IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 40779/14

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

....
SIGNATURE **DATE**

In the matter between:

RETHUSENG LIVE LINE AND SERVICES CC APPLICANT

and

ZEAL ENGINEERING CONSULTANTS (PTY) LTD FIRST RESPONDENT

THE MKHONDO LOCAL MUNICPALITY SECOND RESPONDENT

AOS CONSULTING ENGINEERS (PTY) LTD THIRD RESPONDENT

IN RE:

RETHUSENG LIVE LINE AND SERVICES CC	APPLICANT
ZEAL ENGINEERING CONSULTANTS (PTY) LTD	FIRST RESPONDENT
THE MKHONDO LOCAL MUNICPALITY	SECOND RESPONDENT

JUDGMENT

TSATSI AJ

INTRODUCTION

1. This application has been heard in a virtual hearing via Microsoft Teams.

2. This is an opposed application seeking an order to set aside the appointment of the Third Respondent (Consulting Electrical Engineering; "CEE") and or the setting aside of its findings. The First Respondent delivered a counter claim seeking monetary order as quantified by the Third Respondent against the Applicant and Second Respondent jointly and severally opposed by the Applicant and Second Respondent.

3. The First Respondent applied for condonation for filing its replying affidavit out of time. This condonation application was not opposed by either the Applicant or the Second Respondent.

4. The Applicant and the Second Respondent opposed the First Respondent's counter application. The Second Respondent did not oppose the Applicant's application.

FACTS

5. Rethuseng (herein referred to as "the First Respondent") applied for the liquidation of Zeal Engineering Consultant (herein referred to as "the Applicant") and withdrew such proceedings. Subsequent to that, in 2014 the First Respondent instituted an action against the Applicant and the Second Respondent for payment of an amount of R4846,015.42 alternatively an amount of R3249,043.64.

6. The said liquidation was based on an alleged indebtedness of an amount of R 3 249 043.64. This alleged indebtedness arose from the allegation that the First Respondent as the "sub-contractor" concluded a contract with the Applicant as the "contractor" to the Mkhondo Municipality (herein after referred to as "the Third Respondent").

7. The First Respondent stated that it was owed the said amount due to the fact that it rendered electrification services in respect of five villages in the Second Respondent's area.

8. The First Respondent contended that the said amount was owed by the Applicant since it had a contractual relationship with the Applicant not with the Second Respondent. The Applicant denied that it owed the said amount to the First Respondent and questioned the First Respondent's *locus standi* to apply for liquidation.

9. All work had to be approved by the Applicant before the First Respondent could claim payment from the Second Respondent. The Applicant did not approve the issuing of the last three invoices by the First Respondent which are the subject of litigation.

10. On 1 July 2016 at Circle Chambers, Pretoria, the Applicant, First and Second Respondents conducted a pre- trial conference. The First Respondent will request the President of consulting Engineering South Africa ("the CESA") to appoint an independent Consulting Electrical Engineer ("the CEE") to finally determine what amount is payable to the First Respondent in respect of the five electrification sites, having regard to quantity, quality and defects. For purposes of the said appointment the parties will discover all relevant documents by 15 July 2016.

11. There is only one electrical engineer on the panel of the CESA's President's panel of mediators, adjudicators and arbitrators in the normal course of events that would be the president's nomination.

12. On 19 August 2016 Mr Wally Mayne ("Mr Mayne") from the CESA, sent an email correspondence indicating seven independent Consulting Engineers as option for the appointment of the CEE. On 25 August 2016 the First Respondent's attorney requested the Applicant and the Second Respondent to indicate if they had an objection to the appointment of any of the seven nominated independent Consulting Engineers.

13. On 29 August 2016, Mr Nicholas Muofhe on behalf of the Applicant indicated their choice in order of preference as AOS Consulting Engineers ("the third Respondent"); DJJC Consulting Engineers and CA Du Toit. The Applicant's first preference for the appointment of the CEE was the Third Respondent.

14. On 12 March 2018 the First Respondent's attorney furnished three quotations for the hourly tariffs and travelling costs of the Consulting Engineer nominated by the Applicant; viz. the Third Respondent, DJJC Consulting Engineers and CA Du Toit. The First Respondent's attorney requested the Applicant and the Second Respondent to provide them with their choice in preferred company. The Third Respondent was the preferred choice.

15. The parties delivered submissions to the Third Respondent and the Third Respondent requested further documentation from the First Respondent.

