

SOUTH AFRICA / JUDGMENT

Marce Projects (Pty) Ltd and Others v City of Johannesburg Metropolitan and Others (33291/2019) [2021] ZAGPJHC 138 (3 August 2021) [2021] ZAGPJHC 138

COURT

South Gauteng High Court, Johannesburg

BEFORE

Siwendu

CASE / FILE NUMBER

33291/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, JOHANNESBURG)

CASE

NO: 33291/2019

NOT

REPORTABLE

NOT

OF INTEREST TO THEIR JUDGES

NOT

REVISED

DATE:

3 AUGUST

2021

In

the matter between

MARCE

PROJECTS

(PTY) LTD

First

Applicant

MARCE

FIREFIGHTER

TECHNOLOGY (PTY) LTD

Second

Applicant

FIRE

RAIDERS
Third
Applicant
And
CITY
OF JOHANNESBURG METROPOLITAN
First
Respondent
TFM
INDUSTRIES (PTY)
LTD
Second
Respondent
EXECUTIVE
MAYOR OF CITY OF JHB METROPOLITAN
Third
Respondent

JUDGMENT

- APPLICATION FOR LEAVE TO APPEAL

Siwendu J

[1] I have carefully considered the argument advanced and the application for leave to appeal by the applicant (second respondent a quo). The applicant appeals against paragraphs 7, 8, 9 (b), (c) and (d) and 12 and 13 of the Court's Order of 29 March 2021, revised on 12 April 2021. The application proceeded unopposed.

[2] The applicant takes issues with Court's Orders for:

[2.1] The forfeiture of profits, dividends or bonuses if any paid to its shareholders and/ or directors arising from the invalid contract. [emphasis added]

[2.2] The forfeiture of 15% of salary increases paid to its directors arising from the contract. I refer to the above two orders as the disgorgement orders.

[3] The applicant also takes issues with Court's Orders for:

[3.1] An independent verification of information about the payments made and already disclosed to the Court in terms of a previous Court Order dated 2 June 2020; and

[3.2] The order for the further disclosure and independent verification of any other profits and or dividends and bonuses paid to its shareholders and directors; and

[3.3] The disclosure of the applicant's financial statements, management accounts for the relevant financial year. I refer to the orders in paragraphs 3.1 to 3.3 as the disclosure and independent verification orders.

- [4] Even though the issue was not canvassed at the hearing of the application for leave to appeal, the applicant also takes issue and appeals against the order referring all the affidavits filed on its behalf and on behalf of the City for investigation of a charge of perjury to the National Director of Public Prosecution (NDPP), as well as the costs order against it.
- [5] Prior to dealing with the merits of the application, I observe that the applicant launched this application on or about 20 April 2021. Despite confirming that it abides by the Court Orders for the delivery of the vehicle units already paid for by the City as well as the order for the applicant to file an affidavit and table a report by an independent auditor, confirming the delivery and compliance, the Applicant failed to:
- a) comply with the Court Order.
 - b) timeously apprise the Court of its inability to comply; and/ or,
 - c) seek a variation of the time frames or apply for the condonation for the failure.
- [6] Instead, on the day of the hearing of the application on 23 July 2021, the applicant brought to the Court's attention an affidavit by Mr Mhlwana, who is cited as "the CEO designate" of the applicant. The affidavit was filed on 22 July 2021 but not brought to the Court's attention until the morning of the hearing. It has a bearing on the application for leave to appeal. The nub of the issues in the appeal concern the remedial powers of the Court following an order of an invalidity of a tender.
- [7] Mr Mhlwana belatedly advises that Court that Mr Savage and Mr Else who were Chief Executive

Officer and Chief Financial Officer of the applicant left the employ of the applicant with effect from 31 March 2021. I pause to mention that the orders appealed against substantially affect these erstwhile officers of the applicant. They oversaw the conclusion of the contract with the City and the applicant's approach to this litigation. They had filed various affidavits, made certain averments in opposition.

