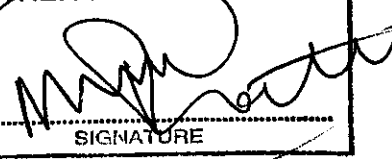




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
16/10/2014	
DATE	SIGNATURE

Case No: 49279/2013

Date heard: 15 September 2014

Date of judgment: 16 October 2014

In the matter between:

DR A. S. ALBERTS N.O.

1st Applicant

DR J.E. BOUWER N.O.

2nd Applicant

DR P.C. JORDAAN N.O.

3rd Applicant

DR ALBERTS, BOUWER & JORDAAN INGELYF

4th Applicant

and

BMI BUILDING MAINTENANCE INSTALLATIONS CC

1st Claimant

TRULY INNOVATIVE CONSTRUCTION CC (in liquidation)

2nd Claimant

JUDGMENT

A.M.L. PHATUDI J:

Introduction

[1] This is an interpleader application instituted by the applicant as envisaged in terms of Rule 58(2)(a) of the Uniform Rules of this court.¹

[2] The trustees for the time being of Wilgers Stralings Onkologie Trust (Wilgers Trust) are the applicants in this matter. The first claimant is BMI Building Maintenance CC (BMI). The liquidators of Truly Innovative Construction CC (in liquidation)(TIC) is the second claimant.

Factual background

[3] Apparently Wilgers Trust concluded a contract with Truly Innovative Construction CC (TIC) to effect alterations to the Oncology Department of the Life Wilgers Hospital. Wilgers appointed Acumen (Pty) Ltd (Acumen), a company of architects and project managers, as a project manager and principal agent in respect of the said alterations (project). It is further apparent that TIC conducted a subcontract with Building Maintenance

¹ Rule 58 (2)(a) stipulate: Where the claims relate to money the applicant shall be required, on delivering the notice mentioned in subrule (1) hereof, to pay the money to the registrar who shall hold it until the conflicting claims have been decided.

CC (BMI). A portion of the alterations involved the installation of air conditioning.

[4] BMI submitted a tender to Acumen for installation of the required air conditioning as envisaged in terms of the project.

[5] On the 28 February 2013, Acumen wrote a letter to BMI informing them of the outcome of the tender. Acumen stated;

‘On behalf of our client, Wilgers Stratings Onkologie Trust we hereby confirm that your tender to the value of R259 295 – 00(excluding 14% VAT) for the air conditioning installation to the above project has been accepted.

The Main Contractor is Messrs TIC Building Contractors ... You will be contracted by them to enter into a selected sub-contract agreement for the said works.

You are requested to plan and co-ordinate your installation, in accordance with their programme ...’²

[6] On the same day, Acumen wrote a letter to TIC where it is stated:

‘You are hereby instructed to accept the tender of Messrs BMI on behalf of our client for the air conditioning installation to the above project ... The tender amount is R259 295 – 00 (excluding 14% VAT)’³

² Interpleader Bundle – Page 30

³ Interpleader Bundle – Page 58 - 59

[7] On the 5 March 2013, TIC wrote a letter to BMI headed: "Appointment as Selected Sub-Contractor for the supply, deliver and commissioning of the Air Conditioning installation to the Life Wilgers Hospital: Oncology." TIC informed BMI that their tender has been 'accepted as instructed by Principal Agent'

[8] A document purported to be a sub-contract agreement and related documents were signed by one DS Reyneke purporting to be representing BMI. The project was distinctly done and completed.