After allegedly executing his mandate, the Third Respondent delivered its decision/determination on 18 April 2019. The determination provided among others that the Third Respondent had meetings, studied, investigated, determined and concluded that the amount owed to the First Respondent is R3,249, 043. 00(incl. 14% VAT) in respect of the services rendered on the electrification projects on Khalambasz, Bhoweni, Emakhaya, Entombe and Bakenko Villages.

16. On 14 November 2019, approximately 7 months later the Applicant instituted the present proceedings.

17. There was an agreement reached and concluded with regard to the appointment of the CEE. The agreement expressly set out the terms upon which the parties wish to dispose of the issue of quantum. The agreement stated that the CEE will make a determination which determination shall be reached by procedures determined by the CEE and shall bind the parties.

18. The purpose of the agreement in an effort to resolve issues, the parties decided to refer the issues of whether the First Respondent was entitled to payment, including the determination of the amount owed (if there was any) in respect of the five electrification sites, having regard to the quantity, quality and any defects be referred to the Consulting Electrical Engineer (herein referred to as the Third Respondent") to determine.

ISSUES

19. The issue is whether or not this Court can set aside the appointment of the Consulting Electrical Engineer (" the CEE") and or its findings.

20. The other issue is whether or not there is a contractual relationship between the Applicant and the First Respondent and or between the Applicant and the Second Respondent.

21. The Court has to determine whether the Applicant owes an amount of R3249 043.64 to the First Respondent or whether such amount is owed by the

Second Respondent and not the Applicant.

22. The other issue is that can the Court grant condonation of filing the First Respondent's replying affidavit out of time to the First and Second Respondents' answering affidavit in the First Respondent's counter application.

23. A further issue that the Court has to determine is whether or not it can grant a monetary judgment in favour of the First Respondent in its counter application with regard to the main action, where the First Respondent is the Plaintiff, the Applicant and the Second Defendants in the main action are the Applicant and the Second Respondent, respectively in this application.

24. In addition can this Court strike out paragraphs 21 to 55 of the Second Respondent's answering affidavit to the First Respondent's counter application.

SUBMISSIONS

25. Adv. Kairinos SC, submitted on behalf of the Applicant that the Applicant was appointed by the Second Respondent. There is dispute as to in what capacity was the Applicant appointed. It is to be determined whether the Applicant was appointed as an agent or not.

26. It was further submitted on behalf of the Applicant that the First Respondent alleged that it was not paid. As a result of non- payment the First Respondent "downed tools". Subsequent to that the First Respondent then applied for liquidation of the Applicant. This was based on the fact that the Applicant allegedly owed the First Respondent money. The Applicant refused to pay the First Respondent the money it demanded payment for.

27. The submission made on behalf of the Applicant was that the Applicant did not appoint the First Respondent, it is the Second Respondent who

appointed the First Respondent.

28. There is no evidence that electrification was installed by the First Respondent, so charged the Applicant. At liquidation application there was dispute of facts and as a result the matter was referred to trial. The parties' argument is whether the Third Respondent was appointed as an expert, quasi- judicial or arbitrator. The Applicant contends that the appointment of the Third Respondent was procedurally flawed and not in compliance with the requirements of the parties' agreement as set out in the pre- trial minutes.

29. The reason why the preceding submission was made was because the President of the Consulting Engineer of South Africa ("the CESA") did not make the appointment. The power of the President was delegated to another person who in turn delegated the appointment to the parties.

30. The CEE appointed was a Consulting Engineering Firm and not Consulting Electrical Engineering. It was further submitted that the appointment of the Third Respondent be set aside as the report is based on mistake.

31. The submission on behalf of the Applicant was that a quantity and quality cannot be determined without virtual inspection of the work. As a result the report and findings are erroneous. The Third Respondent misdirected itself as an expert as there was no physical inspection done.

32. The Court can set aside the appointment of the Third Respondent if the Applicant approached the Court to correct the mistake. The Applicant's submission is that that the Third Respondent's appointment was that of an expert.

33. A joint expert was appointed to curtail the process instead of each party appointing its own expert. The parties did not intend appointing an arbitrator. Functions of an expert are distinguished from that of an arbitrator. The expert will do their own investigation unlike the arbitrator.

