

SOUTH AFRICA / JUDGMENT

Malie NO and Others v Chisa and Others (101188/2015) [2023]

ZAGPPHC 1184 (21 September 2023)

[2023] ZAGPPHC 1184

COURT

North Gauteng High Court, Pretoria

BEFORE

N Davis

CASE / FILE NUMBER

101188/2015

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 101188/2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

21.09.23

In the matter between:

VUSANI FRANCIS MALIE N.O First Plaintiff ANDREW CONWAY GAOREKWE MALUSI N. O Second Plaintiff OPHEMETSE MOGODI N. O Third Plaintiff AVANTHI PARBOOSING N. O Fourth Plaintiff MOTLOGELWE MILTON MATSIPANE N. O Fifth Plaintiff DIRK JOHANNES VAN STADEN N. O Sixth Plaintiff HUGH COLIN CAMERON N. O Seventh Plaintiff MOTLHATLHEDI NELSON MOSIAPOA N.O Eighth Plaintiff WILLEM FREDERICK VAN HEERDEN N. O Ninth Plaintiff YVONNE MFOLO N. O Tenth Plaintiff And SHIPHRA CHISA First Defendant TEDDY MWEWA CHISA Second Defendant HECTOR VERE Third Defendant TUMELO MPOLOKENG Fourth Defendant GIDEON DANIEL VAN TONDER Fifth Defendant DANIE NEL Sixth Defendant ANDRE SKEEN Seventh Defendant RICHARD KEVIN SMITH Eighth Defendant VOLUFON (PTY) LTD Ninth Defendant

Summary: After having obtained judgment against certain co-perpetrators of a scheme whereby bribes had been paid in a corrupt fashion to ensure the award of projects allocated by the Sishen Iron Ore Company Community Development Trust (the SIOC Trust) in 2012 and 2013 and after having reached settlement agreements with certain of the other defendants and having obtained default judgment against the supposed mastermind of the scheme, the plaintiffs' claim against a project director of the Trust, was dismissed. It was found that he had not been part of the scheme and no cause of action had been proven against him.

ORDER

The claim against the third defendant is dismissed, with costs.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] In 2012, a now liquidated company then named Volufon (Pty) Ltd (Volufon) paid bribes in the amount of R4,1 million in order to secure its appointment as a service provider to provide goods and services for learners and teachers with the aim of improving the learners' matric pass rates in certain rural communities. For purposes of renewal of the appointment in 2013, a second bribe of R4,2 million was paid. The trustees of a community development trust, who had funded the projects, have since 2015 attempted to recover the bribes and this judgment relates to the last outstanding recovery attempt, this time from a project director of the trust. The identities of the parties will appear from the summary of facts.

Background

- [2] The Sishen Iron Ore Company (Pty) Ltd (SIOC) operates an empowerment ownership programme as envisaged in the Mineral and Petroleum Resources Development Act 28 of 2002 and the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2018.
- [3] In order to implement this programme, the SIOC created the SIOC Community Development Trust (the SIOC Trust). This trust selects and funds, by way of beneficiary trusts, projects aimed at benefitting communities located in the areas where the SIOC conducts its mining activities. Relevant to this case, were the districts of John Taole Gaetsewe, Thabazimbi and Siyanda districts.

-
- [4] The programme involved the identification and evaluation of projects proposed with the aim of providing and maintaining infrastructure of schools, providing stationery and learning material to learners and teachers, assisting teachers with a view to improve their learners' matric pass rates, providing and maintaining infrastructure to hospitals and clinics and/or to provide assets and equipment to enable those hospitals and clinics to function properly.
- [5] The eleven plaintiffs in this matter were at the time of institution of the action, the trustees of the SIOC Trust. The fifth, sixth, seventh and eighth defendants (messrs Van Tonder, Nel, Skeen and Smith respectively) were the directors and/or controlling minds of Volufon.
- [6] In 2012, amongst many other projects, the SIOC Trust entered into a service level agreement with Volufon, intended to benefit a subsidiary trust, the JTG Trust. In terms of the service level agreement, Volufon had to perform a host of "interventions". These included the provision of mathematics and English training for grades 9 – 12 in 46 schools, the "capacitation" of school management teams, the training of Life Orientation educators, the co-ordination of District Principals' meetings, the supply of 400 scientific calculators, the purchase and provision of 920 mathematical instrument lists, the purchase and supply of 240 EGD instruments, the implementation of parenting programmes to 160 primary and 46 high schools and to "improve the quality of teaching and learning".
- [7] In addition, the specific objectives were to train school management teams on School Development Strategy and effective management, curriculum and financial management, to provide support services in this regard to 46 schools, to carry out a resource inventory to ensure that schools have "all the requirements for good education and sound classroom practice" and to provide motivational interventions and support services to educators and learners.
- [8] The implementation of the project during 2012 was by and large a success, leading to a renewal thereof in 2013, with Volufon then renamed as Augment Skills (Pty) Ltd, by way of a second service level agreement.
- [9] The problems came with the breaches of the clauses in the service level agreements aimed at preventing the use of the funding provided by the SIOC Trust for purposes other than the approved budget and the failing to transfer ownership of all assets acquired via the budgets to the SIOC Trust.
- [10] The total contract price paid out by the SIOC Trust for the 2012 agreement was R34 566 503,45 but for the 2013 agreement, the SIOC Trust had only paid the first 50% before the contract was terminated, being an amount of R 19, 38 million.
- [11] The various breaches of the service level agreements by Volufon were claimed by the SIOC Trust in its Particulars of claim to be the following:
-

“34.1 The ninth defendant used an amount of R4 100 00,00 during 2012 pay bribes to the first, second, third and/or fourth defendants, to ensure that the 2012 service level agreement concerned be awarded to the ninth defendant, which constituted a breach of at least clauses 6.1.1 and 6.1.2 of the service level agreements.

