 July 2006 constitute a valid counter-offer by the department to AITB 1 that was accepted by Mr Tucker on behalf of AITB 1?

[36] The court below held that the department and AITB 1 did enter into contracts in respect of tenders 1417 and 1418, in spite of the initial error relating to the contracting parties, due to the following: (a) The bid documents were submitted in the name of AITB 1; (b) the letter awarding the tender to African Bridge on 28 June 2006 was changed on 5 July 2006 by Ms Mokgoro to read that it was awarded to AITB 1; and

- (c) the meeting of 6 July 2006 between Ms Rose Fraser, Keshwar and Mr Tucker resulted in Mr Tucker and Mr Keshwar signing the agreement presented to them. This was the so-called counter offer that both Mr Tucker and Mr Keshwar signed 'on behalf of their respective companies'. The court a quo found that the re-issue of the letters of award in the name of AITB 1, which were signed by Ms Mokgoro, had the effect that a reasonable man would have believed that the department accepted AITB 1 as the other contracting party.
- [37] The letters of notification of the award of the tenders to the joint venture of African Bridge and iNathi, dated 28 June 2006, setting out the necessary arrangements to be made for the signing of the contracts were addressed to African Bridge. The agreements dated 6 July 2006, (representing the contracts referred to in the letters of award) presented by the department to Mr Tucker and Mr Keshwar, were similarly addressed to African Bridge and iNathi as a joint venture. It is important these documents are dated 6 July 2006, a day after the letters of award were changed to refer to AITB 1 and not African Bridge. The respective contracts had the following provision relating to a Service Level Agreement (SLA):
- 'This signed agreement will be followed by
- A Service Level Agreement will be drafted by the GDPTRW [Gauteng Department of Public Transport, Roads and Works] for both parties,
- i.e. African Information Technology Bridge (Pty) Ltd and iNathi Technology Holdings (Pty) Ltd (Joint Venture).'
- [38] At the end of the letters of confirmation and appointment, provision was made for the signatures of Ms Rose-Fraser on behalf of 'DPTRW' (ie the department), Mr Tucker on behalf of 'AITB' (ie African Bridge) and Mr Keshwar on behalf of iNathi. In respect of tender 1417, Mr Tucker did not sign in the designated place but signed a handwritten addendum dealing with the arrangements of Mr Keshwar and Mr Tucker 'on behalf of their respective companies'. The agreement relating to tender 1418 was signed by Mr Tucker in the designated space, which made provision for his signature as 'Nicholas H Tucker, For and on behalf of AITB who warrants the authority thereto.' It is common cause that the Service Level Agreements were not signed in respect of 1417 and 1418.
- [39] It is important that although Mr Tucker had the name of the company changed on the letters awarding the tender, the next day he did not raise the fact that the contracts were not in AITB 1's name (according to Mr Tucker, the correct contracting party) or inform Ms Rose-Fraser that the information needed to be corrected. Mr Tucker, furthermore, signed these agreements on behalf of African Bridge.
- [40] The court below found that these agreements comprised the counter offer by the department to AITB 1 that the latter had accepted. This cannot be. These documents were addressed to African Bridge which is indicative of the fact that at that stage the department still intended to contract with African Bridge. This contract was in any event a consequence of the tender process. As found above, the exercise of the option, posed by the tender was

due to mistake and rendered the contract void ab initio. The so-called counter-offer was still not addressed to AITB 1. Thus it cannot be said that a new contract was entered into as the contemplated contracts could only be completed with a party after a tender process.

Furthermore, the record does not disclose that the DAC ever considered awarding the tender to AITB 1. The court a quo found that the tenders would not have been awarded to AITB 1 if the department had not made a mistake. Besides that, the letter of award envisaged that the parties had to enter into an agreement. The agreement of 6 July was that agreement and it was not a separate, self-standing contract.

[41] I am accordingly of the view that the department proved that the contracts with AITB 1 were vitiated by the mistake. Therefore the appeal should be dismissed. There was no cross-appeal against the order that was granted in respect of the first claim against the department based on tender 1417. This is understandable as the department conceded that the work in respect of tender 1417 had been partially completed.

[42] The following order is made.

I Schoeman

Acting Judge of Appeal

APPEARANCES

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[1] L C Hofmann 'The basis of the effect of mistake on contractual obligations' (1935) 52 SALJ 532.

[2] National and Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958

(2) SA 473 (A) at 479F-H.

[3] See SWJ Van der Merwe et al Contract General Principles 4 ed

(2012) at 37.

[4] Spenmac (Pty) Ltd v Tatrim CC 2015 (3) SA 46;

[2014] ZASCA 48 (SCA) para 26.

[5] Bird v Sumerville & another 1961 (3) SA 194 (A).

[6] Kok v Osborne & another 1993 (4) SA 788 (SE).

[7] At 799 C-D.

[8] Beyers v Mckenzie (1880) F 125 at 128.

[9] Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis

[1992] ZASCA 56; 1992 (3) SA 234 (A) at 239I-240B.

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