# THE SUPREME COURT OF APPEAL
# OF SOUTH AFRICA

1.1 Case no: 190/2005
REPORTABLE

In the appeal between:

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| **NORTHWEST PROVINCIAL GOVERNMENT** | First appellant |
| **NORTHWEST TENDER BOARD** | Second appellant |

and

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| **TSWAING CONSULTING CC** | First respondent |
| **MANGOPE, SWAI MATHANIEL** | Second respondent |
| **SEBAKWANE, Martin Oleboleng** | Third respondent |
| **ODAME-TAKYI, Kweku** | Fourth respondent |
| **VAN ROOYEN, JWC, NO** | Fifth respondent |

Before: Zulman JA, Cameron JA, Nugent JA, Maya JA, Cachalia AJA
Heard: Thursday 2 November 2006
Judgment: Tuesday 21 November 2006

*Appeal – postponement – refused where litigant and attorney knew appeal pending but did nothing despite reminders – Fraud inducing contract – victim entitled to rescind – rule as to evidence regarding forfeiture of election restated – Restitution when fraudulently induced*

*contract rescinded – once victim establishes fraud, and entitlement to rescind contract, it is entitled to repayment in the absence of evidence showing that restitution would be unjust*

**Neutral citation: Northwest Provincial Government v Tswaing Consulting CC [2006] SCA 138 (RSA)**

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**JUDGMENT**

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**CAMERON JA:**

*Introduction*

[1] This case is about a fraud perpetrated against the Northwest Province by Tswaing Consulting CC (Tswaing) and its principal member, Mr Swai Mathaniel Mangope (the first and second respondents), with the help of accomplices in the provincial bureaucracy. The first and second appellants – the province and its tender board ('the province') – applied to the High Court at Mmabatho to set aside a tender award, service contract and arbitration agreement with Tswaing, and for repayment of R4 319 378.50 plus interest. Landman J dismissed their application. They appeal with his leave. Of the respondents, only Tswaing opposed the application in the court below and appeared on appeal. Mangope and the third to fifth respondents (Mr Martin Oleboheng Sebakwane, a former provincial deputy director-

general; Mr Kweku Odame-Takyi, formerly chief financial officer in the provincial department of transport and chair of the departmental tender committee; and Prof JCW van Rooyen, the arbitrator appointed to hear a dispute between the province and Tswaing) made no appearance in either forum.

[2] The dispute arose from an ambitious programme the province embarked upon in 2000 to upgrade, rehabilitate and repair its roads on a budget of over R156 million. Through the fraudulent interventions of Sebakwane and Odame-Takyi, colluding with Mangope, the province – with Sebakwane as signatory – in December 2000 signed a 'service agreement' with Tswaing, even though it was bereft of experience in roads or civil engineering projects. The tender board was never asked to and did not approve the conclusion of the 'service agreement': but, on the basis of bogus documentation, it later gave approval for the 'ex post facto appointment' of Tswaing. Between January and August 2001 Tswaing quickly pocketed disbursements of over R4 million by the province. But an audit established overpayments, and in the course of 2002, the province made several ineffectual attempts to cancel the agreement. An investigation by a major

firm of auditors comprehensively detailed the irregularities and improprieties in the agreements with Tswaing, and the falsehoods that gave rise to them. The report was submitted to the province in January 2002. But its existence and its findings were not communicated to those in the roads and public works department dealing directly with Tswaing. And when Tswaing itself purported to cancel the agreement – complaining of late payments – and claimed damages of R400 million, the department in August 2003 entered into an arbitration agreement with it to settle its claims. But as soon as the department's chief financial officer, Mr Mawethu Xolani Mtyhuda (who became the appellants' principal deponent), became aware of the damning report, he immediately moved to halt the arbitration.

[3] It was for rescue from this sorry muddle that the province turned to the high court. First, it obtained an order staying the arbitration proceedings. Then it asked Landman J to set aside the tender award, service agreement and arbitration agreement. The province's case was that the tender award was made and the service agreement entered into as a result of fraudulent misrepresentations, and that the service agreement was in any

event invalid and unenforceable because the tender board's approval was essential under the North West Tender Board Act 3 of 1994 and was never sought or obtained.

[4] The fraud was minutely detailed in more than 1600 pages of documentation in the appellants' founding papers. To this Tswaing and Mangope responded with bellicose and evasive argumentation. They claimed that the province had 'failed to make out a prima facie case' for Tswaing to answer. They dealt with the damning audit report by asserting that it was inadmissible. And in any event, Tswaing averred, the province (or at least its 'so called top echelon') knew of the report, and thus acquiesced in the continuance of the contract. No answer was offered to the falsehoods, misrepresentations and devious stratagems the founding papers exhaustively documented.

