

SOUTH AFRICA / JUDGMENT

Tusk Construction Support Services (Pty) Ltd and Another v Mayibongwe N.O and Others (27188/2012) [2023] ZAGPPHC 1893 (6 October 2023)

[2023] ZAGPPHC 1893

COURT

North Gauteng High Court, Pretoria

BEFORE

N Davis

CASE / FILE NUMBER

27188/2012

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 27188/2012

(1)

REPORTABLE: NO.

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

DATE:

6 NOVEMBER 2023

SIGNATURE

In

the matter between:

TUSK
CONSTRUCTION SUPPORT
SERVICES
(PTY) LTD
First
Plaintiff
JOINT
EQUITY INVESTMENTS IN
HOUSING
(PTY) LTD
Second
Plaintiff
and
DR
SOMADODA PATRICK MAYIBONGWE
FINENI
N.O.
First
Defendant
DR
GCWALISILE CYNTHIA KABANYANE N.O.
Second
Defendant
MOROKA
ISAAC BUTCHER MATUTLE N.O.
Third
Defendant
MZAMO
MICHAEL MLENGANA N.O.
Fourth
Defendant
MATSHIPSANA
MERIAM MOLALA N.O.
Fifth
Defendant
TLHOSTE
ENOCH MOTSWALEDI N.O.
Sixth
Defendant
NANDISELE
FLAOUR THOKO MPUMLWANA N.O.
Seventh
Defendant
PHELISA
NKOMO N.O.
Eighth
Defendant
RASHID
AMOD ADECK PATEL N.O.
Ninth
Defendant

ZAKHELE
ALEX TUMMY ZITHA N.O.
Tenth Defendant

Summary:

More than a decade ago the Gauteng Department of Education (the Department) embarked on a school building programme. The Independent Development Trust (the IDT) was appointed as an implementation agent for the programme and, in respect of two schools, Dlamini Construction (Pty) Ltd (Dlamini) was appointed as the contractor. During the construction of the schools, payment was made to Dlamini based on certificates issued by the appointed architect. The plaintiffs had loaned and advanced monies to Dlamini (who has subsequently been deregistered) and sought to recover some R2,5 million from the IDT, being the balance of the loan repayments they could not recover from Dlamini itself. The plaintiff relied on cessions which were precluded by the JBCC agreements between the Department and Dlamini. The claims were dismissed with costs.

ORDER

The plaintiffs' claim are dismissed, with costs.

JUDGMENT

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] More than a decade ago the Gauteng Department of Education (the Department) embarked on a school building programme. The Independent

Development Trust (the IDT) was appointed as an implementation agent for this programme and, in respect of two schools, Dlamini

Construction (Pty) Ltd (Dlamini) was appointed as the contractor and Muhammad Mayet Architects & Urban Designers (Mayet) as the principal agent.

- [2] The two schools, being the Steve Tshwete Secondary School (Steve Tshwete) and Lotus Gardens Secondary School (Lotus Gardens) were constructed and the Department, through the IDT, had paid Dlamini the full contract price during 2010 and 2011 based on payment certificates issued from time to time by Mayet.
- [3] While all the above are common cause, the plaintiffs, being Tusk Construction Support Services (Pty) Ltd (Tusk) and Joint Equity Investments in Housing (Pty) Ltd (Joint Equity), claim that they had loaned and advanced some R4,3 million to Dlamini. They had obtained judgment against Dlamini in a separate case (23 789A/2011) on 21 August 2013, despite Dlamini having been deregistered on 30 August 2020 already. The plaintiffs apparently have succeeded in only recovering a part of their loans.
- [4] The plaintiffs claim that, as security for repayment of their loans, Dlamini had ceded all its right, title and interest in monies due to it in terms of construction works performed by it, including those to be received in respect of the Lotus Gardens school, to the plaintiffs. Despite having been informed hereof, the IDT continued to make payment to Dlamini in an amount of R 2 517 993, 84. It is this amount which the plaintiffs sought to recover by way of the action which only came before this court by way of a stated case on 19 May 2023.

The background facts

- [5] As already mentioned, the background facts are largely common cause and were placed before the court by way of a state case. This included the incorporation of an extensive number of contract and documents. I shall summarise those relevant to the disputes, hereunder.

