IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: 3010/2016

Heard on: 24 November 2016
Delivered on: 09 February 2017

"Reportable"

In the matter between:

STRYDOM AND KROQWANA CONSTRUCTION CC **Applicant/Plaintiff**

and

THE MEC FOR HUMAN SETTLEMENTS

EASTERN CAPE **1st Respondent/1st Defendant**

KOUKAMMA LOCAL MUNICIPALITY **2nd Respondent/2nd Defendant**

JUDGMENT

MAKAULA J:

[1] This is an application for summary judgment. I shall refer to the parties as plaintiff and first and second defendants.

[2] The plaintiff, based on a contract and Deed of Cession entered into between it and the second defendant, issued summons against the defendants. The action is defended by the first defendant only.

[3] The summons reveals that on or about 4 September 2009, the plaintiff and the second defendant entered into a written agreement in terms of which the plaintiff would install ceilings and provisioning of exterior plaster to RDP units within the municipal area of the second defendant for the contract price of R10 274 880.00 (ten million two hundred and seventy four thousand eight hundred and eighty rand). The plaintiff delivered numerous invoices to the second defendant which the latter paid.

[4] On 13 and 14 November 2009 the plaintiff and the second defendant entered into a Deed of Cession *(cession)* in terms whereof the second defendant ceded its rights to claim against the first defendant to the plaintiff. Furthermore, to the cession all payments due to the plaintiff by the second defendant relating to the project shall be honoured by the first defendant. Pursuant to that agreement the plaintiff delivered to the first defendant three invoices amounting to R1 105 772.50 (one million one hundred and five thousand seven hundred and seventy two rand fifty cents). Having failed to pay the invoices, the plaintiff issued summons against the defendants for that amount culminating in this application.

[5] The first defendant avers that it was a bona fide defence that is good in law. Paragraph 9 of the opposing answering affidavit reads:

> "The deed of cession relied on by the Plaintiff, entered into on the 14th November 2009 is illegal and has no force and effect. This cession was not signed by the Municipal Manager of the 2nd Defendant, there is no delegation powers of letter authorizing the person who signed on behalf of the 2nd Defendant to act on his behalf. A copy of the Cession is herewith attached and marked **"SKC B"**."

[6] Mr Van Vuren, on behalf of the plaintiff, argued that the defence raised by the first defendant is not bona fide and good in law in that the Turquand rule applies. My understanding of his argument is that since the Turquand rule applies to the merits of a case, it is equally applicable to this the summary judgment applications.

[7] It has become trite in summary judgment applications that a court in deciding such applications enquires whether a defendant has disclosed the nature and grounds of his defence and whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is bona fide and good in law.[1]

[8] The Turquand rule or the indoor management rule states that when a third party entered into a contract with a company, there is a legal presumption that all acts of the company's internal management have been properly carried out[2]. The effect of a Turquand rule is to prevent a company or municipality in this instance, from lawfully resiling from a contract with a bona fide third party on the ground only that internal requirements have not been observed.[3] The effect of Turquad rule is that a person entering into a

[1]Erasmus: Supreme Court Practice by Farlam *et al* at B1-223 and the authorities cited therein

[2]Tshiki Pakamisa 'The Turquand rule vs the doctrine of ultra vires': The decision in *Mbana v Mnquma Municipality* 2004 (1) BCLR 83 (TK) analysed (2004) 4 *De Rebus* 48.

[3]Henochsberg on the Companies Act 71 of 2008 Vol 1 First Edition by Professor Piet Delport.

contract is not required to ascertain whether the legal entity's internal requirements have been met.

[9] Farlam JA succinctly deals with the origins of the Turquand rule and its adoption in our law in *Nieuwoudt and Another NNO v Vrystaat Mielies (EDMS) BPK*[4] as follows:

> "In this regard, the respondent relied on the so-called *Turquand* rule, first laid down by the Court of the Queen's Bench and confirmed by the Exchequer Chamber in *Royal British Bank v Tarquand* (1856) 119 ER 886 (Ex Ch) (6 E & B 327;[1843-1860] All ER Rep 435), which has been adopted by our Courts as part of our company law (*see Legg & Co v Premier Tobacco Co* 1926 AD 132) and been held to apply also in cases involving trade unions (*The Mine Workers' Union v Greyling* 1948 (3) SA 831 (A)) and municipalities (*Potchefstroom se Stadsraad v Kotze* 1960 (3) SA 616 (A). A modern formulation of the rule, which was approved by Lord Simonds in *Morris v Kanssen* [1946] AC 459 at 474 [1946] 1 All ER 586), is taken from *Halsbury's Laws of England* 2nd ed vol 5 para 698 (see now 4th ed, re-issue vol 7(1) para 980), and is in the following terms:
>
> > '(P)ersons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular.'"

