

SOUTH AFRICA / JUDGMENT

Namasthethu Electrical (Pty) Ltd v City of Cape Town and Another (201/19) [2020] ZASCA 74 (29 June 2020)

[2020] ZASCA 74

COURT

Supreme Court of Appeal

BEFORE

Navsa, Mbha, Molemela, Plasket, Nicholls

CASE / FILE NUMBER

201/19

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 201/19

In the matter between:

NAMASTHETHU ELECTRICAL (PTY) LTD

APPELLANT

and

CITY OF CAPE TOWN

FIRST RESPONDENT

JAMES ROBERT GARNER NO

SECOND RESPONDENT

Neutral Citation: Namasthethu Electrical (Pty) Ltd v City of Cape Town and Another (Case no 201/19) [2020] ZASCA 74 (29 June 2020)

Coram: NAVSA, MBHA, MOLEMELA, PLASKET and NICHOLLS JJA

Heard: 13 May 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 29 June 2020

Summary: Contract- Application for declaration that contract pursuant to tender vitiated by fraud validly terminated – arbitration clause in a contract does not survive termination of contract induced by fraudulent misrepresentation – determination by arbitrator following adjudication process in terms of arbitration clause consequently liable to be set aside.

ORDER

On appeal from: The Western Cape Division of the High Court, Cape Town (Boqwana J sitting as court of first instance): judgment reported sub nom City of Cape Town v Namasthethu Electrical (Pty) Ltd and Another

[2018] ZAWCHC 150; [2019] 1 All SA 634 (WCC)

The appeal is dismissed with costs on the scale as between attorney and client, such costs to include the costs attendant upon the employment of two counsel.

Mbha JA (Navsa, Molemela, Plasket and Nicholls JJA concurring):

[1] This appeal turns on the question whether a dispute resolution clause in a contract survives the termination of that contract on the ground of fraudulent misrepresentations made during a tender process. More specifically, it raises the following issue: Does the clause in the contract in question requiring the parties to submit any dispute between them to arbitration or other adjudication process, bind the aggrieved party in an instance where the contract has been induced by fraud? The Western Cape Division of the High Court, Cape Town (Boqwana J, sitting as court of first instance), having found that the contract had been induced by fraudulent misrepresentations by the appellant, held that a dispute resolution clause in a contract did not survive the termination of the contract for fraud. Thus, the High Court also set aside a determination made by the second respondent, Mr James Garner (Garner), following an adjudication process in terms of the dispute resolution clause in the contract. The appellant, Namasthethu Electrical (Pty) Ltd (Namasthethu), appeals against these findings with leave of the court a quo. The background is set out hereafter.

[2] On 7 March 2014 the first respondent, the City of Cape Town (the City), advertised a tender for the supply, retrofit and installation

of energy efficient luminaries at the Cape Town Civic Centre. On 25 August 2014, the City awarded the tender to Namasthethu. The tender had an estimated value of R29 263 401.75, excluding VAT, and its execution was contemplated to take 18 months. During November 2014 a written agreement following on the tender was concluded between the City and Namasthethu. That agreement is the contract at the centre of this appeal.

[3] On 17 September 2014 an unsuccessful bidder, Citrine Construction (Pty) Ltd (Citrine), a competitor in the tender process, sought to appeal the award of the tender to Namasthethu and called on the City to set aside the award of the tender. Citrine complained that Namasthethu and its directors had been convicted of fraud and corruption on 13 August 2013, arising from a complaint by the

Construction Industry Development Board (the CIDB). The City was informed that Namasthethu and its directors were consequently

sentenced to a fine of R200 000 coupled with a wholly suspended sentence of 5 years' imprisonment. This was the basis of the appeal.

[4] The significance of the complaint located in the appeal in relation to the present dispute lay in the fact that in its tender submission, Namasthethu had completed an official tender document declaring that neither it, nor any of its directors, had in the past five years been convicted of fraud by a court of law. If the allegations by Citrine were true, it would mean that Namasthethu was guilty of a fraudulent misrepresentation. In terms of clause 36.1.3 of the contract, the City was entitled to terminate it where Namasthethu had committed a corrupt or fraudulent act during the procurement process, or in the execution of the agreement.

