IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 1979/2020

In the matter between:

MBHILIBHI (PTY) LTD t/a MBHILIBHI CIVILS **Applicant**

And

ESOR CONSTRUCTION (PTY) LTD **Respondent**

Neutral citation: *Mbhilibhi (Pty) Ltd t/a Mbhilibhi Civils v Esor Construction (Pty) Ltd (1979/2020) [2021] SZHC 13 (25 February 2021)*

CORAM : T.L. DLAMINI J

Heard : 09 November 2020

Delivered : 25 February 2021

[1] Civil procedure – Application ad confirmandam jurisdictionem
[2] Law of contract – Subcontract entered into – Subcontract thereafter terminated – Subcontract terms considered

Summary
A contract was entered into between the respondent and a government parastatal, referred to as the employer – The respondent thereafter entered into a subcontract agreement with the applicant – The contract between the employer and the respondent was terminated – Termination of the contract between the employer and the respondent resulted in termination of the subcontract agreement between the respondent and the applicant – A dispute arose concerning the payment of

fees for services rendered before termination of the subcontract agreement – Terms of the subcontract agreement considered

Held - *That in terms of the Subcontract signed between the applicant and the respondent, the payment sought is not yet due to be paid – Application for attachment of the assets of the respondent ad confirmandam jurisdictionem is premature – Application dismissed and rule accordingly discharged with an order for costs.*

JUDGMENT

The parties

[1] The applicant is a company registered and incorporated in terms of the laws of the Kingdom of Eswatini and carries on business at Ezulwini in the Hhohho District. The respondent is a company registered and incorporated in terms of the laws of the Republic of South Africa and its registered office is 30 Activia Road, Activia Park, Germiston, South Africa.

Background

[2] As the Principal Employer, the Eswatini Water Services Corporation (EWSC), a category A Public Enterprise, concluded and signed a contract with the respondent for the construction of a project known as the Ezulwini Sustainable Water Supply Project.

[3] On the 23rd of April 2018 the respondent concluded and signed a written subcontract agreement with the applicant in respect of the Ezulwini Sustainable Water Supply Project. The scope of works for the subcontract included the supply of labour, plant, materials and competent supervision

necessary for the execution and completion of an access road, reservoir platform civil works, retaining walls and gabion basket construction.

[4] The main contract between EWSC and the respondent collapsed due to reasons which this court was not apprised of. The collapse of the main contract with the Principal Employer compelled the respondent to give to the applicant a formal notice of termination of the subcontract agreement. At the time of termination, certain services had already been rendered by the applicant and had not been paid for. The applicant is of the firm view that the respondent was now in the process of removing all its property within the country and was repatriating back to the Republic of South Africa.

The application

[5] The applicant approached this court on an *ex parte* urgent application on the 20 October 2020 seeking a *rule nisi* for the attachment of the respondent's assets within the country in order to confirm jurisdiction of this court. The applicant sought to have these assets attached and kept with the Deputy Sheriff for the District of Hhohho pending a final determination of an action instituted by the applicant against the respondent. The *rule nisi* was issued by this court and the following items were attached as per the applicant's application:-

4.1 Tenado 25 Ton Mobile Crane – serial no. TR -250M-6-00101 FB1382;
4.2 Mercedes Actros Concrete Mixer Truck 6m3 – serial no. WDB9536416L54005;
4.3 Schwing Concrete Pump – serial no. SP2800HDR-20D135;
4.4 Toyota 2.5 LDV – Registration No. BX 86 DC GP;
4.5 Atlas Copco 1000 CFM Compressor – serial no. WUZ564222;
4.6 Toyota 2.5 LDV – Registration No. BX 86 GM GP;
4.7 Automated ECEM Karoo Batch Plant; and
4.8 CAT 4.4 TLB – serial no. CAT0428EJSN03478

[6] Arguments on the matter were heard on 09 November 2020.

