

SOUTH AFRICA / JUDGMENT

## De Vries Smuts v Department of Economic Development and Environmental Affairs (389/2008) [2010] ZAECHHC 8 (30 July 2010) [2010] ZAECHHC 8

COURT

Eastern Cape High Court, Bhisho

BEFORE

C T Sangoni

CASE / FILE NUMBER

389/2008

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, BHISHO)

CASE NO: 389/2008

Reportable : Yes/No

Date heard: 23 March 2010

Delivered on: 30 July 2010

In

the matter between:

BOUDEWYN  
HOMBERG DE VRIES SMUTS  
Applicant/Plaintiff  
And  
DEPARTMENT OF  
ECONOMIC  
DEVELOPMENT AND  
ENVIRONMENTAL  
AFFAIRS  
Respondent/Defendant

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**JUDGMENT****SANGONI J:**

- [1] In this matter the plaintiff, an environmental consultant, claims a sum of R168 000,00 together with interest and costs, as and for damages arising from what the plaintiff refers to as repudiation by the defendant of an agreement concluded between the parties. The plaintiff alleges that during August 2006 per letter dated 03 August the defendant, through its Head of Department,

Advocate Burwana Bisiwe, appointed the plaintiff 'in terms of the conditions and scope of work as highlighted to you (plaintiff) during the selection phase.' The 'selection phase' referred to is the tender process conducted by the defendant which included an invitation to the service providers to submit proposals based on the terms of reference supplied for the review of the Wild Coast Sustainable Development Project's outputs. Part of the selection phase was the proposals themselves which in the case of the plaintiff inculminated in his appointment.

- [2] To the plaintiff the appointment marks the acceptance of the offer he made and thus constitutes an agreement between the parties. The basis of the claim is the alleged repudiation of the agreement on 10/09/2007 when the defendant, represented by one A Mfenyana, informed the plaintiff, via an e mail that there was no agreement concluded between the parties. That alleged repudiation was accepted by the plaintiff on 18 December 2007 hence the claim for damages. The damages are based on what the plaintiff would have been entitled to, had the agreement not been breached.

**Locus standi in iudicio**

- [3] The defendant has raised various defences. It alleges that the tender the plaintiff is relying on was awarded to an entity known as Landmark Foundation a non profit organisation governed by a trust deed. The plaintiff therefore lacks jurisdiction to sue in his name. With particular reference to the letter of 23 August 2006 (Annexure B), which incidentally, was addressed to the plaintiff in his personal name as well as to one Ms Sandy Muller, the defendant alleges that the terms of reference and other material terms cited in the tender agreement had not been agreed upon so as to constitute a binding contract which would obligate the defendant to perform.
- [4] The plaintiff's case is that whilst the plaintiff agrees that the original tender submission was in the name of Landmark Foundation, but, on 8 May 2006, the parties agreed that the plaintiff be substituted as tenderer. The appointment of the plaintiff was subsequent to that substitution. The plaintiff is suing in his own name and not in a representative capacity on behalf of the Landmark Foundation. The position articulated by plaintiff has been supported by him in oral evidence. No such evidence has been placed before court to contradict or challenge the version of the plaintiff. Whatever discussions that were held by the parties relevant to the role of the Landmark Foundation in the then proposed agreement between

the parties, there is no conclusive evidence to exclude the existence of the appointment of the plaintiff in his personal capacity. To this extent I am not able to agree that the plaintiff lacks locus standi in iudicio. My view is that whether there was a binding contract between the plaintiff and the defendant is a matter that is determinable on its own facts not necessarily linked with the issue of locus standi in iudicio.

[5] It is necessary to record verbatim the contents of Annexure B. It reads as follows:

*“It gives me great pleasure to inform that you have been appointed to facilitate the review of the planning phase documents for the Wild Coast. You are appointed in terms of the conditions and scope of work as highlighted to you during the selection phase. Ms Sandy will be the lead consultant for this project and supported by Dr Bool Smuts.*

We wish you all the best in this project and looking forward to your engagement with the stakeholders on this very important initiative.”

#### Supply Chain Management System

[6] The parties accept that the alleged contractual relationship between the parties is governed by the provisions of the chain management system of the defendant department. It is trite that, generally speaking upon the acceptance of a tender a contract comes into being[1]. One of the defences raised by the defendant seems to be that the appointment of the plaintiff, even though it might be an acceptance

of the offer made, does not and did not constitute a binding contract. For that the defendant relies on a condition in the tender

documents which reads that “the service provider shall enter into a binding service level agreement with the department.”

The argument goes on to say that where there is no fulfilment of that condition i.e. the anticipated service level agreement has not been entered into, no contractual obligations can flow. Indeed no service level agreement was entered into despite the insistence of the plaintiff to have such agreement signed. The plaintiff does not in any event rely on fictional fulfilment.