[5] Citrine's complaint, however, was admittedly submitted outside of the time permitted for appeals in terms of s 62 of the Local Government: Municipal Systems Act 32 of 2000.[1] The City therefore did not regard it as a valid appeal. But it could not ignore the complaint.

[6] On 25 November 2014, the City sent a letter to the appellant, stating that it had come to its attention that Namasthethu Electrical (Pty) Ltd t/a Nationwide Electrical and/or its directors during August 2013 had been found guilty on charges relating to fraud and corruption. Namasthethu was required to respond.

[7] Namasthethu responded by letter dated 27 November 2014, written by one S Chetty, indicated to be the chief executor officer of Namasthethu, stating that neither it nor its sole director, S Chetty, had been convicted of fraud and corruption during August

2013. The letter also confirmed that Namasthethu was cited as a respondent in civil proceedings that had since been finalised, but that no order had been made against it.

[8] The City replied to Namasthethu on 3 December 2014, stating that it had now received information from the CIDB which indicated that Namasthethu and/or its directors had on 13 August 2013 been found guilty, in terms of a plea and sentence agreement, entered into under s 105A of the Criminal Procedure Act 51 of 1977, on various charges of fraud and corruption. The information indicated further that Namasthethu and/or its directors were sentenced to a fine of R200 000 plus five years' imprisonment, the latter of which was suspended on certain conditions. Namasthethu was notified that the matter would be referred to the City's Forensics, Ethics and Integrity Department (FEID) for further investigation and it was requested to furnish a response within seven days. The FEID was

formally instructed by the City on 9 December 2014 to investigate the allegations against Namasthethu.

[9] Namasthethu responded to the City's letter on 12 December 2014, stating that the sole director of Namasthethu at the time of the tender was Mrs Shamla Chetty. Reference was also made to an attached letter, ostensibly written by one Colonel K Naidoo of the South African Police Service (SAPS) Anti-Corruption Task Team, which recorded that no criminal conviction was obtained against Namasthethu or Chetty under criminal matter PMB CAS 611/5/2012 or case number 41/66/2013, as well as that 'Shamla Chetty was not an accused at the finalisation of the criminal matter . . .!.

[10] FEID's forensic investigation into Namasthethu took a long time and was completed around the beginning of 2016. In its report to the City Manager, dated 26 February 2016, FEID confirmed that there had been a number of false misrepresentations and other fraudulent conduct on the part of Namasthethu. It was inter alia stated in FEID's report that:

'... Namasthethu and its directors (S Chetty and R Chetty) were criminally charged with fraud and corruption [while] Namasthethu, under the trading name of Nationwide Electrical and R Chetty, who at all relevant times acted as a director, were convicted in the Commercial Crimes Court in Pietermaritzburg on 7 November 2013, less than [a] year prior to the date of the tender application on 240Q/2013/2014.

... Shamla Chetty [the wife of R Chetty] made a prima facie misrepresentation to the City when she stated in the negative on the tender declaration to the question whether any of the directors or the company/entity has been convicted by a court of law for fraud or corruption during the past five years. This amounts to fraud.

... S Chetty in her tender submission provided the City with a local business address for Namasthethu as 7 15th Avenue, Kensington, which was discovered to be false. Furthermore it was established that the service provider operates from three containers located at the Civic Centre parking area on Hertzog Boulevard, Cape Town.'

As a result of these findings, the FEID recommended the termination of the contract. It also recommended the lodgement of a criminal case of fraud with the SAPS against S Chetty, R Chetty and Namasthethu for the misrepresentations relating to information contained in the tender submission.

[11] On 15 March 2016, the City wrote to Namasthethu informing it that the contract was being cancelled with immediate effect because

Namasthethu had committed fraudulent acts during the tender process, which had resulted in the tender being awarded to it. The City specifically referred to Namasthethu's failure to disclose the conviction for fraud and corruption in November 2013 in the

Pietermaritzburg Commercial Crimes Court and the fact that it had provided a local business address which was fictitious.

