

SOUTH AFRICA / JUDGMENT

Ngwenya t/a Ngwenya Construction v Nkangala District – Municipality (19743/2002) [2008] ZAGPHC 350 (8 October 2008) [2008] ZAGPHC 350

COURT
High Courts - Gauteng

BEFORE
Phatudi

CASE / FILE NUMBER
19743/2002

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IN
THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL
PROVINCIAL DIVISION)
CASE
NO: 19743/2002

DATE:	8 OCTOBER 2008 In the
matter between:	JOHN NGWENYA PLAINTIFF t/a NGWENYA CONSTRUCTION and NKANGALA DISTRICT – MUNICIPALITY DEFENDANT (formerly known as HIGHVELD DISTRICT COUNCIL)

JUDGMENT

PHATUDE (AJ)

[1] The Plaintiff, John Ngwenya, who traded as Ngwenya Construction, instituted an action against Nkangaia District Municipality, the Defendant, for damages in the amount of R279 264, 66 together with interest thereon at the rate of 15% per annum a tempore morae.

[2] The Defendant issued a Tender calling upon tenderers to submit their proposals for Operation and Maintenance of Services of parks for the Townships;

Rietkuil Pulienshope Komati Wilge.

The Plaintiff tendered for Rietkuil Township which turned to be the kernel of this action.

[3] On the 8 February 2000, the Defendant held a briefing session with all interested prospective tenderers. The attendance of the session by prospective tenderers was compulsory. The Defendant kept the attendance register as a control measure over the prospective

tenderers,

[4] The Plaintiff, accompanied by one Erasmus Makhanya Sibanyoni (Makhanya), attended all 4 briefings sessions. The Defendant conducted the internal processes in appointing the successful tenderer.

[5] Subsequent thereto, the Plaintiff alleged that the Defendant indicated that he (the Plaintiff), has been awarded the Rietkuil

tender. The Plaintiff annexed a copy of a letter dated 1 June 2000 to that effect as it appears on page A16

(b).

[6] The Plaintiff accepted the tender as per his undated letter at page A18, which read;

"I hereby wish to accept the tender for the maintenance and Operation of Municipality Engineering Services in Rietkuil parks that has been awarded to our firm..." The amount allocated for the said tender was in the amount of R279 264.66 Vat inclusive and scheduled for one year from the commencement date which would have been 1 August 2000.

[7] On or about 27 July 2000, the Defendant issued a Letter informing the Plaintiff of their cancellation of the tender. The contents of the letter were:

"Following discussions between Mr Sakkie van Greuning, who informed you that his recommendation resulting in your subsequent appointment was incorrect due to the fact that he was under the impression that you are a representative of Makhanya Construction. You are advised not to proceed with the project, and should you proceed, will not be paid for any payment that you may incur."(page 19/20 of the record)

- [8] The Defendant, who opted first to begin with the leading of evidence called Tenani Charles Makola, the Municipal Manager who testified that he was the CEO of the Defendant during the year 2000. He set out the procedure the

Defendant followed in approving the tender from the advertisement up to and including the signing of the contract with the successful tenderer.

- [9] He testified further that the Municipal Executive Council resolved at its meeting held on 12 April 2000;

That the tenders for the operation and maintenance of services in the township of Rietkuil, ... be accepted as shown in table 2 which a summary of the said table 2.1 below, in accordance with the project specifications and drawings at a total amount as shown in table 1..."

- [10] It is evident from the document that the name Makhanya appears under Rietkuil as the successful tenderer at an amount of R279 264, 66. He, Mr Makola, testified that the said total amount is payable to the tenderer on the recommendation by the engineer once the work is done and a certificate has been submitted.

- [11] He further testified that it was incumbent on the tenderer to include the contract as per tender condition 10.1 which states;

"The Contractor shall, when called upon to do so, enter into and execute a contract Agreement (to be prepared at the cost of the Employer) in the form deemed necessary by the Employer." He indicated that if the tenderer commences with the work before the order form is signed, then the tenderer (contractor) will not be paid for work done.

- [12] He acknowledged that a letter was issued to the Plaintiff as per copy annexed at page 16(b). He however, testified that subsequent thereto, the Defendant issued a letter dated 27 July 2000 informing the Plaintiff of the error made for his appointment.

- [13] He testified further that the Plaintiff never commenced with the work, "not even for a day", he said. He indicated that the Plaintiff had accepted the error as bona fide in that the Defendant laboured under the impression that the Plaintiff was a representative of Makhanya Construction.

