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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 1022/2021

In the matter between:

**MASSBUILD (PTY) LTD T/A BUILDERS
WAREHOUSE**

Plaintiff

And

BOLD MOVES 379 (PTY) LTD

First Defendant

ANDREW STUART

Second Defendant

MORNE GARDINER

Third Defendant

**JUDGMENT ELECTRONICALLY DELIVERED
31 AUGUST 2023**

Baartman, J

[1] The Plaintiff issued summons claiming R1 096 433.10 plus interest for building materials sold and delivered at the instance of the first defendant. The claim against the second and third defendant are based on suretyships. It was in issue whether the first defendant had entered into a valid credit agreement

with the plaintiff. It was common cause that the provisions of the National Credit Act¹ were not applicable to the agreement.

[2] The trial commenced before Papier J, who became indisposed after the evidence was led. The parties agreed that I should finalise the matter. Although, I have not had the benefit of observing the witnesses, I had access to the transcript and the parties argued the matter before me. I deal with the evidence led to the extent necessary for this judgment.

[3] It is common cause that the Human Settlements department of the Eastern Cape (**the Department**) had awarded a tender to build 1 500 low-cost houses in rural areas to Vuikani Construction and Transport (Pty) Ltd (**Vuikani**) as the main contractor. Vuikani ran into trouble when it lost approximately R5 million worth of building material that the plaintiff had delivered to it. Vuikani's credit facility with the plaintiff was overdrawn and the plaintiff refused further deliveries. The first defendant came on board as a subcontractor to build 200 units and rescue the project. The first defendant successfully applied for a credit facility with the plaintiff and the second and third defendants stood surety. The plaintiff delivered materials as requested and the account was initially duly paid.

[4] It is common cause that R1 096 433.10 is outstanding on the facility. It is the plaintiff's case that the first defendant is responsible for the debt. On the contrary, the defendants allege that either Vuikani or Tusk Construction Support Services (**Tusk**) is liable to settle the debt. The defendants sought to join Vuikani and Tusk to these proceedings through a joinder application. However, the plaintiff opposed that application and suggested that third party proceedings were the appropriate route. The defendants withdrew the joinder application, apparently to initiate third party proceedings but they failed to do so.

The plaintiff's evidence

¹ National Credit Act 34 of 2005 (NGA).

[5] Ms Singh, a director of Tusk, explained that she dealt with 'compliance and risk for Builders Warehouse' a partner of Tusk. She said the following about Tusk:

'Tusk... we have three different programmes that run under Tusk. The ...backbone of our company is the finance management and support programme. This is where we assist SMME contractors or emerging contractors with bridging finance and funding in order to facilitate them with their projects and we have two other departments or programmes...

We run two other programmes within Tusk, which is the management programme and this assists all the departments in government towards managing their portfolios in terms of construction and we also have a department which we deal with condition assessment. ...'

[6] Ms Singh said the following about the relationship between Tusk and the first defendant:

'With construction project[s] it is not easy for a contractor to have funding upfront to quote when they have been awarded a project. They do not have access perhaps to a material facility so Tusk steps in through our partnerships to enable [a] contractor to perform and complete his projects by assisting him with materials on credit through the partnership as well as assisting him with his labour payments through the other partner as the financial arm of the programme '

[7] She said the following about the contract that forms the subject of this litigation:

'The first defendant was introduced to Tusk by the main contractor so the

first defendant is a subcontractor or was a subcontractor to the main contractor Vuikani and Vuikani was a client of Tusk at that point. '

[8] Ms Singh said the following regarding a document headed 'Construction Support Services Agreement':

'This is a document entered into between the first defendant... and Tusk. It is a support services agreement which is signed at the beginning before Tusk provides any assistance, whether facilitating material or funding to [first defendant]. It sets out the responsibilities and expectations of each party in this agreement.'

[9] Among others, the agreement provides as follows:

'[The first defendant (applicant)] hereby appoints Tusk and Tusk agrees to provide [first defendant] administration and support services....