Applicant's case

[7] The applicant contends that on 23 April 2018 it entered into a written subcontract agreement with the respondent for the Ezulwini Sustainable Water Supply Project for the sum of **E10, 022, 464.32**. The scope of work included the supply of labour, plant, materials and competent supervision necessary for the execution and completion of access road, reservoir platform civil works, retaining walls and gabion basket construction.

[8] As part of the agreement terms, the applicant is to be paid for services rendered after filing monthly certificates of payment for works carried out. The applicant submitted that it complied with its obligations under the subcontract agreement and issued invoices for works carried out which, I assume, were paid for. The applicant now contends that the respondent failed to settle interim payment certificates issued between the period of **August 2020** and **September 2020**. These are interim payment certificates numbers **22**, **23** and **24**, totaling the sum of **E1, 848, 929.74**.

[9] The applicant further contends that the respondent has formally gave notification of termination of the subcontract agreement but is failing to settle the outstanding payment certificates for works already carried out by the applicant. This is despite the fact that the applicant has furnished the respondent with the final account for amounts owing. The applicant has therefore instituted action proceedings against the respondent for payment of the amount owing under the subcontract agreement, hence the application for attachment in order to confirm jurisdiction as the respondent is a *peregrinus*.

[10] It is confirmed by the respondent in paragraph 4.5 of its supplementary affidavit found at page 99 of the book of pleadings, that the respondent is a *peregrinus*. In law, the attachment of the respondent's assets is necessary in order to confirm the jurisdiction of the court so that if judgment is issued in favour of the applicant, execution and enforcement may be levied against these assets. The applicant has stated under oath in paragraph 10 of its founding affidavit that ***"the Respondent has cancelled its contract with the Employer and has begun moving its machinery out of the country to the detriment of the Applicant should it be successful in the action proceedings launched."***

Respondent's case

[11] The respondent begins its case by contending that the applicant has violated the *sine qua non* of *ex parte* applications which is the requirement to make a full disclosure of all the pertinent facts of the case. It was submitted that the applicant has not disclosed material terms of the agreement, in particular the fact that in terms of clause 4(b), payment by the respondent becomes due after certification by EWSC and is to be within 60 days of invoice. It was also submitted that the applicant did not disclose that in terms of clause 4(c), payment to the applicant is to be made once the respondent has been paid for the certified works by EWSC. This however, is denied by the applicant who contends that the suspensive conditions in clauses 4(b) and (c) do not apply after termination and that the relevant clause post termination is clause 12.

[12] The applicant attached the subcontract agreement as annexure "M1" and prayed that all its terms be incorporated into its founding affidavit as if specifically pleaded. To this averment, the respondent submitted that it

underlines the applicant's failure to highlight that payment is expressly provided to be due within 60 days of submission of invoice, and becomes due once the respondent has been paid by the Employer (EWSC) for the works done. It further submitted that it also underlines the applicant's attempt to conceal this crucial and pivotal contractual terms from the first glance. This court cannot, per respondent's submission, be reasonably expected "*to trawl through an agreement in order to identify material terms which the Applicant may have omitted to mention in its Founding Affidavit*".

[13] The clauses referred to by the respondent and the applicant are quoted below:

4. TERMS OF PAYMENT

a) …

b) No payment shall be due to the Sub-Contractor by the Contractor in respect of the Sub-Contract Works or any authorized variations thereof until the same shall have been duly certified to be due from the Employer to the Contractor in respect of such Works by a certificate issued in accordance with the provisions of the Principal Contract and then only for the amount so certified, less the appropriate proportion of retention money and cash discount percentage as set out in Annexure "A" which shall be made to the Sub-Contractor within 60 days after the date of the invoice.

c) Payment will only be made to the Sub-Contractor, once the Contractor has been paid the certified works.

12. TERMINATION OF MAIN CONTRACT

In the event that the Contractor's employment under the Main Contract is terminated or if the Main Contract is otherwise terminated, for any reason whatsoever before the Subcontractor has discharged its obligations under this Subcontract Agreement, then the Contractor may at any time thereafter by notice to the Subcontractor forthwith terminate this Subcontract Agreement.