[5] The factual allegations of fraud that formed the crux of the province's case were thus not contested, and Landman J rightly found that the fraud was not effectively challenged. But though the learned judge was 'prepared to assume' in favour of the province that Tswaing's documents were 'riddled with false and fraudulent misrepresentations', calculated by Mangope,

Sebakwane and Odame-Takyi to induce the tender board to grant ex post facto approval, he nevertheless found the contracts still in force because the tender board had ratified the province's action in concluding the agreement with Tswaing. Since the contracts were only voidable, there had to be an effective election to rescind them: and this the judge found the province had failed to prove. Notice of cancellation, eventually issued in 2004 during preparations for the arbitration, was too late; and even if it had been timeous, the province had in any event by then 'committed itself to suing on the contract'. Since the province could not be allowed to approbate and reprobate, it had to be held to the agreement. The service agreement therefore had to stand. Nor could the arbitration agreement be separately cancelled on the ground of fraud. The province's mistake in entering into the arbitration agreement was unilateral – and because it had acted grossly negligently, the mistake that underlay its consent could not serve as an acceptable basis for cancelling. Finally, the judge concluded that there was no 'good cause' under s 3(2) of the Arbitration Act 42 of 1965 to grant the province and the tender board alternative relief in setting aside the arbitration agreement:

the fraud that underlay the whole transaction could not affect the arbitration since the service agreement had not been cancelled.

*Application for postponement of the appeal*

[6] After obtaining leave in April 2005, the province noted its appeal, lodged the record and filed argument on 30 November 2005. Tswaing's written argument was therefore due by 31 January 2006.[1] It did not come. Months passed. Nothing came. The President of the Court decided to enrol the matter. By letter dated 21 August the Registrar informed both sides' attorneys of the date. On the same day, Tswaing's Bloemfontein correspondents faxed the Registrar's letter to its Pretoria attorneys, Ramushu Morare. Mr Morare's affidavit denies receipt of this fax: it must, he says, 'have gone astray'. The difficulty for Mr Morare is that the 21 August notification did not stand alone. On 8 September, the correspondents sent him a reminder, referring to the 21 August letter. They pointed out 'that we haven't received a reply from you'. This Morare did receive. But still he made no reply. Nearly five weeks later, on 11 October, the correspondents again wrote, pointing out 'that you haven't replied

[1] Supreme Court of Appeal Rule 10(1)(b).

to any of our correspondence'. Morare at last responded. He informed his Bloemfontein correspondents that the parties 'are endeavouring for an ex curia settlement negotiations between themselves', and that 'we have been requested to withhold the appeal'. He asked the correspondents not to take any further step, 'including a consideration for a withdrawal'. There was no communication to the opposing attorneys or to the Registrar.

[7] Against this background, counsel for Tswaing moved for a postponement. The province opposed and the application was refused. The justification Tswaing proffered was that negotiations were taking place to settle the matter, and that Morare denied having received the letter of 21 August informing the parties of the appeal's enrolment, with the result that Tswaing only learnt of the appeal on 1 November. But this is unpersuasive. The fact that Morare may not have learnt the exact date of set down in August detracts no iota from everything else he and Tswaing knew. They knew that the province's appeal was pending; that the province was entitled to its disposal; that written argument had to be filed; that Tswaing had failed to file it; and that weeks and months were passing. An affidavit filed after the appeal by the state attorney's

office in Mafikeng reveals also that Morare ignored a reminder in March 2006 from the province's attorneys that written argument had to be filed.

[8] In this charged setting, Morare in September and October 2006 received pointed complaints from his correspondents about unanswered correspondence but did nothing. Even if he did not receive the fax of 21 August, the repeated allusions to it in his correspondents' later communications made it imperative for him to inquire about its content and significance. He was not entitled to rest content in the belief, as he says he did, that the reminders 'related to the concerns of my Bloemfontein correspondents in respect of the non-filing of the heads of argument'. That he failed to do anything gives credence to the suggestion by Mr Modiboa in the state attorney's affidavit that Tswaing 'did not have any intentions to proceed with this appeal, with the hope that it will use its own contacts to settle the matter and to circumvent due process and to attempt to frustrate the set down of the appeal'.