[The first defendant] shall do nothing to represent to any person that it acts as an agent of Tusk or is authorised to bind Tusk to any transaction '

[10] Ms Singh elaborated:

'So under this duties of Tusk, Tusk actually assists the contractor in drawing up a budget. ... we look at the income on the project, we look at what the labour costs would be, what their material costs would be in order to complete the project and of course ensure that the contract has profit. Tusk also assists with all the administration duties on the project. This means we assist with facilitation of the materials. We reconcile their accounts on the material orders for them specifically. We attend and our professionals attend site visits with the contractor just to ensure that we provide support and if anything -

issues or challenges arise on site we are able to lend a hand and advise the contractor how he should proceed.'

[11] In respect of material, the agreement provides as follows:

'Tusk shall have the right but not the obligation to order any material, labour, plant, or any other items necessary to carry out the project. In so doing Tusk may act as [the first defendant's] agent and will be duly authorised to bind [the first defendant] in the placing of such orders.'

[12] The only exception would be as follows:

' in extreme circumstances we would order materials without consent of the contractor. That would be an exception if we really had to do that to save or if I would say save the project to ensure that the project can continue.'

[13] In these proceedings, the plaintiff has alleged that all orders were placed with the first defendant's consent. The agreement further provided that '[the first defendant] shall not deny the right of Tusk so to act... ' The second and third defendants signed the agreement on behalf of the first defendant. The agreement before court was not signed on behalf of Tusk. Ms Singh suggested that the original would have been signed by 'our MD which would be kept at our head office in our security files'. She was sure that the Construction Support Services Agreement had been signed on behalf of Tusk and accepted as binding.

[14] Tusk and the first defendant further concluded a 'Procurement Support Agreement'. Ms Singh said the following about the second agreement:

'This agreement more relates to the application that [the first defendant] would have signed with Builders for their material supplies and this ties in with the

responsibilities of each party in [first defendant] and Tusk and how that facilitation of material - where Tusk fits in with the facilitation of material and any requirements that emanates from that agreement.'

[15] Ms Singh was adamant that Tusk was a paymaster and a facilitator. She articulated it as follows:

'... There is no money from - funds from Tusk in here. We do not provide funding for the specific project in any way. The requirement for labour would come from the other party, Standard Bank, and material would come from in this instance the Plaintiff, Builders Warehouse.'

[16] Therefore, the agreement provides as follows:

'Tusk will raise the requisition and complete all relevant fields, request for quotations and Tusk will send out a request for a quotation to [the plaintiff].'

[17] Ms Singh further explained the relationship:

'...the contractor who is more involved and also he plays a part in his relationship with the supplier Builders, he would actually request the quotation from Builders on what he requires for his site at that time We facilitate or assist with the application in submitting the application but it is a requirement and this is all done in the name of the contractor in this instance (the first defendant].

It is actually the contractor who prepares his purchase order because the purchase order needs to be on the contractor's letterhead. And this was done so the contractor is aware of the order that he is placing on his letterhead and his company... '

[18] Ms Singh clarified the procedure as follows:

'...the contractor would receive or request his quotation from Builders for the material that he requires. And together with his purchase order for that material. So he would prepare his purchase order verbatim as per the quotation he received. His purchase order would have to match the quotation in value, quantity and description of the items he requires. Tusk prepares what we call a payment undertaking and to that payment undertaking is attached the contractor [the first defendant's] quotation. This payment undertaking is signed by the contractor acknowledging that he is now requesting and placing this order with Builders and Tusk as paymaster to facilitate the repayment of that material once it has been built in, claimed, and paid by the employer and signed by the supplier Builders... they would then supply that specific purchase order received.'

[19] Ms Singh said that:

'[p]ayment would only come from funds which had been paid into the account administered by Tusk. We can only pay those material once the contractor has put in a certificate to the employer for payment. That is the only way that material can be repaid.'

