IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

14/9/16

CASE NO: 6915/2016

DELETE WHICHEVER IS NOT APPLICABLE

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

14/09/2016 .....
DATE SIGNATURE

In the matter between:

MAPCIVIL AND LANDSCAPING	First Applicant
BRIDGET THANDEKA DUMA	Second Applicant
MOSES MAPOLISA	Third Applicant

and

GIYANI ENGINEERING AND CONSULTING (CC)	First Respondent
GIYANI GLORIA MHLANGA	Second Respondent
CALVIN MUTIZE	Third Respondent
FIRST NATIONAL BANK	Fourth Respondent

JUDGMENT

Carrim AJ

[1] The applicants in this matter seek relief in the form of specific performance from the 1st respondent flowing from an alleged joint venture between the parties in relation to vegetation clearing tenders in the Msunduzi Municipality.

[2] The applicants require first respondent, and to the extent second and third respondents are agents of the first, to render to the applicants a true and proper statement of account together with all supporting documents reflecting the correct income, assets, expenditure and liabilities of the joint venture. They rely on a signed Memorandum of Understanding (MoU) and various correspondence and interactions between the second and third applicant with the second respondent.

[3] The respondents have opposed the application. The grounds of opposition are many but the fundamental challenge raised by the respondents is that the MoU is not valid.

[4] The respondents have also have raised two points *in limine*.

[5] The central plank of the first point ***in limine*** raised by the respondents in this matter is that the applicant ought to have foreseen the likelihood of a material dispute of fact arising on the papers and yet they persisted with application proceedings in full knowledge of this fact. On this basis alone the application ought to be dismissed. The second point ***in limine*** is that the referral to court of the dispute between the parties is premature because the joint venture agreement itself provides for a resolution of disputes between the parties and that the applicants ought to have exhausted this remedy first.

[6] The respondents had raised these points ***in limine*** in the papers but had pleaded over in answer to the applicants founding affidavit. However at the hearing of the matter counsel for the respondent limited himself to arguing only the points ***in limine*** and sought to adduce additional evidence by way of his heads of argument, without any direction being given by the court as to the separation of issues or for leave to adduce further evidence. The proper way for counsel would have been to seek the leave of the court in advance. Fortunately for his client's sake the answering affidavit is not limited to the points ***in limine***.

Points *in limine*

[7] It seems that prior to the filing of this application the applicants had brought urgent proceedings against the respondents in this court. The outcome of those proceedings was an agreement between the parties which was made an order of court. The order states –

"***AFTER PERUSAL*** *of the papers filed of record, and hearing argument on behalf of the parties, the following order is made:*

1. *Pending the final determination of an action, alternatively an application further alternatively, arbitration as the case may be, to be issued by the first applicantand against the respondents inter alia, which action/application/arbitration will be launched no later than the 30 January 2016, the parties agree as follows:*

1.1 The first, second, third respondents will:

1.1.1 Pay all monies already recieved by them, alternatively still to be received by them, and pursuant to the Vegetation Management Contract with the Msunduzi Municipality, under contract number 50/55 E9 of 2014, and into the first respondent's call account

held with First National Bank, Account Number 62573199538, less the relevant monthly expenses incurred in the contract only;

1.1.2 The respondents will not be entitled to access any balance held in the call account without prior written approval from the applicant which approval shall not be unreasonably withheld.

1.2 Within 10 days of receipt of this order, to account for all monies received by them up until the date of this order, and pursuant to the Vegetation Management Contract with the Msunduzi Municipality, under contract number 50/55 E9 of 2014, and on a monthly basis thereafter and by not later than the 7th of each month, account fully for all proceeds and expenses relating to the contract.

2. The applicant will:

2.1 Pay an amount of R413 000.00 into a call account held in the name of the first applicant pending finalisation of the dispute in paragraph 1 supra.

2.2 Shall account to the respondents for all and any monies received by them from the Giyani Vegetation Management account with Standard Bank.

3. The costs of this application, to be determined in the main application/action/arbitration."

[8] Following the agreed order of court the applicants' elected to launch this application.