[9] Counsel for Tswaing suggested that there was 'a lack of proper communication' between Morare, his client and the state attorney. If there was, no part of the deficiency can be lain at the door of the

province, its counsel or the state attorney. When a party, through its attorneys, has full knowledge of an imminent appeal, and remains inert in the face of successive passing deadlines, postponement would wreak a clear injustice on the opposing party, and the requested accommodation must be refused.

[10] What is more, counsel conceded that if negotiations were proceeding as propitiously as Tswaing claimed, the disposal of the appeal would do nothing to impede them. The application for postponement was therefore refused, and the hearing went ahead. Counsel for Tswaing, who has at material stages been involved in the matter (and who indicated that his written argument had in any event been in a fairly advanced stage of preparation), assisted the court with oral submissions on the merits.

*Fraud and the province's election to rescind*

[11] Landman J refused the province relief because he found that the province had failed effectually to rescind Tswaing's fraudulently obtained contract. This finding may be considered in two stages. First, Tswaing's fraud certainly rendered the contract voidable at the province's instance. The evidence established

that Tswaing had no expertise in the field, that the basis on which it elicited the contract was fabricated, and that the fees it secured were grossly inflated. In short, the fraudulent misrepresentations of Mangope and his accomplices were far-going and most material.

[12] The province was therefore entitled to elect either to rescind the contract or to enforce its terms. It chose to rescind. The judge's finding that the province failed effectually to rescind derived from a misappreciation of the facts. To establish forfeiture of the right to rescind, there had to be evidence that the province elected, with full knowledge of the deception, to affirm the contract.[2] But Tswaing could point to no evidence that the province, with full knowledge of the relevant facts, including the extent and effect of the deception, elected to affirm the contract. Such evidence was lacking because the roads and public works department, which was overseeing the contract, did not know of the fraud, while those in the province's 'top echelon', who did know, were not involved in the contract's administration. Indeed, far from affirming the contract, the evidence shows that the 'top echelon' tried to rescind it, though because of misadventure and

[2] *Feinstein v Niggli* 1981 (2) SA 684 (A) 699C-E.

incompetence, ineffectually so. The judge's finding is unwarrantable.

[13] This conclusion entails that the arbitration agreement also cannot stand. This is for two reasons. First, the arbitration clause was embedded in a fraud-tainted agreement the province elected to rescind. The clause cannot survive the rescission,[3] and the agreement purporting to give effect to it is still-born. The judge overlooked that to allow Tswaing to enforce the arbitration agreement, the tainted product of Tswaing's fraud, would be offensive to justice.

[14] Second, the arbitration agreement was in any event signed by officials acting on behalf of the province who did not know of the fraud when they signed. The principal deponent's specific averment that he was unaware of the fraud until after the arbitration agreement's conclusion was not and could not be denied; while the official who signed the agreement on behalf of the province, and two provincial legal advisors, stated on oath that they did not know of the fraud when agreeing to arbitration, and Tswaing was unable to put their depositions effectually in issue.

[3] *Wayland v Everite Group Ltd* 1993 (3) SA 946 (W) 951H-I; D Butler 'Arbitration' in WA Joubert *The Law of South Africa* (LAWSA) (2ed, 2003) vol 1 para 558.

[15] This conclusion means that we do not have to consider whether considerations of public policy might prevent a public authority from exercising the innocent party's entitlement to affirm even a fraudulently induced contract. Nor do we need to consider the province's argument that the service agreement with Tswaing was, in any event, invalid for non-compliance with the North West Tender Board Act 3 of 1994, or the contention that 'good cause' existed under s 3(2) of the Arbitration Act 42 of 1965 to set the arbitration agreement aside.

*The province's claim for repayment of moneys paid to Tswaing*

[16] Since the province elected to cancel the contract on the basis of the fraud, it follows that it is entitled to restitution of the money it paid to Tswaing. Counsel for the province initially indicated that the papers did not establish the province's entitlement to repayment. This was because one of the deponents, the former provincial director of roads, Mr Stephanus Pienaar, acknowledged that Tswaing did 'a fair amount of work' under its appointment: 'In other words', he said, 'it should not be construed as if I think that they have done absolutely nothing, or everything they did was

wrong'. Capitalising on this, counsel for Tswaing urged us to find that the province's prayer for repayment should be referred for the hearing of oral evidence.