34. A submission was made on behalf of the Applicant that there was a snag list drawn up because of defects. There was evidence that the expert merely took a desktop evaluation of the amount owed to the First Respondent by considering the documentation furnished to him by all parties. It was submitted that the expert did was is called “number crunching” exercise.

35. Adv. De Beer submitted on behalf of the First Respondent that the First Respondent installed electrical services to the five villages as indicated above. Due to lack of payment the First Respondent abandoned the sites. Another entity had to finalize the project called Alpheu Electrical. Subsequent to that the First Respondent instituted claim for three outstanding invoices that the Applicant refused to approve. It was submitted on behalf of the First Respondent that the amount claimed still stand and is owing.

36. A further submission on behalf of the First Respondent was that the First Respondent wants to be paid for the work done. The determination made by the Third Respondent is not only binding on the parties but it is final. The Applicant agreed to the appointment of the Third Respondent and supported such appointment. The Applicant cannot say that it is aggrieved by the appointment simply because the Third Respondent did not deliver the results that the Applicant wanted.

37. An agreement was reached on who to appoint by the parties. It was submitted on behalf of the First Respondent that the Third Respondent should not be viewed as an expert but rather as a semi- arbitrator.

38. There was a snag list prepared. Eskom indicated that there were defects. However Eskom does not know who caused the defects. The submission on behalf of the First Respondent was that the Applicant’s attempt to set aside the appointment of the Third Respondent and its determination is a clear attempt to resile from the agreement. The Applicant’s application is devoid of any allegation setting out special circumstances justifying detraction from the

agreement.

39. It was submitted on behalf of the First Respondent that it is trite that any criticism in respect of the appointment of an independent party subsequent to an alternative dispute resolution mechanism must be stated at the commencement of such appointment.

40. The Applicant and the Second Respondent supported the appointment of the Third Respondent. The determination was handed down 18 April 2019 a year later. The Applicant never criticized or disputed the appointment of the Third Respondent. The only reasonable conclusion is that the Applicant is voicing its dissatisfaction of the outcome of the determination.

41. The Applicant should have instituted review application to set aside the appointment of the Third Respondent. Since the parties agreed that the quantum be determined by the Third Respondent and that the contracting parties shall be bound by the determination. If it is found that the decision is reviewable then the Applicant failed to make a case for the determination to be reviewed. Therefore the provisions of the agreement stands and remain uncontested.

42. Adv. De Beer submitted that the Third Respondent operated as a tribunal created by a contract. Neither the Applicant nor the Second Respondent challenged any of the provisions of the agreement on the ground of being against public policy. There is no room for a tacit importation of any rule of natural justice into the agreement between the parties. The Applicant had to show that the express contractual provisions had been breached.

43. There is no procedure in the agreement that stated that the Third Respondent should do a physical inspection of the work rendered in respect of an invoice. Neither was there a requirement that the Third Respondent should not do the assessment through a desktop exercise, auditing and scrutinizing all documents available to it on claims. Paragraph 2.8 of the agreement provides that: “The CEE shall at all times be entitled to determine the applicable

procedures for his/her applicable determination of the referred issues".

44. The First Respondent instituted a counter application for the confirmation of the Third Respondent's determination dated 18 April 2018 which was made in accordance with the agreement. The First Respondent also submitted that it wanted to struck out paragraphs 21 to 55 of the Second Respondent's answering affidavit to the First Respondent's counter application.

45. It was submitted that the counter application is based upon the agreement reached between the parties as couched in the relevant pre- minutes. The sole purpose of the agreement was to curtail the issues between the parties in respect of quantum of what is owing to the First Respondent in the main action.

46. According to the submission made on behalf of the First Respondent, it was contended that the Second Respondent decided not to oppose the main application, it only filed the answering affidavit to the First Respondent's counter application. The majority of the allegations made by the Second Respondent in its answering affidavit are irrelevant. The contents which stand to be struck for irrelevance are paragraphs 21 to 55 of the answering affidavit of the Second Respondent.

47. Adv. Malowa submitted on behalf of the Second Respondent that the Second Respondent did not oppose the main application because there was no relief sought against the Second Respondent by the Applicant. The Second Respondent is involved because of the counter application. The Second Respondent should not be held liable by either the Applicant or the First Respondent.

48. The Applicant and the Second Respondent are the only parties who were involved in liquidation application against each other. If the Second Respondent was a party to the construction contract or agreement with the Applicant and the First Respondent it would have been cited as a party in the

relief sought in the liquidation proceedings.