[20] Ms Singh further said that the first defendant had successfully applied for a credit facility and that Tusk had been provided with the specific account number, 7[...], that only the first defendant would have been allowed to contract under. Therefore, Tusk used that account number only for the first defendant's orders.

[21] According to Ms Singh, all went well until April 2018 when no further

funds were received in the account from which payments could be made. At that stage, the first defendant's account with the plaintiff had an outstanding debit balance. She was involved in two unsuccessful meetings between Vuikani and the defendants to resolve the outstanding payment issue. She was adamant that Tusk had only ordered material on the first defendant's instruction and with a completed payment instruction signed by first defendant which served as an acknowledgment 'that (the first defendant) ordered the material.' She denied that Tusk ordered material under the first defendant's account on behalf of Vuikani.

[22] Ms Singh said that Mr Gidi was the plaintiff's account manager for the first defendant's account and that the first defendant had had 'full access' to the account manager. She said the following about the account from which payment was to be made:

'Vuikani and Tusk operated [Standard bank] account with the representatives from both entities having signing powers. The account number [in Vuikani's name] would have been recorded at the Department for payment of funds on the project. ...payment for suppliers would be dependent on when funds came into that account based on work completed by [the first defendant] and Vuikani.... [Tusk does not]... withdraw money from these accounts and pay labour. It has to be done specifically at the request and on the backing of a certificate for work that has been done and this Revolving Account is opened in the name of Vuikani. Again, because they were still the main contractor on the account. It was not Tusk who would just draw money from these accounts.'

[23] Ms Singh conceded that the first defendant could not deal directly with the Department and gave the following explanation:

'The certificate for work done would - because Vuikani is the main

contractor the certificates for work done by [the first defendant] would have been submitted by Vuikani. [The first defendant] did not submit their certificates directly to the Department for work done. So in terms of actually - if money is received then we are guided by [the first defendant] and Vuikani as to who actually had done work on that particular certificate and lies with contractor [the first defendant] and Vuikani to discuss and to advise who actually did work on each certificate and how the funds should be distributed. It was not for Tusk to decide who needs to be paid and how much everyone needs to be paid.'

[24] Ms Singh did not deviate from her evidence-in-chief despite thorough cross-examination. She said that Eduan Naude was a shareholder of Tusk at times relevant to this judgment, although he was not involved in the day-to-day activities as a director. Mr van Tonder, a former employee, was no longer involved in Tusk.

[25] She could not confirm that Mr Naude had done a reconciliation from which it appeared that Vuikani owed the first defendant R1 257 443.37. Nor could she confirm that a representative of the first defendant, Mr Hilton Chapman senior, Mr Naude and Mr Sibusisu on behalf of Vuikani had met in 2020 to discuss the first defendant's claim against Vuikani.

[26] Mr Gidi, the second witness for the plaintiff, one of the plaintiffs external sales representatives, looked after the first defendant's account. He explained his duties as follows:

'It means I would get enquiries from [the first defendant] do quotations, do invoices. And visit the site.'

[27] He was not, however, involved in the credit application; he only got

involved when the first defendant placed its first order with the plaintiff. The first defendant was building 200 low costs houses in Cala and Mr Gidi paid weekly visits to the site as part of his duties. His first visit was after the site had been established and, on that occasion, the second and third defendants were also on site. Vuikani also had an account with the plaintiff but when the first defendant started building, there was no activity on Vuikani's site and no orders had been received from Vuikani's site.

[28] Mr Gidi said that Vuikani had a contract for 1 500 houses of which the first defendant would complete 200 at its site in Cala. He said the following about first defendant's process when placing orders:

'I would get a requisition from the third defendant and I would do a quotation. ...I would do a quotation as per the requisition, send a quotation to the third defendant [to whom he referred as Morne] and [he] would put the quotation with his order and send it to Tusk for a payment undertaking.

I would get an email saying loaded, that means I need to invoice and order what needs to be ordered and facilitate delivery.'