[9] The respondents allege that in that urgent application they had already disputed the validity of the MoU and whether the alleged joint venture between the parties included the existing contract with the Msunduzi Municipality. The applicants were therefore aware that there was likely to be a material dispute of fact between the parties and yet they elected to proceed via application proceedings and not via an action. On this basis alone, it was argued, the application should be dismissed because the applicant was abusing the court's process. However the papers of the urgent proceedings were not included in the record by either party and I am therefore unable to assess whether the same dispute of fact had arisen in that case. Hence I am unable to decide the first point ***in limine***.

[10] The second point ***in limine***, namely premature referral to the court, assumes the existence of a valid MoU or that the provisions dealing with dispute resolution in the MoU were severable. Given that the respondents allege inter alia and seemingly in the alternative that the MoU was signed under duress or that the second respondent whose signature is reflected on the signature page of the document did not know what she was signing, the point ***in limine*** cannot succeed until the validity of the MoU has been placed beyond doubt. Furthermore clause 13 of the MoU, which deals with dispute resolution between the parties, does not contain any provisions that suggest severability or survival of the clause beyond cancellation or termination of the MoU. Hence this clause would only apply if the MoU was valid and binding on the parties. I am therefore unable to decide this point without deciding whether there was a valid contract or not.

[11] I now turn to consider the merits of the application.

Validity of the Joint Venture

[12] The applicants' version is that the husband of the second applicant, Lameck Cindove ("Lameck") and the second respondent had a prior work relationship. The second respondent had experience in vegetation clearing projects. On 26 June 2014, the Msunduzi Municipality tender was advertised. The second applicant ("Thandeka") and Lameck approached second respondent ("Gloria") about working together on the tender. The parties had come to an agreement that they would form a joint venture and utilize the first respondent as a vehicle through which they would tender for the contract. They specifically decided to use the first respondent as a vehicle for the tender. The third applicant assisted Gloria with the collation of information for the tender and ultimately assisted her with the submission of the documents before the due date of 30 July 2014. The MoU had not been signed yet there were discussions between the parties as to the terms thereof. In support of this they rely on an email sent by third applicant on 1 August 2015 to Gloria, in which the MoU is attached for her comments and consideration. The MoU was signed by Gloria on 4 August (on behalf of first respondent) and by third applicant (on behalf of first applicant) on 5 August 2014. The tender was subsequently awarded to the first respondent on 11 March 2015 ("*the contract*"). The contract for the clearing of vegetation would endure until 11 March 2017.

[13] The MoU is intermittently referred to as the Joint Venture Agreement or "Joint Venture partnership".

[14] The applicants allege that until this point things were proceeding smoothly until Gloria, who was the sole member of the first respondent, sold her interest to the third respondent who eventually acquired sole control of the third respondent seemingly with effect from 2 December 2015. Third respondent is now reneging on the agreement between the parties. There is a prior history and tension between the third respondent and Lameck because third respondent had been dismissed by Lameck at TNJ Project Solutions (which appears to be a subcontractor in the contract).

[15] The applicants have put up additional papers relating to the period after the tender was awarded which supports the inference that there was a joint venture between the parties. The first is an email from Gloria to Lameck dated 12 March 2015 in which she puts up a budget proposal for the "Msunduzi project". The important passages in this proposal are that they target to invoice R600 000 every month, they open a joint venture account (Gloria and Thandeka) into which the income from Msunduzi will be deposited and that they will share 50/50 on the net income after expenses. The other document is an email from Gloria to Zanele at Msundizi Municipality, copied to Thandeka, on 5 October 2015 in which she provides the bank account details for the joint venture and a letter confirming that Gloria and Thandeka have entered into a "joint venture partnership to execute and run our Msunduzi Contract No E9 of 2014".

[16] The respondents' core version is that there is no joint venture in relation to the Msunduzi tender. They dispute the events that occurred prior to the signing of the MoU and allege that Gloria submitted the tender documents on her own. They further dispute the validity of the MoU on the basis that Gloria did not know what she was signing alternatively that she signed under duress because she had been found to be moonlighting at TNJ Project Solutions. In the alternative they submit that the MoU was only concluded after the tender was submitted and therefore cannot apply to the contract.

