

SOUTH AFRICA / JUDGMENT

Eldocrete (Pty) Ltd v Direlanang Construction and Project CC and Another (M630/2023) [2024] ZANWHC 211 (15 August 2024)

[2024] ZANWHC 211

COURT

North West High Court, Mafikeng

BEFORE

Dibetso-Bodibe

CASE / FILE NUMBER

M630/2023

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST PROVINCIAL DIVISION, MAHIKENG

Case No.: M630/2023

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates: NO

Circulate to Regional Magistrates: NO

In the matter between:

ELDOCRETE (PTY) LTD

APPLICANT

and

DIRELANANG CONSTRUCTION AND

1ST RESPONDENT

PROJECT CC

MORETELE LOCAL MUNICIPALITY

2ND RESPONDENT

REASONS

FOR ORDER/JUDGMENT

DIBETSO-BODIBE AJ

- [1] A municipality is a creature of statute and when procuring goods and services, it must do so within the purview of the local government prescripts and in the spirit of the Constitution of the Republic of South Africa.
- [2] The existence of a cession agreement is not per se an indication that there existed a prior approval of such an agreement. Transfer of certain obligatory rights from the service provider (the cessionary) affects the original terms and conditions of a procurement contract and therefore necessitates prior approval by the municipal manager in his / her capacity as the accounting officer of the Municipality (the debtor).
- [3] On 18 January 2024, this Court dismissed an application for judgment against the 1st Respondent, Direlanang Construction and Project CC (the Contractor) and the 2nd Respondent, Moretele Municipality (the Municipality). Pursuant to that order, the Applicant, Eldocrete (Pty) Ltd (Eldocrete), filed an application for written reasons for the order granted. I, therefore, provide the reasons hereunder.
- [4] Eldocrete sought relief for judgment against the Respondents, jointly and severally, the one paying the other to be absolved for the payment of R1 604 250.00 plus interest and cost of suit on an attorney and client scale.
- [5] According to its found papers, Eldocrete alleges the following:
- [5.1] Judgment is sought against the Contractor on the basis of an oral agreement of sale concluded between Eldocrete and the Contractor in terms of which Eldocrete sold and delivered to the contractor of precast cement sanitation products for the completion of a municipal project to which the Contractor had been appointed by the Municipality.
- [5.2] Judgment is sought against the Municipality on the basis of a written cession agreement entered into between Eldocrete, the Contractor and the Municipality in terms of which the Municipality undertook to make payment of amounts owing by the Municipality to the Contractor for work done in respect of the municipal project.
- [5.3] During September 2020, and at the Municipality, Eldocrete, represented by the deponent, Mr De Beer, the Contractor represented by Mr Mashigo and the Municipality represented by its Director for Infrastructure, Mr Moreriane, entered into the cession agreement.
- [6] The cession agreement is attached to the founding agreement as annexure “FA2” and in terms of the affidavit, the material express, alternatively implied terms of the cession agreement are that:

[6.1] The Contractor and the Municipality have concluded a contract in terms of which the Contractor is to supply project material on the Mathibestad Ward 1 Basic Sanitation Project for the Municipality;

[6.2] The Contractor requires, to purchase the project material from Eldocrete;

[6.3] As security for amounts owing or to be owed by the Contractor to Eldocrete for the project material to be supplied to the Municipality, the Contractor agrees to cede to the Eldocrete amounts payable by the Municipality to the Contractor under the project;

[6.4] As security for the due and punctual obligation to Eldocrete, the Contractor cedes to Eldocrete all its title and interest to claim, and receive from the Municipality payment of all and any monies owing or which may in the future become owing by the Municipality to the Contractor;

[6.5] The Municipality hereby agrees to pay to Eldocrete the maximum amount of R1 604 250.00 (including 15% Vat) for the supply and delivery of project materials for the municipal project;

[6.6] The Municipality will pay Eldocrete within 30 days of receipt of an invoice addressed to the Municipality;

[6.7] The cession agreement shall endure and be of full force and effect until all obligations of the Contractor to the Municipality have been paid and discharged in full;

[6.8] A certificate under the hand of any director or financial manager of Eldocrete in respect of any indebtedness of the Contractor to Eldocrete or in respect to any other fact shall be prima facie evidence thereof;

[6.9] After having supplied the project materials, and after confirmation from the project engineers that the project materials supplied were satisfactory, in compliance with its obligations under the cession agreement, Eldocrete duly provided an invoice to the Contractor and the Municipality (and addressed to the Municipality) indicating that the amount due to Eldocrete in respect of the project material supplied by it was R1 604 250.00;

[6.10] The Municipality, in breach of its obligations under the cession agreement, failed to pay the amount owing to Eldocrete and instead, paid it directly to the Contractor. The Contractor has since refused to pay any portion thereof to Eldocrete (notwithstanding undertakings made previously by Mr Mashigo that he would do so).

