

SOUTH AFRICA / JUDGMENT

**Equicent Eastern Cape Developments (Pty) Ltd v
University of Fort Hare and Others, In Re: African
Student Accommodation Group (Pty) Ltd and Others
v Equicent Eastern Cape Developments (Pty) Ltd and
Others (4065/2014) [2015] ZAECGHC 46 (28 April 2015)**
[2015] ZAECGHC 46

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson

CASE / FILE NUMBER

4065/2014

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IN THE HIGH COURT

OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: 4065/2014

DATE

HEARD: 02/04/2015

DATE

DELIVERED: 28/04/2015

In

the matter between

EQUICENT

EASTERN CAPE DEVELOPEMENTS (PTY)

LTD.....APPLICANT

and

THE

UNIVERSITY OF FORT

HARE.....1ST

RESPONDENT

COUNCIL

OF THE UNIVERSITY OF FORT

HARE.....2ND

RESPONDENT
AFRICAN
STUDENT ACCOMMODATION GROUP
(PTY)
LTD.....3RD

RESPONDENT
ISONDLO
INVESTMENTS (PTY)
LTD.....4TH

RESPONDENT
JOHN
CHRISTOPHER
SCHOOLING.....5TH

RESPONDENT
and

in the conditional counter-
application between:

AFRICAN
STUDENT ACCOMMODATION GROUP (PTY) LTD.....1ST
APPLICANT
IDONDLO
INVESTMENTS (PTY)
LTD.....2ND
RESPONDENT
JOHN
CHRISTOPHER
SCHOOLING.....3RD
APPLICANT
EQUICENT
EASTERN CAPE DEVELOPMENTS (PTY) LTD.....1ST
RESPONDENT
THE
UNIVERSITY OF FORT
HARE.....2ND
RESPONDENT
COUNCIL
OF THE UNIVERSITY OF FORT
HARE.....3RD
RESPONDENT

JUDGMENT

ROBERSON J:-

BACKGROUND

[1] During 2014 the third and fourth respondents in the application, a joint venture (the JV), were awarded a tender by the first and second respondents (the University) for the provision of student accommodation. The applicant (Equicent) applied to this court for the review and setting aside of the award. (The fifth respondent (Schooling) is the managing director of the fourth

respondent. He was not a party in the review application.) On 5 December 2014 Brooks AJ made an order by agreement between the parties (the 5 December order). Paragraph 1 of the order read as follows:

“1 THAT the 3rd and 4th Respondents (“the JV”) shall complete phase 1 of the tender (REF UFH-SCM 05/2013) (“the Tender”), as defined

in paragraph 4.8.1(a) of the request for proposals (“the RPF”) awarded to them by the First and Second Respondents (“UFH”) on 4th April 2014, to be performed in accordance with the terms of the building contract which was subsequently concluded, but the Tender

award of 4th April 2014 and subsequent contract in respect of phases 2, 3 and 4 be and are hereby set aside.”

Paragraph 4.8.1 of the request for proposals (the RFP) provided as follows:

“The following construction roll out is required:

- a) Buildings 1 and 2 should commence on 1 July 2013 and be completed on 1 January 2014.
- b) Buildings 3 to 7 should commence on 1 January 2014 and be completed on 30 June 2014.
- c) Buildings 8 to 12 should commence on 1 July 2014 and be completed on 1 January 2015.
- d) Buildings 13 to 17 should commence on 1 January 2015 and be completed on 30 June 2015.”

[2] The rest of the 5 December order dealt with the re-adjudication of the tender by a panel of three independent consultants. The order provided that if the parties were unable to agree on the members of the panel, the members could be appointed by the president of Consulting Engineers South Africa, or two alternative persons.

[3] A dispute arose between Equicent and the JV concerning what work was encompassed by “phase 1” of the tender. The JV contended that phase 1 had been re-defined and included the work which was under way at the time of the hearing of the review

application. Work had commenced on five buildings and on bulk infrastructure for the entire project. “Phase 1”

was now phase 1 in terms of the contract concluded between the University and the JV, and comprised 500 beds, later increased to 610 beds.