[17] Additional grounds advanced by the respondents are that the alleged joint venture was not in compliance with the tender requirements and that there was serious non-compliance with the applicants with the Standard Conditions of Tender (Standard Conditions). Clause 7 of this document offers a remedy to tenderers who would have wanted to vary the conditions of tender as the MoU attempts to do. The applicants had the opportunity to do so in the contact award letter but never utilized it. Furthermore the joint venture could not be valid because Clause 13 of the Standard Conditions restricted the assignment of the contract or any part thereof by either the Council or the contractor (Supplier) without the written consent of the other. Much argument was put up and many cases relied upon in support of the contention that the joint venture was not valid vis-à-vis the requirements of the Council or the tender process. However debates about compliance with the conditions of tender or the legal relationship between the applicants and the Municipality are to my mind irrelevant to the enquiry at hand.

[18] The central allegations in the applicants' version are that they had a joint venture agreement with the first respondent in relation to the Msunduzi Municipality tender and that they had specifically agreed to utilize the first respondent as a vehicle for the execution thereof; and that the agreement was reduced to writing in the MoU. The respondents dispute the validity of the MoU and its application to the Msunduzi tender. This issue would be determinative of the matter and it is the issue I have been asked to decide. And it is in this area that I find some discomfort in deciding the matter solely on the papers before me and without the hearing of viva voce evidence.

[19] The first matter that gives rise to this concern is that on the applicants' own version there were oral discussions between the parties and they had assisted Gloria with the submission of the tender. This all occurred prior to the signing of the MoU. The discussions during the period leading up to the

signing of the MoU could help to shed light on the interpretation of some of the wording used in the MoU.

[20] For example clause 1(c) which contains Definitions the Bill of Quantities is defined as Annexure A for this Contract. But Annexure A is not attached amd "this Contract" is not defined. Then in 1(d) the client is defined as the Municipality of, the Employer of the project. Yet neither the word "*Employer*" nor "*project*" is defined. In a paragraph headed "*RECITALS*" the word Project is used, with an upper case P. It is unclear whether this refers back to the project in 1(d).

[21] Critically in clause 2.1 which states that the "*parties associate themselves as independent firms forming a business alliance to execute the Municipality of Msundizi contract namely eradication of vegetation*". It is unclear whether the contract referred to in this clause is the Contract referred to in 1(c). A reader is thus left with uncertainty as to whether there was one or two contracts.

[22] A second matter that gives rise to this discomfort is the interconnected relationships between the parties and in particular the allegation that Gloria had signed the contract under duress. This goes to the question of intention.[1] While her proposal of 12 March 2015 does not contain words suggesting reluctance it would be difficult to make an evaluation about duress without the benefit of viva voce evidence.

[1] See AJ Kerr *The Principles of the Law of Contract* 6ed Lexis Nexis

[23] Further clause 18 of the MoU provides that "*the MoU constitutes the entire agreement between the parties and supersedes any previous understanding, commitments or agreements, oral or written with respect to the subject matter hereof*". The fact that the parties seemingly engaged in discussions and had already submitted the tender prior to the signing of the MoU makes it vital for this court, when asked to interpret the terms of the MoU, which in themselves are not consistently used, to have the benefit of extraneous viva voce evidence as to the meaning of various words and phrases used by the parties.

[24] Another factor that is also somewhat concerning is the parties understanding of the nature of the joint venture. In para 8.25 of the founding affidavit the applicants allege that the joint venture was in the nature of a partnership and as such the parties owed each other inter alia a duty to account. The same term, partnership, is used in the letter of 5 October referred to above. The respondents have pounced upon the latter to suggest that the partnership or joint venture was between Thandeka and Gloria, thus implying that the first respondent, being a close corporation, could not be bound to it.

[25] In the circumstances it is my view that a court would not be able to arrive at an understanding about the nature of the joint venture and the parties' intentions without the hearing of viva voce evidence. While these are matters that in my view would require *viva voce* evidence I disagree with counsel for the respondent that the application ought to be dismissed because in his view the applicants were abusing the court's process and the application of Rule 6(5)(g) through application proceedings.

