

SOUTH AFRICA / JUDGMENT

Quebec Electrical Contractors CC v Thumos Properties 1 (Pty) Ltd (29072/2013) [2017] ZAGPPHC 1164 (7 November 2017) [2017] ZAGPPHC 1164

COURT

North Gauteng High Court, Pretoria

BEFORE

E M Kubushi

CASE / FILE NUMBER

29072/2013

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 29072/2013

DATE: 07/11/2017

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO
In

the matter between: QUEBEC
ELECTRICAL CONTRACTORS CC PLAINTIFF
and
THUMOS
PROPERTIES 1 (PTY) LTD DEFENDANT

JUDGMENT

KUBUSHI J

INTRODUCTION

[1] The claim by the plaintiff, Quebec Electrical Contractors CC ("Quebec") against the defendant, Thumos Property (Pty) Ltd [formerly known as Capicol 1 (Pty) Ltd] ("Capicol 1") is for the payment of the amount of RS 718 974, 68, together with interest thereon calculated at the rate of 15, 5% per annum from 1 September 2010 to date of final payment for services rendered by it to Capicol 1.

[2] At the commencement of trial I was provided with the following documents for trial purposes:

2.1 2 Trial Bundles - Bundle 1 and Bundle 2;

2.2 Index: Pleadings - Volume 1 and Volume2;

2.3 Index: Notices;

2.4 Index: Discovery Affidavits;

2.5 Index: Amended Pleadings; and

2.6 Index: Pre-Trial Minutes and Request for Particulars.

I was informed that the status of the documents had been agreed to at the pre-trial conference of 7 June 2016.

[3] In support of its claim, Quebec tendered the evidence of four witnesses, namely, Mr Dawid Johannes Christopher Pieterse ("Mr

Pieterse"), Mr Hans Adrian Verhage ("Mr Verhage"), Mr Gordon Kenneth Gibbon ("Mr Gibbon") and Mr Peters Jakobus Sherman ("Mr Sherman"). It is alleged that, at the time in question, Mr Pieterse was employed as a project manager by Capicol 1.

[4] Capicol 1 elected not to adduce any evidence this despite the fact that Mr Pavlos Kyriacou ("Mr Kyriacou"), the sole director of Capicol 1, was in court throughout the duration of the trial and chose not to testify. Capicol 1's counsel opted to cross-examine the witnesses instead.

FACTUAL

BACKGROUND

[5] The facts gleaned from the evidence tendered in court are that Capicol 1 is a private company, the sole director of which is Mr Pavlas Kyriacou ("Mr Kyriacou"). Mr Kyriacou has two other companies registered as Thumos Properties (Pty) Ltd [formerly

registered as Capicol (Pty) Ltd] ("Capicol") and Capicol 2. Mr Kyriacou is the sole director of these companies as well. Capicol 1 is said to be the developer of a project known as The Villa Mall, a failed shopping centre which is only 50% built and has been standing like that since 2011. All the professionals in respect of The Villa Mall development, namely, the architect, the quantity surveyor, the consulting engineers and the principal builder, were appointed and employed by Capicol. Osglo Pretoria Architects (Pty) Ltd ("Osglo") was appointed as the architect, McLachlan du Plooy Gauteng (Pty) Ltd ("Mcl achlan") as the quantity surveyor, VSV Consulting Electrical Engineers CC ("VSV Consulting") as the consulting engineers and GD Irons as the principal builder.

[6] Capicol 1 as the developer for The Villa Mall project concluded an engineering services agreement with the City of Tshwane Municipality

("the City of Tshwane"). In terms of that agreement, Capicol 1 was responsible to appoint a professional electrical engineer for The Villa Mall project in respect of the design construction, supervision and project management of the electricity

service connection to the electrical works from the satellite substation. As a result, Capicol 1, through Mr Pieterse, employed VSV Consulting to handle the tender in relation to the process of appointing a subcontractor to carry out the work in connection with the supply, installation, testing, commissioning and handing over of the new main 11kV feeder cables and associated equipment ("the electrical works") to affect a permanent electrical supply to The Villa Mall Phase 1 & 2 project. The tender was advertised and adjudicated upon by VSV Consulting. Quebec was recommended for appointment to do the work.