[4] The JV was warned by Equicent not to continue with work other than buildings 1 and 2. The JV refused to halt work and Equicent brought an urgent application for a declaratory order (the declaratory application) in accordance with its interpretation of the 5 December order and other relief. The University did not oppose the application. The JV brought a counter-application

for a declaratory order in accordance with its interpretation of the 5 December order, alternatively for a variation of that order in terms of rule 42 (1) (b).

[5] On 12 March 2015 I granted the following order (the 12 March order):

[59.1] “It is declared that:

[59.1.1] In terms of paragraph 1 of the order of this Court issued under case number 4065/2014, by Brooks AJ on 5 December 2014, the respondents are not permitted to undertake or progress any construction of any building or structure work, or any earthworks or any other work in respect of or in connection with any buildings other than buildings 1 and 2 contemplated in paragraph 4.8.1(a) of the request for proposals in the tender REF UFH-SCM-5/2013.

[59.1.2] The third, fourth and fifth respondents are in breach of paragraph 1 of the order of Brooks AJ;

[59.2] The respondents are to pay the costs of the application jointly and severally the one paying the others to be absolved, such costs to include the costs of two counsel.

[59.3] The counter-application is dismissed with costs, such costs to include the costs of two counsel.”

APPLICATIONS

[6] The JV and Schooling have applied for leave to appeal against the 12 March order. Equicent has applied for an order in terms of rule 49 (11) that the first paragraph of the 12 March order operate and be executed until the final determination of all present and future appeals, and for an order declaring that the application for leave to appeal by the JV, any appeal by the JV, and the JV’s right to appeal are perempted. Equicent has also brought an application to strike out certain matter from the answering affidavit in the rule 49 (11) and peremption application. I propose to deal firstly with the application for an order that an appeal by the JV is perempted.

[7] On 13 March 2015 the JV’s attorneys wrote to Equicent’s attorneys in the following terms:

“1. We refer to the order granted by Roberson J on Thursday, 12 March 2015.

2. The order will have enormous cost implications for the JV, Dewing Construction and all the subcontractors and ultimately the

University. It is now imperative that the re-adjudication of the bids proceed immediately. In this regard, we suggest the following timetable:

2.1 That Kroon and Griesel JJ be approached by the University (or the parties jointly as previously discussed) immediately in order to appoint them and ensure that they finalise the appointment of the third panellist.

2.2 That the parties submit the written representations to the panel, which shall not exceed 10 pages, on or before 31 March 2015;

2.3 That a meeting be convened in respect of the panel for Wednesday – Thursday, 1 – 2 April 2015 to consider the representations and make a decision.

3, Kindly revert to us on the above proposal before close of business today.”

[8] Equicent’s attorneys replied as follow by letter dated 13 March 2015:

“1. We refer to your letter dated 13 March 2015 (“your letter”) and to the judgment and order in the above matter handed down by the Honourable Madam Justice Roberson on 12 March 2015 (“the judgment and order”). The judgment and order were served on your offices yesterday afternoon.

2. As you will note, paragraph 59.1 of the judgment and order makes it clear that your clients may not “undertake or progress any construction of any building or structure work, or any earthworks or any other work in respect of or in connection with any buildings other than building 1 and 2” (“the prohibited work”). The prohibited work clearly also includes civils (paragraph 37 of the judgment and order), and building clearly means what your clients have referred to as “blocks” 1.1 and 1.2 (paragraphs 33 and 36).
3. Our client requires confirmation from your clients, by close of business on Monday, 16 March 2015, that, as of 12 March 2015, they are no longer progressing the prohibited work.
4. In relation to your letter, our client has not had confirmation from the University that the letter to the experts may be dispatched. As soon as all parties have confirmed that they are satisfied with the contents of the letter, this will be processed.
5. Our client reiterates that it stands ready to progress the court ordered process without any delay, and will take all necessary steps to do so. It is not willing to agree, however, to any attenuation of the process already determined and ordered by the Court, as suggested in your letter. The re- adjudication of the bids is a complex process that requires careful consideration and proper preparation by all involved. Once the appointment of the experts has been completed as contemplated in the 5 December 2014 order, any submissions as to process that any parties have may be addressed to and dealt with by the panel.