49. In addition the Applicant did not involve the Second Respondent in the liability for payment of money by the First Respondent in its founding papers. It is only in the Applicant's heads of argument in the second or fourth paragraph that the Applicant insinuate that there was a contract between itself and the Second Respondent acting as its agent.

50. It was submitted on behalf of the Second Respondent that there were no rights ceded to the First Respondent. The submission on behalf of the Second Respondent was that the Applicant failed to state exactly which rights were ceded. The Applicant is not an agent of the Second Respondent. There is a contractual relationship between the Applicant and the First Respondent which is distinguishable and independent from the Second Respondent.

51. The Applicant would still has his invoice for service rendered even in approving the First Respondent invoice. The Applicant was working independently to put it's signature to the invoice which signature is a "condition sine qua non" to the payment of money towards the First Respondent.

52. The Second Respondent was not responsible for approval or inspection of construction work done. There is no invoice approved by the Applicant which is left unpaid by the Second Respondent. The Second Respondent has already paid other contractors to finalize same work that was supposed to be completed by the Applicant and the First Respondent.

53. Regarding the CEE appointment and findings the process is *void ab initio* and it is proven to be wrongful by lack of substance within it. The findings by the Third Respondent was done outside the mandate given to the CEE. It was thought that the Third Respondent is an Electrical Professional Engineer which seem not to be the case. The Third Respondent was not appointed upon procedure agreed to by the parties.

54. The Third Respondent was executing assigned duty with mistake common to the parties. There are grounds to do away with his appointment and findings. The Third Respondent should have known that assessment of quality, quantity and defect was critical with physical assessment. The Third Respondent should have withdrawn from instruction or mandate if it realized that it can't perform in terms of the mandate due to the factors beyond its control.

55. The submission on behalf of the Second Respondent was that Courts usually hold parties to be bound by pre-trial minutes, the need to set aside the Third Respondent's appointment and findings is different. The First Respondent stated that there are special circumstances that exist, the pre-trial minutes may not be binding. The issue is not the binding of the pre-trial minutes but the finding emanating from the pre- trial minutes.

56. It was submitted on behalf of the Second Respondent that the First Respondent's intention to struck out certain portions of the Second Respondent's answering affidavit is not in line with the law and it will be prejudicial to the Second Respondent not the First Respondent. The Second Respondent opposed the striking out of paragraphs 21 to 55 of its answering affidavit.

57. The striking out of certain portions of the Second Respondent's answering affidavit may happen if the allegations are vague and embarrassing irrelevant or to the prejudice of the First Respondent. The First Respondent did not comply with Rule 23 (2). The Second Respondent was entitled to respond to the Applicant's founding affidavit and the First Respondent answering affidavit wherein its counter claim make allegations against it.

THE LAW

Challenging the findings of an expert or setting aside the appointment of an expert

58. Section 38 of the Superior Courts Act 10of 2013 provides that the Constitutional Court and or in any civil proceedings, any Division may with the consent of the parties refer any matter which requires extensive examination of records or a scientific, technical or local investigation which in the opinion of the Court cannot be conveniently conducted by it or any matter which relates wholly or in part to accounts or any matter arising in such proceedings, for enquiry or report to a referee appointed by the parties and the Court may adopt the report if such referee either wholly or in part or either with or without modification or may remit such report for further enquiry or report or consideration by such referee or make such other order in regard thereto as may be necessary or desirable.

59. According to the Arbitration Act 42 of 1965, the arbitration process refers to proceedings conducted by an arbitration tribunal for the settlement by arbitration of a dispute which has been referred to arbitration in terms of an arbitration agreement.

60. Arbitration agreement refers to a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not.

61. In casu the referee/expert was appointed by the parties not by the Court. The principle is the same regarding the parties' view of the referee/expert's determination.

62. The position of a referee under s 19bis is, as the High Court correctly found, similar to that of an expert valuator who only makes factual findings but dissimilar to that of an arbitrator who fulfils a quasi-judicial function within the parameters of the Arbitration Act 42 of 1965. In this regard, the dictum of Boruchowitz J in **Perdikis v Jamieson** 2002 (6) SA 356 (W); para 7, is apposite: 'It was held in **Bekker v RSA Factors** 1983 (4) SA 568 (T) that a valuation can be rectified on equitable grounds where the valuer does not

exercise the judgment of a reasonable man, that is, his judgment is exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result.' I was referred to the case of **Perdikis v Jamieson** (supra) by Counsel for the Applicant.

