

SOUTH AFRICA / JUDGMENT

## Special Investigating Unit and Another v RI Mako Trading and Projects and Another (NW02/2020) [2022] ZAST 25 (20 October 2022) [2022] ZAST 25

COURT  
Special Tribunal

BEFORE  
L.T. Modiba

CASE / FILE NUMBER  
NW02/2020

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IN  
THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF THE  
SPECIAL INVESTIGATIONS UNIT AND  
SPECIAL  
TRIBUNALS ACT 74 OF 1996  
(REPUBLIC  
OF SOUTH AFRICA)  
In  
the matter

|          |                           |
|----------|---------------------------|
| between: | Case Number: NW02/2020    |
|          | Special                   |
|          | Investigating Unit        |
|          | First Applicant           |
|          | MEC                       |
|          | for Department of         |
|          | Second Applicant          |
|          | Community                 |
|          | and Transport Management  |
|          | And                       |
|          | RI                        |
|          | Mako Trading and Projects |
|          | First Respondent          |
|          | Mako                      |
|          | Remosetlha Isaac          |
|          | Second Respondent         |

**JUDGEMENT**

Application for monetary judgment – whether the respondents submitted excessive claims to the second applicant in respect of the learner scholar transport contract – whether the applicants have made out a case for monetary relief sought against the respondents.

MODIBA J:

[1] In an amended notice of motion, the applicants seek the following orders from the Tribunal:

*“1. That the Respondents invoices submitted to the Department of Public Works Roads and Transport for the period 2010 to 2017 be declared invalid and irregular due to inflated kilometres claimed by the Respondents;*

2. That the Respondents be ordered to reimburse the Second Applicant for all monies that they have unduly enriched themselves through the submission of inflated kilometres to the amount of R7 479 648.44 (seven million four hundred seventy-nine thousand six hundred forty-eight rand forty-four cents) from 2010 to 2017;
3. That a declaratory order be granted by the Honourable Tribunal that the debt has not prescribed;
4. Costs of the suit, and
5. Further and/or alternative relief.”

[2] The respondents are opposing the application. However, although they filed opposing papers, the date for hearing was determined and directives for the filing of heads of argument were given at the case management meeting where their attorney of record was in attendance, he failed to file heads of argument. He also failed to appear on the date of hearing. The application remains of opposed. The Tribunal had regard to the respondents’ answering affidavit when

adjudicating the application.

[3] This judgment follows the following scheme. I first set out the background facts. Then, I outline the basis for the relief sought by the applicants and the respondents’ basis for opposition. Then, I determine the respondents’ point in limine followed by the merits of the application. Lastly I deal with the question of cost. An order concludes the judgment.

## BACKGROUND

### FACTS

[4] The background facts are largely common cause. The first respondent was appointed to render a service to the Department providing transportation for public school learners in the Delareyville rural area in the North West Province under tender number PWRT029/2010 (the tender). Subsequently the Department entered into a contract with the

first respondent to provide services in terms of the tender (the contract). The contract would endure from October 2010 until October

2015. When the contract expired, the first respondent continued to provide transportation to the learners on a month to month basis

until 30 March 2017 when the Department terminated the contract.

[5] In terms of the contract, the service would be provided on pre-determined routes set out in RSMDM 13.

[6] Throughout the term of the contract, the second respondent was the sole director of the first respondent. In that capacity, he was responsible for overseeing the daily operations of the first respondent and was accountable for the overall performance and the administration of the first respondent. The second respondent on behalf of the first respondent submitted claims to the Department in respect of services rendered in terms of the contract.

### THE BASIS FOR THE RELIEF SOUGHT AND RESPONDENTS' OPPOSITION

[7] The applicants allege that the respondents inflated the kilometres travelled when rendering services in terms of the contract. As a result, the invoices submitted to claim payment for services rendered in terms of the contract were overstated. This conduct constitutes fraud. As a result, the first respondent was unjustifiably enriched. The applicants further allege that they are therefore entitled to recover the cumulative amounts by which the respondents exaggerated

the second respondent's invoices as prayed for in the applicants' amended notice of motion.

[8] Initially, the applicants had prayed that the respondents repay an amount of R5,205,577.56. Following further investigations, they discovered that the respondents had exaggerated the second respondent's invoices by an amount of R7 479 648.44.. It is for that reason that the applicants amended their notice of motion, praying for the repayment of the latter amount.

