

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 2018/35644

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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P.H. MALUNGANA

26 January 2024

In the matter between:

ANDRIES SEHLOHO

First Applicant

RUSSEL STEAD

Second Applicant

**TM ECOGLOBAL ENTERPRISE PROPRIETARY
LIMITED**

Third Applicant

and

MASSBUILD PROPRIETARY LIMITED

Respondent

JUDGMENT

MALUNGANA AJ

INTRODUCTION

1. There are three interrelated applications for leave to appeal before me. All of the three applicants seek leave to appeal to either the Full Court or Supreme

Court of Appeal, against the whole judgment and order of this Court which I handed down on 14 August 2023. In the judgement I granted relief for the respondent, in terms of which the applicants were ordered to pay damages to the respondent jointly, and severally in the sum of R4,927,750.21 plus costs.

2. The grounds of appeal are circumscribed in the parties' applications for leave to appeal. It is alleged that I erred in certain respects. Having heard counsels' oral arguments, I reserved judgment in order to properly consider the applications. I consider it necessary to have regard to the grounds of appeal as filed by the parties.

SUMMARY OF GROUNDS OF APPEAL

3. First Applicant's Grounds of Appeal

(a) There are some similar features with slight nuances between the first applicant's grounds of appeal, and that of the second applicant. Essentially they both contend that the court had erred in not considering an act of ratification of Reatha contract.¹

(b) The first applicant further contends that this Court has erred in holding that the first applicant was liable for the damages suffered by the respondent. In this regard the Court failed to assess and consider that at all material times the first applicant in signing the contract acted under the instructions of his senior managers.²

(c) The court erred and failed to consider material evidence of the second applicant that certain managerial staff were aware of the contract. In this regard this Court failed, as it was required, to apply its mind on the credibility of the witnesses who were still in the employ of the respondent.

¹ Case Lines 102 -8. Para 7, of the 1st Applicant's Grounds of Appeal. Case lines 100-10, para 4.2, of the Second Applicant's Grounds of Appeal: "A previously invalid contract ratified by the principal clothes the agent with representative authority with retrospective effect, such that the agents act is thereby rendered an authorized act not in breach either of his employment contract or in offense of any limits of authority governing his contractual capacity."

² Case Lines 02-5, para 1.1 of the Grounds of Appeal.

(d) The court erred in not assessing and considering the terms and conditions of key accounts manager and external manager. This Court also erred in concluding that the first applicant when signing the contract did so as a witness to the contract.

(e) The court erred and misdirected itself in holding that there was no sufficient evidence to support the first applicant's version that Dr Mary instructed to pay the sub-contractor's on site in advance (up-front).

(f) The court erred in holding that CIBD was ever a requirement on approval of one-time vendor in that Reatha did not demand it from the respondent and Structic Engineering.

(g) The court erred and misdirected itself by overlooking and not considering contributory negligence on the part of the respondent, and its staff, which might have mitigated the loss at the early stage of the discovery of the contract.

(h) The court erred and misdirected itself by not assessing or considering that Reatha was unjustifiably enriched by receiving the money in excess of what it was required to receive when it was refunded by the respondent.

(i) The court erred and misdirected itself in failing to properly and correctly apply its mind to the damages claimed by the respondent. It failed to consider the costs of the material which was on site, work in progress and to interrogate the value and costs of the material on site, labour paid by the sub-contractors or any other outstanding material paid and not delivered by the supplier.

(j) The court erred in failing to consider the evidence presented by the respondent relating to the assessment of damages which does not reflect the accurate damages suffered by it.

(k) The court overlooked the contents of settlement agreement entered into between Reatha and the respondent when awarding damages to the respondent.

(l) The court erred in not assessing and considering the credibility of the second applicant on certain parts of his testimony, which indicated an intention to relieve himself, alternatively to shift the blameworthiness on his part from liability and placing the first applicant fully accountable for all the actions in relation to the contract to his exclusion.