The Subcontractor shall with due expedition remove its staff, workmen and equipment from the Site.

If the Subcontractor's employment is terminated in the circumstances detailed in this clause, the Subcontractor shall be paid by the Contractor (in so far as such amounts or items have not already been

covered by payments made to the Subcontractor) for and provided that the Contractor is similarly paid for:

- **all work executed prior to the date of termination at the rates and prices (if any) provided in this Subcontract Agreement, or if there are no such rates and prices, then such amount as may be fair and reasonable and as determined by the Contractor;**
- **…**
- **…**

Provided always that nothing in this clause shall affect the rights of either Party in respect of any breach of this Subcontract Agreement committed by the other prior to such termination, nor any right which accrued to the Subcontractor prior to such determination to receive any payment which is not in respect of or on account of the Subcontract price.

If the Contractor's employment on the Main Contract is terminated, or if the main Contract is otherwise terminated by the Client in consequence of any breach of the Subcontractor, then the provisions of the above clause as to payment shall not apply.

In the event of the situation envisaged in the above clause arising, the Contractor shall have the same rights as if the Subcontractor had by such breach repudiated this Subcontract Agreement and the Contractor had by notice of termination accepted such repudiation.

[14] The term Contractor refers to the respondent herein whilst Subcontractor refers to the applicant whereas Main Contract or Principal Contract refers to the contract between the respondent and EWSC while Employer refers to EWSC.

[15] The respondent also contends that the applicant breached the requirement of full disclosure by concealing the fact that the applicant had not yet been paid by EWSC and it knew that the respondent was therefore not yet liable to pay in terms of clause 4(c) of the subcontract. It submitted that the applicant knew very well about this, hence it also concealed and did not disclose the

correspondence between itself and EWSC dated 14 and 16 October 2020 respectively.

[16] The respondent further contends that the applicant has not alleged that it has a *prima facie* cause of action against the respondent yet this allegation is one of the peremptory requirements in an application to confirm jurisdiction. It submitted that the facts illustrate beyond doubt that the applicant did not, at the time it approached the court, possess a cause of action, *prima facie* or otherwise. It can only possess a cause of action once EWSC has paid the respondent.

[17] The respondent further contended that it has not moved out of the country all of its machinery. It still has its batch plant erected at the EWSC yard and is worth **E411, 000.00** (four hundred and eleven thousand emalangeni). As a gesture of goodwill, it offered to leave this plant at the applicant's yard as security but this offer was not accepted by the applicant. It contended, furthermore, that the attached assets have a total value of approximately **E4, 000, 000.00** (four million emalangeni) and is double the amount being claimed in the summons, and that the concrete pump listed under paragraph [5] above as item 4.3 does not belong to the respondent. These averments are however denied by the applicant.

[18] In a nutshell, the respondent's case and submission is that on the merits, the applicant's cause of action has not yet matured, and is premature and unenforceable until after payment for the services has been made to it by the Principal Employer, EWSC. It submitted that it "*has never defaulted and has always maintained its good account and relationship with the Applicant.*"

[19] On the issue of costs, the respondent seek costs at attorney and own client scale, including the costs of Counsel as certified in accordance with Rule 68(2) of the Rules of this Court. It submitted that the applicant has reprehensibly abused the process of this court in several ways, *inter alia* including the dishonest failure to make express reference to and disclosure of clauses 4(b) and (c) of the subcontract yet it had a duty to do so under requirements of *ex parte* applications; taking the chance and succeeding in that under the pressure of dealing with an application brought on an urgent basis, the court would not at first glance pick up the pertinent material terms in the written agreement comprising more than twenty (20) pages; concealing the exchange of correspondence between the applicant and EWSC, and persisting in pursuing the application even after the respondent had disclosed in its initial answering affidavit the true facts and exposed the applicant's designed concealment of material facts and thereby mulcting the respondent in further unnecessary legal costs.