34.2 The ninth defendant used an amount of R4 200 000,00 during 2013 pay bribes to the first, second, third and/or fourth defendants, to ensure that the 2013 service level agreement concerned be awarded to the ninth defendant, which constituted a breach of at least clauses 6.1.1. and 6.1.2 of the service level agreements.

34.3 In a fraudulent scheme to avoid the consequences of the provisions of clauses 9.3 of the service level agreements, the directors of the ninth defendant declared a so-called provisions divided of R5 900 000,00 to the shareholders of the ninth defendant

against possible future profits, which constituted a further breach of at least clauses 6.1.1. and 6.1.2 of the service level agreements.

34.4 As part of the abovementioned fraudulent scheme to avoid the consequences of clauses 9.3 of the services level agreements, the shareholders of the ninth defendant then lent and advanced the amounts so obtained by them to a company known as Volucept (Pty) Ltd, who purchased all of the assets that the ninth defendant was obliged to purchase to comply with its obligations in terms of the said service level agreements.

34.5 The ninth Defendant lent and advanced an amount of at least R4 811 152,00 to Volucept (Pty) Ltd, which constituted a further breach of at least clauses 6.1.1 and 6.1.2 of the 2012 service level agreement.

34.6 During February and March 2013, the ninth defendant spent a further amount of R11 983 185,00 of the budget in terms of the 2013 service level agreement otherwise than in accordance with the obligations contained in the said agreement”.

[12] Clauses 9.3 of both agreements, referred to above, provided that Volufon had been obliged to transfer all assets, principally consisting of vehicles and equipment, to the SIOC Trust upon termination of the agreements. Particularly in respect of vehicles, this had not been done.

[13] Pursuant to the above, the SIOC Trust claimed payment of R37 736 558, 75, being the total of the following amounts as pleaded in its Particulars of Claim:

“36.1 The amount of R4 100 00,00 paid as bribes to the first, second, third and/or fourth defendant during 2012.

36.2 The amount of R4 200 000,00 paid as bribes to the first, second, third and/or fourth defendants during 2013.

36.3 The amount of R5 900 000,00 paid out to the shareholders of the ninth defendant as the so-called “provisional dividend”.

36.4 The amount of R4 811 152,00, lent and advanced to Volucept (Pty) Ltd.

36.5 The amount of R11 983 185,00 that the ninth defendant spend during February and March 2013.

36.6 The amount of R3 313 896,58 that the plaintiffs were obliged to pay to cover the salaries of program staff during the 2013 period.

36.7 The amount of R1 728 325,17 million, being 5% of the 2012 budget, due to the ninth defendant's inability to complete all of the work in terms of the 2012 service level agreement.

36.8 The amount of R1 700 000,00 million, being 5% of the 2013 budget, due to the ninth defendant's inability to complete all of the work in terms of the 2013 service level agreement".

[14] Reliant on the above claims against Volufon, the SIOC Trust obtained a final winding-up order against it on 12 November 2013, on the basis that Volufon was unable to pay its debts.

[15] In the present matter, the SIOC Trust went ahead and also claimed the above amount jointly and severally from the fifth, sixth, seventh and eighth defendants with reliance on section 424 of the Companies Act 61 of 1973[1].

[16] As a second claim, the SIOC Trust claimed the same amounts from the first, second, third and fourth defendants on the basis of delict. The basis for this claim was formulated as follows (in respect of the 2012 contract) in the Particulars of Claim:

"48. During the period January 2012 to July 2012, and at or near Gauteng, the ninth defendant and/or the fifth defendant and/or the sixth defendant and/or the seventh defendant and/or the eighth defendant paid a bribe or bribes to the first defendant and/or the second defendant and/or the third defendant and/or the fourth defendant, in a total amount of R4 100 00,00.

49. The bribe money was paid from the money that the plaintiffs made available to the ninth defendant for purposes of implementing the abovementioned project.

50. The bribe thus paid was intended to reward the first defendant and/or the second defendant and/or the third defendant and/or the fourth defendant for the fact that the ninth defendant was appointed as the person who would implement the project referred to above, and to reward the first defendant and/or the second defendant and/or the third defendant and/or the fourth defendant for the influence that they alleged exercised in ensuring that the ninth defendant be so appointed.

51. The payment of the bribe money by the first defendant and/or the sixth defendant and/or the seventh defendant and/or the eighth

defendant, and the acceptance of the bribe money by the first defendant and/or the second defendant and/or the third defendant

and/or the fourth defendant, was unlawful and intentional.

52. As a result of the unlawful and intentional actions of the first defendant and/or the second defendant and/or the third defendant

and/or the fourth defendant and/or the fifth defendant and/or the sixth defendant and/or the seventh defendant and/or the eight

defendant-

52.1 the plaintiffs appointed the ninth defendant to implement the abovementioned project;

52.2 paid over the amount of R34 566 503,45 to the ninth defendant.