[17] But this is to mistake the defrauded party's remedies on rescission, and to overlook what must be established before the victim is denied restitution. It is correct that a court will generally not grant restitution when setting aside a contract unless the victim of the fraud is able and willing to restore completely everything received under the contract. The reason is that the victim might be unjustly enriched by recovering what was given under the contract while keeping what was received.[4] Yet, as this court explained in *Feinstein v Niggli*,[5] since the rule derives from equitable considerations, it may be departed from whenever justice requires it.[6]

[18] The facts of this case provide a clear instance where justice demands that the province should be afforded restitution despite its acknowledgement that Tswaing may be entitled to

[4] *Feinstein v Niggli* 1981 (2) SA 684 (A) 700G-H per Trollip JA on behalf of the Court.

[5] 1981 (2) SA 684 (A) 700-701.

[6] See *Harper v Webster* 1956 (2) SA 495 (FC) 500B (a passage approvingly referred to in *Feinstein v Niggli*):
'It does not seem that these cases should be regarded as laying down a general rule and limited exceptions to it; rather they indicate acceptance of the general rule but departure from it when justice requires such departure.'

compensation for some work performed. This is because Tswaing failed to put up any facts indicating that restitution would be unjust. The litigation afforded Tswaing ample opportunity to show what it delivered under the contract, thereby providing a basis for the conclusion that repayment should in justice be refused. Instead, Tswaing's response evidenced only its cavalier disregard.

[19] The province chose to proceed by way of application. It therefore bore the burden of establishing all aspects of its entitlement to relief, including that it was entitled to repayment in the face of Tswaing's claim to some compensation.[7] On the papers, the province established that entitlement. In its founding papers, the province alleged that Tswaing had 'added no or very little value' to the roads project, and that its work under the agreement was mere duplication of existing services. It followed that Tswaing 'added little, if anything' to the project. In addition, the fees it pocketed were grossly excessive, not market-related, and bore 'no relationship' to the amount of work done. Having set out these averments, the deponent (not unreasonably) anticipated a rebuttal from Tswaing, with a resultant factual

[7] *Ngqumba v Staatspresident* 1988 (4) SA 224 (A) 259 and following.

dispute:

> ‘It is anticipated that [Tswaing] will dispute the [province’s] contentions in this regard which might not be capable of resolution on the papers. In the event of this Honourable Court being of the view that this is the position, applicants will request that this portion of the [province’s] claim be referred to evidence or to trial.’

[20] The province anticipated wrongly. Far from engaging with the province’s detailed averments about the extent of the fraud and Tswaing’s lack of entitlement to any recompense, Mangope breezily circumvented the issue. Tswaing offered no exposition of any work it might have done, or of services it might have rendered to the province, or of value it might have delivered. Instead, it seized on the province’s anticipation of a possible factual dispute as an excuse for evading these allegations entirely. In answer to the passage quoted, Mangope contented himself with this:

> ‘It is irrelevant and disputed that our services allegedly were duplications of some sort. The applicants have accepted that the contents hereof are subject to dispute, that we have indeed rendered valuable service, and that it should be referred to evidence. [Tswaing] is thus relieved of answering this paragraph at this stage.’

[21] Evasion of this sort could not serve to raise a dispute of fact

impeding the province's claim to repayment. Once the province established the fraud, and its entitlement to rescind the contract, it became entitled to repayment in the absence of evidence affording a basis for a finding that restitution would be unjust. That could only have come from Tswaing, which could have set out the work it did, its expenditures, the value delivered and the services rendered under the contract. It failed to do so. Instead, it sought refuge in a bare denial of the province's claim that it had added 'no or very little value' to the roads project, and an evasion of all the other relevant allegations.

[22] It must follow that no factual basis existed for denying the province the equitable remedy of restitution. Justice requires that Tswaing be ordered to repay what it received in consequence of the fraud. If it is entitled to recompense for unjust enrichment against the province, it is free to establish that claim in appropriate proceedings.

*Order and costs*

[23] Tswaing must pay the costs of the unsuccessful application for postponement. There is an order as follows:

1. The appeal succeeds with costs, including the costs of two counsel, which are to include the costs of the application for postponement.

2. The order of the court below dismissing the application is set aside.

3. In its place there is substituted:

‘(a) The application succeeds with costs, including the costs of two counsel, which are to be paid by the first respondent.
(b) There is an order in terms of prayers 1 and 2 of the applicants’ notice of motion.
(c) The first respondent is ordered to pay the costs of the urgent application brought by the first applicant against the first and fifth respondents under case number 744/2003.’

**E CAMERON**
**JUDGE OF APPEAL**

**CONCUR:**
**ZULMAN JA**
**NUGENT JA**
**MAYA JA**
**CACHALIA AJA**