

SOUTH AFRICA / JUDGMENT

Lubisi / GMH Joint Venture v SMC Enterprise 2 CC (2357/2022) [2025] ZAMPMBHC 1 (22 January 2025) [2025] ZAMPMBHC 1

COURT

Mbombela High Court, Mpumalanga

BEFORE

Mashile

CASE / FILE NUMBER

2357/2022

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IN THE HIGH COURT OF
SOUTH AFRICA
MPUMALANGA DIVISION,
MBOMBELA

CASE NO: 2357/2022

(1)

REPORTABLE:NO

(2)

OF INTEREST TO OTHER JUDGES: YES

(3)

REVISED: YES

DATE 22/01/2025

SIGNATURE

In the matter between:

LUBISI / GMH JOINT
VENTURE
PLAINTIFF
and
SMC ENTERPRISE 2
CC
DEFENDANT

This judgment was
handed down electronically by circulation to the parties and/or
parties' representatives by email. The date
and time for
hand-down is deemed to be 22 January 2024 at 10:00.

JUDGMENT

Mashile J

Introduction

- [1] This claim stems from a contract concluded between the Plaintiff, a Joint Venture, and the Defendant (“SMC Enterprise”). The Joint Venture is constituted by two close corporations, the one being Central Bridge Trading 46 CC t/a Lubisi Consulting Engineers CC and the other, GMH Tswelelo Consulting Engineers CC. I shall henceforth refer to the Plaintiff as the Joint Venture unless context requires mention of the actual names of the members of the Joint Venture. In the latter event, Lubisi Consulting Engineers CC will be (“Lubisi”) and the other will be (“GMH”).

Contractual Provisions

- [2] As far as I could decipher, the terms of the agreement and performance by the Joint Venture are common cause. The main source of the dispute is whether SMC Enterprise has made payment to the Joint Venture. I now proceed to briefly set out the salient parts of the contract before traversing the testimony of the witnesses of the respective parties. On 20 November 2017, the Ehlanzeni District Municipality (“the Municipality”) appointed the Joint Venture as Engineers in respect of a project known as Driekoppies Regional Water Scheme–Water Treatment Works (Phase 1a) (“the Project”).
- [3] On 23 August 2019, the Municipality appointed SMC Enterprise as the main contractor on the project following submission of a tender to the Municipality by the latter. In 2019, at Nelspruit, the Joint Venture and SMC Enterprise represented by Mr Johan Gilbert (“Gilbert”) and Ms Happy Eunice Mathebula (“Mathebula”) as engineers respectively concluded a partly written, partly verbal contract. In terms of the contract, the Joint Venture would render professional services to SMC Enterprise and/or the Municipality on the project.
- [4] The written part of the contract between the Joint Venture and SMC Enterprise is contained in SQ1 and SQ2 of the tender document between the Municipality and SMC Enterprise. The documents describe the services to be rendered by the Joint Venture to SMC Enterprise and/or the Municipality. Furthermore, they set out the amounts payable to the Joint Venture by SMC Enterprise for the services rendered. The Joint Venture alleges, which is not contested, that the verbal or implied or tacit terms of the agreement between the parties were as follows:

4.1 The pages from the tender document, SQ1 and SQ2, containing costs of items and number of units do not represent an exhaustive list and were amplified from time to time when costs needed to be incurred, and services required to be rendered;

4.2 The Joint Venture would render professional services to SMC Enterprise and/or the Municipality monthly for which services SMC Enterprise would pay the Joint Venture;

4.3 The Joint Venture would do all the things necessary and take all the steps necessary to fulfil its obligations in terms of the contract;

4.4 As the project proceeded, the Joint Venture would render invoices to SMC Enterprise for the services rendered and the latter would, within 30 days of the date of the invoice, make payment.

[5] In terms of the payment procedure between the respective parties, the Joint Venture would raise an invoice for services that it would have rendered. SMC Enterprise would immediately upon receipt of the invoice submit a payment certificate and/or an invoice to the Municipality. The payment certificate or invoice would include the amounts payable by SMC Enterprise to the Joint Venture. The Municipality would pay the amount as per the payment certificate and/or the invoiced amount to SMC Enterprise. SMC Enterprise would in turn pay the amount due to the Joint Venture in terms of the invoice or payment certificate.