[7] Quebec in its claim relies on an agreement constituted by a tender document (Annexure "B" to the amended particulars of claim) and two appointment letters (Annexure "C" to the particulars of claim). The agreement is amplified by an amended

projected cash flow statement (Annexure "D" to the particulars of claim) and the tax invoices (Annexures "E",

"F", "G" and "H" to the particulars of claim) rendered by Quebec to Capicol 1.

[8] The tender document is a comprehensive document. It consists of about 120 pages divided into four sections. It deals with the scope of the electrical works and the obligations of the contracting parties. There are logos of three entities appearing on the cover page of the tender document. The logos are for Capicol, VSV Consulting and Osglo. Quebec's witnesses conceded under cross examination that the logo of Capicol was used because Capicol 1 did not have a log'o of its own and that the logo was used to make the tender document look

presentable. It was also conceded in evidence that the tender document was not signed by Mr Kyriacous presumably on behalf of Capicol 1. From the contents of the tender document it appears that Capicol 1 is named as the employer. This is confirmed on a number of occasions in the tender document. For example, the following information appears in section 2 of the tender document - the tender price; name of tenderer: Quebec Electrical CC; the contact person: Douw de Jong ("Mr de Jong") and is signed on 16 February 2010; and Capicol 1 (Pty) Ltd is named as the employer. Mr de Jong is an employee of Quebec and he represented Quebec during the conclusion of the agreement on which Quebec relies for its claim against Capicol 1.

[9] The appointment letters consists of two letters:

9.1 The first letter dated 26 February 2010, is a letter written on the letter head of McLachlan du Plooy Gauteng (Pty) Ltd. The letter is signed for by Edu Cunze and is written to Osglo instructing Osglo to appoint Quebec as the electrical contractor to carry out the electrical works in respect of The Villa Mall project for the amount of R8 584 632 (excluding VAT). According to the letter, the appointment of Quebec was discussed with Capicol and the approval was given by Mr Pieterse.

9.2 The second letter dated 26 February 2010, is on the letter head of Osglo and signed for by Renell Scheepers. The letter is for the attention of Mr de Jong and notifies him that Quebec's quotation was recommended by VSV Consulting and approved by Capicol 1. The letter further states that 'Quebec Electrical CC is hereby contracted to carry out the work in connection with the supply, installation, testing, commissioning and handing over of the new main 11kV feeder cables and associated equipment to affect a permanent electrical supply to The Villa Mall Phase 1 & 2. We hereby confirm the construction period of ten weeks, starting on 1 March 2010.'

This is the agreement Quebec is relying on in its claim. The terms of the agreement as pleaded in the particulars of claim are not in dispute and arise from the tender document, read together with the Osglo letter of appointment.

[10] The agreement was supplemented by an amended projected cash flow schedule prepared by VSV Consulting and approved by Mr Pieterse on behalf of Capicol 1 on 29 March 2010.

[11] Quebec commenced with the electrical works and completed same. VSV Consulting certified Quebec's tax invoices for the completed work. The tax invoices were issued to Capicol 1. Some of the invoices, in the sum of R3 179 271, 95, were paid by Capicol, leaving an outstanding balance of R5 718 974, 68, which Quebec is claiming in these proceedings.

[12] Quebec's contention is that it completed the electrical works to the satisfaction of Capicol 1's appointed consulting engineers,

represented by Mr Hans Verhage ("Mr Verhage"). According to Quebec, it has performed its contractual obligations and all or any suspensive condition set out in the agreement as supplemented from time to time by the instructions of Capicol 1's

engineers. Capicol 1, by failing to pay to Quebec the outstanding amount of R5 718 974, 68 is said to have breached or repudiated its contractual obligations and Quebec is, thus, entitled to payment of that amount together with interest and costs.

