



**IN THE HIGH COURT OF SOUTH AFRICA,**  
**FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

**CASE NO: 4888/2013**

In the matter between:

**VIP CONSULTING ENGINEERS (PTY) LTD**  
**[Registration number: 1997/005608/07]**

Plaintiff

and

**MAFUBE LOCAL MUNICIPALITY**

Defendant

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**CORAM:** MBHELE, J

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**HEARD ON:** 26, 27, 29 JULY 2016  
1 and 2 NOVEMBER 2016

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**JUDGMENT BY:** MBHELE, J

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**DELIVERED ON:** 16 FEBRUARY 2017

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## **INTRODUCTION AND BACKGROUND**

[1] This is an action based on 4 claims by the plaintiff emanating from alleged services rendered by the plaintiff to the defendant.

The claims are for the payment of the following amounts:

Claim 1: R556 542.30,

Claim 2: R328 833.00,

Claim 3: R164 680.13,

Claim 4: R799 258.33

[2] It is alleged that the plaintiff was given written letters of appointment to perform Preliminary engineering services for the defendant. The appointment letters were accepted by Mr Graeme Ambrose on behalf of the plaintiff.

[3] At all times, material to the transactions, the defendant was represented by one Isaac Radebe (Radebe) and the Plaintiff by Graeme Ambrose (Ambrose) who was the director then.

[4] The letters of appointment related to 4 projects and contained the following:

**"Claim 1: Risk Appointment: Solid Waste Disposal Sites and Rehabilitation of Existing Sites in Mafube towns:**

Mafube Municipality hereby appoint your firm at risk to undertake the preliminary design stage with the view to preparing the feasibility study, technical report and approval from DWAF and registration of the above project.

Upon securing DWAF approval and funds of the project your firm should then proceed with detail design, preparation of necessary documents and the project management of the project during implementation phase of the project.

Please note that the project implementation is subject to approval by the National Department of Finance.

**Claim 2: Risk Appointment: NAMAHAADI- Sewerage Reticulation Network and Toilet Structures in Qalabotjha for 697 stands;**

Mafube Municipality hereby appoints your firm to undertake the preliminary design stage with the view to preparing the feasibility study, technical report and MIG 1 registration documents required to secure the registration of MIG funding for the project, sewer reticulation network and toilet structures in Qalabotjha for 697 stands.

Upon securing DWA approval and MIG registration and availability of funds your firm should then proceed with detail design, preparation of tender documents and the project management of the project during implementation phase of the project.

Please note that the project implementation is subject to approval by the Municipal Infrastructure Grant and availability of funds'.

**Claim 3: Risk Appointment: Sewerage Reticulation Network and Toilet Structures in Ntswanatsatsi/ Cornelia for 393 stands**

Mafube Municipality hereby appoints your firm to undertake the preliminary design stage with the view to preparing the feasibility study , technical report and MIG 1 registration documents required to secure

the registration of MIG funding for the project, sewer reticulation network and toilet structures in Ntswanatsatsi / Cornelia for 393 stands.

Upon securing DWA approval and MIG registration and availability of funds your firm should then proceed with detail design, preparation of tender documents and the project management of the project during implementation phase of the project.

Please note that the project implementation is subject to approval by the Municipal Infrastructure Grant and availability of funds'.

**Claim 4: Risk Appointment: Extension of Bulk Water Supply for Namahadi/ Frankfort and Ntswanatsatsi/ Cornelia;**

Mafube Municipality hereby appoints your firm to undertake the preliminary design stage with the view to preparing the feasibility study, technical report and MIG 1 registration documents required to secure the registration of MIG funding for the project, extension of bulk water supply for Namahadi/ Frankfort and Ntswanatsatsi/ Cornelia.

Upon securing DWA recommendations, MIG registration and availability of funds your firm should then proceed with detail design, preparation of tender documents and the project management of the project during implementation phase of the project.

Please note that the project implementation is subject to approval by the Municipal Infrastructure Grant and availability of funds'.