[29] He said from his weekly site visits, it was apparent the first defendant had used the materials ordered for the 200 dwellings at the Cala site. He claimed that he had established good relations with the first defendant's directors in the 2 years that they were on site in Cala as he was in daily telephonic contact with them.

[30] Unexpectedly, the orders dried up. He learnt from the third defendant that there had been 'issues with the account and that they were busy sorting it out...' Mr Gidi had no further involvement with the first defendant or with Vuikani. Cross-examination did not elicit anything more from Mr Gidi.

[31] Mr Jeffrey Friend, the plaintiff's regional key accounts manager, was the last witness for the plaintiff. He was introduced to the first defendant in 2016. On that occasion, he was on site visits in the area and paid the first defendant's site a visit. At that stage, the first defendant was approximately 10% into its project. He denied that he had been involved in persuading the first defendant to take on the project.

[32] In cross-examination, he said that he was not involved in this Tusk project. He did not know the detail of the agreement between Tusk and the first defendant but volunteered the following:

'... Tusk coordinates the project we supply the materials the certificates which are lodged with the contractor go via Tusk to the department. The department pays the money into a joint bank account which are held between Tusk and the contractor and after that Tusk then distribute:. the funds to Standard Bank, ourselves, they take their fee, and they pay the contractor the balance.'

[33] Mr Friend did not know whether the first defendant had been approached by Mr van Tonder to assist Vuikani.

The defence witnesses

[34] The third defendant had been in the building industry for 30 years and was a director of the first defendant at times relevant to these proceedings. He said that the first defendant was 'specifically created to do Government contracts, RDP housing, hospitals - all that kind of project.' He said the following about the first defendant's involvement in the project:

'We were obviously working in RDP housing projects in the Eastern Cape doing work for other companies, and we met Jurgen van Tonder. ... representative of Tusk at some of the sites that they were involved with at the time....2016... We were involved with projects there in Cala for another contractor, ... [van Tonder] approached us in July 2016 and told us that they had run into trouble with the contract of Vuikani in the Cala area and if we would not be able to assist them to try and resolve the issues there.

We then were explained the whole Tusk facility that materials would be supplied by Massmart, the labour money would be withdrawn from their Standard Bank partner to keep the production going. The claims then paid by Government would go into a Vuikani/Tusk account, whereas Tusk will pay then the supplier, Massmart, and we will get our labour portion, as we were appointed as labour only contractors. We had to supply the plant, the truck, the materials would be delivered to a central point in the Cala Ward and it was our responsibility to move the materials where needed and to utilise the materials and put it into milestones. The claim would then be processed, sent to the Department for payment, and the Department would pay the joint account of Vuikani and Tusk.'

[35] He understood that Vuikani had run into trouble due to lack of expertise and had lost R5 million worth of material that had been delivered at its request. They met the main contractor and discussed the way forward. Importantly, he said, 'and we signed all the necessary documents' being the subcontract agreement that Tusk had drafted. The plaintiff was not represented at that meeting as it intended to use Vuikani's credit facility. However, the facility was overdrawn and they could not get materials to operate profitably at the Cala site.

[36] Tusk then suggested that a credit application be done for the first

defendant. So, in September 2016, Mr van Tonder brought the necessary documents to complete for the credit application which documents were signed on site. He bemoaned the process as follows:

'[no credit checks were done] Nothing whatsoever, because it was never our responsibility for material. What happened to Vuikani, if they made it clear to me that I was going to be responsible for material in the rural villages there is no ways I would have been or would have gotten myself involved in that contract. Because it was a Tusk facility the responsibility was always going to be with Tusk, as they have put it in the ABC.'

[37] The third defendant acknowledged that he had signed the agreements at issue in these proceedings. Thereafter, Tusk prepared quarterly budgets for the first defendant. However, the first defendant did not receive monthly statements before there was a short fall, 2 years into the project. He further confirmed that claims were submitted through Vuikani as the main contractor with the Department. He insisted that the first defendant was only a labour subcontractor although he confirmed the order process as Mr Gidi had testified.