53. As a result of the unlawful and intentional actions of the first defendant and/or the second defendant and/or the third defendant

and/or the fourth defendant and/or the fifth defendant and/or the sixth defendant and/or the seventh defendant and/or the eight

defendant and the consequences thereof as set out above, the plaintiffs have suffered damages in the amount of R37 736 558,75,

calculated as set out above.

54. In the alternative to the preceding paragraph hereof, and as a result of the unlawful and intentional actions of the first defendant and/or the second defendant and/or the third defendant and/or the fourth defendant and/or the fifth defendant and/or the sixth defendant and/or the seventh defendant and/or the eighth defendant and the consequences thereof as set out above, the plaintiffs have suffered damages in the amount of the bribe money concerned, being the amount of R4 100 000,00”.

[17] Similar allegations were made in respect of the 2013 contract with the alternative claim being payment of R4, 2 million.

Procedural history

[18] The matter dragged on for several years before it was referred to this court for case management in June 2019 as a Commercial Court case. This resulted in the implementation of this Court’s Commercial Court Practice Directive. One of the features of this Directive is the delivery of witness statements after the exchange of statements of claim and defence. In respect of the witness statements, the Directive provides that “... it being understood that the witness statements will constitute ... the evidence in chief of the particular witness”. The witness statements in question were delivered during December 2019 and January 2020. These included the witness statements of those witnesses who subsequently testified in open court, being Ms Chisa (the first defendant), Mr Vere (the third defendant) and Mr Skeen (the sixth defendant).

- [19] The trial was specially set down for 10 days and commenced on 27 January 2020. By this time, in addition to the liquidation of Volufon, the seventh and eighth defendants have become sequestered. The SIOC Trust had settled with the first defendant and thereafter relied on her evidence and the evidence of Mr Skeen, the seventh defendant. The second defendant (Mr Chisa) was reportedly conducting business and residing at an unknown address, outside South Africa. The first and second defendants have previously been married to each other but have since become divorced.
- [20] At the conclusion of the SIOC Trusts' case (which ran for more than a week), the third, fifth and sixth defendants applied for absolution against them. The fifth and sixth defendants were legally represented while the third defendant had acted in person. The application for absolution from the instance by the fifth and sixth defendants were refused, which led to a settlement between them and the SIOC Trust respectively. Absolution from the instance was granted in respect of the claim against the third defendant.
- [21] When an application for leave to appeal the order of absolution was refused, the SIOC Trust reverted to the Supreme Court of Appeal, which granted leave to a full court of this Division. That Court, on 24 March 2022 found that there was sufficient evidence at the conclusion of the plaintiffs' case against the third defendant in respect of the bribery claims, upon which a court could or might find in favour of the SIOC Trust. The appeal was therefore upheld and the matter was remitted to the trial court "for completion of the matter".
- [22] At the recommencement of the trial, the third defendant (who, for convenience's sake shall hereafter be referred to as Mr Vere) was legally represented. The trial concluded by way of his evidence. I shall deal therewith hereinafter.

The case against Mr Vere

- [23] On behalf of the SIOC Trust, Adv Wagener SC advanced the argument that Mr Vere was part of the initial negotiations for the payment of a so-called "backhander" by Volufon and that he is therefore in delict jointly and severally liable for all the damages claimed against the other defendants.
- [24] At the conclusion of the trial, Adv Wagener SC based the SIOC Trust's case for the above claim on five "considerations" (as he called them), implicating Mr Vere as a joint wrongdoer. These were (1) the "Randburg meeting", (2) the "Midrand meeting",
- (3) the "Irene meeting", (4) the involvement of Thuthuka Projects and Investments (Pty) Ltd (Thuthuka) and (5) the "payment link". I shall deal with these aspects individually hereunder.

The "Randburg meeting"

- [25] This was a meeting where Mr Chisa, Mr Skeen and Mr Vere were present. Mr Vere had never denied being at the venue with the other two but the dispute is about his participation and what was said. Mr Vere had known Ms Chisa since 2002 when they had studied together (Mr

Vere holds a post-graduate MBL degree). Mr Vere had been introduced to Mr Chisa previously as Ms Chisa's husband but had no friendship or dealings with him. The meeting with Mr Skeen came about coincidentally when Mr Chisa gave Mr Vere a lift and they stopped at a McDonald's eatery in Randburg at the Malibongwe off-ramp from the highway after having visited a Jeep dealership (all this detail was added to Mr Skeen's reference to the meeting by Mr Vere in his evidence).

- [26] After having been introduced to Mr Skeen by Mr Chisa (who apparently had arranged to meet each other), Mr Vere went and sat at the separate table to eat a hamburger, leaving the other two to conduct the business they had arranged to meet about. Mr Vere testified that he had not discussed any bribe with Mr Skeen, that he did not know Mr Skeen and had no cause to prefer Mr Skeen or Volufon in any manner.
- [27] Mr Vere's evidence all along was that his only participation in the set of facts, was as project director for the SIOC Trust. He had also maintained this when cross-examining Mr Skeen. Although there was some dispute as to the commencement of Mr Vere's employment as project director (the formal documentation shows that he was appointed in at least in an acting capacity, as early as in January 2012, while he maintained that he only commenced acting in that position since about middle February 2012), he consistently

maintained that he had no vote or influence over the appointment of service providers or even the selection of projects.