[12] Namasthethu disputed the cancellation in correspondence which it sent to the City without, however, addressing or challenging the specific fraud allegations against it, and thus the City's reasons for cancellation of the contract. Its focus was to insist that the dispute surrounding the City's cancellation of the contract be adjudicated in accordance with the dispute resolution procedure specified in the contract. It is necessary, at this stage, to have regard to the relevant clauses:

‘40.1 Should any disagreement arise between the employer or his principal agent or agents, and the contractor arising out of or concerning this agreement or its termination either party may give to the other to resolve such disagreement.

40.2 Where such disagreement is not resolved within ten(10) working days of receipt of such notice it shall be deemed to be a dispute and shall be referred by the party giving such notice to either,

40.2.1 Adjudication where adjudication shall be conducted in terms of the JBCC Rules from Adjudication current at the time when the dispute was declared.

Or

40.2.2 Litigation...’

[13] In keeping with its stance that the dispute surrounding the cancellation of the contract, which in its view was purely a legal

matter, be adjudicated in accordance with the dispute adjudication clause, Namasthethu suggested as potential adjudicators three senior counsel at the Cape Society of Advocates. The City, however, persisted in contending that the contract was validly cancelled on 15 March 2016, and that Namasthethu's insistence on referring the matter to adjudication, in the face of its fraudulent conduct, was inappropriate. Thereafter Namasthethu approached the Association of Arbitrators Southern Africa, which then appointed Garner, a construction consultant and surveyor, as adjudicator.

[14] The dispute which Namasthethu purported to refer to adjudication, and in respect of which the Association of Arbitrators was asked to appoint an adjudicator, concerned the validity of the City's cancellation of the contract. However, this dispute did not feature as a self-standing issue in Namasthethu's Statement of Claim. Neither did it feature as a prayer for relief. It was instead couched as a component of Namasthethu's claim for damages in relation to a contract which it claimed to have cancelled lawfully in the face of the City's alleged repudiation.

[15] Garner prepared a determination on the basis of the Statement of Claim, and the documents sent to him by Namasthethu, but without

hearing evidence. In that determination, the second respondent upheld various claims by Namasthethu and found the City liable to

Namasthethu for damages in the amount of R516 671.04, R1 483 210 and R499 559.40, including VAT.

[16] The principal issue to be determined in this appeal is, as stated above, whether the adjudication clause in the contract survived the termination of that contract by the City on the basis of fraud.

[17] An ancillary issue is whether the City should be held to have waived its right to rescind the contract with Namasthethu, alternatively,

whether the City should be regarded as having elected not to do so, in both instances by virtue of the time taken by it in investigating

the allegations of fraud against Namasthethu.

[18] The appellant's challenge against the High Court's findings can be summarised as follows. It was contended that, on a proper

construction of the contract, the parties contemplated that the disputes regarding the cancellation of the contract, including those involving allegations of fraud during the tender process, were subject to the dispute resolution process agreed to by the parties. It was submitted that the dispute resolution clause set out above is widely worded so as to encompass disputes of whatever nature. All the more so, it was argued on behalf of Namasthethu, if regard is had to clause 36, which deals, inter alia with termination, after failure by the contractor to comply with certain contractual obligations and on failure to cure the default, after being put on terms. Clause 36 also permits, as stated earlier, the City to terminate the agreement on the basis of corrupt or fraudulent acts by the contractor. This, so it was submitted on behalf of Namasthethu, supported its view that disputes of any kind were to be referred for adjudication in terms of the dispute resolution clause.

[19] It was also submitted on behalf of Namasthethu that there was no contractual or other basis cognisable in law for the judicial review of the second respondent's determination, whose determination was in any event not manifestly unjust.

[20] Furthermore, it was contended that the City had waived its entitlement to terminate the contract and/or elected not to do so

because of the considerable amount of time taken by it in investigating the allegations of fraud against the appellant and making a decision in relation thereto.