- [5] Defendant resists the claims on the basis that the contract it entered into with the plaintiff was on risk basis and dependent on the availability of funds to be allocated through MIG, further that

the contract was concluded in breach of prescribed procurement laws.

- [6] Plaintiff prepared the preliminary design reports for all four projects and submitted the defendant's applications to Department of Water Affairs (DWA) for MIG funding.

The costs of the projects were estimated as follows:

Claim 1: R 31 736 700. 00

Claim 2: R 13 532 085. 00

Claim 3: R 6 394 300

Claim 4: R 30 524 750

- [7] The applications for funding were not approved by DWA for MIG allocation.

Around August 2012 Plaintiff terminated its services in the Free State and Ambrose resigned as its director to take over Plaintiff's operations in the Free State under a new company called FLAGG.

Flagg would complete all outstanding projects defendant awarded to plaintiff.

Ambrose gave the Defendant an agreement entered into between Flagg and the Plaintiff. Upon receipt of the agreement the Defendant terminated all the appointments awarded to the Plaintiff.

It is common cause that the Plaintiff worked with the Defendant as the only consultant for infrastructure engineering work since 1990.

- [8] The relationship between the Plaintiff and the Defendant developed to a point where the Plaintiff would identify a need and advise the defendant on how to meet the needs of the municipality in alignment with the relevant IDP. Plaintiff used this approach as its marketing drive to most municipalities in the Free State.

### **PLAINTIFF'S CASE**

- [9] The Plaintiff party called Stephanus Prinsloo (Prinsloo) in support of its case. Prinsloo testified to *inter alia*, the effect that he is a professional engineer and a Director of VIP Consulting Engineers (Plaintiff). He started working for the Plaintiff since 1989 and assumed the position of a director during 1994-95. Plaintiff is a civil engineering company engaged, *inter alia*, in municipal infrastructure projects involving sewer networks, roads, storm-water drainage and bulk services supply which entails building of reservoirs.
- [10] The projects undertaken by plaintiff often involve civil engineering designs. It starts with the concept and viability and proceeds to preliminary design reports, and then detailed designs and

execution of projects. The Plaintiff does designs and drawings for such projects.

[11] The Plaintiff has been doing civil engineering for the Defendant since 1990 and they were the only consultant until recently.

Plaintiff received appointment letters from defendant instructing the Plaintiff to perform Engineering preliminary designs in respect of the aforementioned projects. The preliminary design reports would be submitted to DWA in support of funding from the MIG. Upon securing approval from the Department of Water Affairs, the Plaintiff would proceed with the implementation phase of the project.

[12] The Plaintiff would, according to Prinsloo, be entitled to submit its invoices upon completion of preliminary design report and such invoices were payable within 30 days of submission. He further testified that plaintiff was aware that all these projects were not budgeted for by the defendant and the general practise in the past would be to wait for the approval of the MIG before invoices could be submitted for payment. This was mere courtesy extended to the defendant owing to the long standing relationship between the parties, but it did not preclude plaintiff from demanding payments immediately.

[13] When asked how would the Municipality pay for work not budgeted for, his response was that defendant can easily redirect funds from its budget as the preliminary designs are being used to source huge sums of money from the MIG.

[14] He is aware that the funding applied for was not approved and that work has commenced on 3 of the projects. Babereki is the consultant in all these projects. Babereki has appointed Flagg as its Subcontractor to perform work that would have been performed by the Plaintiff.

[15] It is his evidence that the preliminary designs used by the contracted service providers were done by the Plaintiff and the Plaintiff is entitled to payment for its completed work. The Plaintiff appointed Flagg as a subcontractor for all the outstanding projects in the Free State when it closed down its operations in the Province.

[16] His understanding of risk appointment is that the 25% of engineering work did not form part of risk appointment. According to him, risk would only kick in on the phase two of the projects which were dependent on approval of MIG funding.