[10] Due to the development of our law, the Turquand rule is now equally applicable to municipalities as it is to companies. In *Potchefstroom Stadsraad v Kotze*[5] *(Kotze)* the court found the municipality of Potchefstroom to be bound by a cancellation of a lease agreement signed by the town clerk who had not been authorised by council or sub-committee. The basis therefor was that the lessor who was being sued by the municipality for arrear rentals, could not be prejudiced by internal management issues relied upon by the municipality. The court held that the fact that council had not authorised the

[4] 2004 (3) SA 486 SCA at 491G-J.

[5] 1960 (3) SA 616.

cancellation of the lease was irrelevant and could not prejudice the respondent. What has to be borne in mind though is that the Turquand rule was not, in *Kotze* raised in a summary judgment. In the instant matter the defence by the first defendant and the point of law raised by the plaintiff are to be viewed in the light of a summary judgment application.

[11] It is correct that in applications of this nature if a point of law is raised against a defence raised and is dispositive of the matter, summary judgment should be granted. I agree with Price J when he said in *Nkungu v Johannesburg City Council*[6]:

> "It seems to me, however, that where the case can be decided on a crisp law point there is no reason at all why the magistrate should not decide that point in an application for summary judgment. He has decided the legal point in this case against the defendant and has granted summary judgment, and it is both more convenient and less expensive for the court now to decide whether the magistrate was correct in his decision on the legal issues. Such decision will dispose of the litigation. It would be highly inconvenient, unnecessary and expensive to decide that the magistrate should not have given summary judgment because there was a difficult question of law involved, and to send the matter back to the magistrate for trial, after which there would be no doubt another appeal to this court when the question of law which is now in issue will be determined."

[12] Even though it is common cause that the contract was between the plaintiff and the second defendant, *ex facie* the papers it is clear that the second defendant was acting as an implementating agent for the first defendant. That much is apparent from the written tender document which was prepared by both defendants. The letter of acceptance by the consulting

[6] 1950 (4) SA 312 at 314E-G.

engineers of the project who acted on behalf of the second defendant addressed to the plaintiff reads in its first sentence as follows:

> "On behalf of the Koukamma Municipality and the Department of Housing: Province of the Eastern Cape, we are pleased to inform you that your tender for Project **TEC SCCCA-0910/001 for the installation of Ceilings and Provision of Exterior Plaster on RDP Units with the Koukamma Municipal area is herewith accepted**, . . ."

[13] Further correspondence between the parties written on the letterhead of the first defendant dated 23 July 2009, seemingly varying the terms of the contract reads in paragraph C;

> "Resolved that:

(a) . . .
(b) . . .
(c) it be approved that the appointed contractor be paid directly by PDoH for value created and that the relevant payment cession between Koukamma Municipality, the appointed contractor and the PHoH be attached as an annexure to the project addendum;
(d) . . .
(e) it be approved that one representative each from the Koukamma Municipality and the consultants, Kantley and Templer (Pty) Ltd Consulting Engineers, as well as <u>the responsible provincial project manager from PDoH</u> be assigned with the responsibility to certify completed work and payment." (My underlining)

The opposing affidavit reveals that there were internal arrangements between the defendants.

[14] In paragraph 7.4 of the opposing affidavit, the deponent states as follows:

> "That the Department paid all claims submitted in terms of agreement with the Municipality and there are no outstanding invoices due for payment. The department denies liability." (sic)

[15] There is no evidence that the plaintiff was privy to the agreement between the defendants. Furthermore, the second defendant did not defend the action nor file a confirmatory affidavit. I am of the view that the plaintiff cannot be prejudiced by the internal arrangements between the first and second defendants. It cannot be found that the plaintiff ought to have known, in the circumstances, whether the person who signed the Deed of Cession was authorised or not. Such knowledge was within the defendants' peculiar knowledge. The plaintiff has performed in terms of the contract and cannot be prejudiced by internal matter or arrangement between the defendants.

[16] Consequently, I make the following order:

1. **Summary judgment is granted in favour of the plaintiff against the first defendant for payment of the sum or R1 105 772.50;**

2. **Interest on the aforesaid amount at a rate of 10.25% per annum from the date of judgment until the date of payment;**

3. **Costs of action.**

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M MAKAULA

JUDGE OF THE HIGH COURT

***Appearances*:**

Applicant/Plaintiff:	Adv Van Vuren *instructed by*
	Huxtable Attorneys
	22 Somerset Street
	GRAHAMSTOWN
Respondents/Defendants:	Adv Ngadlela *instructed by*
	State Attorney
	c/o Mfundisi Attorneys
	72 High Street
	GRAHAMSTOWN