The applicable law

[20] An attachment to confirm jurisdiction, as *in casu*, is an attachment of the property of a *peregrinus* in order to make that person amenable to the jurisdiction of the local court. The attachment strengthens a jurisdiction which already exists. The subcontract between the applicant and the respondent was concluded and signed within the jurisdiction of this court, and performance of the agreed terms was done within the jurisdiction of this court. Those facts found the court's jurisdiction to determine disputes arising from the subcontract and from the performance thereof. In the case of MURPHY V DALLAS 1974 (1) SA 793 at 796 the court considered that the real reason for

an attachment *ad confirmandum jurisdictionem* may not be to render its judgment effective but to complete the court's jurisdiction which is only theoretical but not complete without the attachment. The court stated in VENETA MINERARIA SPA V CAROLINA COLLIERIES (PTY) LTD 1987 (4) SA 883 at 893 that a court can be said to have jurisdiction in a matter if it has the power not only to take cognizance of the suit but also of giving effect to its judgment.

[21] The legal authors **Herbstein and Van Winsen** in their book THE CIVIL PRACTICE OF THE HIGH COURTS AND THE SUPREME COURT OF APPEAL OF SOUTH AFRICA, 5th ed, Vol 1, at page 98, state that the authorization to attach in order to found or confirm jurisdiction has been actuated by the desire to assist *incolae* to litigate at home. The object of the attachment is to furnish an asset against which execution can be levied to satisfy the judgment which may be given so that it is not rendered nugatory.

[22] I wish to mention that the legal authors **Herbstein and Von Winsen (supra)**, state that "*An application for attachment of property to found or confirm jurisdiction must be made before the summons instituting the claim against the peregrinus is issued. If it is ascertained only after issue of the summons that the defendant is a peregrinus, the summons should be withdrawn and application made for attachment. If the application is granted, a new summons will have to be issued.*

[23] *In casu,* the order for attachment *ad confirmandam jurisdictionem* was made and granted on the fifth day (15 October 2020) after summons had been issued. This however, has no material bearing to the present application. It is

an issue for consideration and determination in the action proceedings instituted by the respondent against the Employer (EWSC).

Consideration of the issues

[24] The fundamental issue for consideration is whether or not the applicant was entitled, at the time it sought and was granted the interim order for attachment of the respondent's assets, to be paid for the services it rendered under the subcontract agreement. The answer lies in the agreement terms that the applicant and respondent entered into and signed.

[25] The respondent's case, firstly, is that there is no legal basis and reason for the attachment because it submitted itself to the jurisdiction of this court. It did this by instituting proceedings before this court against EWSC who owns the project that has resulted in the dispute now before this court between it and the applicant.

[26] The respondent also submitted that the applicant concealed certain important and pivotal provisions of the subcontract concerning payment terms and therefore failed to meet the requirement of good faith, which is a *sine qua non* to *ex parte* applications. It submitted that when the applicant disclosed the material terms of the subcontract in the founding affidavit, it did not disclose the most important and pivotal provisions of clauses 4(b) and (c) concerning payment conditions.

[27] The respondent further submitted that the payment which the applicant seeks is not yet due because the terms of the subcontract agreement provides that payment to the applicant becomes due after the respondent has been paid for

the services by the Employer. This is provided for in clause 4 (c) of the subcontract agreement. The respondent also submitted that payment of the amount claimed is not yet due because it is payable within a period of 60 days, in terms of clause 4 (b), from the time a certificate for payment is submitted to the respondent.

[28] The applicant, on the other hand, submitted that the provisions under clause 4 are only applicable at pre-termination of the subcontract and that clause 12 (termination provision) is the applicable provision as the subcontract has been terminated. It states in paragraph 1.5 of its heads what is quoted below:

> **"… It is the Applicant's case that clause 4 of the agreement is inapplicable on the admitted facts of the matter and that the guiding clause is clause 12 of the agreement."**

[29] The applicant also submitted that submission to the jurisdiction of the court in respect of a particular matter is not good for all other litigants but only good against the litigant who is a party to those same proceedings. It therefore denied that the respondent has submitted itself to the jurisdiction in respect of a dispute between itself and the respondent.

