IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION: PRETORIA)

Case No. 37168/21

In the matter between:-

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

DATE: 07th December 2022

SIGNATURE: _____

EKURHULENI MUNICIPALITY	FIRST APPLICANT
JF PIPE N.O.	SECOND APPLICANT
AND	
CEBEKHULU PROBUILD JV	RESPONDENT
In re:	
CEBEKHULU PROBUILD JV	APPLICANT
AND	
EKURHULENI MUNICIPALITY	FIRST RESPONDENT
JF PIPE N.O.	SECOND RESPONDENT

JUDGMENT

KHWINANA AJ

INTRODUCTION

[1] There are two applications before me the first one being for a stay of proceedings pending the finalisation of an action in the Johannesburg High Court Division under case number 29112/2021 and that the respondent pay the costs of this application in the event of opposition.

[2] The respondent has opposed the application on the basis that the General Conditions of the Contact for Construction Works and the adjudicator's decision that is binding and enforceable.

[3] The second application is that the respondent must pay the sum of R 10 095 241.00, plus costs. I am called upon to firstly decide whether the application must be stayed pending the finalisation of this matter and if that application succeeds it renders the second application moot.

BACKGROUND

[4] The applicant has brought stay proceedings against the enforcement of an adjudicator 's decision dated 30th April 2021. The decision was made by Mr JF Pipe pursuant to an adjudication process undertaken by the respondent and the Municipality in terms of the General Conditions of Contract for Construction Works (GCC) wherein the adjudicator awarded the respondent the sum of R 10 095 241.00. The applicant says the dispute arose after the Municipality terminated a contract that was awarded to the joint venture, the Cebekhulu Probuild Joint Venture when one of the joint venture members (Probuild Construction Group (Pty) Ltd was liquidated.

[5] The matter was referred to an adjudicator as per the contract entered into between the parties and the adjudicator found that the Municipality's decision to terminate the contract was repudiation of the contract as the Municipality was not entitled to terminate the contract for the reason of the liquidation of Probuild. The Municipality disagrees with the adjudicator's finding and has launched court proceedings to seek an order declaring the decision to terminate lawful and valid. The application is before the Johannesburg High Court to determine the lawfulness.

[6] The respondent relies on the fact that the decision of the adjudicator is not being reviewed in this application. The respondent says an attempt to review was initiated under case number 29112/21 which was met with an exception which was withdrawn. The respondent submits that the adjudicator's decision can be enforced despite referring it to arbitration or court proceedings. The payment becomes due after date of issue of the decision unless otherwise directed by the adjudication board. The respondent relies on GCC clause 10.6.1.1 which states that the adjudicator's decision shall be binding on both parties unless it is revised by an arbitration award or a court judgment whichever will be applicable.

[7] The Municipality says it accepted a joint venture's bid and issued a letter of appointment on 02 April 2019. Two entities were evaluated acting jointly as to their capacity, experience, and ability to deliver on the project. The joint venture was prohibited from terminating the joint venture until another bidder or work has been completed and all liabilities, and claims incurred have been settled and the bid is cancelled. On the 21 May 2019 the directors of the joint venture, Probuild took a resolution to commence business rescue

proceedings. On the 13 August 2019, Probuild was placed under final liquidation.

[8] The applicant says on 28 October 2019, the joint venture concluded a memorandum of agreement in terms of which Cebekhulu (now known as Khavhakone) was to acquire 100% of the joint venture. It was further stated that the liquidator of Probuild made an election that Probuild will have no responsibility and will not be liable with respect to the execution of the project. The effect of the memorandum of agreement with Probuild was taken as a breach of the terms of appointment by the Municipality. The liquidator of Probuild transferred Probuild interest from 23% to 0% without the written consent of the municipality.

[9] The conclusion of the transfer of percentages is said to dissolve the joint venture. The liquidator of Probuild decided not to retain any responsibilities and liability for the execution of the project which was taken as breach. Municipality terminated the contract on the basis that Probuild was under liquidation. The parties agreed on two-tier process for dispute resolution in GCC. The first one is to refer the dispute to an adjudicator and the second one is if the dispute remains unresolved then a referral of the dispute to arbitration or court proceedings. The applicant submits that the second process is not complete as same is before Johannesburg High Court.