[17] He explains that the appointment was termed risk appointment in order to accommodate an eventuality where funds may not be made available from the Municipal Infrastructure Grant for implementation phase.

### **DEFENDANT'S CASE**



- [18] Defendant called Graeme Ambrose and Nkabi Andrew Hlubi. Ambrose testified to *inter alia*, the effect that he is a consulting civil engineer attached to Flagg. He got employed by the Plaintiff in 1998 as a resident engineer for various projects including Mafube. He became a director in 2004. At the time of issuing of the appointment letters in the current matter he was still a director and project leader for the work performed by plaintiff in the Free State.
- [19] He was instrumental in the discussions that led to the defendant issuing the relevant appointment letters. The appointment letters came as a result of Plaintiff's marketing exercise in terms of which plaintiff would study the defendant's Integrated Development Plan, identify gaps and offer assistance to the defendant on how to meet its delivery objectives.
- [20] The aforementioned engagements resulted in the defendant entering in various contracts with the plaintiff including those that are at the centre of the current matter. According to him, there was no agreement reached in relation to costs payable for the first stage of the process, which would normally constitute 25% of engineer's fees in each project. As per the guidelines the Plaintiff was only entitled to invoice the client after the funds were approved and detail designing was complete. That process comes just before the tender process for actual construction work.

- [21] The understanding was that the Plaintiff would only be paid upon funding being obtained through the Municipal Infrastructure Grant (MIG). There would be no fee payable if funding was not obtained.
- [22] Appointment letters were accepted on the basis that Plaintiff would do work stipulated in paragraph 1 of the letters for the projects to be accepted by the Department of Water Affairs and become eligible for MIG.
- [23] Before 2004 the appointments were done verbally and later it was agreed that they be reduced to writing to avoid exposing municipality to unnecessary disputes. All appointments were based on risk for that purpose.
- [24] He denied that Flagg was a subcontractor for the Plaintiff. According to him, the plaintiff ceded all its rights and obligations to Flagg when it terminated its services in the Free State. Flagg had to take over all outstanding projects that plaintiff was involved in.
- [25] He confirmed that Babereki has been appointed by National Government, from the Presidential budget, to carry out similar projects within Mafube. The appointment of Babereki is under the Presidential bucket eradication programme and it has nothing to do with Mafube.

- [26] He omitted certain sections of the agreement he entered into with the Plaintiff because, in his view, the financial arrangements between them were of no concern to the defendant.
- [27] Nkabi Andrew Hlubi testified to the effect that he is the Acting Municipal Manager and accounting officer for the Plaintiff. He is permanently employed as the Chief Financial Officer.
- [28] The incumbent in the position of the Municipal Manager, Radebe, is on special leave since January 2015. He is aware that the Plaintiff was appointed on risk for all the projects.
- [29] All the projects relevant to this matter were not budgeted for as such the defendant would not have committed funds they did not have to finance these projects.
- [30] His understanding of risk of appointment is that the plaintiff agreed to do preliminary design report, which in his view, is a desk top exercise aimed at helping the Municipality secure MIG funding. Most information is gathered from the Municipality's Integrated Develop Plan.
- [31] He confirms that the Plaintiff would have benefitted by being given preference during the implementation phase of the projects.

Their duties would involve drawing of detailed designs, evaluating bidders for the actual construction work and monitoring each project in its totality.

[32] The National government through the Presidential bucket eradication programme appointed Babereki Consultants to do work similar to the one the Plaintiff got appointment letters for.

[33] Babereki was appointed by National government to oversee business plans of all Municipalities that had backlogs. This was a Presidential intervention to clear Municipal backlog based on the reports submitted by each Municipality. Babereki appointed Flagg as a subcontractor and the relationship between the subcontractor and Babereki is not regulated by the defendant.