THE PLEADINGS

[13] The allegations in the particulars of claim are that on or about 16 February 2010 and at Pretoria alternatively Derdepoort, Quebec, duly represented by

Mr Douw de Jong, tendered for a direct contract for the new main 11kV feeder cables and associated equipment in order to affect a permanent electrical supply to The Villa Mall Phase 1 and 2 under contract No. PE1350/NV/11kV, for the installation of new feeder cables to the Villa 20 MVA distribution substation on the basis of its form of tender. For purposes of the implementation of the tender, the allegation is that on or about 26 February 2010 and at Pretoria, Quebec duly represented again by Mr de Jong and Capicol 1 duly represented by McLachlan and/or Osglo, concluded a partly written partly oral agreement, in terms whereof, Quebec was contracted by Capicol 1 to carry out the necessary works in connection with the supply, installation, testing, commissioning and handing over of the new main 11kV feeder cables and associated equipment to affect permanent electrical supply to The Villa Mall Phase 1 and 2 ("the electrical works"). A further allegation is that on or about 25 March 2010, the duly appointed engineers for the project, VSV Consulting, acting on the instructions of Capicol 1, prepared an amended projected cash flow schedule as at the said date, reflecting a financial breakdown of the works to be performed by Quebec on behalf of Capicol 1 and the phases envisaged for completion in the period commencing March 2010 up and until June 2010.

[14] In terms of the said agreement, Capicol 1 agreed to pay Quebec a global amount of R9 786 481, 01. The agreement was that the said amount would be paid in the following terms: R224 763, 50 as at the end of April 2010 upon submission of the engineered approved payment certificates; R3 461 887, 63 at the end of May 2010; R3 552 333, 13 as at the end of June 2010 and R441 416, 62 to be paid at the end of July 2010. There were other arrangements made as regards monies to be retained by Capicol 1 and paid out to Quebec on compliance with certain conditions, the last such money was to be paid at the end of May 2011. I do not mention these amounts here as I do not think they are necessary for purposes of this judgment. Capicol 1 is said to have made only the following payments: R179 271, 95 on 28 April 2010; R1 500 000 on 29 June 2010 and R1 500 000 on 3 August 2010. In the circumstances Capicol 1 is alleged to remain liable to Quebec in the amount of R5 718 974, 68 which is due and payable, hence this action.

[15] It is further pleaded in Quebec's replication that in the event of it being found that McLachlan and/or Osglo were not authorised to represent Capicol 1, Capicol 1 is estopped from denying the authority of McLachlan and/or Osglo to act on its behalf in circumstances where Capicol 1 represented to Quebec by its conduct that McLachlan and/or Osglo were duly authorised to act on its behalf in concluding the agreement. A further plea by Quebec in the replication is the ratification of the authority of McLachlan and/or Osglo in that by accepting

Quebec's invoices without demure and paying some of the invoices, Capicol 1 ratified the authority of its agents (McLachlan and/or Osglo) to conclude the agreement with Quebec.

[16] Capicol 1 in its defence is denying all the allegations raised by Quebec. In its plea, Capicol 1 denies knowledge of any of the documents referred to by Quebec in its particulars of claim (the tender document, the appointment letters, the amended projected cash flow statement and Quebec's invoices) and puts Quebec to the proof thereof. Specifically, Capicol 1 is denying that-

16.1 There was an agreement between it and Quebec and puts Quebec to the proof thereof.

16.2 McLachlan and/or Osglo acted on its behalf as alleged by Quebec and alternatively, and if it is found that McLachlan and/or Osglo acted on behalf of Capicol 1, it pleads that McLachlan and/or Osglo had no authority to act on behalf of Capicol 1.

THE ISSUE

[17] The crux is whether an agreement was concluded between Quebec, represented by Mr de Jong, and Capicol 1, represented by McLachlan

and/or Osglo, and if it is found that it is indeed so, whether McLachlan and/or Osglo were duly authorised by Capicol 1 to enter

into such an agreement. Further that, if it is found that McLachlan and/or Osglo were not duly authorised to enter into the agreement,

whether Capicol 1 can be estopped from denying the authority of McLachlan and/or Osglo and further whether the said authority of McLachlan and/or Osglo can be ratified.