Lastmentioned fell in the domain of the individual beneficiary trusts, in this instance, the JGT Trust. Mr Vere was neither a trustee of that trust nor did he have any direct interest in any of its projects. Mr Vere's job was to ensure that the projects proposed by beneficiary trusts were viable and that the prices were not inflated. Having performed this function, he presented the projects at formal meetings to the SIOC Trust who then takes a vote and appoints service providers. As already

indicated, service level agreements are then entered into between the SIOC Trust (and not the individual beneficiary trusts) and the service providers. Mr Vere played no part in all this and had no power to influence the process.

- [28] Despite Mr Vere's version of his limited participation on the meeting, much was made by Adv Wagener SC about the fact Mr Vere had in his in-person cross examination of Mr Skeen conceded that he had "met" with him at the Mc Donalds. Similarly, much emphasis was put by the full court on this fact in the appeal against the granting of absolution from the instance, in which appeal Mr Vere has not participated. The full court, in par 10 of its judgment found that, seeing that Mr Vere had not denied his presence at the meeting, the dispute as to the date of the meeting was irrelevant. Whilst this might be correct, the fact of the matter is that once he had an opportunity to testify, Mr Vere maintained that although he had met Mr Skeen at the meeting, he thereafter enjoyed a meal at a separate table and did not partake in any discussion between Mr Chisa and Mr Skeen. The long debates elicited by Adv Wagener SC in cross-examination about the use of the word "met" as opposed to "met

with” did not take the matter further. Mr Vere steadfastly stuck to his version. The reference to his presence by the full court was, of course, made before Mr Vere had testified and could at best have been a factor in deciding whether a court “could” hold him liable, based on the evidence at the end of the SIOC Trust’s case, but not at conclusion of the trial. I shall deal with this aspect finally when considering the credibility of witnesses hereinlater.

The Midrand meeting

[29] Mr Skeen’s version of a second meeting with Mr Chisa where Mr Vere was again implicated, was completely denied by Mr Vere. There is no corroboration of Mr Skeen’s version which I shall also deal with more fully hereinlater.

The Irene meeting

[30] The full court referred to evidence of Mr Skeen that, at a meeting of a committee of the SIOC Trust on 14 February 2012, after Volufon has submitted its proposal, Mr Vere informed Volufon’s directors that although he could not guarantee that Volufon would win the tender, he could ensure that it did not. In the judgment on absolution, I have already dealt with the unsatisfactory nature of Mr Skeen’s evidence. Added to this is the fact that the full court had at the time it heard the appeal (and Adv Wagener SC’s argument at that time), not had the benefit of Mr Vere’s evidence. It also relied on what Ms Chisa had said in examination by Adv Wagener SC on this point, namely that Mr Vere had to vet projects and could thereby exclude them. She, however said this on prompting from Adv Wagener SC and did not otherwise implicate Mr Vere.

[31] On this aspect, Mr Vere’s evidence regarding the process of approval of a project (and a contractor) accorded with that contained in his witness statement delivered in January 2020 already. As Mr Vere’s witness statement and his corroborating evidence have not featured before in these proceedings and also to contrast this with what had been considered by the full court, as this court is now obliged to do at the conclusion of the trial, I find it necessary to refer rather extensively to the following extract from his witness statement:

“The role of the projects director

18. The role of the Projects Director is detailed in the 2012 advertisement for a new Projects Director (see HV 2 attached).
19. The Projects Director was also responsible for being a spokesperson for the Projects Review Committee.
20. The projects Director was an invitee to the SIOC-cdt Board meeting to present Projects status, Funding budgets and present projects for final approval by the Board as recommended by the Projects Review Committee. Board minutes highlighting this fact are attached (see HV 3).

21. In the case of the District Academic Performance Improvement Projects, the Projects Director was responsible for executing the mandate of the board, implementation of the approved Project Plan, liasing with all service providers to ensure that they meet set deadlines, recruitment of staff for the Project and liasing with the department of education to ensure that they submit all approvals.

SIOC-cdt Project Funding Approval Process

22. The Project Funding Approval process was as follows:

22.1 Beneficiary applies for funding at a beneficiary Trust in their area or in the area they intend to implement the project.

22.2 Beneficiary Trusts follow their internal governance and approval processes.

22.3 Only projects for funding approved by the Beneficiary Trust Boards are then presented by the Beneficiary Trust CEO's to the Projects Review committee for approval.

22.4 No project Funding was considered by the Projects Review Committee if they were not approved by the Beneficiary Trust Board and respective Board Resolutions had to be presented.

22.5 Approved Projects for funding by the Projects Review Committee would be referred to the Sioc-cdt Board for approval.

22.6 SOIC-cdt Board then approves or declines funding for a project.

The appointment of the ninth defendant

23. On 1 February 2012, at Misty Hills Hotel in Muldersdrift, a representative of the Northern Cape Provincial Department of Education, Mr Teise, gave a presentation at a meeting of the Board (see HV1).

24. Mr Teise's presentation concerned the challenges faced by schools in the John Taolo Gaetsewe municipality. He made the presentation with a view to obtaining funding from the Trust to help in addressing the challenges. After hearing the presentation, the Board resolved that "management" should propose "interventions" at the Board meeting scheduled for March.

24.1 The Trust's Projects Review Committee was scheduled to hold a meeting on 14 February 2012.

24.2 In anticipation of the meeting, and as was standard practice, the JTG Trust gave members of the Projects Review Committee several documents relating to projects the JTG Trust sought to have ultimately considered by the Projects Review Committee for final approval by the Trustees, including the Augment Skills Project.

