

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES:</u> <u>YES/NO</u>
(3)	<u>REVISED.</u>

Case no: HCAA02/2022

In the matter between:

LEPHALALE LOCAL MUNICIPALITY
And

APPELLANT

NANZA AMAMIYA NDLOVU JOINT VENTURE

RESPONDENT

JUDGMENT

MULLER:

[1] This an appeal against the judgment of Semenya DJP with leave to the Full Court having been granted. This case commenced as an urgent *ex parte* application before MG Phatudi J who granted an order in the following terms on 30 March 2021:

“2. Pending the hearing and final determination of all issues in PART B of the application.

- 2.1 The purported cancellation of the agreement between the applicant and respondent dated 8 March 2021 is declared null and void and accordingly set aside.
- 2.2 The respondent is interdicted, prevented and prohibited from negotiating, entering into and/or appointing any consultants or other service provider in respect of the contract for the professional planning, designs, drawings and supervision of the waste transfer station in respect of GA-SELEKA AREA that includes KAULETSE and MOONG VILLAGES.
- 2.3 Paragraph 2.1 and 2.2 above, shall operate as interim interdict and relief immediately and forthwith.
- 2.4 The sheriff of this Court is directed to serve this interim order on the respondent.
- Parties may supplement their papers as necessary for hearing of PART B on the 13th of May 2021.
- 2.6 Costs reserved.”

[2] It is also necessary to refer to the relief in PART B in light of the arguments presented to which I will revert presently. Part B states:

- “3. Directing the respondent to attend to, consider, and approve the variation order number 1 (Moong) in the amount of R5 269 219.29 (*Five Million Two Hundred And Sixty Nine, Two Hundred And Nineteen Rand, Twenty Nine Cents*) to increase the contract amount to R10 538 438.59 (*Ten Million Five Hundred and Thirty Eight Four Hundred And Thirty eight Rand, Fifty Nine Cents.*)
4. Directing the respondent to pay the sum of R478 128. 60 (Four Hundred and Seventy Eight Thousand, One Hundred and Twenty Eight Rand, Sixty Cents) in respect of professional services rendered and to honour reasonable invoices and claims for payment by Applicant, including for those expenses reasonably incurred and incidental to the contract in the reasonable execution of the tender.

5. Costs of the application on an attorney and client scale.”

[3] The appellant applied, also on an urgent basis, for reconsideration of the order granted by MG Phatudi J in terms of Rule 6(12)(c) to set aside the order and to dismiss the application with costs. The application came before Semanya DJP who dismissed it, with costs. The Deputy Judge President held that:

“I regard the respondent’s application for reconsideration of the order granted on the 30 March 2021 in the urgent court as simply an abuse of court process. More so that it could not categorically deny that the SLA and other tender documents are not specific about the fact that the work was to be done on two projects. It is not sufficient to state that whatever was agreed upon was not compliant with the law. The applicant is entitled to have the remaining issues determined on the normal roll instead of in the urgent court. The issues raised in the answering affidavit are those which could be dealt with in the normal roll and could have waited until the return date of the interim order. The applicant is entitled to costs on this basis.”

[4] The court, accordingly, confirmed the order granted by MG Phatudi J and issued a rule *nisi* returnable on 14 March 2022.

[5] I have considerable difficulty to understand the reasoning why the reconsideration application was considered to be an abuse of process when an order was granted in the absence of the respondent.

[6] The respondent argued before us that the interim order is not final in effect and as a result not appealable. In *Metlika Trading Ltd and Others v Commissioner South African Revenue Service*¹ the Supreme Court of Appeal has held that an interim interdict is appealable if it is final in effect and not susceptible to variation by the court which has granted the order. It was emphasised that in determining whether the order is final in effect, that not

¹ 2005 (3) SA 1 (SCA).

only must the form of the order be considered but predominantly what the effect of the order is.