[10] The applicant submits that the legal issue that must be ventilated upon is the legal status of the joint venture of the two entities taking into account that Probuild has been liquidated. The allegations are that the adjudicator is not legal inclined and failed to appreciate the legal consequence of liquidation on

the contracting party's profile being a joint venture. The municipality had contracted with two entities and it says it would not have been possible to allow one entity to continue with the project. The Municipality is also concerned that if R 10 095,241.00 is paid over there is no evidence that these entities will be able to repay that money.

LEGAL MATRIX

[11] In terms of section 173 of the Constitution[1] "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[12] A joint venture is a contractual agreement that joins together two or more parties for the purpose of executing a particular business undertaking. All parties agree to share the profit and loss of the enterprise. A joint venture is defined as an association of two or more persons formed to carry out a single business enterprise for profit in which they combine their property, money, efforts, skill, and knowledge[i].

The contributions of the respective parties need not be equal or of the same character. However, there must be some contribution by each co-adventurer that promotes the enterprise[ii]. A joint adventure is not created by operation of law[iii]. The existence of a joint venture gives rise to a fiduciary or confidential relationship[iv]. However, the existence of a joint venture is a question of fact that has to be decided according to the facts and circumstances of each case[v].

[1] Constitution of RSA

The elements of a joint venture include[vi]:

- A community of interest in the performance of a common purpose;
- Joint control or right of control;
- A joint proprietary interest in the subject matter;
- A right to share in the profits;
- A duty to share in the losses which may be sustained.

Whereas, a partnership is defined as an association of two or more persons to carry on as co-owners of a single business enterprise for profit[vii]. Generally, there exists no essential difference between a joint venture and a partnership. It can be seen that a joint venture is considered as a form of partnership.

However, a joint venture and a partnership are two separate entities, different from each other:

[13] Section 217(1) of the Constitution[2] provides that 'when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

[14] The Municipality has adopted a Supply Chain Management Policy in terms of section 111 of the Municipal Finance Management Act 53 of 2003 (MFMA) which states that

Supply chain management policy

[2] Constitution of RSA

111. Each municipality and each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of this Part.

ANALYSIS

[15] The first application relates to the stay these proceedings pending the determination of issues in the Johannesburg High Court. These issues emanate from the tender that was awarded to a Joint Venture Known as Cebekhulu Probuild Joint Venture. It is not in dispute that the parties concluded a memorandum of agreement and that all the parties concerned agreed on the terms and conditions of the memorandum of agreement.

[16] It is also not in dispute that the joint venture parties are Cebekhulu and Probuild. It is proper to reflect on the explanation that I have alluded to supra about the characteristics of a joint venture. The joint venture has community interest in the performance of a common purpose. This clearly means that they have the same goal in fulling their purpose for the project. In *casu* the municipality contracted Cebekhulu Probuild Joint Venture to perform the common purpose being construct reservoirs in its municipal area of jurisdiction. It is evident that the tender documents submitted depicted the credentials of both entities as a joint venture. The evaluation that was conducted was based on both entities working together as per their submitted documentation with the Municipality.

[17] The second aspect is that the joint venture has joint control or right of control in respect of the Joint Venture. In the event of any changes to the status of the joint venture, the parties agreed that “No party to the agreement shall be entitled to sell, assign or in any manner encumber or transfer its interest or

any part thereof in the joint venture consortium without obtaining the prior written consent of the party thereto. The contract further says that the parties shall cooperate on exclusive basis, co party shall bid to or enter a contract with CGE or any other party for the project either alone or in collaboration with a third party as only fair that the Municipality being a party to the memorandum of agreement is made aware. It is said on the 28 October 2019 the JV concluded a Memorandum of Agreement in terms of which Cebekhulu (now known as Khavhakone) purported to acquire 100% of the Joint Venture. The third aspect is that of a joint proprietary interest in the subject matter. What this means is that Cebekhulu Probuild have a joint proprietary interest in the project that has been awarded to the joint venture. It is so that their interest will be in accordance with their agreement which in casu has been reflected as Probuild with 23%. The fourth aspect of a joint venture is the right to share in joint profits. The memorandum of agreement signed by the Municipality with the joint Venture depicts the percentages agreed upon. This aspect is imperative when one has to consider the claim that the Cebekhulu Probuild joint venture was awarded the tender. Again, the involvement of the Municipality in so far the changes in the sharing of profits is crucial taking into account that the contract was subject to inter alia subcontract to an EME, or QSE which is at least 51% owned by black people, documentary proof of subcontracting company registration B-BBEE certificates/affidavits being submitted.