25. In paragraph 7 of Mr Malie's witness statement, an attempt is made to explain "the procedure followed within the Trust" leading to the Trustees' abovementioned approvals.

26. Mr Malie's explanation is, inaccurate and incomplete, it is necessary for me to make statements concerning the Trust's project-approval procedure at the relevant time.
27. It is also worthwhile to indicate that the plaintiff's main witness Mr Malie was not involved with the Trust in any capacity at the time the ninth defendant was appointed, thus his statement is mainly based on the Nkonki report, Mr Levin's statement and other evidence the plaintiff got.
28. The appointment process of the ninth defendant as a service-provider to implement the Project, was as follows:

28.1 On 1 February 2012, at Misty Hills Hotel in Muldersdrift, a representative of the Northern Cape Provincial Department of Education, Mr Teise, gave a presentation at a meeting of the Board of Trustees.

28.2 The meeting was attended by inter alia several trustees, the third defendant, and the chairperson of the board of trustees of the JTG Trust, being Ms C Mogodi.

28.3 Ms Teise's presentation concerned the challenges faced by schools in the John Taolo Gaetsewe municipality. She made the presentation with a view to obtaining the Trust's help in addressing the challenges. After hearing the presentation, the Trustees resolved that "management" should propose "interventions" at the Trustees' meeting scheduled for March.

28.4 The Trust's Projects Review Committee was scheduled to hold a meeting on 14 February 2012.

28.5 In anticipation of this meeting, and as was standard practice, the JTG Trust gave members of the Projects Review Committee several documents relating to projects the JTG Trust identified and ultimately approved by the Trustees, including the Project.

28.5.1 During the Projects Review meeting a Mr Choche from JTG Trust, presented Sangari's proposal to the Projects Review Committee (see item 4.4.3.1 of the minutes).

28.5.2 Mr Levin, of the ninth defendant, presented the ninth defendant's proposal to the Projects Review Committee (see item 5.1 of the minutes).

28.5.3 The Projects Review Committee unanimously resolved that the presentation could also be done "at board level" (see item 5.2 of the minutes).

28.6 After the projects Review Committee meeting, and on 7 March 2012, the Trustees held a meeting at Kumba Resources' offices in Centurion. The existence and content of the meeting is evidenced by the minutes of the meeting (see HV 3).

28.7 Although I was not a trustee, and although I did not have a voting right at meetings of the Trustees, I also attended the meeting as an invitee of the Board in my capacity as the Acting Project Director.

28.8 I made the presentation, and discussed the report, as spokesperson of the Projects Review Committee.

28.9 In engaging with the Board on 7 March 2012, the Projects Review Committee submitted many new projects to the Trustees for approval.

28.9.1 A proposal by the ninth defendant to implement the project. A copy of this document is contained in pages 77 to 107 of the trial bundle.

28.9.2 The proposal was accompanied by a document authored by the JTG Trust, which document supported the ninth defendant's proposal. A copy of this document is attached hereto marked "HV 4".

28.10 The board approved the project as follows:

28.10.1 Approved the Project "subject to the [Trustees] being provided with an implementation plan and subject to the appointment of a project manager and an education specialist" (item 8.2.4.3.1 of the minutes, page 1102 of the trial bundle).

28.10.2 Form a sub-committee to "receive feedback from management on the proposed implementation plan and way forward" (item 8.2.4.3.2 of the minutes, page 110 of the trial bundle). This sub-committee was subsequently known as the "Education

Sub-Committee". It should be noted that I attended meetings of this committee to give feedback to the Sub-Committee on the implementation plan and the Service provider performance for 2012 as Acting Projects Director; that I had no voting rights on the Education Sub-Committee.

28.10.3 "Finalise the matter" by way of a conference call or round-robin resolution (item 8.2.4.3.1 of the minutes, page 1102 of the trial bundle).

29. The Trustees noted that "management must ensure that Augment is the correct supplier and follow the proper procurement processes in appointing a supplier, as the project was significant in value" (item 8.2.4.3.3 of the minutes, page 1102 of the trial bundle).

29.1 "Management", in this context, refers to the Projects Review Committee.

29.2 The Projects Review Committee duly compiled an implementation plan hereafter.

29.3 The following information in the implementation plan is important to note:

29.3.1 The implementation plan was prepared for, and submitted to, the Board pursuant to the meeting of Trustees of 7 March 2012.

29.3.2 Pursuant to the abovementioned meeting, Ms Nokuhle Mkele was appointed as the Project Manager and Prof Marina van Loggerenberg was appointed as the Education Specialist.

29.3.3 I facilitated the formulation of the implementation plan as directed by the Board.

29.4 On 22 March 2012, the Education Sub-Committee met to consider the Project and the implementation plan in particular.

29.5 The Education Sub-Committee- recommended to the Board that they approve the project and that they approve the ninth defendant and Sangari as service-providers to implement the project.

29.6 Thereafter, by way of a round-robin resolution, the Trustees duly granted their approval of the Project and the proposed service providers to implement the project.

29.7 After the Board approved the project and approved inter alia in the ninth defendant to implement the Project, the Trust concluded the 2012 SLA with the ninth Defendant.

