

SOUTH AFRICA / JUDGMENT

Multiminds 186 CC t/a Cooling Solutions v E'tsho Civils (Pty) Ltd and Another (3023/2019) [2020] ZAFSHC 40 (28 February 2020)

[2020] ZAFSHC 40**COURT**

Free State High Court, Bloemfontein

BEFORE

Chesiwe

CASE / FILE NUMBER

3023/2019

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

Source record**IN****THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN****Case number:**

3023/2019

In

the matter between:

MULTIMINDS

186 CC

T/A

COOLING SOLUTIONS

Applicant

and

E'TSHO

CIVILS (PTY) LTD

First

Respondent

MEC

FOR SPORTS, ARTS, CULTURE AND

RECREATION,

FREE STATE PROVINCE

Second Respondent

CORAM:

CHESIWE, J

HEARD

ON:

24 OCTOBER 2019

JUDGMENT

BY: CHESIWE, J

DELIVERED ON: 28 FEBRUARY 2020

[1] This is an opposed application in which the applicant seeks the following relief:

“1. The first Respondent is ordered to issue and certify or cause to issue and certify payment certificates under contract numbers SCM – INFR 02/2014 (Soutpan); SCM – INFR 03/2014 (Smithfield) and SCM – INFR 04/2014 (Luckhoff) relating to additional work, preliminaries and generals, monthly progress meetings and transport in favour of the Applicant over the period of 04 September 2015 and 13 May 2016.

2. In the alternative to 5.1 above, the Second Respondent is ordered to take all the steps necessary to issue and certify and or cause to issue and certify payments certificates under contract numbers SCM – INFR 02/2014 (Soutpan); SCM – INFR 03/2014 (Smithfield) and SCM – INFR 04/2014 (Luckhoff) relating to additional work, preliminaries and generals, monthly progress meetings and transport in favour of the Applicant over the period of 04 September 2015 and 13 May 2016.

3. The First Respondent and/or the Second Respondent to pay the costs of the application.”

THE PARTIES

[2] The Applicant is Multiminds 186 CC t/a Cooling Solutions (Registration 2006/221286/23), a close corporation, duly registered and incorporated with registered business address at 128 George Street Kimberley, Northern Cape and main place of business is situated at Phillip Fourie Street, New East End, Bloemfontein Free State.

[3] The First Respondent is E'Tsho Civils (PTY) LTD (Registration number 2015/084173/07), a private company duly registered and incorporated, with registered business address at 2nd Floor Pretty Gardens Lifestyle Centre, Langenhoven Park, Bloemfontein, Free State.

[4] The Second Respondent is the Member of the Executive Council for Sport, Arts, Culture and Recreation, Free State Province. The principle business is at HOD Building, Sport and Recreational Grounds, Free State Psychiatric Complex. The Second Respondent exercised executive authority in terms of section 125(2), read with section 125 (1) of the Constitution of the Republic of South Africa, Act 108 of 1996, and co-ordinates the functions of the Department in accordance with the provisions of section 125(2)(e) of the Constitution.

[5] The background on this matter is that during August/September 2015 the Second Respondent appointed Machabachaba Constructions for construction of new library buildings in various towns in the Free State, that is Smithfield, Soutpan and Luckhoff. Machabachaba through its General Contract Manager, Mr Lekoba Mabogwana, approached the Applicant to tender as subcontractor on the installation of air conditioners.