6. Our client is not willing to jeopardise its right to a procedurally fair hearing in order to allay your clients' newly minted concerns that compliance with the requirements of an order of court to which they agreed with have cost implications for them.
7. The judgment and order simply confirm what your clients could and could not do since 5 December 2014, and that your clients have acted in breach of any order of court. Any purported urgency now is completely self- created and self-serving."

[9] On 17 March 2015 Equicent's attorneys sent the following e-mail to the JV's attorneys:

"Unless we receive written confirmation from you by close of business today that your clients are no longer progressing the prohibited work (as defined in our letter of 13 March 2015), then our clients will assume that your clients are progressing such work. Our clients will then have no option but to apply to hold your clients in contempt and seek appropriate orders of committal on an urgent basis"

[10] The JV's attorneys' e-mail in response was:

"Kindly note that you will receive the confirmation you seek as soon as I have received confirmation from client.

Any assumptions drawn at this stage are dangerous."

[11] Finally on 17 March 2015 the JV's attorneys e-mailed Equicent's attorneys as follows:

"1. As of 12 March 2015 my client has instructed the Principal Agent and all sub-contractors to cease work on all but two (2) buildings;

2. It is confirmed, therefore, that what you refer to as 'the prohibited work' is not being undertaken by my client;
3. For avoidance of any doubt, I confirm that my client is only constructing buildings 1.1 and 1.2.

Kindly confirm that you are satisfied therewith."

[12] The notice of application for leave to appeal was delivered on 20 March 2015.

[13] The founding affidavit in Equicent's application, deposed to by its director Mr Mazwi Yako, contained averments that the correspondence from the JV indicated that the JV unambiguously accepted the 12 March order, that it was implementing the order, and that it hoped to accelerate the implementation of the 5 December order. There was no indication of an intention to appeal

against the 12 March order or a reservation of its right to appeal. The application for leave to appeal was, so it was alleged, at odds with the JV's prior unambiguous acquiescence in the 12 March order. The JV had unequivocally conveyed an intention to be bound by the order and its right to appeal was therefore perempted. The application for leave to appeal was brought mala fide and was a dilatory tactic so that the JV could persist with work which, in terms of the order, it was not entitled to perform, thus undermining the re-adjudication process.

[14] Schooling deposed to the answering affidavit. He stated that the application for leave to appeal was bona fide. The effect of the order is that completion of performance of phase 1 as required by the order, has become impossible in the sense that no habitable units can be completed. He claimed that these issues had been dealt with in the application for declaratory relief but expanded on some aspects which he said had only recently become apparent. The order for the completion of buildings 1 and 2 only has resulted in complications and additional costs. The order makes it impossible to provide some services to these two buildings because the JV is not able to complete only 2/17 of the services infrastructure, such as water reticulation and electricity sub-stations. The services for buildings 1 and 2 are integral parts of the bulk services for the whole project and to provide services just for these two buildings would involve a material re-design and fundamental departures from the contract specifications. A further difficulty is that if the JV complies with the order, a fire compliance certificate and an occupancy certificate would not be issued for building 1.2, rendering it uninhabitable. Further still, work on the three other buildings was at an advanced stage and has now ceased. It was performed in accordance with the JV's design and another contractor will not be entitled to complete these buildings in accordance with that design. Should Equicent be awarded the tender, demolition of this work would result, at the University's expense. Leave to appeal was therefore sought to try to rescue the project from failure, in the interests not only of the JV and its subcontractors but also the University and its students.

[15] In dealing with the JV's attorneys' e-mail of 17 March 2015 (see para [9] above), Schooling referred to the JV's

"undertaking" not to continue with construction other than on buildings 1.1 and 1.2, which undertaking he confirmed.