30. Having explained the procedure followed by the Trust, I return to paragraph 7 of Mr Malie's witness statement.

30.1 It is here stated that "proposals were elicited from interested parties".

31. With respect, the statement is incorrect.

32. The proposal for the Project was put forward (not "elicited") by the JTG Trust (not "interested parties").

33. It is then stated that I played an "influential role" in the Projects Review Committee.

34. With respect, the statement is incorrect.

35. I had a very limited "role" in the Project Review Committee. This is most clearly evidenced by the Projects Review Committee's Terms of Reference, a copy of which is annexed hereto marked "HV5". I refer to the following parts of the terms of reference in particular:

35.1 The objective of the Projects Review Committee is to assist the Trustees in the fulfillment of its obligations relating to the assessment of projects that are recommended by Beneficiary Trusts to the Trustees. (See paragraph 2).

35.2 Paragraph 4.3 states: "The Chief Executive Officer and the Projects Director of the Super Trust may be in attendance at the meetings of the Committee, but by invitation only, and they shall not have a right to vote and shall not be counted for purposes of a quorum" (emphasis added).

35.3 It is therefore clear on the face of the Terms of Reference of the Projects Review Committee that I had very little "influence" in this committee. While I have acted as its spokesperson, I had no voting right and I could not influence its decisions.

36. Paragraph 7 of Mr Malie's statement states that, "without the recommendation of the first and third Defendant, the Trust would not have appointed the ninth Defendant". This statement is reiterated in paragraph 68 of Mr Malie's statement, where it is declared that "the first defendant and the third defendant were the officials of the Trust that has a major influence in the award of the contract to the ninth defendant".

37. With respect, this statement is incorrect:

37.1 First, while I presented Projects for funding for approval to the Board of Trustees for approval, the “recommendation” came from the Projects Review Committee – not from the “first and third defendant”. Second, the Projects Review Committee made a recommendation to the Board. The Board were not obliged to follow the recommendation. It was their right and fiduciary duty to consider the recommendation – and to consider all other relevant information – and then to decide independently whether to appoint the ninth defendant.

37.2 Finally, the Board (i.e. the plaintiffs themselves) were the “major influence” in the award of the contract to the ninth defendant.

38. In conclusion of the foregoing, there is no basis to plaintiffs’ suggestion that I unduly influence the Board in deciding to approve the project and in deciding to appoint the ninth defendant to implement the project”.

[32] As can be seen from Mr Vere’s witness statement, which he has confirmed in his oral evidence (in addition to its status in terms of this Court’s Commercial Court Directive) he furnished extensive detail of the process and his involvement therein. His criticism of Mr Malie is also justified and the plaintiffs had not presented any direct evidence contradicting that of Mr Vere. In my view, this evidence refutes the “teeth” which the full court has found to have existed in Mr Skeen’s evidence.

[33] Similarly, I find that little weight can be attached to Mr Skeen’s evidence that Mr Vere had been “represented” by Mr Chisa at a later (second) meeting, again at a McDonalds fast food establishment (the “Midrand meeting”). Insofar as the full court had referred to the fact that invoices which had been sent and which has apparently been discussed at that meeting, had been paid, none of these invoices emanated from Mr Vere and there is no evidence at all that he had been linked to or were instrumental in the creation of these invoice or in fact, that he had any knowledge thereof at the time.

The involvement of Thuthuka and the payment link

[34] The documents showed that funds had indeed been paid by Volufon to Thuthuka and the plaintiffs argued that there is a “payment link” to Mr Vere. Regarding the documentary evidence relied on by the SIOC Trust, this was considered by the full court in paragraphs 15 to 18 of its judgment. In this regard, the full court found as follows: “... the uncontested evidence of Mr Ferreira, a forensic accountant, shows the flow of money form the appellants [the SIOC Trust] to Volufon and from Volufon to various entities who were the recipients of the bribe. It is quite correct that there is no actual proof that the respondent himself [Mr Vere], received any bribe money, however what the evidence does show, is the flow of money and the documents indelibly link the respondent [Mr Vere] to the flow of funds and the bank accounts that were used to move the money” (my underlining, to also facilitate a reference to the absence of documentation as dealt with in paragraph 46 hereunder).

[35] Now, having subsequently heard the evidence of Mr Vere and having reached the end of the trial at the conclusion of his defence, can it still be said that he was “indelibly” linked to the account in question, which was that of Thuthuka? I think not. I set out my reasons for this answer below.

[36] The two documents in question providing “the link” were copies of Mr Vere’s identity document and a municipal account. These two documents were apparently obtained by the SIOC Trust from Standard Bank under a duces tecum subpoena. No evidence was led about the relevance of the documents and no explanation could be given as to why these documents were related to the request for the documents concerning Thuthuka’s account.

[37] The director of Thuthuka was disclosed by Mr Vere to be one Patrick Phosa, a person he did not know. Mr Vere was never a director

or shareholder of Thuthuka. The account must have been open in 2012 already, as that was when at least R4 million of the R4.1 million “bribe” in respect of the 2012 contract had been paid by Volufon to Thuthuka yet Mr Vere testified that his identity document (ID) was only issued to him in 2014 and he, in the witness box, produced the original from his wallet to confirm this. This corresponds to the copy of his ID contained in the trial bundle of the SIOC Trust[2]. This two year anomaly was left unrefuted by the plaintiffs.