- [6] The Applicant submitted its bid to Machabachaba where after the Applicant was appointed on 4 September 2015 to install the air conditioners at Luckhoff, Smithfield and Soutpan (appointment letters attached as annexures “FA4” “FA5” and “FA6”).
- [7] The parties entered into a partly written and partly oral subcontract. The Applicant was duly represented by Mr Lorenzo Barrington and Machabachaba was represented by Mr Mabongwana. In the appointment of the Applicant the parties incorporated the terms and conditions as contained in the Joint Building Contract Committee, Series 2000 (the JBCC) between Machabachaba and the Second Respondent. Included in the terms of the JBCC between the parties was the provision pertaining to payment and preliminaries which are defined as the priced terms listed in the Preliminaries Document with any additions, alterations or modifications thereof (clause 1.1 of the JBCC). The terms and conditions relating to the preliminaries between the Applicant and Machabachaba was applicable as well as the tariffs relating to the Bills of Quantities. In respect of the payments in the JBCC, the Applicant and Machabachaba elected option B, which refers to the preliminaries and generals including transport and attendance of monthly progress meetings. The payments in terms of the subcontract agreement between the parties was subject to the issuing and certification of payment certificates by the First Respondent.
- [8] The payments were initially made directly to Machabachaba. Machabachaba fell behind with the projects as a result thereof. Machabachaba failed to make the required payments to the Applicant. As a consequence of Machabachaba’s failure, the Second Respondent undertook to make payments directly to the Applicant upon receipt of payment certificates and invoices issued by Mekan Engineering Services (Pty) Ltd (Mekan). (Mekan was appointed by the First Respondent to oversee mechanical and electrical work during the construction of the libraries.)
- [9] On the 7th April 2016 the Second Respondent, duly represented by Mr Kobus Kellerman and Machabachaba duly represented by Mr Mabongwana amended
- the terms of the contract that all amounts due and payable to the Applicant by Machabachaba Constructions will be paid directly to the Applicant by the Second Respondent upon receipt of the payment certificates and invoices.
- [10] The parties further entered into various cession agreements which are attached as annexures “FA9”, “FA12”, “FA13”. The effect of the cession agreements was such that payments due to the Applicant under the contract with Machabachaba Constructions would be made by the Second Respondent directly to the Applicant. As a consequence, thereof, all payments from April 2016 were made directly to the Applicant by the Second Respondent after payment certificates were issued and certified by the First Respondent.
- [11] The issue for determination by the court is whether the First Respondent should issue payment certificates in order for the Second Respondent to pay the Applicant.

NON-JOINDER

[13] The First Respondent raised a point in limine based on the non-joinder of Mekan Engineers Services (Pty) Ltd (Mekan), Quantum Built and Environmental Consultants (the QS) and Machabachaba Construction. The First Respondent contends that these three services providers all played an important role in terms of the performs of the project. The Applicant in its written Heads of Argument contends that the Applicant's defence in respect of the miss-joinder of the Mekan, the QS and Machabachaba is not a bona fide defence, in that the mentioned service providers do not have a contractual obligation towards the Applicant.

[14] Rule 10 of the Uniform Rules of Court provides that that anyone who has a direct and substantial interest in a matter must be joined as either plaintiff/defendant (applicant/respondent). An application for a joinder must set out why the other party should be joined, which will include direct and substantial interests of the party to be joined which is simply not a financial interest. (see *Hartland Implements (Edms) Bpk v Emal Eiendomme Bk* 2002 (3) SA 653NC at 663 E – H).

[15] In *Shapiro v South African Recording Rights Association Ltd (Galeta Intervening)* 2008 (4) SA 145 (W) at para 98, the court said:

“The test for joinder under Rule 10(1) is that the right to relief depends upon the determination of substantially the same question of law or fact and that it is therefore not necessary that the party has a direct and substantial interest in the subject matter of the litigation which could be prejudicial by the judgment.”

[16] The First Respondent in its Heads of argument mentioned that the relief sought will prejudiced the three service providers, and such relief cannot be granted based on the fact that the parties who were not joined must perform their obligation respectively and indirectly as follows:

“1.2.2.1.1 Mekan must approve the additional work done by the applicant before any payment certificate can be issued

by the Quantity Surveyor (QS) and ultimately signed off by the first respondent.

1.2.2.1 Since it (sic) left the site the appointed engineer in itsplace should be joined.

1.2.2.1.2 The work done by the applicant must be valued by the QS who's also responsible to issue payment certificates, which certificate must thereafter be signed off by the first respondent.

1.2.2.1.3 Machabachaba is the contractor who appointed the applicant whose full obligation to the second respondent was not ceded to the applicant as alleged.”

[17] The Applicant contends that Mekan and Quantum Built Environmental were appointed by the First Respondent and that there is no contractual obligation between the

Applicant and Mecan, neither is there a contractual obligation between the Applicant and Quantum Built Environment. Counsel on behalf of the Applicant further submitted that any issued payment certificate will not bind Machabachaba, nor is relief sought against any of the parties not joined to the application.

[18] An application for a joinder of a party is only required as a matter of necessity, as opposed to a matter of convenience. (See *Judicial Service Commission and Another v Cape Bar Counsel and Another* 2013 (1) SA 170 SCA at paragraph 12)

[19] The fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the

proceedings has been held to be a limited one. (See *Judicial Service Commission and Another supra*).