- [14] Mr Makola accepted under cross-examination that the documents submitted by both Ngwenya and Makhanya were identical in respect of the amount and the hand writing save for few spelling errors. He emphasised that a letter issued on 1 June 2000 by their Mr Greuning was erroneous in content with specific reference to the name of the tenderer. He indicated that the tender was awarded to Makhanya and not Ngwenya (the Plaintiff).

- [15] When questioned on "the impression that you (Plaintiff) are a representative of Makhanya Construction" he responded that the identical documents submitted under the names Ngwenya and Makhanya could have muddled the beholder or peruser to have that impression whether wrong or right.

- [16] He was further asked if there exist a possibility that Ngwenya is the one who submitted the tender document and that Makhanya copied from Ngwenya. He responded that that possibility may exist and probably the opposite. He emphatically denied that the Plaintiff was entitled to the tender and the amount that flow with it. He testified that the Plaintiff did not perform in accordance with the provisions of the tender and thus not entitled to any remuneration thereto.
- [17] The second defence witness, Anania Mangisi Langa, testified that he was the Director of Finance of the Defendant during the year 2000. He stated that it was brought to his attention that Mr Greunen had erroneously caused issue of the letter to Ngwenya (Plaintiff) instead of Makhanya Construction.
- [18] He further testified that during July 2000, he chaired a meeting where the Plaintiff was categorically informed of the bona fide error made by Mr Greunen. He enquired from the Plaintiff if he had already done any work in connection thereto. He indicated that the Plaintiff assured him that the Plaintiff did not and will not proceed with the work.
- [19] He, under cross- examination, responded to the question that one tender could have been written off from the other that resulted in two identical documents submitted, as a probability that that' could have been written and submitted by the same firm or individual.
- [20] On the other hand, the Plaintiff, John Ngwenya who traded as Ngwenya Construction, testified in rebuttal that he attended the briefing session meeting accompanied by his brother-in-law, Sibanyoni Makhanya. He, at that meeting, bought 4 tender documents in the total amount of R400.00. He then instructed one Gerry van Rooyen to complete the tender document for him. He stated that the document appearing on page A28-A84 looked similar with the tender document he signed and submitted.
- [21] He further testified that on the 14 July 2000, he received a call from the Defendant informing him that the tender has been awarded to him. Subsequent thereto, he on the 21 July 2000 received the message from Mr Greunen's secretary indicating that he was required to present himself at the meeting on 25 July 2000. He testified that he indeed did attend the meeting but to his dismay his name was not called out. On enquiring from Mr Langa, as to why his name was not called out, he was informed that he will receive a letter to that effect. At that moment Mr Van Greunen stopped him from attending the meeting. He was then given a letter dated 27 July 2000 as it appears clearer on page A20, which he took soon thereafter to his attorney of record, Mr Morare, for advise.
- [22] Mr Ngwenya conceded under cross- examination that he was told not to do any work as intended in terms of the tender. When asked if there was any document he signed subsequent to the message that the tender was awarded to him he indicated that he did, referring to the letter as it appears on page A18. (his letter of acceptance of tender which he could not remember as to who typed it).

- [23] He further conceded that he did not attend the Rietkuil site meeting on the strength of the information from Mr van Greunen of the error to which he (van Greunen) will write him a letter. He conceded further that Mr Langa said that he (Langa) knew the tender to have been awarded to Makhaya.
- [24] Mr Gerrit Louw van Rooyen better known as Gerry, a Quantity Surveyor, testified that he knew John Ngwenya, the Plaintiff in this matter very well. He said that the Plaintiff instructed him to complete the tender document. He admitted that he is the one who completed the tender document that appears on page A28-A84. He conceded that the handwriting appears to be that of his positively confirmed to have completed the document and further that the calculations are his.
- [25] He, under cross- examination, testified that there existed the possibility that one person may buy, complete and submit 3 tender documents in 3 different names for one tender. I then asked him if there exist the possibility that he could have completed two documents for two different tenderers for the same tender, he conceded to have once did complete tender documents in different names for one person. This matter was never taken up by both counsel. He further testified that the total amount of the tender included the expected expenses the tenderer would have incurred.
- [26] Dr Botha, Counsel for the Plaintiff, submitted that John Ngwenya submitted only one tender document for Rietkuil. He submitted that the Makhanya tender document could have been completed after the submission by Ngwenya. He further submitted that there is no resolution by the Municipal Executive Council tabled before court depicting that Makhanya was the tenderer who was awarded the tender. He submitted further that the letter dated 1 June 2000 addressed to the Plaintiff constituted an agreement, between the parties. He said that the action by Mr van Greunen must be found to be good in Law to bind the Defendant.
- [27] He lastly submitted that full tender amount should be allowed as damages. He finally submitted that the court should award costs on the Attorney and own client scale. On the other hand, Mr Swart, Counsel for the Defendant, submitted that although the contract existed between the parties the Plaintiff accepted the cancellation thereof. The Plaintiff did not do any work. He conceded in his testimony that he had done nothing at the time of cancellation other than to approach his attorney.
- [28] He lastly submitted that the Plaintiff did not suffer any damages and that no evidence was led to the damages suffered. He referred me to the NATIONAL AND OVERSEAS DISTRIBUTORS CORPORATION (Pty) Ltd v POTATO BOARD 1958
- (2) SA 473 (A) where, he submitted, the Court awarded damages and not tender amount. He finally submitted that the Plaintiffs case stands to be dismissed with costs.