THE LAW

[18] The approach followed in civil cases, where a defendant elects not to adduce any evidence and the facts in dispute fall particularly within the knowledge of the defendant, is stated in *Galante*[1] as follows -

"In the case of the party himself who is available, as was the defendant here, it seems to me the inference is, at least, obvious and strong that the party and his legal advisers are satisfied that, although he was obviously able to give very material evidence as to the cause of the accident, he could not benefit and might well, because of the facts known to himself, damage his case by giving evidence and subjecting himself to cross-examination"

[19] In order to apply the principle in *Galante*, it is a prerequisite that the plaintiffs evidence must be such that, when she or he closed her or his case, and an order for absolution from the instance was not warranted, the defendant's failure to testify should not justify a verdict for the plaintiff unless there is enough evidence to enable the court to say that, having regard to the absence of an explanation, the plaintiffs version is more probable than not.[2]

[20] As stated earlier in this judgment, Capicol 1's counsel opted to cross-examine Quebec's witnesses. The purpose of cross-examination is said to be to establish the credibility of witnesses and probabilities. In *Carroll v Carroll*[3] Henochsberg AJ said:

"The objects sought to be achieved by cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief; to sift the facts already stated by the witness. to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party."

[21] In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*, [4]the court said in regard to the interpretation of contracts and documents, that:

"Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'."

THE EVIDENCE

[22] The first witness of Quebec, Mr Pieterse was employed by and acted as the project manager and principal agent of Capicol. He was at one time a director of Capicol. During the time in question, he was no longer a director and only managed all the projects of Capicol. He was also assigned by Mr Kyriacou to manage all the projects of Capicol 1 even though he was not directly employed by Capicol 1. According to his testimony the professionals in respect of The Villa Mall project were appointed by Capicol: Capicol signed an architectural agreement with Osglo; a quantity surveyor agreement with McLachlan; a building agreement with GD Irons; and an engineering services agreement with the City of Tshwane resulting in the appointment of VSV Consulting as consulting engineers of the project. On the basis of the engineering service agreement, VSV Consulting had the obligation of employing a subcontractor to carry out the installation of the electrical works - hence the employment of Quebec by tender process. Mr Kyriacou is said to have been aware about the tender process, evidence is that he approved and signed the tender documents. Mr Pieterse confirmed that the consulting engineer, in this instance VSV Consulting, was the appropriate organ to deal with the tender documents and would advise the principal agent about the outcome. Mr Pieterse testified also that he approved and signed off the amended projected cash flow schedule in respect of the installation of the electrical works in The Villa Mall project, with the knowledge and approval of Mr Kyriacou.

- [23] The second person to testify, Mr Gibbon, works for the City of Tshwane as an engineer. His brother, Mr Frank Gibbon, is the chief engineer for the City of Tshwane he handled the process for the feeder cable for The Villa Mall development. According to Mr Gibbon, Capicol 1 appointed Quebec to do the electrical works. The City of Tshwane accepted the work performed by Quebec and signed it off as satisfactory. He is the one who did the inspection and all the quality assurance and confirmed that the project was completed.
- [24] The other witness, Mr Verhage, was employed by VSV Consulting as an electrical consulting engineer. VSV Consulting was employed as consulting engineers by Capicol on the basis of the engineering services agreement concluded between Capicol 1 and the City of Tshwane. Mr Verhage's work, as such, involved designing and specifying electrical installations. He was at all times material

hereto involved, on behalf of VSV Consulting, as an electrical consulting engineer in The Villa Mall project. The engineering services agreement was drafted by him on behalf of Capicol 1 and certified by Capicol 1's attorneys. There was, in terms of the

engineering service agreement, a contractual obligation on VSV Consulting to appoint a subcontractor for the installation of the

electrical works, hence the tender and the consequent appointment of Quebec. His testimony is that the costs of the tender were for Capicol 1 as stated in the engineering services agreement. The instructions, to call for a tender for the electrical works, were given by Mr Pieterse on behalf of Mr Kyriacou. The adjudication of the tender was done by VSV Consulting and having considered the tender, VSV Consulting recommended Quebec to do the work. In his testimony, Mr Verhage was able to explain the logo of Capicol

appearing on the cover page of the tender document. The logo was used to make the tender document look presentable. Capicol 1 does not have a logo. He personally prepared the projected cash flow statement and showed it to the developer indicating when the finances will become due and when the electrical works will be completed. As an engineering consultant his work also involved certifying payments. In this instance, he received tax invoices from Quebec which relate to the electrical works done by Quebec for The Villa Mall. He signed the payment certificates confirming payment due to Quebec.