[38] Sadly, he said there should have been sufficient funds to complete the project as 'Government projects are profitable projects if managed correctly because Government always pays.' He said that Vuikani owed the first defendant R1.2 million and once that had been paid, the first defendant would settle the account with the plaintiff.

[39] In cross-examination, he said that the second defendant had completed the credit application in his presence. He admitted the first defendant's resolution authorising him and the second defendant to represent it in concluding the credit application. He conceded that he knew that he was required to 'stand as surety and bind [himself] as surety on the document.' He

signed to keep the project going.

[40] At the time, Mr Dotwana was also a director of the first defendant and refused to enter into a suretyship agreement when requested. Instead, he resigned as he 'told us... he does not want to be involved with Tusk...' The third defendant was adamant that the first defendant had only been a labour subcontractor- 'R26 000 for the labour and multiply that by 200 units and that was our actual contract value...' He insisted that Tusk or Vuikani was responsible to settle the plaintiff's account and that the first defendant was not involved in that process.

[41] Mr Chapman senior, a retired director of the first defendant, said that the second and third defendants had approached him to assist with RDP housing as they needed finance. He agreed. He understood that they would provide labour only and that the plant and equipment were necessary to transport material. He knew that the second and third defendants had signed the credit application prior to his involvement. He also knew about Vuikani's misfortunes. He said that the third defendant had signed most of the purchase orders although his son, also one of the first defendant's directors, had signed some. He said that the first defendant had completed the required paperwork and submitted claims to the Department on behalf of Vuikani; the Department in turn paid into Vuikani's account from which Tusk made payment. Later, the second and third defendants left the project, leaving the Chapmans to continue. He said that Vuikani owed the first defendant approximately R1.3 million for work done. He attended several meetings with representatives of Tusk and Vuikani to resolve the outstanding issue.

[42] There was agreement that Vuikani owed the first defendant R1 393 433.30. Vuikani undertook to settle the debt but paid only R500 000. The first defendant paid R300 000 to the plaintiff and used the balance on

another project it had with Vuikani. Mr Chapman said that if he received further payments from Vuikani, he would pay the plaintiff to settle the account. He said that was the agreement reached among the parties in the meeting leading up to Vuikani admitting it owed the first defendant and the latter undertaking to settle the plaintiff's account from payments received from Vuikani.

[43] In cross-examination, he said that the first defendant had a labour contract with Vuikani, therefore the plaintiff's debt should be settled by either Vuikani or Tusk. He was adamant that the first defendant was not liable to the plaintiff. However, he agreed that Tusk was only the paymaster and would only handle money that came into the joint account. He felt strongly that the reconciliation that the parties accepted indicated that the first defendant had done work, submitted claims to the Department and the latter in turn paid so Vuikani had the money and so should have settled the debt. The first defendant built 160 of the 200 houses it had undertaken to build. He agreed that the first defendant had received approximately R19 million in respect of the subcontract. Mr Chapman had done a reconciliation from which it appeared that Vuikani still owed the first defendant R1 894 000.

[44] When pressed, he agreed with the following proposition:

'...in terms of your budget the price you were getting per unit that was included in your pricing, the amount that would [be] paid towards [the first defendant] into the kitty administered by Tusk, and that amount included R19 million included materials and labour.'

[45] Mr Chapman was adamant that Vuikani owed the first defendant approximately R1.8 million and that upon receipt of it, the first defendant would settle the debt owed to the plaintiff. He would also accept the outstanding amount from Tusk and settle the plaintiffs account. He said that Tusk should not

have run out of money unless it had used the money for another project - there was no excuse for the shortfall.