63. Counsel for the Applicant also referred me to **Estate Milne v Donohoe Investments (Pty) Ltd**, 1967 (2) SA 359 (A) at 373H – 374C, where Ogilvie - Thompson JA stated that: 'This argument assumes something in the nature of an appeal to the arbitrator against the decision of the auditor. That is, however, not the position. In making his valuation, the auditor hears neither party. His is not a *quasi*-judicial function. He reaches his decision independently on his knowledge of the company's affairs. His function is essentially that of a valuer (*arbitrator*, *aestimator*), as distinct from that of an arbitrator (*arbiter*), properly so called, who acts in a *quasi*-judicial capacity. The distinction between *arbitrators* was well known to our writers .... The *arbitrator* or *aestimator* need not necessarily be an entirely impartial person. In discharging his function he is of course required to exercise an honest judgment, the *arbtirium boni viri*; but a measure of personal interest in not necessarily incompatible with the exercise of such a judgment.'

64. In **Van Heerden v Basson 1998 (1) SA 751** Hartzenberg J referred to **Hurwitz Hurwitz & Others NNO v Table Bay Engineering and Another!994 (3) SA 449 (C)** at 457 A-C wherein the Court said: "*do not conceive it to be the law that, where a third party nominated by the parties fixes a rent which is shown to be manifestly unjust, the contract ipso facto fails to the ground. Whether in any particular case that will be the consequence will depend, so it seems to me, the subsequent actions of the parties. If a party signifies that he will accept the determination of a court in lieu of the third party's determination, there is no good reason why he should not be bound to do so thereafter He has agreed thereby to a variation of the rent fixing method originally agreed upon. But, if he declines to accept such a determination by a court, I do not think that he can or should be compelled to do so. Why should he not be entitled to say, for example, that he concedes that the third party's determination is indeed manifestly unjust and therefore not binding, but that*

he is not prepared to become involved in a litigious proceeding to determine what the rent should be, and prefers to allow the lease to lapse for want of the contractually agreed determination."

65. In **Wright v Wright** 2013 (3) SA 360 (GSJ), The Court stated that: “It is significant, in this regard, that an arbitrator, as contemplated in the Arbitration Act, fulfils a quasi-judicial function whereas a valuator is required only to make a finding. Similarly, a referee, appointed in terms s19bis of the Act, is required only to make a factual finding. A referee, unlike an arbitrator, does not exercise a judicial or quasi-judicial function. Accordingly, the grounds upon which the award of an arbitrator and the report of a referee may be challenged differ significantly. In this regard, a report of a referee as contemplated in s19bis may be set aside if his or her judgment is exercised unreasonably, irregularly or wrongly, whilst the award of an arbitrator, appointed in terms of the Arbitration Act, may only be set aside on the limited basis as provided for in s 33 of the Arbitration Act, which includes that an arbitrator has misconducted himself in relation to his duties as an arbitrator; or has committed a gross irregularity in the conduct of the proceedings; or has exceeded his powers; or that the award was improperly attained.

66. The test applied for rectification of an expert valuator's report, which is akin to that of a referee's report, accords with the test applied in **Estate Young and Chaffer 1917NDP 244,** albeit that the jury system has been discontinued in South Africa. A referee's report, as contemplated in s19bis of the Act, is a finding of an expert appointed by the court, to investigate and provide a report of his or her findings to the court on questions of fact. A court should, therefore, be 'extremely slow' to interfere with these findings, unless it can be shown that the findings are so unreasonable, irregular or wrong, so as to lead to a patently inequitable result.

67. In **LTA Construction Ltd v Minister of Public Works and Land Affairs** 1992 (1) SA 837 (C) at 847 D-I, 854 G-H). The court is not obliged to ratify a referee’s report. It may take any of the following steps:(a) adopt the report wholly or in part with or without modifications; or (b) remit the report for

further enquiry or report or consideration by the referee; or (c) make such other order as may be necessary or desirable.

Breach of contract

68. Rule 18 (6) of the Uniform Rules of Court provides that: "*A party who in his pleading relies upon a contract shall state whether the contract is written or oral and* when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading".

69. When a breach of a contract occurs, the innocent contracting party has an election: he or she may either abide by the contract and enforce it or cancel the contract[1].

