



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case No: 606/2012
Not Reportable

In the matter between:

**THE MEMBER OF THE EXECUTIVE
COUNCIL FOR FINANCE AND ECONOMIC
DEVELOPMENT, KWAZULU-NATAL**

APPELLANT

and

**MASIFUNDISANE TRAINING AND
DEVELOPMENT COLLEGE CC**

RESPONDENT

Neutral citation: *MEC for Finance and Economic Development, KwaZulu-Natal v Masifundisane Training* (606/2012) [2013] ZASCA 138 (27 September 2013)

Coram: Lewis, Ponnann, Tshiqi and Wallis JJA and Swain AJA

Heard: 5 September 2013

Delivered: 27 September 2013

Summary: Public private partnership (PPP) – regulation 16 of the Treasury Regulations in respect of Government Departments, promulgated in terms of the Public Finance Management Act 1 of 1999 – alleged that PPP not concluded in accordance with regulation 16 and PPP agreement not binding on the MEC – dispute of fact incapable of resolution on the papers – not necessary or desirable to resolve legal issue – appeal upheld.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Norman AJ sitting as court of first instance):

1. The appeal succeeds with costs, such costs to include those occasioned by the employment of two counsel.
2. The order of the court below is set aside and is replaced with the following order:
'The application is dismissed with costs including those occasioned by the employment of two counsel.'

JUDGMENT

Swain AJA (Lewis, Ponnan, Tshiqi and Wallis JJA concurring):

[1] The respondent, Masifundisane Training and Development College (Masifundisane), successfully instituted application proceedings before the KwaZulu-Natal High Court, Pietermaritzburg (Norman AJ) against the appellant, the Member of the Executive Council for Finance and Economic Development KwaZulu-Natal (the MEC), for payment of the sum of R3 877 119.16 together with interest on this and certain other capital sums.

[2] The claim of Masifundisane arose from an agreement concluded between the Department of Economic Development, KwaZulu-Natal (the Department) and Masifundisane on 12 May 2006. Masifundisane was to assist the Department in developing primary, secondary and tertiary co-operatives registered in terms of s 7 of the Co-Operatives Act 14 of 2005, over a period of three years for a total consideration of R99,30 million.

[3] The establishment of these co-operatives was aimed at encouraging and supporting a variety of economic enterprises, where individuals could work together to advance the business of each co-operative.

[4] The breakdown in the relationship between Masifundisane and the Department occurred when the Department formed the view that the claims of Masifundisane in terms of the agreement were unjustified. As a result payments by the Department were delayed and then withheld, leading ultimately to the cancellation of the agreement by the Department.

[5] In answer to the claim of Masifundisane, the MEC opposed the application on two grounds, these being the only issues on appeal:

(a) In limine the MEC contended that the agreement was correctly classified as a Public Private Partnership (PPP) agreement as defined in regulation 16.1 of the Treasury Regulations for departments, trading entities, constitutional institutions and public entities¹ (the regulations) issued in terms of the Public Finance Management Act 1 of 1999. Because the requisite approvals of the Treasury were not obtained in terms of regulation 16 prior to the conclusion of the agreement, the agreement was not binding on the department in terms of regulation 16.9.1.

(b) Masifundisane should have anticipated that a material dispute of fact would arise on the papers and proceeded by way of action and not application.

[6] The court below rejected these defences, finding that the parties never intended to conclude a PPP agreement. In addition, any disputes of fact were not material and did not have to be referred for the hearing of oral evidence. The present appeal is with the leave of the court below.

¹ Treasury Regulations, GN R225, GG 27388, 15 March 2005.

[7] The issue whether the agreement was correctly classified as a PPP agreement, as defined in regulation 16, was raised for the first time as a point in limine in the answering affidavit deposed to by Ms Coetzee on behalf of the MEC. It was dealt with in a perfunctory manner with no reference to the detailed requirements of the regulations in this regard. The deponent simply referred to the general characteristics of a PPP and made the bald statement that the agreement met these criteria. The need for a detailed examination of this issue was not met in the heads of argument filed by the parties, or in the arguments advanced before this court.

[8] The issue is one of considerable importance to private parties concluding contracts with government institutions and to those institutions. It required for its proper determination a more careful consideration than that which has been provided in the present case. In addition, we have not been provided with the views of the National Treasury, whose interests would be affected by a decision on this issue. Accordingly, in the light of the conclusion I have reached on the alternative ground of appeal, I find it unnecessary and undesirable to decide this issue.

[9] I turn to the remaining issue of whether the court below erred in finding that the disputes of fact on the papers were not material and did not have to be referred for the hearing of oral evidence.

[10] At the heart of the dispute as to whether Masifundisane was entitled to payment lies the issue of whether Masifundisane had achieved specified 'deliverables' in terms of the agreement which entitled it to payment. There was a dispute of fact incapable of resolution on the papers in this regard. In addition, clause 13.7 of the agreement provided that the payments were only to be made to Masifundisane if the Department was satisfied with Masifundisane's performance. The Department's dissatisfaction with Masifundisane's performance was made clear in the correspondence between the parties and the meetings held prior to the institution of proceedings. Whether the Department's dissatisfaction was reasonable was an issue which could not be

decided on the papers. The court below accordingly erred in deciding the matter when there was a dispute of fact incapable of resolution on the papers. Masifundisane should have realised this before proceeding by way of application and should have done so by way of action. See *Adbro Investment Co Ltd v Minister of the Interior* 1956 (3) SA 345 (A) at 350A.

[11] In the result the following order is made:

1. The appeal succeeds with costs, such costs to include those occasioned by the employment of two counsel.

2. The order of the court below is set aside and is replaced with the following order:

‘The application is dismissed with costs including those occasioned by the employment of two counsel.’

K G B SWAIN
ACTING JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT: C J PAMMENTER SC (WITH HIM S JIKELA)
NGIDI & COMPANY INC, DURBAN
SYMINGTON & DE KOK, BLOEMFONTEIN

FOR RESPONDENT: V I GAJOO SC (WITH HIM W S KUBONI)
GARLICKE & BOUSFIELD, LA LUCIA
WEBBERS, BLOEMFONTEIN