[30] The applicant further submitted that all the relevant provisions of the subcontract were placed by it before court as an attachment to its founding affidavit and specifically prayed that the subcontract terms be read with the affidavit as if specifically pleaded therein.

Duty of good faith

[31] In applications brought before court on an *ex parte* basis, it is an indispensable requirement that the applicant must state all relevant and material facts, and

on which the court is to base its decision, in good faith. The court stated in the case of **Power NO v Bieber & others 1955 (1) SA 490 at 503B-504C** that in *ex parte* applications the applicant must make a full disclosure of all the material facts that might affect the granting or otherwise of an order *ex parte*. Utmost good faith, according to the judgment in the matter of **Ex parte Madikiza et uxor 1995 (4) SA 433 at 436**, must be observed by litigants making *ex parte* applications in placing material facts before the court.

[31] **Her Lordship Langwenya J**, in deciding the case of **M & M Hiring Magquee vs Swazi Boy Investments (Pty) Ltd & Four Others (2069/2019) [2020] SZHC 06 (30 January 2020)** cited the case **of Momental SARL v Corlana Enterprise (Pty) Ltd 1981 (2) SA 412 at 414E** where the following cardinal rules for *ex parte* applications were stated:

> **[1] In *ex parte* applications all material facts must be disclosed which might influence the Court in coming to a decision;**
> **[2] The non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission (i.e., of the order obtained ex parte); and**
> **[3] The Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.**

[32] The applicant, in motivating its case, states in paragraph 6 of its founding affidavit that "… *The Respondent failed to attend to settlement of interim payment certificates issued between the period of **August 2020** and **September 2020**. The Respondent has failed to attend to payment of interim certificate numbers **22, 23** and **24**. The Respondent is therefore indebted to the Applicant in the amount of **E1, 848, 929.75** being certified amounts owing for works carried out in terms of the Agreement plus a sum charged for plant hire*." The applicant ends by stating that *"Find attached hereto a statement*

issued by the Applicant reflecting the sum owing by the Respondent to the Applicant marked as ***annexure M2***.

[33] In its supplementary answering affidavit, the respondent brought it to the attention of this court that the applicant has not attached to its papers the unpaid invoices referred to. It is then that in its replying affidavit, the applicant attached copies of the unpaid certificates and collectively marked them as annexure M6. Certificate number 22 was signed by the parties' representatives on the 09 September 2020 (09/09/2020). Certificate number 23 was signed on behalf of the applicant on 23 September 2020 (23/09/2020) and is not signed on behalf of the respondent. Certificate number 24 was signed on behalf of both parties on 30 September 2020 (30/09/2020).

[34] On the basis of the dates reflecting in the above-mentioned certificates, none was prepared and signed in the month of August 2020. The allegation made by the applicant in paragraph 6 of the founding affidavit cannot therefore be truthful and the allegation is misleading in my opinion, particularly concerning the time period within which payment is in default.

[35] Concerning the non-disclosure to the court about the provisions of clause 4 (b) and (c) of the subcontract, I am inclined to agree with counsel for the respondent that these provisions are material and pivotal in dealing with the question of the payment being sought in the proceedings. There must therefore have been a full disclosure, and in good faith, of these provisions by the applicant. A full disclosure, as per the case of **Ex parte Madikiza et uxor (supra)**, is made by *"placing material facts before the court"*, and that it must be a full disclosure of all the material facts that might affect the granting or

otherwise of the order being sought *ex parte*. That, in my view and conclusion, means setting forth in the founding affidavit these facts and not for them to be researched and identified by the court from attached bulky documents.

[36] The applicant was able to make specific reference to payment clauses that support its case but said nothing about the payment suspensive clauses. This in my view, is not the utmost good faith required of applications made *ex parte.* It is therefore a finding of this court that the applicant failed the utmost good faith requirement.