70. In Christie's *Law of Contract in South Africa* 7 ed[2], at 616 states:'The remedies available for a breach or, in some cases, a threatened breach of contract are five in number. Specific performance, interdict, declaration of rights, cancellation, damages. The first three may be regarded as methods of enforcement and the last two as recompenses for non-performance. The choice among these remedies rests primarily with the injured party, the plaintiff, who may choose more than one of them, either in the alternative or together, subject to the overriding principles that the plaintiff must not claim inconsistent remedies and must not be overcompensated.'

71. There are many cases in which it was held that if one party to the agreement repudiates the agreement, the other party at his election, may claim specific performance of the agreement or damages in lieu of specific performance and

that his claim will in general be granted, subject to the Court's discretion[3].

72. *Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract[4].

73. In **Govan v Skidmore**[5], the following principle was enunciated: '*In finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on evidence … by balancing probabilities select a conclusion which seems to be the more natural or plausible conclusion from amongst several conceivable ones, even though that conclusion may not be the only reasonable one.'*

The Applicant ought to stand or fall by its founding affidavit

74. In ***Betlane v Shelly Court CC***[6] the Court said: 'It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit. A case cannot be made out in the replying affidavit for the first time. In ***De Beer v Minister of Safety and Security and Another***[7], where it was held that 'It is trite law that an applicant must stand or fall by his or her founding affidavit. The Applicant is therefore not permitted to introduce new matter in the replying affidavit. The Courts strike out such new matter. The above being the relevant principle, I am thus entitled to exclude any new material in the replying affidavit insofar as it seeks to make out a new case and not simply replying to what is set out in the answering affidavit".

75. In **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA) at para 47 the Supreme Court of Appeal held that, it is not proper for a

Court in motion proceedings to base its judgment on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. A party cannot be expected to trawl through annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained.

The Court cannot deal with a matter that is not before it: Lis pendis

76. It is trite law that the principle of *lis alibi pendens* has four requirements namely: Pending litigations; between the same parties or their privies; based on the same cause of action; in respect of the same subject matter (**Eravin Construction CC v Twin Oaks Estate Development (Pty) Ltd** (1573/10) [2012] ZANWHC 27 (29 June 2012).

77. In **Nestlé (South Africa) (Pty) Ltd v Mars Inc**[8], the SCA describe the features of the plea *lis alibi pendens* as follows: *'The defence of* lis alibi pendens *shares features in common with the defence of* res judicata *because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally.'*

Application to strike out paragraphs 21 to 55 of the Second Respondent's answering affidavit

78. Rule 6 (15) provides that the Court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The Court shall not grant the application unless it is satisfied that the

applicant will be prejudiced in his case if it be not granted.

79. In **Helen Suzman Foundation v President of the RSA and others**[9], the Court held that: 'Is the additional evidence scandalous, vexatious or irrelevant? Two requirements must be met before a striking out application can succeed: (i) the matter sought to be struck out must be scandalous, vexatious or irrelevant; and (ii) the court must be satisfied that if such a matter is not struck out the party seeking such relief would be prejudiced. "Scandalous" allegations are those which may or may not be relevant but which are so worded as to be abusive or defamatory; a "vexatious" matter refers to allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy; and "irrelevant" allegations do not apply to the matter in hand and do not contribute one way or the other to a decision of that matter. The test for determining relevance is whether the evidence objected to is relevant to an issue in the litigation'.

80. If it were not for the requirement the offending material should be prejudicial most applications to strike out scandalous, vexatious or irrelevant materials could have been on notice only. However prejudice need to be alleged and proved, which in turn means that evidence is required and that the other party has to be given an opportunity to answer the factual allegations made with regard to the. question of prejudice[10].

Dispute of facts

81. In ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another***[11] **Heher JA** stated; "*recognising the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-*

fetched clearly untenable that the court is justified in rejecting them merely on the papers; ***Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty)Ltd 1984*** **(3) SA 623 (A) at 634 that E – 635 C…".**

82. Erasmus confirms that the purpose of Rule 37 is to promote the effective disposal of litigation: "The main object of the rule is investigating ways to avoiding costs at a stage where it can still be avoided. It is intended to expedite the trial and to limit the issues before the Court. The rule is intended primarily to curtail the duration of a trial, narrow down issues, cut costs and facilitate settlements." (7 Erasmus Superior Court Practice Vol 2 at D1 – 496).

