

SOUTH AFRICA / JUDGMENT

# Kipp Consulting Engineers JV Mashaipone General Construction CC v MEC for the Department of Rural Development and Land Reform: Limpopo Province (7741/2020) [2023] ZALMPPHC 73 (15 August 2023)

[2023] ZALMPPHC 73

## COURT

Limpopo High Court, Polokwane

## BEFORE

Kganyago

## CASE / FILE NUMBER

7741/2020

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## Source record

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: 7741/2020

REPORTABLE: YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED:

YES/NO

DATE:

15/08/2023

In

the matter between:

KIPP

CONSULTING ENGINEERS JV

MASHAIPONE

GENERAL CONSTRUCTION CC

PLAINTIFF

And

MEC

FOR THE DEPARTMENT OF RURAL DEVELOPMENT

AND

LAND REFORM: LIMPOPO PROVINCE

DEFENDANT

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**JUDGEMENT****KGANYAGO J**

- [1] On 9th September 2015 the defendant appointed the plaintiff as a professional service provider for the construction of Mphalaleni Irrigation Project for a period of 9 months. After the expiry of the 9 months period, the parties have orally agreed to the indefinite extension of the contract. The appointed engineers for the project was Aurecon whose services was terminated during November 2016. After the termination of the services of Aurecon, the defendant notified the plaintiff that all further correspondence between plaintiff and defendant should be made directly to the defendant as from 1st December 2016. The defendant appointed Mokhomole MJ who was the department's deputy director of Infrastructure to oversee the project, and perform all the functions that Aurecon had previously performed.
- [2] The defendant per letter dated 17th October 2018 notified the plaintiff of its intention to terminate the contract that had lapsed and was never renewed. The contract was formally terminated by the defendant per letter dated 15th March
2019. On 1st November 2019 the defendant appointed Siyeza Consulting Engineers which is a third party to compile a costs

**determination**

report for the cancellation of the contract in respect of the project. The determination report by Siyeza would have been used to determine a fixed amount of monies due and payable to the plaintiff as a result of the termination of the contract.

- [3] Siyeza determined the amount of R3 113 882.51 as the amount that was due and payable to the plaintiff. The plaintiff rejected that amount and made a counter proposal of R9 661 446.98 as the amount that was due and payable to it. The defendant did not respond to the offer or pay the counter offer by the plaintiff. That resulted in the plaintiff proceeding to institute action against the defendant claiming the amount of R9 661 446.98 as financial damages it had suffered arising out of the cancellation of the contract by the defendant.
- [4] The defendant had defended the plaintiff's action. In their plea to the plaintiff's particulars of the claim, the defendant had raised a special plea of lack of jurisdiction by this court to adjudicate the plaintiff's claim. The defendant in its special plea has stated that the plaintiff has failed to refer the dispute to an engineer for adjudication in terms of the General Conditions of Contract, second edition (GCC) read with the appointment letter which was regulating the contractual obligations between the parties. Further that the plaintiff has failed to lodge a written notice with the engineer within 28 days after the plaintiff had rejected the defendant's proposed settlement amount as contemplated in clause 10.3 of the GCC. It is the defendant's contention that the plaintiff has not exhausted the agreed internal

remedies in terms of the contract concluded between the parties.

[5] This court is called upon to determine whether the plaintiff had exhausted the internal remedies provided for in the GCC before resorting to institute legal action against the defendant. Where the parties have agreed to a dispute resolution mechanism, there is a duty on the parties to exhaust that internal remedy before they approach the court directly unless the internal remedy would be ineffective.

[6] In *Koyabe v Minister for Home Affairs*[1] Mokgoro J said:

"Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before the aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and costs effective internal remedies cannot be gainsaid".

[7] Clause 10.3 of the GCC which the defendant's special plea has been based on read as follows:

"10.3 Dispute Notice

10.3.1 The contractor or the employer, hereinafter referred to as "the parties", may deliver to the other a written notice, hereinafter referred to as a "dispute notice", of any dispute arising out of or in connection with the contract;

Provided that:

10.3.1.1 The dispute arises from an unresolved claim.

10.3.1.2 Reference shall be made to this clause in the dispute notice.

10.3.1.3 A copy of the dispute notice shall be delivered to the engineer.

10.3.1.4 The dispute notice shall clearly state the nature of the dispute and the extent of the redress sought.

10.3.1.5 The dispute notice shall be delivered within 28 days of the event giving rise to the dispute has arisen. Failing such delivery, the parties shall have no further right to the dispute matter.

10.3.2 If either party shall have given notice in compliance with clause 10.3.1, dispute to be the dispute shall be referred immediately to adjudication in terms of referred clause 10.5, unless amicable settlement is contemplated.

10.3.3 In respect of a ruling given by the engineer, and although the parties may have delivered a dispute notice, the ruling shall be of

full force and carried into effect unless and until otherwise agreed by both parties, or in terms of an adjudication decision, an arbitration award or court judgment".