[18] The last aspect is the duty to share in the losses that may be sustained. Again it is imperative to note that in any business transaction particularly a joint venture not only do the entities share in the profits but the losses too. In *casu*

it would mean Cebekhulu has exonerated Probuild without the knowledge and consent of the Municipality. The changes in the entity that has been awarded a tender, particularly where public funds are concerned must be made known to the community involved in order to ensure transparency, equality, fairness, competitive and cost-effective.

[19] The municipality learned of the liquidation of Probuild being one of the parties to the joint venture who was entitled to 23%. The municipality proceeded to terminate the contract on the basis of liquidation. The Municipality relies on a clause in the JV consortium authority information which says the JV/Consortium may not be terminated by any parties hereto until either, the contract has been awarded to another bidder or the work undertaken by the joint venture consortium under the contract has been completed and all liabilities and claims incurred by and made by the joint venture/ consortium have been settled, the bid is cancelled or the period of validity of bid extended. The parties in their agreement had dealt with how disputes must be resolved. The parties are ad idem that the first step was done being to refer the matter to an adjudicator. It is not in dispute that the second tier to the process is that if the dispute remains unresolved then the matter must be referred for arbitration or court process.

[20] The respondent does not consider the process that is before the Johannesburg High Court as the relevant court process referred to as the second tier, despite that the subject matter of the pending action in the Johannesburg High Court is the same as that of the enforcement application in this court. However, it is evident that the parties are at loggerheads regarding this matter. The matter has been brought to the attention of the

court and that is where all the issues in relation to this matter must be ventilated upon. There is a clause that the applicant relies on in enforcing the claim. The said clause says that upon the decision being made by the adjudicator it is binding on both parties unless and until it is revised by an arbitration award or court judgment, whichever is applicable in terms of the contract .(clause 10.6.1.1)

[21] The question that came to my mind is whether it will be in the interest of justice for such an order to be enforced. Herein we are dealing with public funds, the Municipality is answerable to the National Treasury. However, it seems there are two clauses that are in conflict with each other. It is inconceivable that a court process that has ensued in the Johannesburg Court will be ignored and make payment in this matter of R 10 095 241.00. The concern raised by the applicant is indeed valid that there is no evidence that the funds can be refunded in the event the municipality succeeds in the Johannesburg High Court matter.

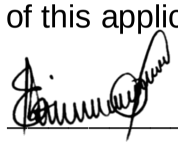
[22] It is evident that the contract was terminated, and the question remains was it lawful for the Municipality to terminate the contract that existed on the basis that Probuild had been finally liquidated? This question cannot be answered with a simple yes or no. the said question is the subject matter before the Johannesburg High Court. In *casu* I am unable to venture into these issues as I have not been called upon to make a determination of the said issues. The Johannesburg High Court is ceased with the matter, and I believe it is proper to allow the said court to adjudicate upon the said issues.

[23] In the matters of Framatome v Eskom Holdings Soc Ltd[3] and Stefanutti Stocks (Pty) Ltd v S8 Property (Pty) Ltd (20088/2013)[4] the facts differed materially from the matter herein. In *casu,* the contract has been terminated and the is no further work that is being done. It is prudent to wait for the Johannesburg High Court to make a ruling on this matter.

[24] In terms of section 173 of the Constitution this court has inherent power to regulate its own process, and to develop the common law, taking into account the interest of justice. I have cumulatively taken into account all the issues that have been raised and I do not think it is in the interest of justice that the order be enforced. It is on that basis I have come to the conclusion that the matter is stayed pending the finalisation of the matter in the Johannesburg High Court. The second application was dependent on the outcome of the first application. This application has therefore become moot.

[25] In the result I make the following order:

1. That the application brought by Cebekhulu Probuild Joint Venture under case number 37168/2021 is stayed, pending the finalisation of the action in the Johannesburg High Court, Division under case number 29112/2021.
2. That the respondent pay costs of this application.



ENB KHWINANA
ACTING JUDGE OF NORTH GAUTENG HIGH COURT, PRETORIA

APPEARANCES:

[3] 2022 (2) SA 395 (SCA)
[4] 2013 ZAGP JHC 388 (23 October 2013)

APPEARANCES For the Applicant: Advocate BH STEYN
Instructed by: MAMATELA ATTORNEYS INC.

For the First Respondents: Advocate BL MANENTSA & D MOKALE
Instructed by: RN INCORPORATED

Date of Hearing	07 September 2022
Date of Judgment	07 December 2022