- [25] The last witness was Mr Sherman, the sole member of Quebec. His testimony is that he was telephonically contacted by Mr Verhage to tender for the

installation of the electrical works in The Villa Mall project, and he did so. He

accepted that Mr Verhage had the necessary authority to call for the tender. He authorised Mr de Jong, one of Quebec's employees, to represent Quebec in this process. A positive response appointing Quebec for the tender was later received from the principal agent (Mr Pieterse) on behalf of Capicol 1. He accepted that the principal agent had the necessary authority to act as he did. He testified that the tender called for a performance guarantee which he provided. The guarantee had to be amended to make reference to Capicol 1 instead of Capicol as initially stated.

He did not know about the distinction between Capicol and Capicol 1. Invoices for work performed were sent to Capicol 1 for payment. An amount of about R3 179 271, 95 was paid leaving a balance of R5 718 974,

68. The payments were received from Capicol but for him Capicol and Capicol 1 are one and the same. When talking to Mr Verhage there was no distinction between the two.

ANALYSIS

Was there an agreement between Quebec and Capicol 1?

- [26] The onus is on Quebec to prove on a balance of probabilities that there was an agreement concluded between it and Capicol 1.
- [27] In general, the evidence of Quebec's witnesses was credible. The witnesses appeared honest; they told the truth as they knew it and did not contradict themselves or each other. The four witnesses were cross-examined at length by Capicol 1's counsel. There was some discrepancy, which to me was not material, in their evidence. In particular, the name of Capicol instead of that of Capicol 1 was used in the documents which formed part of the tender document, one of the appointment letters and various other correspondences between the witnesses and/or Mr Kyriacou. In his cross-examination, counsel for Capicol 1, sought to project confusion in regard to this discrepancy in that it could not be ascertained whether the party involved was Capicol or Capicol 1. This did not work. In their evidence in chief and under cross examination the witnesses explained this discrepancy away as being an error which was occasioned by the fact that the companies, Capicol, Capicol 1 and Capicol 2, were intrinsically involved so much that their names were used interchangeably. The companies are housed in one office, have one e-mail address and the office staff is the same for all the companies. As such, mistakes like the one singled out by Capicol 1 could easily occur. All the companies were generally referred to as Capicol without specifically referring to Capicol 1 or Capicol 2 when the staff members communicated. As regards the tender document, it was conceded that the logo used on the tender document is that of Capicol but is a mistake; the explanation is that the logo of Capicol was used because Capicol 1 did not have a logo of its own. The mistake was also made when Quebec provided the performance guarantees which referred to Capicol instead of Capicol 1 and were subsequently rectified.
- [28] I am satisfied that the evidence of Quebec's witnesses established the existence of an agreement concluded by Quebec and Capicol
1. On the probabilities, the evidence actually demonstrates that regard being had to the contextual setting and the parties' behaviour, the tender document and the letters of appointment relied on by Quebec is an agreement concluded between Quebec and Capicol 1.