[21] Finally, as far as the allegations of fraud against it were concerned, the appellant argued that there was a material dispute of fact in respect of the merits of these allegations and that its version should not have been rejected by the court a quo. In effect, the appellant disputed that it was ever charged and convicted as an accused for fraud and corruption.

[22] The City, on the other hand, submitted that the contract was void, alternatively voidable, as a result of specified fraudulent

misrepresentations and non-disclosures by the appellant. Upon being satisfied that there had in fact been fraud on the part of the appellant, on the strength of a comprehensive forensic investigation, so it was contended, the City elected to terminate or rescind the contract and validly did so. The one issue that was not in contestation, so it was argued, was the conviction of Ravan Chetty, who was a director of Namasthethu, within the five year period preceding the advertisement of the tender. Fraud, so it was contended, unravelled all.

[23] It is common cause that when Ms Shamla Chetty, a director of the appellant, completed and submitted the tender documentation on behalf of the appellant on 1 April 2004, she expressly wrote 'NO' in the specified column of para 1.3 of the declaration in schedule 4 of the documentation. This was in response to the question specifically asked therein, namely, 'Was the tenderer or any of its directors convicted by a court of law (including a court of law outside of the Republic of South Africa) for fraud or corruption during the past five years?'

[24] The appellant had denied the alleged criminal convictions for fraud and corruption. However, it conceded that criminal charges of fraud and corruption were indeed laid against Ms Shamla Chetty (accused number 1), Mr Ravan Chetty (accused number 2) and Namasthethu

Electrical (Pty) Ltd (accused number 3) and that the charges against Ms Chetty were later withdrawn. It then contended that Mr Ravan Chetty had pleaded guilty on charges of fraud and corruption in his personal capacity, as well as on behalf of 'Nationwide Electrical', a sole proprietorship, as opposed to Namasthethu trading as Nationwide Electrical. Furthermore, as Namasthethu was only incorporated as a company at a later stage, certain of the charges in respect of which there was a guilty plea pre-dated the incorporation of Namasthethu as a company. The appellant then submitted that, notionally, it was possible for the sole proprietorship to have continued to trade even after Namasthethu had been incorporated, whereas it was not possible for Namasthethu to have traded before it was incorporated.

[25] In November 2013, the appellant's director, Ravan Chetty, was criminally convicted of fraud and corruption. That was a relevant and undisputed fact. It is not necessary to interrogate the name change of the company and whether it was an expedient measure. Nor is it necessary to investigate any further the suggestion on behalf of the City that the relevant charge sheet appears to have been suspiciously altered. The City and other state entities are entitled to be concerned about the integrity of company directors with whom they envisage doing business. It was entitled to know whether persons who were corrupt or fraudulent had been directors during the relevant window period. It is for that reason that the tender documents required answers to questions about convictions related to fraud and corrupt activities. Ravan Chetty's conviction, which ultimately is common cause, is the crucial element in this appeal. It is worth noting that Mr Ravan Chetty, who purportedly resigned as a director of Namasthethu with effect from 12 May 2011, was however still involved with Namasthethu and the tender, as on 11 April 2014 he met with one Mr Wayne Thomas to discuss awarding 25 per cent of the tender to the latter's company as a local sub-contractor.

[26] There was no denial that the appellant had in its tender given a fictitious business address as 7 15th Avenue, Kensington, Maitland, Cape Town. As a result, the unavoidable inference is that this was done to give the impression that the appellant had a local office. The explanation given in the answering affidavit, that the premises were identified by an unspecified project manager, whose confirmation affidavit is glaringly missing, and that the appellant never took up those premises because the City provided space for the premises in containers located at the site, is contrived and nonsensical and was correctly rejected by the court a quo. Clearly, the appellant must have known that a Cape Town business address was required, for otherwise it would not have pretended that it had one and filled in a false address. There is no gainsaying the fact that in a tender adjudication process, points get awarded in respect of locality.[2]

[27] In the end, having considered the conduct of the appellant during and after the tendering process, the court a quo was satisfied that all the requirements of fraudulent misrepresentation had been met, which rendered the contract voidable at the instance of the City, which it then validly and effectively elected to rescind.[3] I am unable to fault the court a quo in arriving at this conclusion.

