

SOUTH AFRICA / JUDGMENT

Fikeni and Others v Mlamli Projects CC and Others, In re: Mlamli Projects CC v Fikeni and Others (39611/2013) [2015] ZAGPPHC 880 (29 October 2015) [2015] ZAGPPHC 880

COURT

North Gauteng High Court, Pretoria

BEFORE

Mngqibisa-Thusi

CASE / FILE NUMBER

39611/2013

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REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG HIGH COURT DIVISION, PRETORIA

JUDGMENT

Case no: 39611/2013

DATE: 29 OCTOBER 2015

In the matter between:

SMFIKENI.....1st Applicant
MIB MATLUTE.....2nd Applicant
Z Q L MDHLADHLA.....3rd Applicant
M M MLENGANA.....4th Applicant
N F T MPULWANA.....5th Applicant
M M MOLALO.....6th Applicant
T E MOTSWALEDI7th Applicant
R AS PATEL.....8th Applicant
P NKOMO.....9th Applicant
Z A T ZITHA10th Applicant

G C ZULU-KHABANYANE.....11th Applicant

And

MLAMLI PROJECTS CC.....1st Respondent

DEPARTMENT OF PUBLIC WORKS, ROADS

& TRANSPORT (MPUMALANGA PROVINCE).....2nd Respondent

In re:

MLAMLI PROJECTS CC.....Plaintiff

SMFIKENI.....1st Defendant

M I B MATLUTE.....2nd Defendant

Z Q L MDHLADHLA.....3rd Defendant

M M MLENGANA.....4th Defendant

N F T MPULWANA.....5th Defendant

M M MOLALO.....6th Defendant

T E MOTSWALEDI7th Defendant

R A S PATEL8th Defendant

P NKOMO.....9th Defendant

Z A T ZITHA10th Defendant

G C ZULU-KHABANYANE.....11Th Defendant

MNGQIBISA-THUSI, J

- [1] On 29 October 2015, I dismissed an application for a postponement and undertook to provide reasons for the decision.
- [2] Furthermore, when the application for a postponement was dismissed, counsel for the applicant indicated to the court that he had no instructions to proceed with the trial. As a result, the trial continued without any representation on behalf of the applicant, who is the defendant in the main action.
- [3] The first respondent, Mlamli Projects CC ("Mlamli") instituted an action against the applicants in their capacities as trustees of the Industrial Development Trust ("IDT"), for the payment of the amount of R1 612 754.95, interest plus costs.
- [4] The matter was set-down for 29 October 2015. The notice of set- down was served on the IDT's attorneys of record on 24 July

2014. On the day on which the trial was supposed to start, the IDT brought a substantive application for the postponement, sine die, of the trial. The IDT further sought a punitive cost order against the second respondent, Department of Public Works, Roads and Transport (Mpumalanga Province) (the Department).
- [5] The Department is not a party in the main action. However, Mr Oosthuizen, for the Department, was present since the Department had been served with the application for a postponement. Mr Oosthuizen, submitted that even though the Department did not file papers opposing the application for a postponement, he was there to oppose the. punitive cost order sought against the Department.
- [6] The IDT sought a postponement mainly on the ground that there is a pending application to substitute it with the Department on the basis of the alleged cession agreement it allegedly concluded with the Department.
- [7] The claim arises from a building contract ("the contract") Mlamli and the IDT concluded in October 2010. Pursuant to the contract, on 15 August 2012, the IDT's consulting engineers issued a payment certificate in the amount of R1 612 754.95. Furthermore, on 17 August 2012 Mlamli issued a tax certificate and a certificate of completion was issued on 21 August 2012. However, the IDT has failed to pay Mlamli in terms of the payment certificate.
- [8] Due to the non-payment by the IDT, during January 2013, Mlamli's attorneys of record sent a letter of demand to the IDT. When no payment was forthcoming, Mlamli issued summons. During September 2013 the IDT was granted leave to defend at a summary judgment application hearing.
- [9] It is Mlamli's contention (not disputed by the IDT) that leave to defend was granted solely because the IDT alleged that payment was not forthcoming because it had discovered some alleged fraud in the award of the contract and that an investigation was pending with regard to the claim of fraud.
- [10] Despite Mlamli's attempt to hold a pre-trial conference, the IDT has had one or another excuse why it should not be held. During June 2015, Mlamli came to know of an alleged cession agreement allegedly concluded on 23 December 2014, in terms of which the IDT ceded its rights and obligations under the contract to the Department. Sometime during July 2015, the IDT informed Mlamli of its intention to bring an application for its substitution by the Department The substitution application was only filed on 22 September
2015. The Department has filed its answering affidavit opposing the application for substitution. The IDT still has to file its replying affidavit in that application.
- [11] On the basis of the substitution application, the IDT informed Mlamli that they would not be in a position to proceed with the trial until the substitution application was finalised. Mr Makhambeni, counsel for the IDT, contended that in view of the cession agreement it was no longer a party to the action as it has been substituted by the Department.