The school building programme

- [6] During 2005 the Department resolved to implement a school building programme, targeting various “clusters”. It budgeted funds for this purpose in three tranches of R 134 million each. For purposes of managing and implementing the programme, the Department concluded a written Programme Implementing Agent Agreement (the Implementation Agreement) with the IDT, represented in this litigation by its trustees, on 22 December 2005.
- [7] The Implementation Agreement entailed that the IDT would manage the financial side of the programme, after the presentation to it and approval of a “Programme Implementation Plan” by the Department. The Implementation Agreement further envisaged that the Department would pay monies in terms of the budget into a specified account of the IDT, whereafter the IDT would effect

payments “... specifically and only for the purpose of implementing the Programme”.

- [8] The IDT in turn, appointed Mayet as principal agent for three schools in Cluster H of the Programme on 2 February 2006. It also identified a number of consultants such as quantity surveyors and civil-, structural-, electrical- and mechanical engineers. Steve Tshwete and Lotus Gardens were two of the three schools. The construction of the three schools each had an estimated contract value of R16 million.

The JBCC contracts

- [9] After a truncated or re-negotiated tender process had been concluded on 11 May 2006, the Department on 28 August 2006 concluded two written Joint Building Contracts Committee Services 2000 (JBCC) principal building agreements with Dlamini for Steve Tshwete and Lotus Gardens schools respectively. Each agreement had a contract value of R18 863 666, 01. In each of the JBCC agreements Dlamini was identified as “the Contractor” and Mayet as “the Principal Agent”.
- [10] In each of the JBCC agreements, at the relevant signature pages dealing with the pre- and post-tender information (Clause 42.0) “the Employer” was indicated as being the Department. On the cover page of the agreement in respect of the Steve Tshwete school the IDT was denoted as “employer” but nothing turns on this as the relevant denotation is actually in said clause 42.0 of the agreement. Furthermore, in paragraph 13 of the signed stated case, it was expressly recorded that “the Defendants [the trustees of the IDT] were not the Employer as defined in the JBCC contracts” (my emphasis).
- [11] In respect of payments to be made in terms of the JBCC agreements, they provided that it may only be made after the Principal Agent had issued payment certificates and that all payments are to be made to the Contractor, save in cases where, on certain conditions, subcontractors may have been used.
- [12] In addition to the above, clauses 19.1 of the agreements are also relevant. They both read as follows “Neither the employer nor the contractor shall assign or cede his rights or obligations without the written consent of the other party, which consent shall not be withheld without good reason”.

The payment in question

- [13] Dlamini proceeded with the construction of the schools and invoiced the IDT from time to time. After progress payment certificates had been issued by Mayet, the IDT caused the following payments to be made to Dlamini:

R 530 00,00 on 20 February 2011

R 960 177,81 on 26 June 2011

R1 027 815,21 on 25 August 2011

The stated case did not itself indicate whether the payments were in respect of the Steve Tshwete or Lotus Gardens agreements.

- [14] The bank account of Dlamini into which the payments had been made, was that indicated by Mr Dlamini in two written “payment instructions”, one in respect of each school, which the IDT had accepted. In these “irrevocable” instructions, it was indicated that the account particulars may not be changed without the written consent of Tusk.

The loan by the plaintiffs

- [15] The explanation for the mention of Tusk in these instructions can be found in the following: on 17 July 2006 Dlamini as a defined

“borrower” entered into a written “FMO Infrastructure (Emerging) Project Loan Agreement” with the plaintiffs. In terms of the agreement Joint Equity lent Dlamini R1, 9 m and Dlamini ceded as security for the repayment thereof certain “pledged rights”. In terms of the agreement, these rights included the “contract income” of “approved projects”. Lastmentioned was defined in the schedule to the agreement as the Steve Tshwete school. Tusk was defined as “the paymaster” for the agreement. A second exact same agreement was concluded with the only difference being that Lotus Gardens school was indicated as the “approved project”.

- [16] The loan agreements were preceded by a “General Covering Cession”, issued by Dlamini to Tusk on 4 July 2006 and a separate written “Cession of Progress Payments” also issued by Dlamini in favour of Tusk in respect of “all progress payments that become due and payable to me/us under Contract Gauteng Schools Building Programme. Cluster H Schools – Lotus Gardens Secondary School”. There doesn’t appear to be a similar separate cession of progress payments in respect of the Steve Tshwete school.