[6] The Joint Venture would be entitled to payment for the services that it has rendered, the rates of which would be set out in the tender documents. The items the Joint Venture is entitled to claim in terms of the tender documents are at least:

6.1 Telephone – R2 500.00 per month excluding Value Added Tax;

6.2 Health and Safety Agent – R52 500.00 per month excluding Value Added Tax;

6.3 Supervision for the duration of construction for Engineer – R42,500.00 per month excluding Value Added Tax.

Assertions of the Parties

[7] It is common cause that the Joint Venture has performed in terms of the contract by rendering services to SMC Enterprise for which it generated invoices amounting, in all, to R2 383 375.00. The Joint Venture asserts that SMC Enterprise has failed to observe the terms of the contract insofar as it only paid an amount of R1 598 500.00 leaving an amount of R784 875.00 still outstanding. Conversely, SMC Enterprise contends that the reconciliation statement for some of the work done by the Joint Venture on the project excludes two specific payments made by it. These amounts are R828 000.00 paid on 30 March 2020 and R258 750.00 paid on 19 March 2020. SMC Enterprise acknowledges that the aforesaid amounts were not paid to the Joint Venture but rather to Lubisi, which is the other party constituting the Joint Venture. Accordingly, SMC Enterprise regards itself as having discharged its liability to the Joint Venture in full and final settlement as prescribed by the contract.

Evidence

- [8] The Joint Venture called two witnesses to testify in support of its case while SMC Enterprise had only one to do so on its behalf. These witnesses were Messrs Ruvaan Swanepoel (“Swanepoel”), Chalmers Tantara Pagiwa (“Pagiwa”) and Mathebula respectively. Below follows a consideration of the evidence of these witnesses in the order I have listed them. To start with Swanepoel. The essence of his testimony was that he was a manager at GMH stationed in Mpumalanga. He confirmed payment of R828 000.00 and R258 750.00 to Lubisi. Payment of these two amounts was made on 20 March 2020 and 19 March 2020 respectively.
- [9] He stated that the bank account number into which the two amounts above were paid belonged to Lubisi and not the Joint Venture. This was consistent with the parties’ agreement that Lubisi could render services independently of the Joint Venture and be paid for them. This was one of those instances where it had done work alone. He added that it explains why the reconciliation statement of the Joint Venture does not display those amounts. Additionally, the invoices were generated by Lubisi and not the Joint Venture. The two amounts together were far more than the Joint Venture was owed anyway. When cross examined, he said that he was not aware of a meeting between Messrs Gilbert and Lubisi, representing the Joint Venture and Mathebula representing SMC Enterprise. His re-examination did not raise anything of significance.
- [10] Pagiwa’s evidence was that he was the sole director of Lubisi. He corroborated Swanepoel’s evidence that instances of direct invoicing by Lubisi to SMC Enterprise were not a rare occurrence. They were common because of the arrangement that Lubisi would do some work alone and not the Joint Venture, as stated by Swanepoel. The direct payment of the two amounts into the bank account of Lubisi was not anything extraordinary.
- [11] The first amount for R828 000.00 was for certain pump designs done by Lubisi and the second in the sum of R258 750.00 was for social facilitation. During his cross examination, he denied that there was a meeting of the Joint Venture members where they resolved that the payment of the two amounts would be made to Lubisi even though they were due to the Joint Venture. When re-examined, he agreed that the two invoices were generated by Lubisi, and payment did not feature in the statement of the Joint Venture fortifying the contention that the payment was meant for Lubisi alone. This concluded the case for the Joint Venture.
- [12] The only witness for SMC Enterprise was Mathebula who testified that the payments to Lubisi should be displayed and accounted for in the statement of the Joint Venture. Her justification for this was that she had received instructions to pay Lubisi directly during a meeting of the members of the Joint Venture represented by Messrs Pagiwa and Gilbert. Gilbert has since died. The instructions were regardless that the service was exclusively rendered by the Joint Venture.
- [13] She confirmed that the payments to Lubisi were made into a different account presented to her by Lubisi. She disavowed the invoices of Lubisi pulled out of the court file, stating that those she had received were not the same. Mathebula agreed that in response to a letter of the Joint Venture demanding payment, she wrote an e-mail message that reads:

“Hi Piet

I asked Zama to communicate with yourselves regarding the outstanding payment.

Our account is selected for audit at SARS.

I’ll advise as soon as they are done.

Regards

Happiness.”

- [14] Mathebula confirmed that the tax affairs of SMC Enterprise were in order and that despite this SMC Enterprise could not pay the amount due. When cross examined, she was flabbergasted when it was pointed out that the different invoices that she claims to have received from Lubisi were not discovered and not in the court file. Mathebula failed to proffer an intelligible answer as to why SMC Enterprise did not counterclaim because on her version there is an indubitable over payment exceeding R300 000.00 to the Joint Venture if regard is had to the sum claimed of R784 875.00.
- [15] Confronted with her e-mail message supra dated 8 August 2021 in response to a demand for payment by the Joint Venture, she could not explain why the overpayment did not feature in her email at all. She also could not provide any sensible or practical explanation as to why she would communicate the tax affairs and status of SMC Enterprise to the Joint Venture. Faced with these difficulties, Mathebula disowned the contents of the email message. Her personal assistant, one Zama, would have sent it, she said. This concluded her evidence and the case for SMC Enterprise.