- [9] It is common cause between the parties that the defendant had unilaterally cancelled the contract between the parties which was in relation to the Mphalaleni Irrigation Project. On cancellation of the contract the defendant appointed Siyeza to compile a costs determination report for the cancellation of the contract in order to determine the amount due to the plaintiff as a result of the termination. Siyeza determined the amount which the plaintiff rejected and made its counter offer. The defendant did not respond to the counter offer and that led to the plaintiff instituting an action against the defendant claiming what it alleges are damages suffered by it as a result of the termination of the contract.
- [10] The parties have chosen to have their own dispute resolution mechanism in case a dispute arose concerning their relationship. In terms of the parties' dispute resolution mechanism as provided for in clause 10.3 of the GCC, if a dispute arose, the plaintiff if it is the aggrieved party, will be required to deliver a copy of the dispute notice to the engineer within 28 days of the event giving rise to the dispute. Since the services of Aurecon has been terminated, the dispute will have to be referred to Mokhomole as he was the one who had taken over the role of Aurecon. The plaintiff had been duly notified of the role which Mokhomole will be playing, and it at no stage raised an objection to that.
- [11] The role of the engineer is to try and resolve the dispute. In terms of clause 10.3.3 of the GCC, the ruling given by the engineer shall be in full force and carried into effect unless otherwise agreed by both parties, or in terms of an adjudication decision, an arbitration award or court judgment. This entail that the ruling of the engineer is final and binding on both parties. In my view, Mokhomole had foreseen that a dispute was going to arise as a result of the termination of the contract, and sourced Siyeza to assist him in making a determination for the amount that might be due to the plaintiff as a result of the termination of the contract. He did not wait for the plaintiff to first deliver a dispute notice within 28 days after the termination of the contract. Mokhomole had aligned himself to the determination by Siyeza. As the person in charge of the project, when that determination was communicated to the plaintiff, it became Mokhomole's own determination which was equivalent to a ruling of what was the final amount due to the plaintiff.
- [12] The plaintiff was the one who was rendering services, and under normal circumstances it was expected that the plaintiff would have been the one to first deliver the invoice after the contract was terminated. The dispute will arise when the defendant rejects the submitted invoice. It is not clear on what basis was Siyeza appointed before the plaintiff had submitted its final invoice emanating from the cancellation of the contract. The dispute notice will be delivered after the dispute had arisen.
- [13] If the plaintiff was to deliver a dispute notice, it had to deliver

it to the same Mokhomole who had already made a ruling of what was due to the plaintiff. Referring the matter to same person who had made his position clear, in my view, would have been a futile exercise as there was no possibility that he would have changed his mind, taking into consideration that he did not respond to the plaintiff's counter-proposal. He had regarded his ruling as final.

[14] Clause 10.3.3 of the GCC provides that once the engineer had made a ruling, the parties may deliver a dispute notice. Therefore, after the engineer had made a ruling, it is not peremptory to deliver a dispute notice as the clause use the word 'may'. By failing to respond to the plaintiff's counter offer, Mokhomole was confirming that his determination was equivalent to a ruling, and should be of full force and carried out. The plaintiff tried to resolve the matter by giving Mokhomole a counter-proposal which he did not consider, and was therefore to be carried into effect. In terms of clause 10.3.3 of the GCC, once the engineer had given his/her ruling, either party had a choice to (i) agree otherwise in relation to the ruling of the engineer; (ii) proceed to adjudication in terms of clause 10.5 of the GCC wherein a member(s) of the Adjudication Board will be appointed

within 56 days to adjudicate on the matter; (iii) an arbitration award; and (iv) court judgment. The plaintiff has chosen the legal

route by instituting an action against the defendant which will result in it obtaining a court judgment.

[13] In my view, the dispute notice which the plaintiff was required to deliver to Mkhomole, has been overtaken by events when Mokhomole made a ruling immediately after termination of the contract. Even if the plaintiff had served the dispute notice, in my view, it would have served no purpose since it was going to be determined the same Mokhomole who had already made a ruling on the same issue. That makes the parties dispute resolution mechanism to be ineffective.

[14] As per clause 10.3.3 it is not peremptory to refer the dispute for adjudication after the engineer had made a ruling, and the parties have choice of what route to follow. Even though the procedure followed by Mokhomole was not strictly in line with what has been provided for in the GCC, it had achieved the same result, which was a ruling which was binding on both parties, and was in full force and had to be carried into effect. If this court was to find that the dispute procedure as provided for in the GCC has not been exhausted due to the failure by the parties to step by step follow that procedure as it appears in the GCC, it will be giving effect to form over substance. In my view, the internal remedies provided for in the GCC have been exhausted and the defendant's special plea stands to be dismissed.

[14] In the result the following order is made:

14.1 The defendant's special plea of lack of jurisdiction is dismissed with costs.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

APPEARANCES: Counsel for the plaintiff : Adv GJ Diamond Instructed by: Everton Dankuru  
Attorneys Counsel for the defendant: R Ramaweale SC Instructed by : Office of State Attorney,  
Polokwane Date heard: 14th June 2023 Electronically circulated on: 15th August 2023

[1] 2010 (4) SA 327 (CC) at para 35

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