The demands

- [17] On 28 October 2010 Tusk’s legal advisor wrote a letter to the IDT, advising it of the two abovementioned cessions and claimed and demanded as follows: “Please note that in terms of receipt of this letter to acknowledge the aforementioned cessions, as well as being obliged to make all and any payments due to Dlamini to Tusk in its capacity as cessionary of all and any amounts due to Dlamini. Please note that should you proceed to make any payments to the contractor or any other cessionary that obtained a cession after the 4th of July 2006, that Tusk will be entitled to hold you liable for such payment as well ...” Tusk’s bank account details were then furnished.
- [18] It is common cause that the IDT continued to make those progress payments referred to in paragraph [13] above to Dlamini.
- [19] The letter of 28 October 2006 was followed up by a letter of demand by the plaintiff’s attorneys on 17 February 2011, referring to payment made in respect of the Lotus Gardens school (only).
- [20] The trial bundles contain a further letter from Tusk’s Director: Corporate & Legal Affairs, Adv P. C. De Villiers, dated 30 November 2011 pursuant to a meeting with the IDT, threatening with a damages claim pursuant to the last two payments (one of which was in

respect of the Steve Tshwete school) but as this letter did not form part of the stated case, I need not say any more about it. What is contained in the stated case however, is a response thereto dated 18 January 2012 wherein the IDT claimed that the cession of progress payments was obtained without consent and in breach of clause 19.1 of the JBCC agreement.

[21] Pursuant to the IDT's denial of liability, the present action was instituted on 15 May 2012.

The contentions of the parties

[22] The plaintiffs' contentions set out in the stated case, wherein the contents of all the aforementioned documents were admitted, were the following:

"29.1 Payment by the Defendants to Dlamini was contrary to the payment instruction given by the Second Plaintiff to the Defendants (which payment instruction the Defendants accepted) and amounts to a breach of a legal duty the Defendants owed to the First and Second Defendants ...

29.3 When it made the payments to Dlamini ... the Defendants had knowledge of the cessions ...

29.4 Payment by the Defendants to Dlamini of the said amounts that was owing to it, did not discharge the debt".

[23] Based on the above the plaintiffs claimed that they have suffered damages and that the IDT is liable to it in the amount of the total of the payments listed in paragraph [13] above.

[24] The IDT's contentions were firstly that "... the monies which the Defendants paid to Dlamini were not paid to Dlamini to settle a debt owed by the Defendants to Dlamini. Such monies were paid to settle debts owed by the Department to Dlamini in terms of the JBCC contracts".

[25] The IDT's contention was further that "Dlamini was not entitled to cede its claim for payment against the Department without the Department's prior consent" and therefore that the cessions are neither valid nor can they be enforced against the IDT.

Evaluation

[26] Despite the formulation of the stated case, Adv Stoop SC, who appeared on behalf of the plaintiffs, argued that the JBCC agreements were never "implemented". This argument is not underpinned by the facts agreed to in the stated case and it should therefore be impermissible. Even if it is to be entertained, all the facts point to implementation of the agreements: the monies to which the plaintiffs now seek to lay claim were invoiced and claimed by Dlamini in terms of those agreements, Mayet as architect acted as Principal Agent in terms of those agreements and evaluated the amounts claimed by Dlamini and certified progress payments from time to time in terms of those agreements. There is no evidence, either in the stated case or otherwise, that Dlamini had been entitled to payments on any other basis than in terms of the JBCC agreements.

[27] In support of his argument however, Adv Stoop SC referred to a letter dated 9 February 2006 wherein the Department had notified the IDT that it had resolved to appoint the IDT as "project manager" for a number of infrastructure projects, including the "fast-tracking" of

“slow moving” projects, construction of classrooms, both permanent and mobile, as well as numerous other schools, some of which had gone out on tender. The Lotus Gardens and Steve Tshwete schools were two of those to be “fast-tracked” and in respect of which the IDT was authorised to negotiate with preferred tenderers to lower their prices.

- [28] After this, the IDT instructed Mayet on 21 February 2006 as follows: “You are hereby instructed to appoint the following contractors for schools in Cluster 4 as per the adjudicating meeting in the 15th and 17th of January at the IDT Head Office in Pretoria ... [then the particulars of three schools followed, two of which were Lotus

Gardens and Steve Tshwete with Dlamini (under its previous name Blackstone Projects (Pty) Ltd listed as contractor and with approximated contract prices of R16 million each]. The date of the site handover must be on or before 28 February 2006. The contractors must supply sureties, priced bills of Quantities etc as per JBCC 2000 contract” (my emphasis)

- [29] Adv Stoop SC argued that these two letters, i.e the appointment by the Department of IDT (and its appointment of Mayet) and Mayet’s letter of 21 February 2006, constituted “the agreements”. Adv Stoop SC could offer no explanation for as to how the JBCC agreements came into being despite their admitted existence, the detailed particulars contained therein and the fact that they had been signed by or on behalf of the parties mentioned therein. The only inference however, is that those agreements were indeed the contracts contemplated in the underlined portion of the letter of 21 February 2006 on which Adv Stoop SC relied.
- [30] Based on all of the above, the argument that the JBCC agreements were not the agreements on which the parties had relied and that these agreements were never implemented, is rejected. On a balance of probabilities, this contention is simply not being not supported by

facts.