[29] When the relevant context is considered, it is clear that the agreement constituted by the tender document and the letters of appointment can only be interpreted to be between Quebec and Capicol

1. The contextual setting is demonstrated by the following evidence:

29.1 Although, as conceded by Quebec's witnesses, the tender document was not signed by Mr Kyriacou but, in the engineering agreement between Capicol 1 and the City of Tshwane in regard to the electrical works, Capicol 1 was mentioned as the land owner and developer of The Villa Mall; a tender was called out for the exact same electrical works provided for in the engineering agreement; the appointment of a sub-contractor to perform the electrical works was at the expense of Capicol 1; the provision of performance guarantees in terms of the tender document was in favour of Capicol 1 as employer; mention was made of Capicol 1 as the employer in the second section of the tender document; the tax invoice for architectural design fees for The Villa Mall project was referred to Capicol 1 for payment; and in the engineering services agreement entered into between the City of Tshwane and Capicol 1 in respect of the rezoning of the Wingate Park extension for The Villa Mall phase 1 and electrical works - the signatories of which are Mr Kyriacou and Mr Pieterse - the developer is stated as Capicol 1.

29.2 The letter of appointment of Quebec as the sub-contractor for the electrical works referred to Capicol 1. It is so that the letter that recommended the appointment referred to Capicol, but it was conceded by Quebec's witnesses that some of the documents and correspondence contained reference to Capicol (like the cover page of the tender document), but they maintained, as already alluded to, that such reference was an error on the part of the staff members who made such reference. There was always an effort to make the staff members aware of this error. For instance, on 4 December 2016 an e-mail was sent to all the professionals by Ms Anita van Niekerk (Mr Kyriacou's assistant) informing them that correspondence and invoices for The Villa Mall development should be made out for Capicol 1. On 2 February 2010 a letter was sent by Mr Kyriacou himself to all members of staff informing them that tax invoices provided by suppliers should comply with the VAT Act by referring to the correct company details and the company details of Capicol 1 were provided for The Villa Mall project.

29.3 In supplementing the agreement, Quebec relied on the amended projected cash flow statement for The Villa Mall project's electrical works which was prepared by VSV Consulting and signed off by Mr Pieterse. Mr Pieterse's evidence is that he signed the amended projected cash flow statement with the approval of Mr Kyriacou

- he could not have signed without Mr Kyriacou's approval. The undisputed evidence of Mr Verhage is that the amended projected cash flow statement was prepared for Capicol 1.

29.4 All the invoices, certified by VSV Consulting, were issued out to Capicol 1. The invoices could only be paid on the evidence of work done. The invoices were received without any demur by Mr Kyriacou and some of those invoices were paid. Mr Kyriacou paid the invoices from Capicol's bank account because initially Capicol 1 did not have a bank account. The money from Sharemax, meant to finance The Villa Mall project, was deposited in Capicol's banking account. This

banking account is also mentioned in the Sale of Business Amendment Agreement: The Villa Mall concluded by Capicol 1 and The Villa Retail Park, as the banking account of Capicol 1. Mr Verhage also testified that in order to ensure that invoices were made out to the correct entities a general letter was sent out to the staff members to remind them of the different entities and the projects for each such entity.

[30] It is on that basis that I find that there was an agreement concluded between Quebec, represented by Mr de Jong, and Capicol 1 represented by McLachlan and/or Osglo.

LACK OF AUTHORITY

Were McLachlan and/or Osglo authorised by Capicol 1 to enter into the agreement?

[31] Capicol 1 has raised a defence that, if it is found that McLachlan and/or Osglo acted on behalf of Capicol 1, then in that event, McLachlan and/or Osglo were not duly authorised to act on behalf of Capicol 1. The question, in this regard, is whether McLachlan and/or Osglo were duly authorised to conclude the agreement with Quebec on behalf of Capicol 1.

[32] I have to accept the undisputed evidence of Mr Pieterse as supplemented by that of Mr Verhage in this regard. In his

testimony, Mr Pieterse contended that he was employed by Mr Kyriacou as a project manager of Capicol and duly authorised to act in all the projects, including The Villa Mall project which belonged to Capicol

1. His further evidence is that he was separately authorised with each and every document which left the office more specifically in relation to The Villa Mall project. According to him, each document was signed off or approved by Mr Kyriacou and he in turn approved and signed off all the required processes pertaining to The Villa Mall project. He said that he would not have on his own approved and/or signed off any document relating to The Villa Mall project without the knowledge, approval and/or consent of Mr Kyriacou. Mr Pieterse's evidence is supplemented by that of Mr Verhage in that he (Mr Verhage) testified that he was directly authorised by the engineering agreement and separately by Mr Kyriacou through Mr Pieterse in all the work he did in respect of The Villa Mall project. As we know, Mr Kyriacou opted not to challenge this evidence either by leading evidence or in cross-examination and as such the evidence tendered remains unchallenged.