[7] The effect of the interim order is that the contract which has been cancelled by the respondent on 8 March 2021 was revived. The revived contract which is the subject matter of PART B of the notice of motion has far reaching financial consequences for the appellant. The relief under Part A in terms whereof the contract was given a new life is simply a precursor for the main relief claimed in Part B. Part B is not, on a close reading of the prayers, independent relief but indeed predicated upon the validity of the revived contract in terms of the order granted in Part A. Put differently; the relief in PART B presupposes a valid contract. The revival of the contract does not have interim effect. Once the contract is declared valid the effect thereof is final. I am accordingly of the view that the order is appealable.

[8] Before turning to the merits of the appeal a preliminary issue which was raised must first be determined. The appellant raised the issue in the court *a quo*, and in this court, that the respondent lacked *locus standi*. The respondent is cited in the heading of the notice of motion as 'NANZA AMAMIYA JOINT VENTURE.' The deponent to the founding affidavit identified himself as an adult male director of the applicant. In paragraph 4 the deponent states that:

"The Applicant is a private company duly registered and incorporated as such in accordance with the company laws of the Republic of South Africa and carries on business as Consultants in the Project management and Civil and Structural Engineering Industry, with its principal business and registered office at..."

[9] The deponent continued in the next paragraph to state that he, as the Managing Director of the applicant, per the joint venture agreement, and in terms of resolution of the board of directors, is duly authorised to depose to the affidavit and bring the application on its behalf. The resolution is attached to the papers.

The heading of the said resolution states:

“BOARD RESOLUTION OF NANZA AMAIYA (PTY) LTD

Registration Number 2018/364241/07

TO COMMENCE LITIGATION

DULY PASSED ON 23 MARCH 2021”

[10] The resolution records that Nanza Amamyia (Pty) Ltd believes that it has a valid claim against the respondent arising from Bid no T03/2018-2019 and that it is resolved that Nanza Amamyia (Pty) Ltd in pursuit of its claim through court proceedings and that the deponent is authorised to institute action.

[11] The appellant denied in the papers that the resolution is a resolution of the joint venture. It was submitted before us that there is no evidence that the joint venture authorised the application. Counsel for the respondent submitted that the joint venture is partnership between two parties and that any one of the two parties has *locus standi* to institute the proceedings.

[12] The Deputy Judge President accepted that the respondent has been correctly described as a private company and that the company on the face of the resolution authorised the institution of the proceedings. The Deputy Judge President overlooked that the company is only one of the parties to the joint venture agreement.

[13] It is common cause that a joint venture agreement exists. Apart from the name of the joint venture in the heading of the notice of motion, no other reference is made to the joint venture in the papers. Apart from a cursory statement that the deponent is the managing director appointed in terms of a joint venture agreement nothing else is said about the contents of or the rights and obligations of the parties to the contract. What the rights and obligations are of Nanza Amamyia (Pty) Ltd in the joint venture are not mentioned. I am hesitant simply to accept on the mere submission advanced by counsel for the respondent that the arrangement is a partnership without evidence to support such a proposition. Certain *essentialia* need to be embodied in a joint venture agreement for the arrangement to be a partnership.² A joint venture which is not a partnership might be a commercial association distinct from a partnership.³ The difficulty is that since the founding affidavit is both pleadings and evidence, and that the parties to the joint venture are not identified in the founding affidavit, it is impossible for the court to determine what the nature of the arrangement is. The proposition that the existence of a joint venture which has a sharing of profits as a goal is *prima facie* evidence of a partnership, cannot be accepted. The sharing of profits is not conclusive evidence of a partnership.⁴

[14] Rule 14(2) provides that:

“‘Association’ means any unincorporated body of persons, not being a partnership.
‘Firm’ means a business, including a business carried on by a body corporate, carried on by the sole proprietor thereof under a name other than his own.”

² *Bester v Van Niekerk* 1960 (2) SA 779 (A) 783H-784A.

³ *R v Bowen NO and Others* 1967 (3) SA 236 (R) 239G-H.