[7] Over and above the cession agreement, also attached to the founding affidavit are the delivery notes and an invoice to the amount of R1,604,250.00 together with the correspondence between Eldocrete and Mr Moreriane concerning the alleged breach of the agreement of cession.

[8] As already alluded to, the Municipality is a creature of statute and can exercise no power and perform no function beyond that conferred upon it by law. Through a procurement process for provision of services for the Municipality, the Contractor was appointed and

signed a service level agreement with the Municipality. Once it becomes impossible for the Contractor to execute its obligations towards the Municipality due to financial constraints and the Contractor agrees with a third party, as in this case, Eldocrete to come to the aid of the Contractor, such an agreement is in effect the alteration and/or amendment of the procurement contract between the Contractor and the Municipality. This, therefore, means that, there must be prior approval by the municipal manager for a third party to assist the Contractor as in this case with the supply of the project material.

- [9] Prior approval by the municipal manager means that a cession agreement entered into between Eldocrete and the Municipality will become valid and the Municipality will be obligated to pay all amounts owing to the Contractor to Eldocrete in terms of the cession agreement. Prior approval by the municipal manager, of the cession agreement, further means that the Contractor's financial details for purposes of payment of the monies due and owing for the supply of the project material will have to be removed from the Municipality's system and officially replaced by those of Eldocrete in accordance with the cession agreement.
- [10] Once the Municipality through the municipal manager undertakes to enter into a cession agreement with Eldocrete, the cession agreement becomes valid and any failure by the Municipality to fulfill the obligations as stipulated in the cession agreement will constitute a breach of the said agreement. No proof is before this Court that the agreement was entered into on behalf of the Municipality.
- [11] Prior approval of the cession agreement will mean that the Municipality cannot escape liability for the erroneous payment of the monies to the Contractor instead of Eldocrete as has happened in casu.
- [12] No proof of prior approval of the cession agreement has been attached to the founding affidavit, nor is there any form of intervention by the municipal manager on the way forward regarding the alleged erroneous payment to the Contractor including an undertaking that the Contractor will forfeit the retention monies and that same will be paid to Eldocrete.
- [13] In fact, if the Municipality had made an undertaking that payments for the material delivered for the completion of the municipal project will be made to Eldocrete, and it occurs that such payment is erroneously paid to the Contractor, it is inconceivable that the Municipality is still awaiting the consent of the Contractor for retention monies to be released to Eldocrete. No evidence is before this Court to assist it as to why the Contractor should have the last word after receiving payments which in terms of the agreement should not have been paid to it but to Eldocrete.

- [14] Except for Mr Moreriane's say so that the payment due to Eldocrete was paid erroneously to the Contractor, no proof has been provided that despite Eldocrete's financial details having been approved to replace those of the Contractor, this was not done thus resulting in the erroneous payment to the Contractor.
- [15] Mr Moreriane entered into the cession agreement on behalf of the Municipality. The cession agreement will be valid if Mr Moreriane had delegated powers to bind the Municipality to effect payment to Eldocrete in accordance with the cession agreement. Proof of such delegation is not before this Court.
- [16] In the premises, the application was dismissed for lack of sufficient evidence on the Applicant's founding papers that there was proper approval and undertaking by the Municipality to effect payments of all material supplied for the completion of the municipal project to Eldocrete in terms of the cession agreement.

O.Y DIBETSO-BODIBE

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and handed down electronically by circulation to the Parties or their legal representatives by email and by release to SAFLII

DATE OF HEARING: 18 January 2024 DATE OF JUDGMENT: 15 August 2024 APPEARANCE FOR THE APPLICANT: Mr Labuschagne INSTRUCTED BY: Labuschagne Attorneys FOR THE RESPONDENT: No appearance

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