[20] The Applicant correctly stated that the relief sought is not against Mecan, QS and Machabachaba but seeks relief against the First and Second Respondent. In my view the three parties have no direct and substantial interest nor will they be prejudiced by the judgment of the court. As correctly stated by the Applicant that the payment certificates in respect of preliminaries including the attendance of monthly progress meetings and transport is not depended upon the works being measured and certified by Mecan and Quantum Built. Mecan and Quantum have no contractual obligation towards the Applicant. Machabachaba had left the site and thus any relief sought will not bind Machabachaba. It is common cause that there was an agreement reached between the Applicant and the Second Respondent that payment will be made directly to the Applicant.

[21] To simply join Mecan, QS and Machabachaba would hinder justice. Neither is there any financial interest that the non-joint parties will suffer any prejudice. The Applicant only seeks relief in terms of payment certificates against the First and Second Respondent.

[22] In my view it is not convenient nor necessary to join Mecan, QS and Machabachaba. Thus, the application for joinder ought to be dismissed.

[23] The Applicant and Machabachaba construction entered into a contract, which its terms and conditions were contained in the Joint Building Contracts Committee, Series 2000 (JBCC).

[24] The JBCC series 2000 sets out the guidelines in the drafting of new agreements that are acceptable to all stakeholders including the Department of Public Works. The JBCC 2000 is described as follows by Finsen:[1]

“The JBCC series 2000 is suited of documents that comprises the Principle Building Agreement and the Minor Works Agreement, which define the legal rights and obligations of the employer and the contractor, the Nominated/Selected Subcontractor Agreement, which regulates the relationship between the contractor and a nominated or selected subcontractor, and a variety of ancillary documents which on no account should be used in conjunction with any of the previous generation of JBCC

documents, because the various provisions will be mismanaged and ambiguities and confusion will ensue.”

[25] The First Respondent was appointed by the Second Respondent as the project manager principal agent. The parties included in the appointment, the terms and conditions of the JBCC. The provisions of the JBCC in respect of payments referred to the preliminaries and the parties opted to select Option B on the JBCC which provided as follows:

“10.2.2 - Option B

Calculated from the priced, terms on the Bill of Quantities/Lump Sum Documents. The contractor and the principal agent shall agree on a division of the priced preliminary’s items into: An initial claim; A monthly charge; A final or disestablishment charge. (all inclusive of tax)”

[26] Clause 10.3.2 of Option B further provides that:

“The contractor shall within fifteen (15) working days of taking possession of the site provide the principal agent with a detailed breakdown of the amount of the preliminaries. This breakdown shall set out, among others, full particulars of administrative, supervisory and other personnel, plant transport and other resources and charges included in the amount for preliminaries. The contractor shall show the periods to which the individual claims relate with the charge rate for such claims by means of a programme all to the satisfaction of the principal agent.”

[27] Clause 10.4 of the JBCC on payment certificate cash flow provides that: “The contractor shall provide all reasonable assistance to the principal agent in the preparation of cash flow projections of claims for payment certificates where required by the employer. The projections shall be based on the programme in terms of 4.2 and shall be updated as and when the programme requires updating. The co-operation of the contractor in terms of this item shall not prejudice his right to receive payment in terms of the agreement.”

[28] In terms of the JBCC’s definition and interpretation, the following terms need to be highlighted:

“1. Contractor – The party contracting with the employer for the execution of works;

2. Employer means the party contracting with the contractor for the execution of the works and named in the agreement;
3. Payment certificate – means the document issued by the principal agent certifying the amount due and payable by the employer to the contractor or vice versa;
4. Principal Agent - means the person or entity appointed by the employer, and named in the agreement.”

[29] The First Respondent having been appointed as the principal agent as defined in the JBCC by the Second Respondent, therefore qualified as the principal agent. Clause 10 of the JBCC specifically requires that the contractor shall provide all reasonable assistance to the principal agent in the preparation of cash flow projections of claims for payment certificates

where required by the employer. The issuing of the payment of the certificate rests on the First Respondent. The Applicant does not seek payment from the First Respondent, but is requesting that the First Respondent should do the necessary paperwork to issue payment certificates in order for the Second Respondent to make payment.

- [30] The terms and conditions of the JBCC between the parties is clear, to the extent that clause 10 of the JBCC mentioned the cooperation of the contractor is required in order not to prejudice a principal agent in his right to receive payment in terms of the agreement. It's understandable that the Applicant seek relief for the reasonable cooperation of the First Respondent to ensure payment certificates are issued and certified. The Applicant correctly stated that if there are any defective work before final certificates will be issued, the Second Respondent has a remedy of retention of the money which may be deducted from the amount outstanding.
- [31] The payment of preliminaries is clearly set out in the chosen option between the parties, that is Option B of the JBCC. It is understandable that the Applicant referred to the preliminaries in respect of the payment in terms of option B. The First Respondent and Second Respondent are both fully aware of the terms of the preliminaries and the terms of Option B thereof.
- [32] It is further common cause that the Applicant, Machabachaba and the Second Respondent entered into and concluded various cession agreements between 7 April 2016 and 22 April 2016. As a consequence of the cession agreements, payments were made and these are attached as annexures "FA", "FA10a", "FA11a", "FA13" and "FA14".