⁴ *Bale & Greene v Bennett* 1907 NLR 361, 381.

[15] The purpose of the rule is to provide a procedural aid to the applicant to ameliorate the need to join and cite each individual member of the unincorporated joint venture. The rule, however, cannot be of any assistance to the respondent who has failed to cite each member of the joint venture. The resolution attached to the founding papers is on a proper interpretation thereof a resolution of a company, Nanza Amamyia (Pty) Ltd. The resolution recorded that it is this company who has a valid claim against the appellant. The deponent was granted the authority, in terms of the resolution, to settle the claim upon recommendation of its legal representative on terms he deems to be in the best interests of Nanza Amamyia (Pty) Ltd without reference to the other party to the joint venture.

[16] Again, if Nanza Amamyia (Pty) Ltd is a member of an unincorporated joint venture which has no independent existence on its own, every member of the joint venture should have been cited.⁵ The failure by the respondent to adduce cogent and acceptable evidence in this regard leads me to conclude that the respondent has failed to prove that it has the required *locus standi*.

[17] I now turn to the merits of the application. It is the case of the respondent that it was awarded a tender in June 2019 by the appellant as a consultant for planning, design and supervision of waste transfer station at Lephallale (Ga-Seleka Area). Pursuant to a letter of appointment issued by the appellant, the parties entered into a written service level agreement.⁶ The respondent commenced with the work at Ga-Seleka Area. To the respondent's surprise it was informed that Ga-Seleka consisted of two stations, namely, Moong and

⁵ *EX-TRTC United Workers Front and Others v Eastern Cape Province* 2010 (2) SA 114 (ECB) par 13-14.

⁶ Hereinafter called "the SLA".

Kauletse and that two designs and plans for the two stations must be produced. The development was not in accordance with the brief. The joint venture were informed by the appellant to continue with the work but to claim as the work progressed. After a while they started to encounter delays in payment of their interim claims. The respondent then by agreement applied for a variation order which sets out the expected costs of the inclusion of the other station. The appellant acknowledged the variation request for the professional fees of the respondent in a letter dated 8 October 2020 in the amount of R5 269 218.29 inclusive of VAT in respect of Moong village. They were informed that any deviation from the scope of work should be communicated in writing to the appellant and that it should be approved by the accounting officer before the respondent may commence with any work on site. They were furthermore informed that the appellant has considered their request and that the request must be submitted to the department of Co-Operative Governance Traditional Affairs and Local Government before granting such permission to vary the order.

[18] When the respondent submitted a claim for R478 128.60 on 11 December 2020 the appellant replied that the invoice is going through a verification process and that it will revert once the process has been completed. No payment was made in respect of the invoice.

[19] On 15 January 2021 further invoices were submitted. Again the invoices were not paid. This caused the respondent to write a letter on 21 January 2021 to the respondent in which it is stated that any further professional services to Moong and Ga-Seleka waste transfer project are suspended due to non-payment of

their professional fees and failure to consider and honour the variation orders by the appellant. The relevant paragraph reads:

“Nanza Amamiya JV submitted a Variation Order for the Consultation for Planning, Design and Supervision of the Moong Waste Transfer Station upon discovering that the initial appointment was solely for the Ga-Seleka Waste Transfer Station. Due to the unapproved variation Orders and consequential financial strain of the addition Waste Transfer Station to the professional team, Nanza Amamiya JV has come to the conclusion of suspending the contract as of Friday, 6 November 2020.”

[20] The appellant acknowledged receipt of the letter referred to above and replied on 8 February 2021 that it had paid the respondent for work done and denied owning the respondent the amount claimed. The reply states:

“In your letter dated 21 January 2021 you have also stated that you have suspended your professional services since the 6 the November 2020, but have failed to communicate that to the municipality on the said date. This has resulted in delays in completion of the project as you have not provided the municipality and the contractors with the reviewed drawings that the municipality has already paid for.”