[9] On the 21 May 2013, an application to liquidate TIC was issued. On the same day Acumen caused issue of the Payment Certificate in respect of the Air Conditioning project directing Wilgers Trust to effect payment. Acumen stated the following in their letter:

'Attached please find Payment Certificate no 1 (interim) for the above work, payable by you to Messrs BMI Building Maintenance Installations CC ... Please Pay the amount ... within 14 days of date of issue of the certificate ...'⁴

[10] On the 28 May 2013, TIC was placed under provisional liquidation. Final liquidation order was granted on 30 July 2013. On the 11 June

⁴ Interpleader Bundle – Page 39

2013 the attorneys Van Greunen and Associates Inc wrote a letter to Acumen where it is stated:

- '1. The abovementioned matter as well as your recent correspondence refers
2. A quantity surveyor is to be of your assistance to establish a final account for work done to date by TIC and final payments are to be made to the estate
3. No deduction or setoff can be made at this point in time and any claims have to be lodged with the Liquidators.'⁵

[11] It is apparent that an umpteenth correspondence was exchanged wherein Acumen was in the centre between the Liquidators and BMI's attorneys. In their letter dated 28 June 2013, Acumen responded to BMI's attorney and informed them that their client (BMI) concluded a contract with the main contractors (TIC). It is further stated that there is no contract or agreement between BMI and the Trust. Further thereto, Acumen stated that the Trust did not as alleged by BMI, allow them to complete the work. It was part of its contractual obligation of its contract with TIC.⁶

⁵ Interpleader Bundle – Page 62

⁶ In antwoord op u laaste skrywe, die volgende:

- U kliënt het 'n kontrak gesluit met die hoofkontrakteur (TIC);
- Daar bestaan nie 'n kontrak of ooreenkoms tussen BMI en die Trust nie;
- Die Trust het al hul kontraktuele verpligtinge nagekom, wat die betaling van rekeninge/sertifikate insluit;
- U kliënt het geen eis teen die Trust nie;
- Die Trust het nie, soos beweer u kliënt BMI toegelaat om sy werk te voltooi nie.. Dit was deel van sy kontraktuele verpligtinge met sy kontrak met TIC (hoofkontrakteur); en

[12] On the 16 July 2013, BMI attorneys caused issue of a letter of demand⁷ directed at Wilgers Trust. Summons followed on the 3 October 2013. Wilgers Trust defended the action and filed its plea on 04 November 2013. Later Wilgers Trust caused issue of this application.

[13] The applicant's counsel submits, on the one hand, that this is a clear case for adjudication in terms of Rule 58. He further submits that the amount in question has been paid to the Registrar of this court. This court has to make a ruling as to who of the two claimants must be paid. The court must further indemnify the applicant from a claim by the party who shall not have been paid. On the other hand, the first claimant (BMI) counsel submits that the applicants application must be dismissed as BMI had a contract with the applicant and not TIC (the second claimant). BMI's counsel relies on the contract concluded by and between BMI and Wilgers Trust dated 01 August 2007. He further submits that BMI rendered its services by installing the said air conditioners in accordance with the said 2007 agreement.

-
- Dat u kliënt steeds besig is met addisionele instandhoudingswerk. Dit word onder 'n ander ooreenkoms uitgevoer – vir hierdie werk word hy dan ook afsonderlik betaal deur die Trust.

Acumen se stellings wana u verwys was ons mening. Hierdie stelling word tans op die proef gestel

⁷ Interpleaded Bundle – Page 40

[14] The liquidators counsel submits that there existed a sub contract between TIC and BMI. Wilgers Trust must effect payment into TIC's estate.

The Law

[15] Rule 58 provides that

'(1) Where any person, in this rule called 'the applicant', alleges that he is under any liability in respect of which he is or expects to be sued by two or more parties making adverse claims, in this rule referred to as 'the claimants', in respect thereto, the applicant may deliver a notice, in terms of this rule called an 'interpleader notice', to the claimants...