[9] Although the respondents deny these allegations, they do not dispute that they have inflated the kilometres travelled as claimed. They contend that they claimed for kilometres as verified by the Department and were paid on the basis of their invoices as approved by the Department.

[10] The respondents have also raised the following points in limine:

10.1 prescription;

10.2 the application procedure is inappropriate in the present circumstances;

10.3 non-compliance with the Administration of Oaths Act[1].

[11] I firstly deal with the points in limine. Then, I consider the merits of the applicants' claim.

#### POINTS IN LIMINE

##### Prescription

[12] The applicants pre-empted the respondents' prescription defence by dealing with it in their founding affidavit. They have also prayed for an order declaring that their claim has not prescribed.

[13] They have set out in their founding affidavit a factual basis for their contention that their claim has not prescribed. They contend that the SIU was only authorised to institute action on 19 January

2018. The balance of convenience favours the adjudication of this dispute in the public interest to promote ethical, accountable and transparent public administration. The prejudice to the applicants far outweigh the prejudice to the respondents.

[14] The respondents contend that the applicants' claim has become prescribed in terms of s 11(d) of the Prescription Act[2]. It started running in terms s 12(1). It was never delayed in terms of s 13(1). It was also never interrupted in terms of s 14(1) or s15(1).

[15] The principles regulating prescription are trite. In terms of s 11

(d) read with s 12 (3), the applicants had three years from the date they had knowledge of the identity of respondents and of the facts from which the debt arose within which to institute their claim. The running of prescription is delayed under certain circumstances as described in s 13(1). None of the relevant circumstances are prevalent here. In terms of s 14(1), prescription is interrupted when the debtor has expressly or tacitly acknowledged liability of the debt to the creditor. The respondents have not acknowledged their liability to the applicants. Prescription is also interrupted in terms of s 15(1) when the creditor serves process on the debtor claiming payment of the debt.

[16] The respondents have not presented a version regarding when prescription started running.

[17] In their founding affidavit, the applicants also do not specifically allege when prescription started running. Counsel for the applicants submitted from the bar in response to a question from the bench, that prescription started running in June 2018 when the SIU was furnished with the forensic investigation report. However, this is not expressly pleaded. In their founding affidavit, the applicants only state that they were only authorised to investigate the matter on 19 January 2018 when Proclamation R.2 of 2018 was published. According to what

is pleaded, this is the earliest date on which I reckon the date from which prescription started running. The applicants instituted the present proceedings on 5 March 2020. They served the present application on the respondents on 21 May 2020. This date falls within the three-year period contemplated in s 11(d) read with s 12(3).

[18] Therefore, the respondents' prescription point in limine stands to fail.

Whether the application procedure is inappropriate in the present circumstances

[19] The respondents contend that the application procedure is inappropriate in the present circumstances because the applicants put up refutable inaccurate facts. They further contend that the application sets out incomplete information and raises more questions than answers.

[20] It is trite that application proceedings are appropriate where there is no foreseeable dispute of fact between the parties which is incapable of resolution on the papers. As I find below, there is no dispute of facts between the parties which is incapable of resolution on the papers.

[21] The application procedure is appropriate in the present circumstances. Therefore, this point in limine also stands to fail.

The founding affidavit is not properly commissioned

[22] The respondents contend that the founding affidavit has not been properly commissioned in that some of the pages were not initialled by either the commissioner of oaths or the deponent.

[23] As contended by the applicants, this is not entirely accurate. All the pages of the founding affidavit have been properly commissioned. It is the annexures to the founding affidavit, comprising of Proclamation R.2 of 2018 and confirmatory affidavits by Dinoko Mphumela and Palena Molefe and Tiroyamodimo David Matshane which have not been initialled by both the deponent to the founding affidavit and the commissioner of oaths. It is important to mention that the deponents to the confirmatory affidavits have been signed by the deponents and the commissioner of oath.

[24] As contended by the applications on the authority in Msibi[3], these omissions do not render the founding affidavit not properly commissioned because they are not substantial. The Proclamation is an official document, published in the government gazette. The confirmatory affidavits only confirm the evidence set out in founding affidavit concerning the relevant deponents. The respondents have not stated what prejudice they would suffer if the Tribunal accepted these annexures. Neither have they challenged the probative value of the annexures.

[25] The applicants also rely on Munn[4] where the court assessed the purpose of administering an oath. The court held that a study of the history and purpose of the administration of the oath leads to the view that the purpose of obtaining the deponent's signature to an affidavit is primarily to obtain irrefutable evidence that the relevant deposition was indeed sworn to and add to the dignity or impressiveness of the occasion. I find that these requirements are satisfactorily met in casu.