- [31] As a further argument, consequential upon the above, Adv Stoop SC argued that the IDT, and not the Department, was the employer for the construction of the schools. The express wording of the JBCC agreements however refute this.
- [32] I considered the construction which the plaintiffs seek to place on the whole scheme of contracts from another angle as well. Their contention would mean that the Department disbursed monies from its own coffers to the IDT and that the IDT, as principal, would then have built schools in its own name. Had this been the scheme, the schools would then had to have been handed over or transferred to the Department. And what about existing Departmental contracts which simply had to be fast-tracked by the IDT or contracts where mobile classrooms had to be built at existing Departmental schools? When one compares this proposition to the scenario indicated by the Implementation and JBCC agreements, namely that the Department merely contracted with the IDT to implement the Department’s own projects and to manage the building of schools on Departmental property and for the Department in terms of agreements where the Department featured as principal, the plaintiffs’ proposition becomes, if not absurd, then at the very least not the one favoured by

the balance of probabilities.

[33] On a conspectus of all the facts set out in the stated case, it is clear that the Department, as owner of the schools building programme, was the employer in respect of any and all agreements for the construction of such schools. Even if the IDT had made payment

in respect of such construction projects from funds paid to it by the Department, it at all times acted as implementing agent on behalf of the Department. The Programme Implementing Agent agreement puts this agency relationship beyond doubt, particularly if regard is had to my underlining. IDT was clearly an agent and not a principal contracting party and did not act as “employer”.

[34] I consequently find that the IDT’s response to the letters of demand wherein it, reliant on clauses 19.1 of the JBCC agreements, contended that it gave no consent to such cessions, could only have been made in its capacity as agent of the Department. It had no authority to act otherwise. Even if the IDT believed it had the capacity to consent, it is common cause that no consent had been sought by Dlamini and none had been given, neither by the Department, nor by the IDT.

[35] It further follows from the above, that the IDT had never incurred any liability against Dlamini in terms of the JBCC agreements and, when it made payments, it did so on behalf of its principal, the Department. The IDT was never a debtor of Dlamini and the payments were never in respect of any own indebtedness to Dlamini. The IDT’s contention in this regard, referred to in paragraph [24] above, is therefore correct.

[36] Having reached the above conclusion, one needs not consider whether the “General Cession” was wide enough to cover both the Lotus Gardens and Steve Tshwete schools payments (in the absence of a separate progress payments cession in respect of the Steve Tshwete school) and whether the letters of demand, referring only to Lotus Gardens, were sufficient. One also need not enter the debate as to whether the first plaintiff, Tusk, indicated only as “paymaster” in the loan agreements, would be entitled to rely on any of the cessions or not. The proverbial “bottom line” is simply that Dlamini was not entitled to cede any of the payments due to it by the employer in terms of the JBCC agreements to any other party without the Department’s consent.

[37] Furthermore the IDT, acting as implementing agent for the Department, cannot be held liable for any claim which the plaintiffs may have had against its principal, had there been such a claim.

[38] The further alternate contention raised in paragraph 29.1 of the stated case, namely an alleged breach of a duty by the IDT, does not, in the absence of a duty, disclose a cause of action. The payment instructions (incidentally issued by Dlamini and not Joint Equity as claimed in the stated case) are simply that: instructions. Joint Equity had no locus standi to issue such instructions, the instructions could not be elevated to supercede the JBCC agreements and the obligations that flowed from them did not create any self-standing legal

(or even contractual) obligations or duties.

[39] It must follow that the plaintiffs' claims should be dismissed and I find no reason why costs should not follow the event.

Order

[40] The following order is made:

The plaintiffs' claims are dismissed, with costs.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing:

19 May 2023

Judgment

delivered:

6 November 2023

APPEARANCES:

For the Plaintiffs: Adv B C Stoop SC Attorney for the Plaintiffs: Coetzer & Partners Attorneys,
Pretoria For the Defendants: Adv N K Tsatsawane SC Attorney for the Defendants: Gildenhuys
Malatji Inc, Pretoria

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