Issues

- [16] The question for determination is simply whether SMC Enterprise has honoured all the invoices from the Joint Venture. Another issue is whether the payments of R828 500 and R258 750.00 paid to Lubisi should be regarded as payments that were meant for the settlement of the debt of SMC Enterprise to the Joint Venture as asserted by SMC Enterprise.

Legal Framework and Application

- [17] SMC Enterprise asserts that it has discharged its liability to the Joint Venture by making payment to one of the parties to the Joint Venture, Lubisi. This is denied by the Joint Venture which is firm that it is still owed an amount of R784 875.00 being the amount of the claim in this matter. The principle that “he who alleges must prove” finds application here. Thus, SMC Enterprise, as the Defendant and by alleging that it has paid, bears the burden of proving that it has done so. In this regard it could be instructive to refer to *Pillay v Krishna and Another*.^[1]

- [18] The argument of SMC Enterprise that the two payments that it has made to Lubisi should be regarded as payments made to the Joint Venture is not sustainable, especially if one has regard to the history of the business transactions between the parties. All amounts that the Joint Venture invoiced were paid in its bank account and not to one of its members. In the second place, the two amounts far exceed the sum the Joint Venture is claiming from SMC Enterprise. SMC Enterprise could not explain, if it had authority to pay to Lubisi, why the amount is far above that claimed by the Joint Venture.
- [19] The evidence of the representatives of the members of the Joint Venture is sensible and this Court should not doubt to accept it. The explanation by both Swanepoel and Pagiwa is that there was an arrangement between the members of the Joint Venture that one of them would be entitled to invoice and receive payment from SMC Enterprise where it alone had done the work. Lubisi rendered service to SMC Enterprise drawing designs for a pump station and engaging in social facilitation. It issued invoices which SMC Enterprise paid.
- [20] How SMC Enterprise can turn around and state that the two amounts, which exceed the claim of this case by more than R300 000.00 was meant for the Joint Venture leaves this Court baffled. Even more staggering is Mathebula's admission that the overpayment is considerable, but SMC Enterprise had not claimed it back and to date it is still not claiming it back. As the Joint Venture has remarked, the e-mail message dated 8 August 2021 by which Mathebula replied to the demand for payment is completely silent on the issue of the overpayment, reinforcing the argument of the Joint Venture that the payments were in full and final settlement of invoices issued by Lubisi.
- [21] The e-mail message subtly intimates that SMC Enterprise was not settling the debt because the South African Revenue Service ("SARS") had selected its account for inspection. When the shoe pinched, Mathebula was quick to say that she did not pen the e-mail message responding to the demand. This was exposed as contrived by the Joint Venture. How could this be when the author of the e-mail message refers to the supposed author in the third person? This is a demonstration that in fact Mathebula is the author even though she would have this Court believe otherwise.
- [22] Mathebula conceded that the issue concerning SARS had been resolved implying that there were no obstacles stopping SMC Enterprise from settling the debt. However, when asked why SMC Enterprise was not paying, she readily admitted that it was unable to do so. I agree with the Joint Venture that this is reminiscent of a party who would hang on anything to delay payment. Settlement of the amount was for invoices issued by Lubisi for work done by it alone. The Joint Venture had nothing to do with it. If there was an agreement that the amount would be paid to Lubisi with the intention that it would be paid over to the Joint Venture, then it would be R784 875.00. The fact that the amount is more than the claimed amount speaks volumes.
- [23] In the result, the claim succeeds, and I make the following order:

1. SMC Enterprise is directed at paying an amount of R784 875.00 to the Joint Venture.
2. SMC Enterprise is liable for payment of interest on the amount of R784 875.00 at the legal prescribed rate of interest reckoned from the date of judgment to the date of payment.
3. SMC Enterprise shall pay the costs of the Joint Venture occasioned by this action.

B A MASHILE

JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the Plaintiff: Adv JGC Hamman Instructed by: Neethling & Vosloo Inc Counsel for the Defendant: Mr Viviers Stander Instructed by: J Terblanche Attorneys Date of Judgment: 22 January 2025

[1] Pillay v Krishna and Another 1946 AD 946.

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