### **SUBMISSION FOR THE PLAINTIFF**

[34] Mr Venter painstakingly contends for the Plaintiff to , *inter alia* , the effect that the Plaintiff entered into a partly oral and partly written contract for the drawings of preliminary design reports in all 4 claims constituting 25% of the engineering work in each project. He further contends that the evidence shows that the Plaintiff's payment of the completed work in each project did not depend on approval of funds through MIG. He contends further that the defendant derived benefit out of the work done by the plaintiff and defendant was enriched at the expense of the

plaintiff. He further submits that the principle of fairness dictates that the plaintiff be compensated for its loss.

### **SUBMISSION FOR THE DEFENDANT**

[35] Mr Louw on behalf of the Defendant submits, with reference to authority to *inter alia*, the effect that the appointments were made on a risk basis, with an understanding that the plaintiff would be entitled to payment once projects are approved by (DWA) and funds allocated through MIG. He further contends that the agreements relied upon by Plaintiff are unlawful as they violated provisions of Section 217 of the Constitution of the Republic of South Africa or regulation 12 (1) of the Municipal Supply Chain Regulations.

[36] He contends, further, that the agreements are void and unenforceable and do not afford the Plaintiff a right of action.

He further contends that enrichment claims cannot succeed on behalf of the Plaintiff as the defendant's estate was not enriched, but that of Babereki Consultants who are carrying out the Presidential project, alternatively Ambrose through FLAGG.

### **LEGAL PRINCIPLES**

[37] The approach to be followed where a question of illegality is raised was laid down in **Yannakou v Apollo Club 1974 (1) SA (A) at 623** where the following was said:

"It is the duty of the court to take the point of illegality *mero motu*, even if the defendant does not plead or raise it, but it can and will only do so if the illegality appears *ex facie* the transaction or from the evidence before it."

[38] When an organ of State in the National, Provincial or Local sphere of government, contracts for goods or services, it must to do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. See **Section 217 of the Constitution of the Republic of South Africa.**

[39] Supply Chain Management Policy of a municipality must comply with a prescribed regulatory framework for Municipal Supply Chain Management. See **Section 112 (1) of the Municipal Finance Management Act 56 of 2003,**

"A contract or agreement procured through the Supply Chain Management system of a Municipality must:

- (a) Be in writing;
- (b) Stipulate the terms of the contract which must include:
  - (i) The termination of contract in case of non or under performance
  - (ii) Dispute resolution mechanisms to settle the disputes. See **Section 116 of the Municipal Finance Management Act.'**

[40] Procurement contracts by state organs concluded without complying with prescribed competitive processes are invalid. See **Municipal Manager: Qaukeni Local Municipality and another v FV General Trading CC 2010 (1) SA 356 SCA.**

- [41] Procurement laws are peremptory and give public authorities no discretion. They seek to eradicate patronage and promote fairness, openness and equity. Adherence thereto ensures good governance and accountability.

**Eastern Cape Provincial Government Contract props 25  
(PTY) LTD 2001 (4) SA 142 (SCA)**

**APPLICATION OF THE LEGAL PRINCIPLES AND FINDINGS**

- [42] It is patent from the undisputed evidence and submissions by the parties that the Plaintiff was awarded appointment letters in terms of which it would perform consulting engineering services for various projects. It is clear that the Plaintiff did perform the preliminary designs on each project with the defendant contending that the preliminary designs were done on risk basis in that the plaintiff would only be entitled to payment for the work done once projects have been approved by DWA for funding and MIG approval number has been allocated.
- [43] The factual dispute between the parties is limited to whether the plaintiff was entitled to payment upon completion of preliminary designs and feasibility study.
- [44] The validity of the contracts emanating from the appointment letters is also in dispute.

[45] It is apparent from undisputed evidence before me that the relationship between the plaintiff and the defendant saw the plaintiff as the sole provider for engineering services within Mafube and Phumelela Municipalities since 1990 until 2012 when the plaintiff decided to terminate its services in the Free State. The lines were so blurred that plaintiff never had to submit quotations nor tender for the services it rendered for the defendant.

