

(1) REPORTABLE : YES / NO
(2) INTERESTED TO THE JUDGES : YES / NO
(3) REVISED
28/6/2017 DATE
Mangena AJ SIGNATURE



REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 1007/2016

In the matter between:

TSHEPEGA ENGINEERING (PTY) LTD

PLAINTIFF/APPLICANT

(Reg Nr: 2000 / 029629 / 07

And

ROADS AGENCY LIMPOPO (SOC) LTD

DEFENDANT / RESPONDENT

Reg Nr: 2001 / 025832 / 07

JUDGMENT

MANGENA AJ

1. In this summary judgment application, the applicant claims payment for R 1 354 106.72 against the Respondent, payment of interest calculated at 9% from 07 September 2015 to date of payment as well as the costs of suit.

2. The applicant is Tshepega Engineering (Pty) Ltd, a company duly registered and incorporated in terms of the laws of the Republic of South Africa with its main place of business at 09 Biccard Street, Polokwane.
3. The respondent is Roads Agency Limpopo (SOC) Ltd, a state owned entity with its offices at 26 Rabe Street, Polokwane.
4. The applicant based his claim on the appointment letter issued by the Respondent on 12 December 2007 attached to the bundle and marked **annexure "A1"**. The letter states that the remuneration for consulting services (Including disbursements for survey, EIA, Social, Geotech. Site staff etc) will be in accordance with the gazetted rates and the stipulations in the agreements and annexures for consulting Engineering Services (Latest Revision) as used by RAL.
5. Subsequent to the issuance of the appointment letter, applicant signed a document titled "RAL" Agreement for Consulting Engineering services. Date of Revision April 2014. The document was signed by the applicant on 23 April 2015. The respondent has not signed the document.
6. Following the appointment and the signing of the agreement, applicant rendered the consulting engineering services to the Respondent in respect of the upgrading of road D1392 from Ga-Masha to Mampuru to Tukagomo to Mankgabane, in Sekhukhune District of Limpopo Province.
7. A tax invoice dated 07 August 2015 was issued and presented to the respondent for payment in respect of the services rendered. It is this invoice that gave rise to the legal proceedings including the summary judgment application.

8. The respondent has filed an affidavit in which he sets out various grounds upon which the application is opposed. The nature of the grounds as I understand them and explained by counsel are principally that the applicant lacks *locus standi* to bring the proceedings as it is not the entity appointed in 2007. The respondent further argues that the appointment of the respondent was done in violation of the Public Finance Management Act and the Supply Chain Management processes.
9. The respondent's counsel accordingly urged me in his submission to disregard both the appointment letter and the "unsigned" agreement on the basis that the documents are contradictory of each other in that the appointment letter is addressed to Tshepega Holdings (Pty) Ltd whereas the agreement refers to Tshepega Engineering (Pty) Ltd. Significantly there is no dispute on the question whether the services were rendered or not, nor is there a dispute on the quality of the work performed. There is equally no dispute on the amount claimed.
10. Counsel for the applicant submitted that the deponent to the opposing affidavit is not in a position to argue non-compliance with the PFMA and Supply Chain processes as he was not employed by the Respondent at the time of the applicant's appointment. He further argued that the fact that the respondent company could not locate the documents cannot be a reason to conclude that the appointment was irregular and in violation of the internal processes. I agree with this submission. It is the duty of the respondent and its appointed officials to keep records of its service providers. In the absence of documentation to back up the claim of illegal appointment, the allegation is based on conjecture and speculation.
11. On the issue regarding *locus standi*, Counsel for the applicant submitted that nothing turns on the difference in the names as contained in both the letter and the "unsigned" contract. The reference to Tshepega Holdings (Pty) Ltd in the appointment letter is a mistake by the respondent and such a mistake does not go

to the root of the contract. In any event, the respondent has already admitted that the applicant was amongst a number of consulting engineering companies with open-ended appointments whose appointment was being investigated as part of due diligence. This in my view put to rest the issue of *locus standi*.

12. It is an established law that in summary judgment application the respondent is required in asserting that he has a *bona fide* defence to fully disclose the nature and the grounds of the defence and the material facts relied upon therefor. The requirements were stated by Corbett JA as he then was in *Maharaj v Barclays National Bank Ltd*, 1979 (1) SA 418 (A) at 426 B – C as follows:¹

“all that a court enquires into is (a) whether the defendant has “fully” disclosed the nature and grounds of his defence and the material facts upon which is founded and; (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the court must refuse summary judgment either wholly or in part, as the case may be.”

The position was stated in Shepstone v Shepstone (1974 (2) SA 4 62CN)² as follows “A defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he advances may succeed on trial.”

13. Against the test expounded in *Maharaj*, I am required to make a finding whether the respondent has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded.

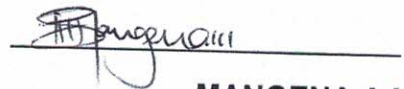
¹ 1979 (1) SA 418 (A) at 426 B - C

² 1974 (2) SA 4 62 CN

14. I have given serious and thorough consideration to the affidavit filed in opposition of the application for summary judgment with a view to establish the nature and the grounds of the defence which if proved at trial will constitute a valid defence. I was also mindful of Counsel's submission that the respondent does not need to set out the defence with particularity and precision of a pleading. It is indeed so that the court will not be disposed to grant summary judgment where, giving due regard to the facts, it is not persuaded that the plaintiff has an unanswerable case.
15. The respondent's affidavit does not in my view satisfy the dual requirements of the test in Maharaj. The affidavit is riddled with innuendos, conjecture and speculation. The respondent seeks to resile from a contract and refuse to honour a contractual obligation on the basis of illegality but fails to put material facts before the court upon which he claims illegality. It is not enough for the respondent to state that the appointment of the applicant was illegal. Something more in respect of the allegation of irregularity or illegality as a defence should be stated. If the respondent is not able to give any further information, he should say so and give reasons why he cannot do so. In this regard the deponent to the opposing affidavit only gives a lamentation of the instability he found when he joined the institution. He conducted due diligence but fails to state what his findings are with regard to the appointment of the applicant in particular. I accordingly find that the affidavit is lacking and inadequate in material respects.
16. It is only when adequate information is placed before court that the court can be satisfied that the defence is *bona fide*. On the facts placed before me, I remain unpersuaded by Mr Masipa, counsel for the respondent, that I should exercise my discretion in favour of the respondent and grant the defendant leave to defend. I do not agree that the respondent has demonstrated a defence which if advanced at trial will constitute a valid defence.

17. In the result, summary judgment is granted against the defendant/respondent as follows:

1. Payment of the sum of **R 1 354 106.72**.
2. Payment of Interest on the capital sum of **R 1 354 106.72** at a rate of **9%** calculated from 07 September 2015 to date of payment.
3. Costs of the summary judgment application on a party and party scale of the High Court tariffs.



MANGENA AJ
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

REPRESENTATIVES:

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|-------------------------------------------|-----------------------------|
| 1. Counsel for Plaintiff / Applicant | : Adv A J Venter |
| Instructed by | : Alberts Attorneys |
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| 2. Counsel for the Defendant / Respondent | : Adv R G Masipa |
| Instructed by | : AM Vilakazi Tau Attorneys |
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| 3. Date of Hearing | : 13 June 2017 |
| 4. Date handed down | : 29 June 2017 |