[28] The question that must now be answered is whether, in the light of the fraudulent and corrupt conduct of which the appellant was undoubtedly guilty, the City, after validly cancelling the contract, can be compelled to submit to an arbitration process in accordance with the dispute resolution clause in the contract, an issue to which I now turn.

[29] It is trite law that fraud is conduct which vitiates every transaction known to the law. In affirming this principle, this

court, in *Esorfranki Pipelines (Pty) Ltd*,^[4] referred with approval to Lord Denning's dicta in *Lazarus Estates Ltd v Beasley*,^[5] when he said:

'No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever . . . !'

[30] As regards an arbitration or similar adjudication clause contained in an agreement which was found to have been induced by fraud, this court has emphatically ruled that once the agreement had been rescinded by an aggrieved party, the said arbitration clause cannot stand. The reason, this court stated per Cameron JA in *North West Provincial Government and Another v Tswaing Consulting CC and Others*,^[6] was because ' . . the arbitration clause was embedded in a fraud-tainted agreement the province elected to rescind' and 'cannot survive the rescission', for 'to enforce the arbitration agreement, the tainted product of [the guilty contractor's] fraud, would be offensive to justice'.

[31] In *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*[7] this court had occasion to again consider the question of fraud in relation to an arbitration clause and reiterated that the effect of fraud that induces a contract is, in general, that the contract is regarded as voidable. This means that the aggrieved party may elect whether to abide by the contract and possibly claim damages, or to resile from it and regard the contract as void from inception. The court held that the arbitration clause could not survive in the face of allegations of fraud by one party, even though it expressly included the phrase 'any question as to the enforceability of this contract'.[8] Thus, disputes regarding the validity or enforceability of contracts induced by fraudulent misrepresentation and non-disclosures were not generally intended to be arbitrable.[9]

[32] Relying on what was held in *Heyman v Darwins Ltd*,[10] the court stated that the position might only change if the parties specifically made provision in the contract for such a dispute being referred to arbitration. In *Heyman*, Lord Peter expressed this as follows:

'... I see no reason why, if at the time when [the contracting parties] purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute as to whether the contract ever bound them or continues to do so. They might, for instance, stipulate that, if a dispute should arise as to whether there had been such a fraud, misrepresentation or concealment in the negotiations between them as to make a purported contract voidable, that dispute should be submitted to arbitration'.[11]

But even then, as the House of Lords stated in *Heyman*, it may require very clear language to effect this result.[12]

[33] In the present case, the question that must be answered is whether there is clear and unequivocal language in the contract or even the arbitration clause itself, providing for this kind of dispute to be addressed by arbitration or adjudication. Alternatively, can it be inferred that the parties foresaw a possible dispute regarding whether the agreement was induced by fraud, in which event the City would be required to participate in certain dispute resolution procedures? Needless to say, this must be determined in line with the generally accepted approach to the interpretation of contracts, viz. by having regard to the context in which the agreement was concluded.[13] In addition, the contract must be interpreted so as to give it a commercially sensible meaning.[14]

[34] A simple reading of the arbitration clause 40.1 reveals that it merely provides that one party may give notice to the other to resolve a disagreement in the event of there being a disagreement 'arising out of or concerning this agreement or its termination'.

Clearly, this clause contemplates a dispute arising out of the agreement when it was accepted to be valid from the outset. There is no suggestion that it covers fraud, nor that it involves an exception to the general rule enunciated above. Indeed, clause 40.7 provides that recording of a dispute under clause 40.1 'shall not relieve the parties from liability for the due and timeous performance of their obligations', thereby indicating that the rest of the agreement is considered

to be valid. In any event, even the giving of 'notice' as stipulated in clause 40.1 would clearly not apply to a situation of a contract which the aggrieved party has already validly terminated or cancelled as a result of fraud.