At this stage, so Schooling stated, it will be difficult and costly to resume full scale construction. For example, retrenched

staff will have to be re-employed. The JV has no intention of resuming construction until clarity is obtained on what it is permitted to do, either by way of appeal or the re-adjudication process.

[16] Schooling stated that the e-mail of 17 March 2015 had to be read in the light of the JV's attorneys' letter of 13 March 2015 (see para [7] above) which he said indicated that the 12 March order had enormous cost implications for the JV, Dewing Construction, the subcontractors and the University. Schooling also said that this letter confirmed that the JV did not intend to proceed with the construction of any buildings other than two of the

buildings, “pending the outcome of the adjudication process.” The statement in the letter that the re-adjudication process should proceed immediately was an attempt by the JV to save the project by proposing reasonable time periods for the filing of submissions and a date for the determination of the re-adjudication.

[17] According to Schooling the JV at no stage indicated to Equicent that it did not intend to apply for leave to appeal. The severe implications of the 12 March order for the project meant that it would have been irresponsible of the JV not to exhaust every possibility of seeking a variation of the order in order to save the project. The JV never indicated that it accepted the 12 March order or that it would not appeal against it. The fact that the order was implemented did not mean that the JV had waived its right to appeal.

[18] In *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 (3) SA 315 (SCA) at para [3] Wallis JA said:

“Where, after judgment, a party unequivocally conveys an intention to be bound by the judgment any right of appeal is abandoned. The principle can be traced back to the judgment of this court in Dabner v South African Railways & Harbours[1], where Innes CJ said:

‘The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.’

That judgment has been consistently followed in this court.”

[19] In the *Qoboshiyane* matter the court a quo had ordered the first appellant (the MEC) to disclose a report of an investigation into concerns of maladministration in the affairs of the Nelson Mandela Bay Metropolitan Municipality. The disclosure was made at a public ceremony where the MEC handed the

report to a representative of the first respondent. At the ceremony the MEC made a public statement that although he disagreed

with the judgment he would deliver a copy of the report as ordered by the court. Eight days later an application for leave to appeal was lodged. The court a quo granted leave to appeal.

[20] In deciding that the appeal was perempted Wallis JA said at para [4]:

“The facts here are simple. The MEC was ordered to disclose a copy of the report to Avusa within five days of the court’s order. He did so. He did not indicate any reservation of rights or any intention to appeal at that time. The application for leave to appeal was delivered later. There was only one thing that the MEC had to do in terms of the court’s order and he did it without reservation. His conduct was unequivocal and inconsistent with an intention thereafter to challenge the judgment on its merits. The appeal was perempted and must be dismissed.”

- [21] In my view the contents of the JV's letter of 13 March 2015 were an unequivocal indication that it acquiesced in the order and was not going to take the matter of its interpretation any further. Its proposal that the re-adjudication should go ahead immediately and the setting of dates, conveyed a message that what is past is past and the parties should now go forward in terms of the 5 December order, so that resolution concerning the award could be achieved, and finality reached as soon as possible. Other than saying that the order would have costs implications, there was no mention in the letter that the JV challenged the order or that it intended to appeal or reserved its right to appeal. The significance of the need to press ahead with the re-adjudication process was underscored by Schooling's statement in his affidavit that the JV did not intend to proceed with construction on any but two of the buildings pending the outcome of the adjudication process. Again in my view this expresses acquiescence in the order and a desire to achieve finality.
- [22] Further in my view, the JV's e-mail of 17 March 2015, sent four days later when it had had time to reflect on the request by Equicent for confirmation that it would not carry out the prohibited work, indicated that it intended to be bound by the order and in fact had implemented it by giving instructions to the principal agent and the sub-contractors to cease work on all but two buildings. This implementation in my view strengthens a conclusion that the JV intended to be bound by the order, when viewed in the light of its earlier refusal to halt work because it maintained that its interpretation of the 5 December order was the right one. Again there was no mention of an intention to appeal or a reservation of the right to appeal. One would imagine in the face of a strongly worded request in which Equicent was clearly seeking to enforce its rights in terms of the order, that the JV would at that stage voice non-acquiescence in the order and an intention to appeal. I am unable to read the e-mail of 17 March 2015 as an undertaking. It is not in such terms. It does not mention that an undertaking is made pending the happening of a particular event. The e-mail does nothing to dispel the message of the letter of 13 March 2015 that the parties should move forward and achieve finality via the re-adjudication of the bids.
- [23] While some difficulties in implementing the order as interpreted were raised in the declaratory application, much of the difficulties