[7] Simultaneously with the defendant’s heads of argument the plaintiff filed and served on 9 April 2010 a notice of intention to amend plea as follows:

*“Alternatively to 5.4 and 5.5 above, and in the event that the Honourable Court finds that a binding contract was entered into between the parties, the defendant pleads that entering into a binding service level agreement with the defendant envisaged in the tender document was a material suspensive condition thereof which was never fulfilled. Consequently, pending fulfilment of such condition no enforceable obligation/s flowed therefrom and the conduct of the defendant’s official in denying the existence of the contract did not amount to repudiation”.*

[8] It is unnecessary to deal with this application for amendment because, what is said therein is virtually implied in the defence raised.

[9] I endorse the approach that says that the acceptance of a tender by an organ of state results in an agreement[2]. That agreement may not be detailed enough and there may be outstanding matters that are not covered by the agreement. When such

matters are lacking it may be an indication that the parties did not intend the agreement to be a final one. In the case of CGEE

Alstom[3] the following statement was made:

*“The existence of such outstanding matters does not, however, necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement.”*

[10] I agree with the statement I have just recorded. To me what that implies is that an agreement is binding in law upon the acceptance of the tender. It is then a contract in its own right. The parties may however agree to tie up in the form of a comprehensive agreement whatever matters that are outstanding in the first agreement. Once that is done the latter agreement would incorporate and supersede the first agreement. The first agreement together with what is commonly known as service level agreement translate to one comprehensive agreement.

[11] A service level agreement is normally referred to in the first agreement, in fact cited therein as a standard condition. It has to be consistent with the terms stated in the first agreement[4]. The construction of the so-called condition is very important. It should be clear that a tender is awarded subject to a legally

enforceable contract. From the reading of the condition – “the service provider shall enter into a binding service level agreement with the department” – places a duty on the service provider to commit himself / herself to concluding a formal contract with the department. It appears to me, as I have clearly alluded above, the so-called condition referred to is a standard provision for the sole intention to protect the department with no intention to subject thereto the validity of the first agreement. If it was so intended why would it not clearly expressed to capture that the validity of the agreement is dependent on the said condition.

[12] Another factor to consider as to whether the intention of the parties was to suspend the validity of the agreement pending the conclusion of the service level agreement as to consider whether the essential requirements of the contract had not been set out in the tender papers. The request for the submissions of the proposals for the reviewal of the planning phase outputs sets out the background and introduction leading to the invitation. The scope of work expected to be done was also set out in detail. In his tender motivation, albeit given under the name of Landmark Foundation, the plaintiff gave details of the tasks in the tender, and the cost thereof. The motivation was submitted on 8 May 2005 and the appointment of the plaintiff must have taken all those facts into account as the appointment

was only during August 2006. It does not appear that there were not material matters still outstanding to agree on for the agreement to be binding. The defendant does not indicate what it is to be showing maturity of the left out material matters.

[13] The plaintiff sent an e-mail to the department on 8 May 2006 in the following terms:

*“I have also designed the review process without knowing the budget provisions or the depth with which you required the work done. My tender thus assumes that a detailed and very thorough task is to be undertaken. Again, if these assumptions are incorrect please let us talk”.*

[14] In my view this extract confirms that the information supplied pointed to a thorough task to be undertaken even though the extent of the budget had not been indicated. The defendant was invited to revert for the plaintiff if it had contrary ideas regarding the task and cost. There was no response from it in that regard.

[15] I am of the view that the principle in *Lambons (Edms) Beperk* should apply in this case. It was held in that case that:

*“Where parties reached agreement by offer and acceptance, the fact that there were still material matters outstanding on which they had not agreed might prevent the agreement from having contractual force. This would occur where the evidence showed that the parties*

*contemplated that consensus would have to be reached on the outstanding matters before a binding contract could come into existence”.*

[16] I thus come to the conclusion that there was no suspecondition to be fulfilled before the agreement reached between the parties on the basis of tender information supplied. That the conduct of the defendant in denying the existence of the contract constituted repudiation thereof. In the result the defendant must fail.

[17] There is no challenge to the quantification of the damages. I thus make the following order:

1. Judgment in favour of plaintiff for payment of R168, 000 as damages.
2. Interest on the aforesaid amount calculated at the legal rate from the date of the issue of summons to date of payment.
3. Costs of suit.

C T SANGONI

JUDGE OF THE HIGH COURT

For the Plaintiff: ADV A BEYLEVELD Instructed by: Hutton & Cook Attorneys, King William's Town Tel: 043 – 642 3410 For the Defendant: ADV T M NTSALUBA Instructed by: State Attorney, East London Tel: 043 – 706 5100

[1] E Finsen : The Building Contract – A Commentary on the JBCC Agreement : 2nd Ed p 55

- [2] Jicama 17 (Pty) Ltd v West Coast District Municipality 2006 (1) SA 116 (C).
- [3] CGEE Alsthom Equipments Et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd
- [4] The Law of Government Procurement in South Africa – Phoebe Bolton – p23.
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Prepared on 12 October 2026 · Esheria