[26] For these reasons, this point in limine also stands to be dismissed.

#### Misjoinder of the second respondents

[27] The respondents also resist the relief being granted against the second respondent as prayed for in the notice of motion because the first respondent is a juristic person and the first respondent did not receive any payment from the Department. In response to this complaint, the applicants have invited the Tribunal to invoke s 20(9)

- (a) (b) of the Companies Act. It provides that if, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may –

*“Declare that the company is to be deemed not to be a juristic person in respect of any right, liability or obligation of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or any other specified person in the declaration; and*

*“Make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).*

[28] I am satisfied, on the authority on Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and others[5] and Department of Agriculture, Forestry and Fisheries and Another v B Xulu and Partners Incorporated and Others [2022] 1 All SA 434 (WCC) that the present circumstances are appropriate for the invocation of s 20(9) (a) (b) of the Companies Act. The first respondent being a juristic person could only engage in the alleged activities on the basis of the second respondent's

conduct. He prepared invoices and submitted claims for payment to the Department on the first respondents' behalf. He had a fiduciary duty to ensure that the conduct of the first respondent was at all times in accordance with the law. He failed in that duty. In this regard, there is no distinction between the conduct of the first respondent as a juristic person and the second respondent as the person controlling the first respondent. The first respondent's alleged dishonest and fraudulent conduct was enabled by the second respondent.

[29] Therefore, this point in limine falls to be dismissed.

#### THE MERITS

- [30] The second respondent confirms that he is the director of the first respondent and as such responsible for its affairs. The respondents do not dispute that the actual distance for the route it travelled or operated is 226 kilometres per month. The respondents also do not dispute that in the invoices submitted by the first respondent to the Department, the first respondent claimed payment for more kilometres than the distance travelled as alleged by the applicants. They are also not disputing the applicants' evidence in respect of the excess kilometres claimed for. All that they are contending, is that the kilometres they claimed for were verified by the second applicant on the basis of which the second applicant approved the invoices and honoured them.
- [31] The respondents are silent on which official of the second applicant verified the kilometres claimed. They have also not placed evidence of such approval by such an official before the Tribunal. Be that as it may, even if such approval was given, it would have been unlawfully given as the first respondent is not entitled to claim for more kilometres than it actually travelled. The respondents have failed to explain the basis on which they claimed vastly different amounts for the same route. In one instance they claimed 985km for one month. In another instance, they claimed 334kms for one month. If anything, the disparity of the kilometres claimed for the same route at various times during the term of the contract manifest a fraudulent intent and strongly implicate the respondents' complicity in such fraud.
- [32] I am satisfied that the applicants have made out a proper case for the relief claimed in the amended notice of motion.

## COSTS

- [33] The respondents' fraudulent conduct warrant a punitive cost order against the respondents.
- [34] In the premises, the following order is made:

## ORDER

1. The application succeeds.
2. It is declared that the applicants' claims against the respondent have not become prescribed.
3. The first respondent is to be deemed not to be a juristic person in respect of liability or obligation to the applicants arising from this judgment.
4. The respondents are jointly and severally liable to make payment to the second applicant in the amount of R7 479 648.44

(seven million four hundred seventy-nine thousand six hundred forty-eight rand and forty four cents), the one paying the other to be absolved.

5. The Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved on a punitive scale, inclusive of costs occasioned by the employment of counsel.

JUDGE L.T. MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARANCES

Attorney for the 1st and 2nd applicant Ms S Zondi, Office of State Attorney, Pretoria

Counsel for the 1st and 2nd applicant Adv. G Mokonoto

Attorney for the 1st and 2nd respondent Mr N. Mahlangu, Mahlangu & Associates INC

Counsel for 1st and 2nd respondent No appearance

Date of hearing:

29 August 2022

Date of Judgment:

20 October 2022

Mode of delivery: this judgment was handed down electronically by circulation to the parties' legal representatives by email, uploading on Caselines and release to SAFLII. The date and time of delivery is deemed to be 10am.

[1] Act no 16 of 1963.

[2] 68 of 1969.

[3] S v Msibi 1974 (4) 821 (T)

[4] S v Munn 1973

(3) SA 734 (NC) at para 737 F-H

[5] Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others

[1995] ZASCA 53; 1995

(4) SA 790 (A)

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