[35] Clause 36 is of no assistance to Namasthetu. It deals with termination for failure to meet contractual obligations, different

from termination based on fraud or corrupt activity. Notice of default has to be given in respect of breach of contractual obligations before termination can take place. Fraud is provided as a separate and distinct basis for termination. One can hardly be expected to give notice to cure fraud or corrupt conduct. Disputes that arise for adjudication in terms of an arbitration clause usually

relate to a failure to comply with contractual obligations and the consequences that follow.

[36] Clause 40 does not expressly, or by any necessary implication, provide that an adjudication under that clause can determine the validity or enforceability of the agreement when the City claims that it has been vitiated by fraud. In other words, it does not enable an adjudicator to determine whether the agreement was induced by fraud and void, or voidable, as a result. Moreover, as pointed out above there can in any event not be any dispute about Ravan Chetty's conviction.

[37] As this court emphasised in *North East Finance (Pty) Ltd*,^[15] in order for the validity of a contract terminated for fraud to be determined by reference to adjudication, the contract must specifically say so, or otherwise clearly indicate as much. In this case, the contract unquestionably does not.

[38] In the light of the conclusions reached above, it follows that the referral of the dispute to the second respondent for adjudication was invalid and unlawful and that the court a quo was correct in setting aside his determination following on an unlawful adjudication

process. Clearly, the second respondent was not clothed with any authority to adjudicate the dispute.

[39] There can be no question of waiver on the part of the City. It might have acted with greater urgency but it appears to have been intent on obtaining verified and accurate information.

[40] The court below considered that the appellant's conduct justified a punitive costs order. I can see no fault with that

conclusion. Our courts have repeatedly recognised the widespread nature of fraud and corruption and its corrosive effect on society. I am in agreement with counsel for the first respondent that a punitive costs order on appeal is equally justified.

[41] The following order is made:

B H Mbha

Judge of Appeal

APPEARANCES:

For appellant: S Rosenberg SC

Instructed by:

Anand-Nepaul Attorneys, Durban

Honey Attorneys, Bloemfontein

For respondent: P Farlam SC

WJ Da Grass Attorneys, Athlone

Holmes Attorneys, Cape Town

[1] Section 62(1) provides:

'A person whose rights are affected by a decision taken by a political structure . . . of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure . . . may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the notification of the decision.'

[2] Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others

[2014] ZASCA 2; [2014] 2 All SA 493 (SCA) para 11.

[3] See Bowditch v Peel and Magill 1921 AD 561 at 572: 'A person who has been induced to contract by the material and fraudulent misrepresentations of the other party may either stand by the contract or claim a rescission.'

[4] Op cit fn 4 para 25.

[5] Lazarus Estates Ltd v Beasley

[1956] 1 QB (CA) at 712.

[6] North West Provincial Government and Another v Tswaing Consulting CC and Others [2006] ZASCA 108; 2007 (4) SA 452 (SCA) para 13. See too Wayland v Everite Group Ltd 1993 (3) SA 946 (W); and Absa Bank Limited v Moore and Another

[2016] ZACC 34; 2017 (1) SA 255 (CC) para 39, where Cameron J warned that the maxim 'fraud unravels all' was '... not a flame-thrower, withering all within reach'. He continued: 'Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim. Whether fraud unravels a contract depends on its victim, not the fraudster or third parties'.

[7] North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd

[2013] ZASCA 76; 2013 (5) SA 1 (SCA).

[8] Ibid para 26.

[9] Ibid para 30.

[10] Heyman v Darwins Ltd

[1942] 1 All ER 337 (HL) at 357B-D.

[11] Ibid.

[12] See also Gutsche Family Investments (Pty) Ltd and Others v Mettle Equity Group (Pty) Ltd and Others [2007] ZASCA 45; 2007 (5) SA 491 (SCA) para 14, where this court held that where there is a dispute between contracting parties as to an arbitrator's jurisdiction, an arbitrator may only finally determine his (or her) own jurisdiction if this is 'provided for specifically, and in the clearest terms'.

[13] See Natal Joint Municipal Pension Fund op cit at fn 3.

[14] Ibid para 18.

[15] Op cit at fn 9.

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