[21] The appellant forwarded a second letter to the respondent on 8 February 2021 in terms whereof the respondent was requested to provide the appellant with the revised drawings for which they have been paid and continued to state:

“It should be noted that the contractor cannot proceed on site without the revised construction drawings. You should be aware by now that the contractor has likewise abandoned site and therefore the project will not be completed on the 28th February 2021 as scheduled. The municipality is at risk of forfeiting the allocated funds appropriated to the municipality with specific terms and conditions in accordance with the Division of Revenue Act.

To this effect it is brought to your attention that:

- (i) In terms of section 8, clause 8.1(b) of the service level agreement you have failed to comply with the provisions of the signed service level agreement;
- (ii) And therefore notified to rectify such failure within a period of 14 days from date of receipt of this letter.

You are therefore requested to submit in writing your commitment to complete the project within 24 hours upon receipt of this correspondence failing which the municipality will assume that you are no longer interested in the project. The Municipality will be left with no option but to terminate your services and proceed with the implementation and completion of outstanding works on the project.”

[22] The respondent has failed to communicate its commitment as requested to the appellant.

[23] On 8 March 2021 the appellant forwarded a letter to the respondent in which the appellant said:

“...

The municipality has given an ample time to enable your company to collate relevant information and respond within 14 days as per the signed service level agreement which lapsed on the 05 March 2021 and to date we have not received any feedback from your company.

We are nearing the end of the third quarter without any progress on site and expenditure on the allocated budget and this adversely affects the municipality's performance. To this effect in terms of section 8, clause 8.1(b) of the service level agreement you have failed to comply with the provisions of the signed service level agreement and the Municipality is therefore left with no option but to terminate the contract with Nanza Amamiya Ndlovu Joint Venture and proceed with the implementation and completion of outstanding works on the project.

It should further be noted that any additional cost that will be incurred by municipality in this regard will be categorised as fruitless expenditure and will be claimed from your company.”

[24] Neither the letter of 21 January 2021 and nor the letters dated 8 February 2021 were attached to the *ex parte* application. The court was therefore not placed in the position to properly consider the events and sequence of the letters that eventually culminated in the cancellation of the contract. I am also firmly of the view that the respondent nevertheless on its own version has failed to make out a proper case for the relief claimed in PART A. On the respondent’s own version it has committed a breach of the contract when the respondent has stopped to perform professional services in terms of the service level agreement as from 6 November 2020.

[25] The service level agreement in clause 9 provides that:

“It is a specific condition of this tender that the Service Provider is required to perform his task to acceptable standards and shall be obliged to meet the deadlines as determined by the parties.

Serious default of this contract shall include but not limited to:

- . Non-compliance with tender specifications/scope of work
- . Breach of confidentiality and/or conflict of interest;
- .Inadequate valuation results measured against monitoring;
- .Non-compliance with any relevant legislation/regulation and any other conditions referred to in this tender.

[26] The service level agreement provides that should a party fail to comply with any provision of this agreement, the innocent party shall be entitled to notify the other party in writing of such failure in term of clause 8.1 of the service

agreement to rectify any such failure within 14 calendar days calculated from the date of postage by registered mail or alternatively on that date such notice was hand delivered to the defaulting party. In the event that the failure is not rectified the innocent party may cancel the agreement and claim damages. As indicated above such notice was duly communicated to the respondent. After the respondent has failed to rectify its breach a notice was submitted to the joint venture that the service level agreement is cancelled as a result of the respondent's repudiation of the contract.

[27] The contract makes provision for arbitration in respect of any dispute arising from or in connection with or the subject matter of the agreement. The respondent, for reasons of its own, did not avail itself to resort to arbitration in respect of the dispute with regard to the variation order.

[28] Repudiation of a contract occurs *inter alia* when there is a refusal to perform a contract acknowledged to be binding, or of a declaration of inability to perform, or of other declarations of a similar nature.⁷ In *Datacolor International (Pty) Ltd v Intamarket*⁸ the test to be applied in cases of repudiation was explained:

“The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the

⁷ Kerr AJ *The Principles of Law of Contract* 4th ed (1989) 425.