(m) The court erred and misdirected itself by concluding that the first applicant acted in breach of his employment contract when he procured the appointment of TM Ecoglobal without the consent of the respondent. This Court ought to have found that the first applicant had disclosed such relationship with the third applicant to the second applicant.

(n) The court erred both in law and on facts by concluding that the respondent proved its claims both on contract and in delict.

(o) The court erred and misdirected itself in concluding that the third applicant did not perform any work under Reatha Contract, and was merely a paymaster. This Court misconceived the concept of sub-contractor in relation to the Reatha contract.

4. Second Applicant's Grounds of Appeal

(a) The court erred by erroneously holding that the second applicant was liable for the respondent's damages. This Court overlooked the fact that the respondent did not pray for, nor obtained judgment against the second applicant, and third applicant. Instead the respondent prayed for and obtained judgment only for the two duly authorised amounts which it paid to the third applicant.

(b) The court erred in finding that the second applicant was in breach of his employment contract with the respondent by having signed the Reatha contract, and that such breach had given rise to the damages based on acts of wrongfulness and factual causation. This Court ought to have found that all purported legal acts ostensibly performed by a professed agent on behalf of a principal without due representative authority by the principal is invalid ab initio devoid of legal effect and does not bind the principal. In this case the Reatha contract signed by the second applicant without the necessary authority is invalid at their respective inception such that no valid contracts ensued or came into being.

(c) The Court erred in finding that the second applicant was liable for payment of the sum of R4 927 750,21, both based on breach of contract and on delict. This Court ought to have found that the contract in question was ratified by the respondent with retrospective effect pursuant to the principle that states: "A previously invalid contract ratified by the principal clothes the agent with representative authority..." In this case ratification occurred when the respondent concluded a subcontract with the third applicant with the first applicant representing the respondent.

(d) This Court ought to have found that the conclusion of the settlement agreement relating to the Reatha contract, without the involvement of the second applicant severed the casual link or factual causation between damages suffered by the respondent and any breach of contract or delictual act perpetuated by the second applicant thereby discharging all constituent elements for liability whether contractual or delictual.

(e) The Court erred in granting an order for costs against the second applicant in respect of the dismissal of his application for absolution from the instance instituted at the close of the respondent's case.

(f) In the premises the Court erred in granting judgment against the second applicant, and another court confronted with the same facts and evidence, will arrive at a different conclusion.

5. Third Applicant's Grounds of Appeal

(a) The Court erred and/or misdirected itself in finding and concluding that TM Ecoglobal was wrongful in its conduct: In that it knew and ought to have known that the first applicant was not authorised to conclude the Reatha contract for the building or renovation of schools in Limpopo; it knew or ought to have known the reasonable costs or usual market value of labour and materials referred to in the BOQ, and ought to have known that it would not perform the obligations in terms of the Reatha contract (Sub-Contract), whether properly or at all;

(b) The Court erred and/or misdirected itself in finding and concluding that TM Ecoglobal procured payments for work that was not done, materials not delivered or overcharged against the prescripts of BOQ. The Court ought to have found that the agreement between TM Ecoglobal and the respondent did not indicate that TM Ecoglobal was to use any BOQ when preparing its invoices. Instead the respondent would issue Purchase Orders as acceptance of the prices in the invoices issued by TM Ecoglobal without raising any issue about the BOQ;

(c) The Court erred and/or misdirected itself in not addressing and considering that when Reatha terminated the contract with the respondent, there was some work that was going on at all three sites in terms of the contract;

(d) The Court erred and/or misdirected itself in not considering that when making the repayment to Reatha the respondent failed to give a full evaluation of the costs of the work that has been already conducted, the costs of materials already delivered on site and the costs of materials that were ordered but not delivered on site and the costs of the materials that were ordered and

not yet delivered, which materials were delivered and used on sites after the termination of the contract;

(e) The Court erred and/or misdirected itself in not addressing and considering that TM Ecoglobal had done some work and incurred expenses towards the contract;