[33] Capicol 1's other submissions that as the professionals in this instance were appointed by Capicol, they could not be authorised to act on behalf of Capicol 1 and that, as Mr Pieterse and Mr Steven Heydenrych (Mr Pieterse's assistant) were either contracted to or employed by Capicol, they were precluded from being authorised to act on behalf of Capicol 1, cannot be correct. Employment does not necessarily confer authority on any employee, as the nature of the employment may restrict or limit such authority. There is also nothing in our law which precludes a principal from appointing an agent who is not in that principal's employment.

ESTOPPEL

Can Capicol 1 be estopped from denying the authority of McLachlan and/or Osglo?

[34] Should I have been wrong in finding that VSV Consulting and/or Osglo were not duly authorised by Capicol 1 I would hold that Quebec would succeed in its plea of estoppel; and that Capicol 1 be estopped from denying the authorisation.

[35] It is Quebec's contention that Mr Kyriacou's conduct in allowing VSV Consulting to prepare tender documents on behalf of Capicol 1 and in negotiating with Quebec and other tenderers, Capicol 1 (represented by Mr Kyriacou) made a representation to Quebec that VSV Consulting had authority to act on behalf of Capicol 1; and, by allowing a principal agent to knowingly engage with or appoint a contractor also created an impression by Capicol 1 that Osglo was so authorised. I

agree.

[36] Estoppel exists where an agent does not have authority to represent the purported principal, but the latter is precluded by estoppel from disputing the agent's authority.[5]

[37] Generally, the courts have been loath to come to the aid of a principal who clothes her or his agent with apparent authority and then falls back on private instructions in an attempt to escape the consequences of the agent's conduct[6].

[38] Capicol 1 made representation to Quebec in that as the main director of both Capicol and Capicol 1, Mr Kyriacou was at all material times hereto, aware of what was happening and did nothing to correct the perception. His assertion that although VSV Consulting and Osglo purported to act on behalf of Capicol 1 they were actually acting on behalf of Capicol should not be entertained by this court. The other elements of estoppel, namely, that Quebec relied on this representation to its detriment and that Capicol 1 could and should have foreseen that Quebec would rely on such representation follows as a matter of law and of fact. From the evidence tendered it is quite clear that Quebec acted on the representation to its detriment by performing the electrical works where it otherwise would never have done so had it known that VSV Consulting and/or Osglo were unauthorised.

- [39] It is my conclusion that Capicol 1, through Mr Kyriacou, is complicit by its conduct in creating the impression that Mr Pieterse, McLachlan and/or Osglo had the authority to bind it to the agreement with Quebec. Mr Kyriacou's conduct led Quebec to reasonably believe that McLachlan and/or Osglo were acting with due authority on behalf of Capicol 1.

RATIFICATION

- [40] I would hold further that, if my decision is wrong in the aforementioned issues, Quebec would succeed on its plea of ratification.
- [41] The act of ratification is said to be the validation by a person of a juristic act concluded on her or his behalf by another who did not have authority to do so.[7]
- [42] Ratification is a unilateral juristic act amounting to a declaration of intention to be bound by an otherwise unauthorised (and hence non-binding) legal act.[8]
- [43] I am in agreement with the submission by Quebec's counsel that Mr Kyriacou ostensibly knowing that an unauthorised agreement had been concluded on behalf of Capicol 1 through his attorneys, continued to enforce the agreement, that is, by insisting on Capicol 1's performance guarantee, and accepting Quebec's invoices on The Villa Mall project made out to Capicol 1, without demur and pays some of the invoices. These are indeed deliberate acts and are tantamount to the ratification of the agreement if ever the agreement was not authorised as Capicol 1 wanted to suggest.