- [29] In my evaluation of the evidence tendered, the testimonies by all witnesses who testified and the submissions made by both counsel, it is clear before me that the Defendant invited tenderers to tender for the Operation and Maintenance of Services in the Township of Rietkuil, Pullenshope, Komati and Wilge. I find that the Plaintiff, accompanied by one Mr Makhanya, attended the briefing sessions meeting where he brought four documents. He instructed Mr van Rooyen, the Quantity Surveyor to assist in completing the tender document inclusive of pricing thereof.
- [30] I infer, from the facts given, that the Plaintiff used the names: Ngwenya Construction and Makhanya Constructions of the 4 tender documents he bought. The Plaintiff and Makhanya were in good terms at that time and worked together or assisted one another to a greater extent. I further infer that Mr van Rooyen did complete the tender document in the names of Ngwenya Construction and Makhanya Construction as instructed by the Plaintiff himself. Mr van Rooyen is in business, as he testified, that he does assist his clients in completing and pricing of the tender documents for a fee.
- [32] He further testified that some of his clients did instruct him to complete two or more tender documents in different names for one and the same tender, in anticipation that if one is not considered then the other may. It is on that basis that I infer that the Plaintiff, of the 4 tender documents he bought, submitted one in his name and the other in the name of Makhaya. The
- Plaintiff was with Makhanya at the briefing session meeting and probably being side by side and again when they submitted the tender in the tender box.
- [33] It is not clear from the evidence tendered if Mr Van Greunen was present at the briefing session meeting. It is, however, common
- practice for the Engineering Technician to attend the briefing session meeting as well as the site meeting. In my view, I find it a bona fide impression Mr Van Greunen had that the Plaintiff was a representative of Makhaya Construction.
- [34] I however, find that the Chief Executive Officer at the time, Mr Makola, was negligent by appending his signature on the letter dated 1 June 2000 addressed to the Plaintiff without verifying if the recipient is as resolved by the Municipal Executive Council.
- [35] I further find that the plaintiff accepted the cancellation of the tender in his (Ngwenya Construction) favour. He instructed his attorney immediately thereafter who could have enforced the Plaintiff's right by approaching the court on remedies available

against the Defendant from awarding the tender to Makhaya Construction as the 27 July 2000 and even before the commencement date of the tender on 1 August 2000. It is common cause that the amount tendered on the tender documents include the anticipated expenses to be incurred in executing the mandate. There is no evidence tendered of the damages the Plaintiff suffered. The Plaintiff did not execute the work, not even for a day, in accordance with the tender. The Plaintiff, in my view, did not incur any expenses in connection with the Rietkuil Operation and

Maintenance of services in the amount of R279 264.66 as claimed. [36] in the result, the Plaintiff's claim stands to be dismissed. It is trite law that costs follow the event and that the successful party in litigation is entitled to costs. I find the Defendant to have succeeded in defending its case and thus entitled to their costs. I, as a result, make the following order:

The Plaintiff's claim is dismissed with costs."

AML PHATUDI

ACTING JUDGE OF THE HIGH COURT.

Date of hearing: 23 AUGUST 2008

For the Applicant: Adv BOTHA TJ (dr)

instructed by: OB MORARE INC

For the Respondent: Adv LB SWART

Instructed by: MOIMA LEDWABA NGOEPE ATTORNEYS

Date of Judgment: 8 OCTOBER 2008

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Prepared on 10 October 2026 · Esheria