[46] The evidence further shows that some appointment letters were issued long after the work was completed by the plaintiff.

[47] It is clear from evidence before me that the plaintiff's way of doing business put breaks on the wheels of procurement laws long before they could start turning.

[48] The evidence shows that the appointment letters were issued without taking into consideration what the laws governing procurement in municipalities prescribe.

[49] The cost of each project exceeded R200 000 by far and appointment letters were issued without competitive bidding contrary to procurement laws. The appointments were made based on the long standing relationship the plaintiff had with the



defendant and put the plaintiff in a position where it captured decision making capacity of the defendant.

[50] Ambrose is the only witness who shed light on the circumstances that prevailed when the relevant appointment letters were issued and subsequently accepted. It is clear from the undisputed evidence that the plaintiff accepted appointment letters based on risk as its marketing exercise to retain its position as a preferred provider for engineering services.

[51] The preliminary designs were used to earn plaintiff advantage over other potential service providers. It is patent from the evidence that defendant was held at ransom to the desires of the plaintiff and found no room to implement its supply chain management policy nor comply with the procurement laws once plaintiff had delivered preliminary designs and played a role in securing funding.

[52] The plaintiff knew that the projects were not budgeted for. It is clear from the evidence that in all projects where plaintiff was appointed as a consulting engineer invoices would only be submitted once funding was approved and allocated through MIG. This was the practice from 1990 when the plaintiff started doing business with the defendant. The problem came in 2012 when plaintiff terminated its services in the Free State and appointed Ambrose through FLAGG to handle all its outstanding work in the province.

[53] I am convinced that there was no agreement to pay plaintiff for preliminary designs before funds were approved.

[54] It is clear that the contract between the parties was not in accordance with the prescribed laws.

[56] Mr. Venter's argument that there was nothing wrong in appointing plaintiff without competitive bidding process owing to the fact that years before appointment letters were issued plaintiff was put on defendant 's database is misplaced. Defendant's supply chain management policy provides that no procurement of services exceeding R 200 000 .00 may be made without competitive bidding.

[57] Municipalities, like all other government entities, have a responsibility to act in public interest. Appointment of plaintiff without competitive bidding process deprived defendant an opportunity to hear alternative views or diverse estimates. It confined itself to one story line; the one provided by the plaintiff and had nothing else to measure plaintiff's capacity and cost effectiveness with.

[58] The appointments were not in the interest of the community as a whole. They have a potential of stifling inclusive development and economic empowerment within the municipality.

[59] It is clear that the contracts that plaintiff seeks to enforce are illegal and unenforceable.

## **ENRICHMENT**

[60] A claim for enrichment must meet the following requirements:

- (i) The defendant must be enriched;
- (ii) The plaintiff must be impoverished;
- (iii) The defendant's enrichment must be at the expense of the plaintiff;
- (iv) The enrichment must be unjustified (*sine causa*). See **MC Carthy Retail Limited v Short Distance Carriers 2001 (3) All SA 236 (A)**.

[61] Plaintiff entered into the agreement knowing very well that its payment depended on availability of funds. It gambled with its resources hoping to score bigger contracts. There is no proof that defendant's estate was directly enriched by the work that the plaintiff performed. Funding was not approved. Babereki got appointed by National Government. Babereki then appointed FLAGG as its subcontractor to do the work on projects similar to those plaintiff was appointed for. It is FLAGG that derived benefit out of these projects.

[62] I find no justification to allow an enrichment claim against defendant. I am of the view that there exists no cause to depart from the general applicable practice of allowing costs to follow the event.

## ORDER

[63] In the light of the above, I make the following order:

Plaintiff's claim is dismissed with costs. Costs to include that of one counsel.

  
N.M. MBHELE, J

On behalf of Plaintiff: Adv. JA VENTER  
M. VOSCHENK  
PHATSOANE HENNEY  
MARKGRAAF & KELLNER STREET  
WESTDENE  
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On behalf of the Defendant: Adv. M LOUW  
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