(f) The Court erred and /or misdirected itself in not addressing and considering that the amount claimed by the respondent as damages is the full amount paid to TM Ecoglobal irrespective of the work done and material already purchased and delivered on site, and those still ordered and were later delivered and used by Reatha to complete the project;

(g) The Court erred and/or misdirected itself in not addressing and considering that in making repayments to Reatha, the respondent kept the profit margins;

(h) The Court erred and/or misdirected itself in not addressing and considering that Reatha was unjustifiably enriched by the work that was done by the third applicant;

(i) The Court erred and/or misdirected itself in not addressing and considering that it was due to the respondent's own conduct and negligence that it suffered loss, if any, by repaying the full amount that was paid to TM Ecoglobal to Reatha without consideration of the costs of work done, materials ordered and materials delivered and used by Reatha after the termination of the contract.

(j) Another Court presented with same facts, evidence and properly directing itself would arrive at the different conclusion. Under the circumstances the third applicant's case enjoys the prospect of success on appeal.

PARTIES' SUBMISSIONS

5. It was submitted on behalf of the first applicant that the Court erred in failing to consider that the plaintiff's claim was based on the breach of employment contract. The policies and regulations governing the employee and employer's relationship apply equally to the senior managers. Mr Matlhanya, also argued that the court misconstrued the role of the applicant as a key account manager, which role is akin to that of a 'sales man', responsible for, amongst other things, to foster relationships and to chase sales volumes and margin with large customers, and contracting customers. Authorising payments was not one of his duties. Accordingly the chains of events and conduct of different role players does not justify the application of 'but for test' principle.
6. Counsel for the first applicant further argued that the matter raises inconsistency about how policies and regulations were applied differently by the respondent to its employees. The Court erred in considering the end of the tail of the contract without answering whether the first and second applicants have the authority to bind the respondent. The Court failed to address the relationship between the agent and the principal. At all times Reatha was aware that the first applicant did not have the authority to bind the respondent. Therefore it was clear that no binding contract existed between the respondent and Reatha.
7. Mr Matlhanya further contended that the issue of damages was not properly considered by the Court. There are discrepancies between the amounts claimed by the respondent. For instance there is an amount of approximately R524 967.69 which was added to R4 402 782.52 without any reasonable explanation. The miscalculation resulted in Reatha being enriched by approximately R2,307,261.24. In this regard the first applicant has met the threshold for leave to appeal set out in section 17 of the Superior Court Act.
8. The second applicant's submissions were to the effect that leave to appeal ought to be granted in that the sub-contract concluded between the first applicant and third applicant in March 2017 has been ratified as testified by John Kyamba. Moreover, the subsequent payments were made pursuant to the valid contract

authorized by Frank Urzi. The substantial quantities of building materials were supplied and services rendered by the third applicant to Reatha, and such services and building materials were not discounted against the quantum of plaintiff's claims.

9. Mr Slabbert further argued on behalf of the second applicant that the Court erred in holding that the second applicant was liable for the respondent's damages in circumstances where the respondent had signed a settlement agreement with Reatha. The settlement in question disposed of all surviving *ex contractu* rights of recourse pursuant to the Reatha contract. The respondent further concluded a settlement agreement with the second applicant appertaining to his unfair dismissal in full and final settlement in the sum of R95 000.00. Such settlement discharged the second applicant's employment contract as well as *ex contractu* claims, rights and obligations between the parties *inter se*.
10. On behalf of the third applicant, Mr Mashimbye contended that this Court erred and misdirected itself in holding that the respondent would not have suffered damages had it not been the wrongful conduct of the third applicant. There is uncontested evidence to the effect that when the Reatha contract was concluded the first applicant was not involved. Structus Engineering was the entity that was involved at the time. It is the third applicant's submission that there are reasonable prospects that the appeal will succeed in this respect.
11. Mr Mashimbye further submitted that the Court misdirected itself as to damages suffered by the respondent in holding that once the third applicant is factually linked to the pecuniary loss by the first applicant, then the "but for test" liability will ensue. Under the circumstances, Mr Mashimbye argued that the third applicant has reasonable prospect of success on appeal either to the Full Court or the SCA.