mentioned by Schooling have become apparent subsequent to the 12 March order. In my view the JV cannot change its mind after

having unequivocally acquiesced in the order and not having reserved its right to appeal. As was said in *Hlatshwayo v Mare & Deas* 1912 AD 242 at 259:

"A person has the right to re-open the case or to appeal; he voluntarily chooses to do an act which is clearly inconsistent with this right, and he is therefore presumed to have consented to the judgment. Whether then we base the doctrine of acquiescence on the consent which is implied or the choice which is exercised, or call it waiver makes no difference. At bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate."

- [24] It was submitted on behalf of the JV that something more than mere compliance with a court order is required. Reliance was placed on instances given by Erasmus Superior Court Practice at A1-52A-52B, with reference to authorities, where peremption will not occur, namely: submission to the order of Court, pending appeal, in circumstances where what appears to be acquiescence is no more than respect for the court or a desire to avoid delay pending appeal; apparent acquiescence, dictated by fear of certain legal consequences if certain steps were not taken; or enforced acquiescence. In my view neither the letter of 13 March 2015 nor the e-mail of 17 March 2015 suggested that any of these situations governed the JV's decision to implement the order. At the risk of repetition, the overriding interest contained in the letter of 13 March 2015 was the need to proceed without delay with the re-adjudication of the bids.
- [25] Overall therefore the JV indicated twice that it intended to be bound by the order, namely in the letter of 13 March 2015 and the e-mail of 17 March 2015. In neither document, drafted by its attorneys, did it reserve its right to appeal. It has implemented the order. This conduct also gains significance when seen against the background of an ongoing dispute which began in August 2014. The JV has opposed all the applications so far: an application for interim relief pending the review application, the review application itself, and the application for declaratory relief culminating in the 12 March order. Its silence in these two documents about a dispute clearly conveys the message that the time for disputes is over and its hope for redress lies in the re-adjudication. It regards that process, and not the appeal procedure, as decisive.
- [26] In all these circumstances and having regard to the authorities, I am satisfied that Equicent proved that the JV acquiesced in the 12 March order and its conduct was inconsistent with an intention to challenge the order on the merits.
- [27] The order sought that the appeal is perempted should therefore be granted. It is therefore not necessary for me to consider the application in terms of rule 49 (11).
- [28] It is strictly speaking not necessary for me to consider the merits of the application for leave to appeal. However it was fully argued and I shall deal with it.

There were four grounds of appeal.

- [29] The first is that I altered the nature of the order, which had been agreed upon, by giving it a prohibitory content, when the order had no such prohibitory content. I dealt with this argument in my judgment. Clearly the setting aside of the tender award and contract in respect of phases 2, 3 and 4 of the tender award, meant that there was no lawful basis for the JV to perform work in respect of phases 2, 3 and 4. This is especially so because the order was premised on unlawful administrative action and public money was involved.
- [30] The second ground was that the order as interpreted has shortcomings. Paragraph 4.8.1 (a) of the RFP must be read with

subsequent amendments otherwise it is unenforceable. As I stated in my judgment, the document expressly referred to in the

order was the RFP and it was the only document which referred to four phases. The other documents did not and in fact differed in their reference to phases. If a different definition of phase 1 had been intended, the order would have said so.