- [12] Mr Oosthuizen, counsel for the Department, submitted that the alleged cession agreement was invalid as it was concluded between the cedent and the cessionary to the exclusion of Mlamli which had to give its consent to the cession in order for the cession to be valid. Further, Mr Oosthuizen submitted that it did not see any reason why the Department should be burdened with the costs of the application as it was not party to the action.
- [13] Mrs Strydom, counsel for Mlamli, submitted that the IDT has no prospects of succeeding with the substitution application, particularly on the strength of clause 19.1 of the contract between Mlamli and the IDT. Clause 19.1 of the contract reads as follows:
- "neither the employer nor contractor shall assign or cede his rights or obligations without the written consent of the other party, which consent shall not be withheld without good reason."
- [14] It was contended on behalf of Mlamli that the purported cession between the IDT and the Department was a bilateral agreement which was in contravention of clause 19.1 of the contract and did not, therefore, affect the rights of Mlamli or the obligations of the IDT as they pertain to the contract. On behalf of Mlamli it was further submitted that the application for a postponement was a dilatory tactic by the IDT not to pay Mlamli in that, despite the fact that at the hearing of the summary judgment application, the IDT had claimed that it was awaiting the report on the investigation of the alleged fraud from the SIU, such investigation has not even started.
- [15] Counsel for Mlamli submitted that if the trial was postponed, Mlamli will be prejudiced in that it has been waiting for payment since 2012 and that no investigation into the alleged fraud has been done or any fraud uncovered. It was further submitted that the non-payment by the IDT has had a knock-on effect on Mlamli's other projects.
- [16] In order for a party to succeed in an application for a postponement, the applicant has to show good cause why the matter should not proceed on the scheduled date. Since a postponement is an indulgence, normally the applicant would also be liable for the wasted costs occasioned by the postponement. In considering whether or not to grant a postponement, the court has to consider the explanation given by the applicant for the postponement and any prejudice which may be suffered by either party if the postponement is or is not granted.
- [17] In this matter, the IDT had since 2012 avoided paying Mlamli on the ground that there was an investigation into an alleged fraud in the contract. Despite efforts by Mlamli to get the report on the alleged fraud, none has been forthcoming. Over and above, the IDT has concluded a cession agreement pertaining to its rights and obligations under the contract with the Department, without first seeking the consent of Mlamli, in compliance with the provisions of the contract.
- [18] In my view the application to substitute itself with the Department, belatedly so (after the alleged cession agreement was concluded in December 2014) in September 2015 knowing fully well that the trial was set down for hearing at the end of October, appears to be another

delaying tactic on the part of the IDT to have the dispute between itself and Mlamli finally resolved. No plausible explanation has been given by the IDT as to why it only sought its substitution during September 2015, barely a month before the trial started, particularly as the cession agreement was concluded in December 2014.

- [19] Bearing in mind that payment was due since 2012 and taking into account the industry in which Mlamli operates, I am of the view that Mlamli would be severely prejudiced if the postponement was granted. On the other hand, if postponement was not granted and the IDT was successful in its application for substitution, it would still have a right of recourse against the Department. However, without attempting to pre-judge the substitution application, the outcome of that application would not affect Mlamli's rights as against the IDT in view of clause 19.1 of the building contract
- [20] I am satisfied that the IDT has not shown sufficient cause for a postponement to be granted and that its application for a postponement ought to fail.
- [21] With regard to costs, I am of the view that the IDT should be liable for the costs of this application.
- [22] In the premises, the following order was made:

'The application for postponement is refused with costs including costs of appearance on behalf of the second respondent on an attorney and client scale.'

MNGQIBISA-THUSI J

Appearances:

For applicant: Adv Makhambeni

Instructed by: Inc Mokuena Attorneys

For first respondent: Ms Strydom

Instructed by: Macbeth Attorneys

For second respondent: Adv Oosthuizen, SC

Instructed by: State Attorney

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