[38] It seems that the SIOC Trust, apparently aware of these shortcomings, wanted to boost its case insofar as documentary evidence goes. It sought to do so by discovering documents which had neither featured in its case before its closing nor before the full court on appeal. The full court had handed down judgment on 24 March 2022. Almost a year to the date later, the SIOC Trust delivered a supplementary discovery affidavit to Mr Vere’s erstwhile attorneys of which a signed copy was only uploaded onto the court file on 27 March 2023. Yet another two documents were discovered and similarly delivered on 17 April 2023, that is less than 10 court days prior to the recommencement of the trial. This was done despite Mr Vere’s current attorneys having been on record since 13 April 2023.

[39] The upshot of the above was that neither Mr Vere, nor his current attorneys, nor his counsel were aware of these documents until such time as counsel for the SIOC Trust introduced them by way of an announcement of an intention to use the documents on the second day of Mr Vere’s cross-examination. These documents also did not feature in any witness statement delivered by the SIOC Trust. Clearly this amounted to trial by ambush.

[40] Counsel for the SIOC Trust claimed that the documents were of crucial importance, constituting a proverbial “smoking gun”. The documents, when taken at face value, showed the flow of some funds (not the full R4.1 million) from Volufon via Volucept to Thuthuka and from there to a conveyancing attorney’s trust account as part payment of the purchase price of an immovable property, later registered in the name of a trust of which Mr Vere and Ms Khumalo were the trustees.

- [41] The trial by ambush issue and the relevance of the documents to the determination of the issue to be decided was extensively and vehemently debated, while Mr Vere was excused from that part of the proceedings. In the end and, in order to avoid a postponement and that the matter became part-heard, Mr Vere and his counsel opted to deal with the documents and face them head-on, without attempting to procure other witnesses. The only way this could be achieved in a manner to avoid further prejudice to Mr Vere, was to allow him to deal with the documents afresh in chief examination and to not only let him face them in cross-examination for the first time. The SIOC Trust's counsel consented to this arrangement. Cross-examination was therefore halted and Adv Wills led Mr Vere on these documents as if in chief examination.
- [42] Mr Vere made no attempt to discredit the documents and accepted that they all were what they purported to be. The documents indeed showed the acquisition of an immovable property in Floracliff, Gauteng. This acquisition was confirmed by a written signed offer to purchase, dated April 2012. At that time Mr Vere and Ms Khumalo were not married nor romantically involved with each other. Ms Khumalo was actually at the time married and only got divorced from her then husband a year later on 30 April 2013. She and Mr Vere however had a child together from a previous relationship in 2008. They were also partners in a business Camith Investments. The decision at the time was to diversify the business. The property was purchased with the intention to run it as a bed and breakfast venue by Ms Khumalo. The property was to be registered in the name of a trust, the Magwinhi Munckins Property Trust. Letters of authority had been issued to the trustees by the Master on 25 April 2012. The trustees were Mr Vere, Ms Khumalo and an independent trustee, iProtect Trustees (Pty) Ltd, represented by a Mr Velosa. The beneficiaries were Mr Vere, Ms Khumalo and their child.
- [43] The arrangement between Mr Vere and Ms Khumalo was that they would go into the Floracliff bed 'n breakfast venture on a 50/50 basis. The purchase price was R3,4 million of which Ms Khumalo would put in R2,1 million and Mr Vere the balance of the purchase price together with all the costs of refurbishment and furniture being for his account to make up his equal contribution. The source of Mr Vere's contribution was from other unrelated investments of his. He was, until the late discovery of documents by the SIOC Trust, unaware of the actual source of Ms Khumalo's contribution. He only knew at the time that she had other business interests. When the "Hawks" had investigated the matter back in 2017, the investigating officer told Mr Vere that Ms Khumalo had received R2 million from Volufon and paid this money towards the property. The investigating officer did not give Mr Vere any further particulars. Upon hearing of this allegation, Mr Vere confronted Ms Khumalo as by that time they had gotten married on 15 August 2014. Her answer did not satisfy him. She had apparently said that she had no restraint of trade binding her and that she could do business "with anyone". This upset Mr Vere as, since having become project director (having previously done human resources work for the SIOC Trust), he had been at pains not to get involved in other business or work. He said this would only create "political

problems". He therefore felt betrayed in his attempts at avoiding conflicts of interest and "filed for divorce" soon thereafter.