- [31] The third ground was that the context militates against the order as interpreted. It is impossible to provide any services to buildings 1 and 2 in order to render them habitable. To provide separate services will entail a re-design and departures from the contract specifications. To some extent this ground is based on events discovered subsequent to the order. In any event however, I found that the order was clear and unambiguous and if, as was contended, what was on everyone's minds when the order was agreed to was the work which was already under way on five buildings and bulk infrastructure, the order would not have been couched in the terms that it was.
- [32] Fourthly it was contended that I erred in not finding that paragraph 4.8.1 (a) of the RFP was reconcilable with the award and the contract. The paragraph does not deal with installation of bulk services and buildings 1 and 2 cannot be made habitable without such bulk services. This ground encroaches on the previous ground and involves material discovered after the order was made. I dealt with bulk services in my judgment and decided that if the construction of buildings 1 and 2 necessitated the provision of bulk services, this would not equate to bulk services for the entire project.
- [33] The second, third and fourth grounds of appeal all really relate to a different definition of phase 1 other than that expressed in the order. It is clear that a different definition would entail a reference to documents additional to the RFP, and to work which had been commenced at the time of the order. The order did not refer to any other documents nor did it refer to the extent to which work had commenced. It restricted the portion of the award which the JV was allowed to retain very specifically. It is important to remember the premise on which the remainder of the award was set aside, namely unlawful administrative action.
- [34] I am consequently of the view that there is no reasonable prospect that another court would reach a different conclusion on the interpretation of the 5 December order.
- [35] The dismissal of the conditional counter-application inevitably followed the decision on the application and likewise I am of the view that there is no reasonable prospect that another court would come to a different decision.

APPLICATION TO STRIKE OUT

- [36] This application concerned certain paragraphs in Schooling's affidavit on two aspects. The first was that the paragraphs

concerned introduced matter which was not before the court in the review application or the declaratory application, and which was irrelevant. The second aspect concerned allegations of dishonest and corrupt conduct on the part of Equicent in that it obtains inside information from someone at the University, and that it had made fraudulent claims in its bid.

[37] While it is so that events subsequent to the order were raised in the affidavit, I am prepared to accept that they were raised as part of the opposition to the rule 49 (11) and peremption application. They related to the JV's expressed inability to carry out any further work and whether or not it had acquiesced in the order and whether or not it intended to challenge the order. I therefore decline to strike out those paragraphs. However the allegations of dishonesty and fraud must be struck out. They were in response to Equicent's allegations that the JV was mala fide in applying for leave to appeal and that the application for leave to appeal was brought with the intention of persisting with the unlawful work and delaying the application of the 5 December order. However the JV's allegations of dishonesty and fraud went far beyond a relevant response to these allegations and were indeed scurrilous and prejudicial.

[38] Equicent has had only partial success in the application to strike out and I propose to order that each party pays its own costs of this application.

[39] In the result the following orders are made:

[39.1] It is declared that the third, fourth and fifth respondents' appeal against the order of this court of 12 March 2015 is perempted.

[39.2] The third, fourth and fifth respondents are to pay the costs of the application jointly and severally, the one paying the others to be absolved.

[39.3] Paragraphs 4.14 and 30 of the third, fourth and fifth respondents' answering affidavit are struck out.

[39.4] The parties are to bear their own costs of the application to strike out.

[39.5] The application for leave to appeal is dismissed.

[39.6] The third, fourth and fifth respondents are to pay the costs of the application for leave to appeal, the one paying the others to be absolved.

J M ROBERSON

JUDGE OF THE HIGH COURT

Appearances:

For the Applicants: Adv D Unterhalter SC and Adv M du Plessis, instructed by Webber Wentzel Incorporated, Johannesburg c/o Netteltons

Attorneys, Grahamstown.

For 3rd, 4th & 5th Respondents: Adv J Dickerson SC and Adv J de Waal, instructed by Boqwana Burns Incorporated, Port Elizabeth c/o NN Dullabh & Co, Grahamstown

[1] 1920 AD 583

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