83. The Supreme Court of Appeal confirmed in Filta – Matrix (Pty) Ltd v Freudenberg & Others: [1998] 1 All SA 239 (A); that, "(t)o allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre- trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of the litigation." ([1998] 1 All SA 239 (SCA) at 247 e-f; MEC for Economic Affairs, Environment and Tourism : Eastern Cape v K Kruizenga & Henque 2189 CC t/a Wimrie Boerdery (169/2009) [2010] ZASCA 58 (1 April 2010).

APPLICATION OF THE LAW TO THE FACTS

84. In light of the definition of the arbitration process and agreement, the process of appointing a third party *in casu*, to resolve issues does not fall within the definition of arbitration process.

85. There was no submission made that any agreement between the parties had an arbitration clause where the parties were obliged to refer the dispute to an arbitrator.

86. It is therefore not correct to submit that the Third Respondent was appointed as an arbitrator or semi- arbitrator. Based on the law quoted above, the Third

Respondent was appointed as an expert.

87. The submission that the appointment of the CEE should be set aside, poses challenges. The reason being that the Applicant and the Second Respondent were involved in the appointment of the CEE. They were given an opportunity to choose between seven independent Consulting Engineers as option for the appointment of the CEE. The Applicant and the Second Respondent opted for the Third Respondent as their choice.

88. If the Third Respondent was chosen without the knowledge and consent of the Applicant and the Second Respondent, the issue of the flawed appointment would have come into the picture.

89. The fact that the President did not appoint the CEE as expected cannot be challenged after the fact. Both the Applicant and the Second Respondent participated in the appointment of the CEE. The two parties should have challenged the procedure at the beginning and not agree to the appointment only to challenge such appointment later.

90. I agree with the submission made on behalf of the First Respondent that the Applicant and the Second Respondent supported the appointment of the Third Respondent. Both the Applicant and the Second Respondent were kept updated about the developments regarding the appointment of the Third Respondent and they both participated.

91. The report of an expert may be set aside if his or her judgment is exercised unreasonably, irregularly or wrongly. For an expert determination to be underpinned by proper reasoning, it must be based on correct facts. The proper facts can be deduced once proper inspection of the facts including physical inspection of the sites have been acquired.

92. Incorrect facts militates against proper reasoning and the correct analysis of the facts is paramount for proper reasoning, failing which the Court will not be able to properly assess the cogency of the determination. Proper facts can be

attained when a holistic approach has been adopted by using both desktop, physical inspection of the sites and any other factor that the expert deem fit to take into consideration.

93. The Applicant and the Second Respondent could not have challenged the Third Respondent's findings until a determination was made. It would be only after a determination was made that the Applicant and the Second Respondent had grounds to challenge the Third Respondent's determination.

94. Both the Applicant and the Second Respondent have issue with the findings of the Third Respondent and want same to be set aside. I am of the considered view that the Third Respondent should have conducted physical inspection for it to arrive at an informed conclusion in order to compile an informed rand holistic report/ determination.

95. The Applicant failed to attach the alleged agreement between the Second Respondent and it as the Second Respondent's agent. This is in conflict with Rule 18 (6) of the Uniform Rules of Court. If the Applicant in deed had an agreement where with the Second Respondent, where the Applicant is considered an agent, the Applicant should have sued the Second Respondent for breach of agreement.

96. Even though the Second Respondent did not oppose the main application, it is a fact that the first time the Applicant mentioned that there is an agreement between it and the Second Respondent was in its heads of argument.

97. As mentioned above, a party must stand or fall by its founding papers. The Applicant failed to make out a proper case on the founding affidavit and notice of motion, with regard to the fact that the Applicant has a cession agreement with the Second Respondent and then seeking to make out a proper case in the heads of argument.

98. The First Respondent failed to attach an agreement it allegedly has with the Applicant. Instead the First Respondent attached an appointment letter dated

24 April 2012 marked annexure “A”. It is trite that a letter of appointment is not a contract or an agreement. There has to be proof that there was in fact consensus *ad idem* among the parties.

99. In the appointment letter it is stated that the conditions applicable to the contract between the Applicant and the First Respondent are set out in the NEC Engineering Construction short contract and Mkhondo Municipality Supply Chain Management (“SCM”) policies. Neither the said short contract nor the SCM policies were attached.

100. This Court was not in a position to determine the exact contractual relationships between the Applicant, First and Second Respondents without access to the relevant contracts.