CONCLUSION

- [44] As already stated, Mr Kyriacou, the director of both Capicol and Capicol 1 was in court throughout the duration of the trial and chose not to testify and give an explanation to the allegations made against the two companies. Absent any explanation from the defence, I have to accept from the evidence tendered by Quebec's witnesses, that, Mr Kyriacou knew of all the documents which were being sent out and received in regard to The Villa Mall project; and that he at all material times hereto knew that such documents were sent and received on behalf of Capicol 1; and that Mr Pieterse and McLachlan and/or Osglo were authorised by him as the sole director of Capicol 1. The version of Capicol 1 was never put to the witnesses during cross-examination, as well, and thus, the version of Quebec remains uncontested. On the evidence before me, it is probable that there was an agreement between Quebec and Capicol 1. I hold that Quebec was able to establish, on a balance of probabilities, the agreement between it and Capicol 1.

COSTS

- [45] The submission by Quebec's counsel is that Capicol 1's defence is *ma/a fide* and dishonest. The conduct complained of is that the denial of Quebec's citation, the completion of the electrical works, the receipt of invoices, the making of payments and the like were all placed in issue where Capicol 1 was clearly aware of all these facts,

and Quebec was unnecessarily put to the proof of all the issues. Further conduct by Capicol 1 which justifies this court to grant a special cost order is: the fact that Capicol 1 was the only company entitled to claim VAT from SARS in respect of invoices rendered by Quebec and its denial that it was a debtor of Quebec in these proceedings; seven in circumstances where Capicol was sued by the main contractor, GD Irons, and alleged in those proceedings that GD Irons should have sued Capicol 1 and the uncontested evidence of Mr Pieterse during cross-examination that a list of Capicol 1's creditors, containing the name of Quebec, was prepared by Mr Kyriacou himself.

[46] The following is said in Alluvial Creek[9]

"Now sometimes such an order is given because of something in the conduct of a party which the court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the utmost upright purpose and most firm belief in the justice of their case, and yet those proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear."

[47] I am satisfied that this is one of those cases where the conduct of a litigant ought to be punished. Mr Kyriacou as the director of Capicol 1 knew very well that he should not have defended this matter. A punitive cost order would in the circumstances be appropriate.

ORDER

[48] In the circumstances the plaintiff is granted judgment as follows:

1. Payment by the defendant of the sum of R5 718 974, 68;
2. Interest on the aforesaid sum of R5 718 974, 68, calculated at the rate of 15,5% per annum from 1 September 2010 to date of final payment; and
3. Costs of suit to be taxed on the scale as between attorney and client,

which costs to include the costs consequent upon the employment of two counsel.

E. M. KUBUSHI

JUDGE OF THE HIGH COURT

Counsel for Plaintiff : Adv. A.G. South

: Adv. J.A. Venter

Instructed by

: Herman Van Rensburg Attorney

Counsel for Defendant : Adv. R.F. De Villiers

Instructed by

: Ben Smith Inc.

Date heard

: 05 June 2017

Date of judgment : 07 November 2017

[1] Galante v Dickson 1950 (2) SA 460 (A) at 465.

[2] See Marine & trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 465.

[3] 1947 (4) SA 37 (W), at p 40.

[4] 2014 (2) SA 494 (SCA) para 12.

[5] Makate v Vodacom Ltd 2016 (4) SA 121 (CC) para 143.

[6] See United Cape Fisheries(Pty) Ltd v Silverman 1951 2 SA 612 (T) 616C and Akojee v Sibanyoni 1976 3 SA 440 (W) 442H.

[6] See United Cape Fisheries(Pty) Ltd v Silverman 1951 2 SA 612 (T) 616C and Akojee v Sibanyoni 1976 3 SA 440

(W) 442H.

[7] See LAWSA, 1st Re-Issue, Vol 1, para 125.

[8] See Kerr Agency p80-94, De Wet and Du Plessis LAWSA 123-129, Van der Merwe et al p257; De Wet and Van Wyk pl 14- 115.

[9] In re: Alluvial Creek Ltd 1929 CPD 532.

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Prepared on 12 October 2026 · Esheria