- [8] Significantly, Mr Mhlwana claims that the applicant was not able to purchase part of the components required to complete the manufacture of the vehicles because the City owed the applicant monies for services rendered in respect of the maintenance and repair contract. I understand from the papers that the maintenance and repair contract

though linked with the award of the tender to the applicant, is a separate contract from what is at issue in the appeal.

- [9] Central to the application for review, the Court orders dated 2 June 2020 and 29 March 2021 (as varied) are undisputed upfront payments made by the City to the applicant for the units of vehicles. On the papers, the pre payments for the manufacture of the units of vehicles were made separately from the maintenance and repair contract.

- [10] In addition to the above, the Court had expressed concerns about a dissipation of public funds paid over upfront to the applicant throughout. The applicant and the City failed to perform and or enforce the contractual terms pertaining to the presentation of the performance guaranteed for the contract. The attempt by the Court to address the issue in the order dated 2 June 2020 was thwarted by yet another application for leave to appeal by the applicant.
- [11] The main issue raised by Mr Budlender SC in the appeal concerns the appropriateness of the disgorgement orders and the parameters for granting them. I agree with Mr Budlender SC, that the question has significant public procurement law implications. I also agree that on the face of it, those aspects of the order are crafted in final terms and or language. I also agree that the legal frame work for doing so is not clearly defined.
- [12] Nevertheless, the disgorgement orders must be read holistically in the context of the commercial exigencies, the approach by the applicant, and the power conferred on the court to creatively craft a remedial remedy. These disgorgement orders are linked inextricably with the Court orders for the full disclosure and independent verification of the gains if any as well as the orders for the delivery of the vehicles. The applicant has failed to comply even with those aspects of the orders it purportedly agrees with.
- [13] Whether a Court of first instance, confronted with practical considerations and its assessment of particular risks in the litigation is bound to follow the sequence and approach by the Constitutional Court in *All Pay* also arose during argument. I am of the view that the sequence in *All Pay* does not confine or bind the discretion of a Court of first instance.
- [14] By virtue of the sequence deliberately chosen by the Court, the applicant was invited to demonstrate that it is indeed bona fide and that the disclosures it had already made following the order of 2 June 2020 were independently verifiable. In addition, the applicant was invited to voluntarily make any further and additional disclosures of the gains and to confirm these by a presenting Audited Financial Statements and Management Accounts to the court. It is the Court's view that by failing to do so, and by this appeal, the applicant declines accountability placed on it. It declines the requisite scrutiny by the court.
- [15] Implicit in the order for the delivery of the vehicles, as well as the disclosure, independent verification and reporting orders is that the Court retained an ongoing supervisory role over the compliance with its Court Order both by the applicant and the City. Full accounting to it was to be made within 5 days after compliance, almost contemporaneously, for the Court to consider the veracity of the audited financial reports and determine the next steps once all the information was placed before it.
- [16] I am of the view that the applicant cannot cherry pick aspects of the Court Order it does not like. The Court Order must be considered as a whole. Full financial disclosure is an inherent part of the remedial relief.

[17] Given that the applicant declines the full financial disclosure, has not complied with the court order, the appropriateness of the disgorgement cannot be determined. The question cannot be determined as an academic exercise and/or in the air.

[18] For these reasons, I decline the application for leave to appeal.

Accordingly, I make the following order:

- a. The application for Leave to Appeal is dismissed;
- b. The applicant is directed to comply with the Court Order and to present the requisite information for the further direction and conduct of the matter.

T SIWENDU

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and the time for the hand-down is deemed to be 10h00 on 3 August 2021

Date of hearing:

23 July 2021

Date of judgment:

3 August 2021

Appearances:

Counsel for the Applicant/

Second Respondent a quo:

Mr Steven Budlender SC, withhim Mr Louis Hollander

Attorneys for the Applicant/

Thomson Wilks Inc

Second Respondent a quo

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