Submission to jurisdiction

[37] **Herbstain and Van Winsen, THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA, 4th ed**, cite cases, amongst others, that of **Salkinder v Van Zyl & Buissinne 1922 CPD 59** and state that it has been held that a plaintiff who sues a defendant in the defendant's forum to which the plaintiff would ordinarily not be subject to its jurisdiction, by so doing, it consents to the jurisdiction of that forum, and the defendant becomes entitled to bring a counterclaim against it. Once a peregrinus submits itself to the jurisdiction of a local court, it cannot thereafter deprive the local court of that jurisdiction by withdrawing the proceedings it instituted. **See: ZWYSSIG V ZWYSSIG 1997 (2) SA 467**.

[38] The question of whether a *peregrinus* has submitted itself to the jurisdiction of a local court depends on the facts of each particular case. In order to constitute submission, the elements of an acquiescence must be present. **See: Du Preeze v Philip-King 1963 (1) SA 801 at 803C-804H**. The learned authors **Herstein and Van Winsen**, in their **5th edition** of **THE CIVIL**

PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA, give an example and state that the conduct forming the subject matter of the inquiry must be of such a nature that the court must be able to say that it is consistent only with a submission to the jurisdiction of the court (at p.65)

[39] When one considers **clause 1** of the subcontract, it *ex facie* appears from the first paragraph that the conditions of the Main Contract (between respondent and EWSC) form an integral part of the subcontract (between applicant and the respondent). It also succinctly appears in the fifth paragraph that the respondent (Contractor) has like powers and **rights** in relation to the subcontract as the Employer (EWSC) has in relation to the Main Contract, and the Subcontractor (applicant) has the like powers and **rights** in relation to the subcontract as the Contractor (applicant) has in relation to the Main Contract.

[40] From the above contractual terms contained in clause 1, I have no doubt that the applicant and respondent adopted the Main Contract terms and conditions as an integral part of the subcontract they agreed to and signed. I also have no doubt that the applicant has like rights against the respondent as EWSC has against the applicant. It is common cause that on the 01 October 2020 the respondent, through the Registrar of this Court, issued provisional sentence summons against the Employer for payment of a total sum of **E8, 689, 705.00** being in respect of construction works of the Ezulwini Sustainable Water Supply Project.

[41] Based on the above mentioned facts, the respondent, being a *peregrinus*, submitted itself to the jurisdiction of this court concerning issues between

itself and EWSC relating to the Project. A submission to the jurisdiction, once made cannot be revoked. See: Herbstein and Van Winsen, 5th ed (supra), p.66.

[42] In terms of clause 1 of the subcontract, the applicant has similar right against the respondent just as EWSC has against the applicant. The import of clause 1 is that since EWSC has been sued by the applicant who is a peregrinus (respondent), the peregrinus has submitted itself to the jurisdiction of this court concerning issues between him and EWSC. This right which EWSC now enjoys is equally conferred on the applicant as against the respondent. I am therefore in agreement with counsel for the respondent that her client unequivocally submitted itself to the jurisdiction of this court by instituting the proceedings against EWSC.

[43] Per **Ota J.** in **INYONI BOERBERY VERVOER VS SMADCO INVESTMENTS (PTY) LTD (2606/2012) [2012] SZHC 243 (25 September 2012**), where a *peregrinus* submits to the jurisdiction of the court before attachment, then the necessity for the attachment is rendered nugatory. This is so because submission to jurisdiction has a better effect in that it makes the judgment of the court internationally enforceable against the peregrinus and binds all his possessions. The attachment of the property of the respondent *ad confirmandam jurisdictionem* is therefore unwarranted. The argument made by counsel for the applicant that submission only relates to the same litigants and concerns the same matter is misconceived in my opinion. That is not always the case.