[26] In this case there is documentary evidence in the form of a MoU signed by both parties which *ex facie* suggests that there was an agreement between the parties. The respondents have not denied signing the MoU but have put up a version challenging the validity thereof and the application of its ambit. In my view this is a sufficiently narrow albeit critical issue that can be referred to oral evidence in terms of Rule 6(5)(g).

[27] The applicants have already suggested that if this court is not willing to adopt a robust approach the matter should be referred to oral evidence. The respondents when asking for the matter to be dismissed also agree by implication that I cannot decide it only on the papers before me.

[28] Accordingly I make the following order –

1. The application is referred for the hearing of oral evidence at a time to be arranged with the Registrar on the following issues:

    1.1 Whether the Memorandum of Understanding, (hereafter "*MOU*") dated 5 August 2014 is a valid agreement between and binding on the parties in respect of the Msundizi Municipality Contract awarded to the first respondent on 11 March 2015.

    1.2 That the first respondent (and so to the second respondent and third respondents insofar as they are the agents of the first respondent), be ordered to render the applicants, within a period of twenty (20) days from the date of the granting of this order, a true and proper statement of account together with all supporting documents reflecting the correct income, assests, expenditure and liabilities of the joint venture in terms of the MOU signed on 5 August 2015.

1.3 That the first respondent is ordered to comply with, and perform in terms of the MOU dated 5 August 2014, including but not limited to:

1.3.1 the continuation of the contract with Msunduzi Municipality;

1.3.2 to continue to use the assest and services of the applicants as set out in the MOU;

1.3.3 to make payment of all payments received from the client into the joint venture bank account;

1.3.4 granting the first applicant in particular Bridget Thandeka Duma, joint signing powers to the joint venture bank account; and

1.3.5 the sharing of the profits made from the contract with the first applicant in the ratio 1:1 with the first applicant.

1.4 The parties are to debate the account received in paragraph 1.2 supra, within sixty (60) days after the account has been received, amongst themselves, failing which they may set the matter down, on a date to be arranged with the Registrar, for a debatement of the said account.

2. Prayers 2, 3 and 5 of the Otice of Motion dated 28 January 2016 is postponed sine die.

3. The evidence shall be that of any witness whom the parties or either of them may elect to call, subject, however, to what is provided in paragraph 3 thereof;

4. Neither party shall be entitled to call witnesses unless:

4.1 It has served on the other party at least fifteen (15) days before the date appointed for hearing (in case of a witnessto be called by the respondent) and at least ten (10) days before such date (in case of a

witness to be called by the applicant), a statement wherein the evidence to be given in chief by such person as set out; or

4.2 The court, at the hearing, permits such person to be called despite the fact that no such statement has been served in respect of his or her evidence;

5. Either party may subpoena any person, to give evidence at the hearing, whether such person has consented to furnish a statement or not;

6. The fact that the party has served a statement in terms of paragraph 3 hereof, or has ssubpoenaed a witness, shall not oblige such arty to call the witness concerned;

7. In so far as Expert Witnesses are to be called, Rule 36 of the Uniform Rules of Court shall apply.

8. Within twenty (20) day of the making of this order, each of the party shall make discovery on oath, of all documents relating to the issues referred to in paragraph 1 thereof which are or have at any time been in possession or under the control of such party;

9. Such discovery shall be made in accordance with Rule 35 of the Uniform Rules of Court and the provisions of the rule with regard to the inspection and production of documents discovered shall be operative;

10. The incidence of costs incurred by the parties in the current and pending proceedings, shall be determined by the court after the hearing of oral evidence.

Y. CARRIM

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Heard on:	06 September 2016
Delivered on:	14 September 2016
For the Applicants:	Advocate H. Jacoobs Advocate J. Hershenshon
Instructed by:	Gwanangura Singini Attorneys
For the First & Third Respondents:	Advocate N. S. Petla
Instructed by:	Masewatla Attorneys