(2)(a) Where the claims relate to money the applicant shall be required, on delivering the notice mentioned in subrule (1) hereof, to pay the money to the registrar who shall hold it until the conflicting claims have been decided. '

[16] It is clear from the historical background of the project especially surrounding the installation of air conditioning that there are adverse claims lodged by both BMI and TIC. I find it appropriate to first deal with the 2007 contract relied upon by BMI. The contract was indeed

concluded by and between Wilgers Trust and BMI. The contract was termed "Maintenance and Services Agreement"⁸

[17] On perusal of the contract, I find that the contract was concluded on 13 August 2007. The contract contains the clause headed "Duration of Contract". The clause provides that 'this contract will become effective on 01 August 2007 for a period of twelve months ...'⁹

[18] It is further noted that the words "or on a month to month basis" were redacted. The parties initialled next to the redaction. It is clear from the wording of the contract that the said contract lapsed on 31 July 2008. There is no evidence to show that the said contract was renewed. As at the 28 February 2013, the 2007 agreement was history. No further reliance can be inputted on the 2007 agreement.

[19] Considering the issue surrounding the sub-contract as between BMI and TIC, it is clear from the evidence tendered that the installation of the Air Conditioners at Wilgers Hospital was subcontracted to BMI. This

⁸ Interpleader Bundle – Page 79 - 81

⁹ Ibid – Page 81

is evident from the two letters written on the 28 February 2013 by Acumen to both BMI¹⁰ and TIC¹¹ respectively.

[20] An application setting in motion the liquidation of TIC on 21 May 2013 may have come to the knowledge, if not, reasonably expected to have come to the knowledge of Acumen. In trying to protect the sweat of BMI had from the installation of Air conditioning, Acumen, in my view, caused issue of the payment certificate on the same day with instructions to Wilgers Trust to effect payment within 14 days. Acumen even went to the extent of placing on record that such payment be paid "before 2013-06-04 directly to Messrs BMI CC"¹² It is further in my view that Acumen was fully aware that BMI was sub-contracting from TIC.

[21] The appointment of liquidators of TIC after it was placed under provisional liquidation stepped in for TIC and intercepted the payment with direct instruction to Acumen not to cause any payment due out of the project to any person other than TIC's estate.

¹⁰ Interpleader Bundle – Page 30

¹¹ Interpleader Bundle - Page 58

¹² Interpleader Bundle – Page 39

[22] The applicant, faced with two claimants in respect of the same work and same money due, cannot be faulted, in my view, for having invoked the provisions of Rule 58 (1). The applicant, in my view, did the correct thing by paying the said money to the registrar of this court pending the decision on conflicting claims.

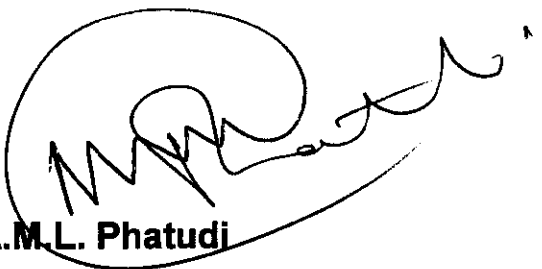
[23] TIC, as the main contractor, would have been paid the amount payable out of the project. TIC would have paid BMI in accordance with their agreement. Now that TIC has been liquidated, the amount payable must be paid into TIC's estate managed by the liquidators. BMI, like any other TIC's creditor, has a right to lodge its claim with the liquidators and the law of insolvency will take its course.

[24] It is trite that costs follow the event. The applicant succeeds with its application and thus entitled to its costs. The first claimant –BMI, is unsuccessful with its claim and stands to be mulcted with costs of both the applicant and the second claimant.

The following order is thus made.

Order:

- 1. The registrar is order to pay R259 295 – 00paid by the applicant in terms of Rule 58(2)(a) to the Second Claimant.**
- 2. The First Claimant is ordered to pay the cost of both the Applicant and the Second Claimant on party and party scale**



A.M.L. Phatudi

Judge of the High Court

On behalf of the Applicant:

Potgieter – Marais Attorneys

1019 Francis Baard Street

Hatfield

Pretoria

Adv. T.A.L.L. Potgieter

On behalf of the 1st Claimant:

Werda Fourie Inc.

1102 Naguil Street

Montana Park

Pretoria

Adv. S.A. Visser

On behalf of the 2nd Claimant:

Schabort Inc

40 Weavind Street

Colbyn

Pretoria

Adv. S.J. Van Rensburg