⁸ 2001 (2) SA 284 (SCA); *B Braun Medical (Pty) v Ambasaam* CC 2015 (3) SA 22 (SCA) 10.

agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach.”⁹

The conduct from which the inference of impending non-or malperformance is to be drawn must be clearcut and unequivocal, ie not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is a “serious matter”... requiring anxious consideration and – because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments – not lightly to be presumed.”¹⁰

[29] The facts are that the respondent suspended the rendering of professional services to the appellant in November 2020 in terms of the service level agreement coupled with the failure to make use of the dispute resolution mechanism provided by the arbitration clause in the contract. The respondent only communicated to the appellant in January 2021 that it has suspended further performance of work. It is, in my view, clear evidence that the respondent was no longer interested in performance of its obligations in accordance with the provisions of the contract. Their sustained and persistent failure to commence with the work, despite being put on terms by the appellant, would have allowed the notional reasonable person to conclude that the respondent no longer considered itself bound by the provisions of the service agreement and that proper performance will not be forthcoming. The court in *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou*¹¹ explained what conduct can be described as repudiation of a contract:

“Om ‘n ooreenkoms te repudieer, hoef daar nie, soos in die aangehaalde woorde uit *Freeth v Burr* te kenne gegee word, ‘n subjektiewe bedoeling te wees om ‘n einde aan die ooreenkoms te maak nie. Waar ‘n party, bv, weier om ‘n belangrike bepaling

⁹ 294F-G.

¹⁰ Para 18.

¹¹ 1978 (2) SA 835 (A)

van die kontrak na te kom, sou sy optrede regtens op 'n repudiëring van die ooreenkoms kon neerkom, al sou hy ook meen dat hy sy verpligtinge behoorlik nakom. (Kyk De Wet en Yeats *Kontraktereg en Handelsreg* 3de uitg op 117.)¹²

[30] The respondent averred in the papers that the appellant did not pursue the correct process in their purported cancellation of the agreement and that same is null and void and falls to be set aside. The aspect was dealt with a bald unsubstantiated allegation in the founding affidavit that:

“Respondent did not pursue the correct process in their purported cancellation of the agreement and same is unlawful, null and void and falls to be declared so and set aside.”

[31] The respondent contended in the court *a quo* that since the letter of termination was not served by registered post, the cancellation was therefore ineffective. It was common cause that the respondent received the notice of cancellation of the contract. The appellant was not obliged to give the required notice period of 14 days in terms of the forfeiture clause (8.1) under circumstances where the respondent repudiated the contract.¹³

[32] The evidence convincingly demonstrates that the contract was properly cancelled as a result of the respondent's unilateral decision not to continue to render performance in terms of the service level agreement. No grounds have been shown to exist in terms whereof the contract, which has been properly cancelled, can be restored.

[33] The appeal falls to be upheld for the reasons set out above.

¹² 845H-846A; *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) 22D-F.

¹³ *Eden George Ltd v Chamomu Property Investments* 1981(3) SA 460 (T) 471D-E. *Taggart v Green* 1991(4) SA 121 (W) 125H-126E.

ORDER

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and replaced by the following order.
 - 2.1 The application in terms of Rule 6(12)(c) succeeds with costs.
 - 2.2 The order dated 30 March 2021 is set aside.

GC MULLER

JUDGE OF THE HIGH COURT LIMPOPO

DIVISION: POLOKWANE

EM MAKGOBA

JUDGE PRESIDENT OF THE HIGH COURT LIMPOPO

DIVISION: POLOKWANE

M NAUDE

**ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION: POLOKWANE**

APPERANCES

1. For the Appellant : SG Gouws
2. For the Respondent : A Njeza
3. Date of the hearing : 13 May 2022
4. Date judgment delivered : 26 May 2022