- [44] The divorce was a torrid affair which dragged on until a final settlement was reached in February 2022. In terms of the settlement, the Floracliff property would be sold, 25% of the proceeds would be retained in the Magwinhi Munchkins Property Trust for the minor child and the remaining 75% of the proceeds would be divided between Mr Vere and Ms Khumalo. A second property owned by them in Bulawayo, Zimbabwe, would also be sold and the proceeds be divided equally between them. In the end, Ms Khumalo "took" the whole of the Bulawayo property in lieu of her portion of the Floracliff property. The intention achieved thereby was that she would in that fashion "get back" what she had put into Floracliff property. Mr Vere thereby not only terminated all ties with Ms Khumalo but also with the monies she had initially contributed to the Floracliff property, whatever the source thereof was and, according to Mr Vere, irrespective of the correctness of whatever the Hawks investigating officer had told him or not.
- [45] In cross-examination an attempt was made to indicate that more than the initial R2 million contribution to the Floracliff property by Ms Khumalo was paid by Thuthuka. Whilst it is indeed correct that there were two payments made to the attorneys who also acted as transfer attorneys (R2 million on 25 April 2012 and R1 million on 15 May 2012) the bank statement used by Adv Wagener SC for this purpose, also indicated in respect of the second payment a corresponding deposit into the account of Thuthuka, emanating from a deposit by Phutha-Phuthang, which had nothing to do with the "bribe" payment or with Volufon.
- [46] I must say that the cross-examination of Mr Vere devolved into an extra-ordinary affair. Many a question became a statement of a set of facts, from which Adv Wagener SC drew an inference and insisted that Mr Vere agree therewith. Mr Vere remained steadfast in his denial of participation in any solicitation of bribes, denial of actual knowledge of bribes at the time and a denial of knowledge of any tainted funds possibly having ended up in the Floracliff property. Mr Vere, when being confronted with the newly discovered documents, made concessions which needed to be made regarding the entries reflected therein. There was, however no evidence binding him personally to any of those entries. This accords with the finding of the full court quoted in paragraph 34 above.
- [47] Insofar as the 2013 bribe is concerned, there was also, even before the matter came before the full court, no evidence linking him at all to the 2013 bribe. Mr Ferreira (the forensic expert) had also not linked Mr Vere in his report to either the 2012 or the 2013 bribe. Mr Ferreira actually did not even deal with the Floracliff purchase at all. What is also important to understand, is that Mr Malie, who deposed to the SIOC Trust's principal affidavit, was merely an after the fact witness, placing the SIOC Trust's case before the court as it were, but with no actual own knowledge of the facts. He only became a trustee long after the events. The contents of his statement, unless otherwise corroborated, amounts to inadmissible hearsay evidence.

[48] So what, after having heard all the permissible evidence, actually linked Mr Vere to the “bribery claim”? Only the evidence of Mr Skeen, involving meetings with Mr Chisa. Mr Chisa has since fled the country and has not participated in the trial or filed a witness statement. Ms Chisa, with whom the SIOC Trust had reached a secret settlement and who had testified, had not implicated Mr Vere.

[49] To a large extent, the case then depends on the evaluation of the evidence of Mr Skeen and Mr Vere. In the judgment at the

conclusion of the SIOC Trust’s case, I have, with reference to Ruto Flour Mills (Pty) Ltd v Adelson[3] found that the evidence of Mr Skeen regarding Mr Vere’s alleged participation in the scheme to be “unconvincing” and “too vague and contradictory to serve as proof of the question in issue” (to use the words in Ruto Flour Mills). Having reviewed his evidence and my notes about his evasive demeanour in court and his resorting to vague generalities, I remain of the same view.

[50] Mr Vere however, has grown in stature as a party and as a witness since he has in person participated in the initial part of the trial. Since before action had been instituted and since the forensic investigation leading to the “Nkonki-report” on which Mr Ferreira had based his investigations and since the criminal investigation by the Hawks, there had been numerous opportunities for Mr Vere to have “adjusted” his position if he had wanted to. He had done nothing of the sort. Even his divorce settlement was intended to divest him of any possible benefit which may have been obtained by Mr Chisa and Ms Khumalo or any of the other defendants.

[51] But it is actually as a witness that Mr Vere had impressed this court. He gave his evidence, whether in chief or in cross-examination, in a clear and forthright manner. He did not fudge his answers and made concessions when he was reasonably expected to do. He did this despite having been criticised for how he, as lay person, had conducted cross-examination and even in the forthright manner in which he faced the virtual trial by ambush by belated discoveries by the SIOC Trust. I find him to have been a credible witness.

[52] In the final analysis then, I find that the SIOC Trust had not proven its case against Mr Vere as quoted from its pleadings in paragraph 16 above. I also find no reason why costs should not follow the event.

Order

[53] The following order is made:

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 24 and 25 April 2023

Judgment delivered: 21 September 2023

APPEARANCES:

For the Plaintiffs:

Adv S D Wagener SC

Attorney for the Plaintiffs:

Weavind & Weavind Inc., Pretoria

For the Third Defendant:

Adv R Willis

Attorneys for the Third Defendant: Simon Senosi Attorneys, Johannesburg

c/o DD Nkhwashu Attorneys, Inc., Pretoria

[1] This section provides as follows: “(1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner

aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct. (2)

(a) Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to the declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him or any company or person on his behalf or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may from time to time make such further orders as may be necessary for the purpose of enforcing any charge imposed under this subsection. (b) For the purposes of this subsection, the expression 'assignee' includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the matters on the ground of which the declaration is made. (3) Without prejudice to any other criminal liability incurred, where any business of a company is carried on recklessly or with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence. (4) The provisions of this section shall

have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is made”.

[1] This section provides as follows:

“(1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner

aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.

(2)

- (a) Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to the declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him or any company or person on his behalf or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may from time to time make such further orders as may be necessary for the purpose of enforcing any charge imposed under this subsection.
- (b) For the purposes of this subsection, the expression 'assignee' includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the matters on the ground of which the declaration is made.
- (3) Without prejudice to any other criminal liability incurred, where any business of a company is carried on recklessly or with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence.
- (4) The provisions of this section shall have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is made”.

[2] Caselines 034 – 956

[3] 1958

-
- (4) SA 307 (T) at 309 D – G, with reference to *Gascoyne v Paul & Hunter* 1917 TPD 170 at 172 (Ruto Flour Mills)
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2023/1184.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/malie-no-and-others-v-chisa-unknown-topic-agpphc-2023>

Prepared on 12 October 2026 · Esheria