Discussion

[46] It is common cause that the plaintiff is owed the amount claimed for material delivered to the first defendant's site at its request. It is further common cause that the first defendant's representatives authorised each payment that Tusk made in respect of materials. It follows that the first defendant conducted its business in accordance with the terms of the agreement with the plaintiff. The second and the third defendants realised that the first defendant needed its own credit facility when they could not obtain material through Vuikani's facility. They had been in the building industry for many years and understood the import of the agreements they entered into. The defendants appeared to have a legitimate dispute with Tusk and Vuikani but failed to join them to these proceedings. I am not called upon to pronounce on the merits or demerits of that failure. Nevertheless, the defendants cannot use their dispute with third parties to escape the obvious consequences of the failure to have performed in terms of the first defendant's credit facility with the plaintiff.

[47] Nor can the second and third defendants avoid the consequences of the suretyship agreements they entered into. The third defendant admitted that he had signed and intended to sign as surety although his signature appears above 'Witness'. He initially sought to use that technicality to escape liability; commendably, once under oath, he fairly conceded that he had intended to stand surety as that was necessary to keep the project going. The plaintiff sought rectification of the 'Deeds of Suretyship annexed to the Particulars of Claim to reflect that the Third Defendant signed the Deed of Suretyship as a surety.' Rectification presupposes a common intention²; as indicated,

² *Sonap Petroleum (SA) (Pty)Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis*

the facts show that the second and third defendants intended to enter into the suretyship agreements.

[48] It is inexplicable that the defendants did not foresee the obvious; their confidence in Vuikani and Tusk to manage the purse without any input from them was illogical. Vuikani had mismanaged R5 million worth of material under the guidance of Tusk. Therefore Mr Dotwana, a former director of the first defendant, resigned in the following circumstances as the third defendant explained in evidence:

'Third Defendant: He [Mr Dotwana] just told us verbally that he does not want to be involved with Tusk because he heard so many stories about them at the time.'

[49] I intend to grant the prayer for rectification so that the Deed of Suretyship annexed to the Particulars of Claim reflect that the third defendant signed as 'surety' not 'witness'.

[50] Ms Seton, the defendants' counsel, correctly submitted that the issue before court was whether the parties had entered into a valid credit agreement. They did. As indicated above, the provisions of the NCA do not apply to the agreement. The first defendant requested materials from the plaintiff in accordance with the terms of the credit facility it had applied for. The plaintiff delivered in terms of the agreement and sought and received payment in terms of the agreement. The first defendant indemnified Tusk in each order request. Therefore, the defendant's claim that Tusk can be held liable for payment of the plaintiff's account is illogical.

[51] Harms AJA³, with reference to the relevant authorities, endorsed the position in our law as follows:

The law, as a general rule, concerns itself with the external manifestations, and not the workings, of the mind of parties to a contract...

"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."(internal footnotes omitted.)

[52] It is common cause that an amount is owing in respect of material requested and delivered. The payment undertaking which H Chapman, one of first defendant's directors, signed on 3 April 2018 indemnifies Tusk against 'any claim resulting from the late payment or non-payment by the Employer of any and all money due... ' The subjective reservations that the defendants held do not alter the consequences of their outward actions and declared intent when they applied for the credit facility and acted in accordance with the terms of the agreement.

Conclusion

[53] I am persuaded that the plaintiff has met the civil standard of proof⁴ and grant the following relief:

(a) Rectification is granted so that the Deed of Suretyship annexed to the Particulars of Claim reflects that the third defendant signed the Deed of

³ Ibid page 118.

⁴ *Pather and another v Financial Services Board and others* [2017] 4 All SA 666 (SCA).

Surety as a 'surety'.

(b) The first, second and third defendants, jointly and severally, the one paying the others absolved, are directed to pay the plaintiff an amount of R1 096 433.10.

(c) Interest is due on the judgment amount at the rate of 2% per month, calculated daily and compounded monthly from 16 October 2020 to date of final payment.

(d) The defendants are to pay the plaintiff's costs of suit on an attorney and client scale.

Baartman, J