12. Miss Bosman for the respondent submitted that all three applicants have failed to demonstrate a sound and reasonable basis that the appeal would have a realistic chance of success. She further submitted that they failed to show compelling reasons why the appeal should be heard in terms of section 17 of the Superior Courts Act.
13. In argument she pointed out that the proposition by the first and second applicants that the Reatha Contract was null and void *ab initio*, and without legal effect ignored the fact both applicants represented that they had authority to conclude the contract and to bind the respondent. If the respondent had been sued by Reatha it would have been estopped from denying such representation by the first and second applicants. Furthermore Reatha had already paid R5 million to the respondent, which money was paid to the third applicant through the unlawful actions of the first and second applicants.
14. Counsel for the respondent further argued that the respondent's claim was not based on the breach of Reatha contract, but on the breach of employment contract. In this regard the first and second applicants signed the Reatha contract without the requisite authority thereby breaching the employment contract and their fiduciary duties. As regards ratification, she argued that the proposition that the respondent ratified the conclusion of the Reatha contract is not backed up by facts.
15. In respect of the quantification of damages that the Court awarded to the respondent, Miss Bosman argued that the applicant's calculations set out in the application for leave to appeal is not backed up by any evidence submitted during the trial. In this regard she demonstrated how the quantum was calculated by Mr Visagie in paragraph 23 of her written submissions. According to Miss Bosman there was no evidence adduced on behalf of the applicants to challenge the respondent's evidence placed before the court by Mr Visagie. The Court was not required to determine whether Reatha was enriched unjustly, and the terms of settlement agreement between Reatha and the respondent were irrelevant to the damages sought by the latter.

16. With regard to the second applicant's application for leave to appeal on costs, arising from the judgment on absolution from the instance, the respondent argued that the said judgment was handed down in 2022, and any appeal in this regard has lapsed.

LEGAL PRINCIPLES ON LEAVE TO APPEAL

17. Section 17 of the Superior Courts Act provides that:

'(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard; including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2) (a); and

(c) Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

18. It is apparent from the section that the threshold for granting leave to appeal against the judgment of a High Court is 'whether another court will differ from the court whose judgment is sought to be appealed.'³

19. In *Notshokovu v State* [2016] ZASCA 112 (delivered on 7 September 2016), the Supreme Court of appeal stated in para 2 as follows:

³ *Mount Chevaux Trust [It 2012/28 v Tinaa Goosen and 18 Others* 2014 JDR 2325 (LCC) at para 6.

“...An appellant on the hand faces a higher and stringent threshold in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959.”

CONCLUSION

20. What is required of this Court is to consider, objectively and dispassionately, whether there are reasonable prospects that another court will find merit in the arguments advanced by the losing party.⁴
21. It follows from above that the applicants must convince the court on proper grounds that there are sounds rational basis to conclude that there are reasonable prospect of success on appeal not just a possibility.⁵
22. Returning now to this matter. I am not satisfied that the applicants have demonstrated in their respective applications any rational basis upon which this Court can conclude that there are reasonable prospect of success on appeal in the context of s 17 of the Superior Court Act. For these reasons and other reasons set out in the main judgment, the applications for leave to appeal should fail.

ORDER

23. In the result the order that I make is:
 1. The applications for leave to appeal are dismissed, with costs.

⁴ *Valley of the kings Thaba Motswere (Pty) Ltd and Another v Al Maya International* [2016] 137 (ZAECGHC) 137 (10 November 2016) at para 4.

⁵ *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 (25 November 2016) Para 16-18.

PH MALUNGANA
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard on: 12 December 2023

Delivered: 26 January 2024

APPEARANCES

For the First Applicant Advocate MJ Matlhanya

Instructed by: Mahlokwane Attorneys

For the Second Applicant Advocate F Slabbert

Instructed by: David Meyer and Partners

For the Third Applicant Advocate DG Mashimbye

Instructed by: Makobe Attorneys

For the Respondent Advocate P Bosman

Instructed by: ENS Africa