This shows that the cession agreements had effect and the parties involved at that stage had no issues in respect of payment being made based on the cession agreements. The Applicant thus received payment certificate which were in accordance with the cession

agreements. The effect of the cession agreements between the parties was such that payments under the contract with Machabachaba and the Second Respondent would be paid directly to the Applicant. It still remained an obligation on the First Respondent to certify and issue payment certificates.

- [33] The First Respondent appointed as the Principal Agent has to fulfil the role and function under the JBCC contract, as defined in the JBCC that the agent is the person or entity appointed by the employer. As consequence thereof, it is correct that the Applicant had to expect the Principal Agent to take the necessary steps to ensure that payment certificates are certified and issued.
- [34] Finsen points out these functions and duties as follows:

“The employer surrenders many of his contractual rights to his principal agent: inter alia, the right to approve the work to order additional work, to determine the value of variations to the nature and extent of the construction period in appropriate circumstances and to determine the amounts of payments to be made under and interim or final payment certificate, and in so doing, the principal agent binds the employer. It is submitted that this arrangement is right and proper; it would be inappropriate for the employer to be judged in his own cause in these matters.....”

“The principal agent approves the subcontract work and values variations and determines the amount to be paid to a sub-contractor under an interim or final payment certificate, and prepares the subcontract final amount and is required to issue a final payment certificate within seven day.”

- [35] In my view the First Respondent as the principal agent has an obligation to perform its role and function in order for the Applicant to receive the payment certificates.
- [36] The Legal Representative of the Applicant has sent several correspondences to the First and Second Respondent to resolve the matter. Annexures “FA15” to “FA22” all deal with the correspondence requesting that the First Respondent resolve the issue of the payment certificates. The Applicant has attempted all possible solutions to have these payment certificates be issued and certified, but to no avail. It is in the interest of businesses that agreements between parties in a contract are honoured by all parties.
- [37] The First Respondent raised an issue with regard to the pending Variation Order that was submitted to the Second Respondent on 11 March 2019. The Variation Order involves the additional work which needs to be evaluated before payment certificates could be issued. The Applicant in its opposing affidavit explained that there was various delays; that the contract was extended and additional work had to be done, including preliminaries and generals. However, the Applicant is specific to mention that these delays and additions, which caused a Variation Order, were not due to the Applicant, but due to the First and Second Respondent’s conduct. The Second Respondent failed to respond to the submitted Variation Order. Thus, the Applicant cannot be prejudiced for the failure of the Second Respondent’s action.
- [38] In my view the Applicant ought to be granted the relief sought in terms of the notice of motion. Both the First Respondent and the Second Respondent in terms of the JBCC, have to take the necessary reasonable steps to ensure that the payment certificates are issued and certified. Seeing that Counsel on behalf of the First Respondent also conceded that the delay was on the side of the Second Respondent as due process needs to be followed.
- [39] In the circumstances, I make the following order;
1. The First Respondent be ordered to issue and certify or cause to issue and certify payment certificates under contract numbers

SCM-INFR 02/2014(Soutpan), SCM-INFR 03/2014 (Smithfield) and SCM-INFR 04/2014 (Luckhof) relating to additional work preliminaries and generals, monthly progress meetings and transport in favour of the Applicant over the period 04 September 2015 to 13 May 2016.

2. The First Respondent to pay the costs of the application.

S. CHESIWE, J

Appearances

On Behalf of the Applicant: Adv R Van der Merwe

Instructed By:

L & V Attorneys

BLOEMFONTEIN

For the 1st Respondent: Adv E.G. Lubbe

Instructed By:

V R Ward Attorneys

C/O Rossouws Attorneys

[1] First version of the JBCC contract was published in 1991. The second edition became the JBCC 2000- The Building Contract 2nd Edition by Eyvind Finsen.

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/ZAFSHC/2020/40.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/multiminds-186-cc-ta-cooling-solutions-v-etsho-civils-pty-ltd-and-others-unknown-topic-afshc-2020>

Prepared on 10 October 2026 · Esheria