101. The First Respondent asked this Court to grant it an order in the amount of R3249 043.64. Both the Applicant and the Second Respondent dispute the submission that the First Respondent is owed the said amount. There is dispute with regard to whether or not the Applicant or the Second Respondent or both are liable to the First Respondent. The conflict as it stands *in casu*, cannot be decided on papers.

102. The Plascon Evans Rule holds that when factual disputes arise in circumstances where the Applicant seeks final relief, the relief should be granted in favour of the Applicant only if the facts alleged by the Respondent in its answering affidavit, read with the facts it has admitted to, justify the order prayed for. A Court must be convinced that the allegations of the Respondent/s (in casu being the Applicant and the Second Respondent) are so far-fetched or clearly untenable that it is justified in rejecting them merely on the papers and without requiring oral evidence to be led.

103. It is my view that the Court cannot grant the monetary order prayed for by the First Respondent in its counter application as it stands.

104. The counter application cannot be decided without hearing of oral evidence. The Plascon-Evans Rule will not resolve the dispute because of the degree of conflict between the parties' versions of events. This Court would have ordered that Rule 6(5)(g) of the Uniform Rules of Court be followed, which includes the referral of the disputed portion of the matter to oral evidence. There is an action pending with regard to the same issue.

105. The First Respondent in its application to strike out paragraphs 21 to 55 of the Second Respondent's answering affidavit failed to comply with Rule 6(15). This Court cannot grant the application unless it is satisfied that the First Respondent will be prejudiced in its case if paragraphs 21 to 55 of the Second Respondent's answering affidavit are not struck out.

106. The First Respondent failed to allege and prove prejudice in its application to struck out. I disagree with the Second Respondent's submission that the application should have been in terms of Rule 23(2). An application in terms of Rule 23 (2) does not have to be on affidavit, it can be on notice only. The First Respondent had a choice to use Rule 23 (2) or Rule 6(15). The only problem is that the First Respondent did not plead prejudice on affidavit.

107. I have considered all the submissions made by the Applicant, First and Second Respondents including the authorities they relied on.

108. In the premises I therefore make the following order:

108.1 The decision of the CEE/ Third Respondent is set aside and the existing CEE/ Third Respondent must value the unpaid work (if any) with the benefit of the physical inspection assessment in order to determine their quantity, quality and whether they were free of defects in order to make a proper decision as to the amount owed to the First Respondent (if any).

108.2 The Applicant's application to set aside the appointment of the CEE/ Third Respondent as the independent Consulting Civil Engineer as envisaged

in the pre-trial minutes signed by the Applicant, First and Second Respondents on 1 July 2016 in the action between them in this Court under case number 40779/2014 is dismissed with costs.

108.3 Condonation for filing the replying affidavit out of time by the First Respondent is granted.

108.4 The First Respondent's application to struck out paragraphs 21 to 55 of the Second Respondent's answering affidavit to the First Respondent's counter claim is dismissed with no order as to costs.

108.5 The First Respondent's counter – application is dismissed with costs.

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E.K. Tsatsi
Acting Judge of the High Court

For the Applicant: Adv. G. Kairinos SC
Instructed by: W.P. Steyn Attorneys

For the First Respondent: Adv. J. De Beer
Instructed by: Du Plessis Mundt Attorneys

For the Second Respondent: Adv. M. Malowa
Instructed by: TMN Kgomo and Associates Inc.

Date of hearing: 31 May 2021
Date of judgment: 8 July 2021

This judgment was handed down electronically by circulation to the parties' representatives via email and by uploading on case lines.

1. Culverwell & another v Brown 1990 (1) SA 7 (A) at 16J-17A.
2. G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 616.
3. Haynes v Kingwilliamstown Municipality **1951 (2) SA 371** (A); Rens v Coltman 1996 (1) SA 452 (A).
4. Farmers' Co-operative Society(Reg) v Berry 1912 AD 343.
5. 1952 (1)SA732 (N).
6. 2011 (1) SA 388 (CC) para 29.
7. (2011) 32 ILJ 2506 (LC).
8. (333/99) [2001] ZASCA 76; [2001] 4 All **SA** 315 (A) (31 May 2001).
9. Helen Suzman Foundation v President of the RSA and others 2015 (2) SA 1 (CC).
10. CG Marnewick: "Litigation Skills for South African lawyers; Second Edition: 2007: P151.
11. [2008] 2 All SA 512 (SCA).