Prima facie case to be made

[44] It is trite law that in an application for attachment *ad confirmandam jurisdictionem* a *prima facie* case is to be made by the applicant. The Supreme Court of Appeal of South Africa in the case of **SIMON N.O. V AIR OPERATIONS OF EUROPE AB & OTHERS (354/96) [1998] ZASCA 79; 1999 (1) SA 217 (SCA); [1998] 4 All SA 573 (A) (25 September 1998)** held that *"the requirement of a prima facie cause of action is satisfied if an applicant shows that there is evidence which, if accepted, will establish a cause of action. The mere fact that such evidence is contradicted will not disentitle the applicant to relief – not even if the probabilities are against him. It is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused."* (p.20)

[45] It is common cause that payment terms are provided for in clause 4 of the subcontract. It is also common cause that clause 12 that sets out provisions regarding termination of the subcontract. **Clause 4 (a)** makes provision for the preparation and submission of monthly certificates of payment for work that has been carried out. **Clause 4 (b)** provides in specific terms that no payment shall become due to the applicant from the respondent until it has been certified to be due from EWSC to the respondent, and that payment is to be made by the respondent to the applicant within a period of 60 days from the date of invoice. **Clause 4 (c)** provides in specific terms as well, that payment will only be made to the applicant once the respondent has been paid for the certified work.

[46] A submission by counsel for the respondent is that the payment being sought for the work carried out is not yet due because none of the conditions specified

by clause 4 (b) and (c) has occurred. The payment is prematurely sought and is therefore not yet enforceable.

[47] Counsel for the applicant on the other hand argued that clause 4 is no longer applicable because the subcontract has been terminated, and that clause 12 has been invoked since the contract has already been terminated. He submitted that it would be an absurdity to have clause 4 applicable post-termination of the subcontract. He then referred this court to **RH Christie** in his book "**The Law of Contract in South Africa, 4th edition**, where the learned author discusses the effects of fulfilment and non-fulfilment.

[48] The above-mentioned author specifically discusses more about payment that has been made for a service that is ultimately not rendered. It states that the payment should be refunded back. In casu, no payment has been made in anticipation of the performance of an agreed service. There is therefore less relevance, if any, of the extract from RH Christie in his book on 'The Law of Contract in South Africa'. The learned author also discusses the effect of fulfilment of a condition precedent, and cites, as his authority, the case of **G&G Investment and Finance Corpn (Pty) Ltd v Kajee 1962 (2) SA 73 D 80D** as authority. An extract from the above-mentioned case is quoted below:

> **"Classically, the effect of fulfilment of a condition precedent is not only that the whole contract, or however much of it was suspended, becomes enforceable, but also that this enforceability operates retrospectively as if the contract had been unconditional from the outset … The rule that the contract becomes enforceable retrospectively also does not apply if the contract provides otherwise, nor does it affect rights acquired in good faith by third parties during the period of suspension.** (underlining represents my own emphasis)

[49] The above quotation discusses the effect of fulfilment of a condition precedent, which is not the case *in casu*. There is no fulfilment at all of the condition precedent. In my opinion, the extract from RH Christie's book is therefore of less relevance, if any, to the particular facts of this matter. The extract also makes it clear that even the rule that the contract becomes enforceable retrospectively does not apply if the contract provides otherwise. The last portion of paragraph 3 of clause 12 (termination clause) provides that if the subcontractor's employment is terminated as per this clause, the subcontractor shall be paid for work done and not paid for, ***"and provided that the Contractor is similarly paid for".***

[50] In paragraph 3.2 of its Heads of Argument, the applicant cites the case of **JOHANNESBURG CITY COUNCIL V NORVEN INVESTMENTS (PTY) LTD 1993 (1) SA 627(A)** and submits that ***"at termination of the agreement the reciprocal duty to attend to payment becomes due immediately"***. At page 13 of the judgment, Nienaber JA state what is quoted below:

> **"A debt, once established, is, as a rule, recoverable forthwith and as such is 'due and payable', unless its enforceability has been deferred by a suspensive time clause (*dies certus an ac quando* or *dies certus an, incertus quando*) or a suspensive condition (*dies incertus an, certus quando* or *dies incertus an, incertus quando*)** (underlining represents my own emphasis)

[51] It is my finding and conclusion that clause 12 incorporates and imports the very same condition imposed by clause 4(c),*viz*., that payment will be made by the respondent to the applicant once the respondent has been paid for those works by EWSC. I am in agreement with counsel for the respondent that on the basis of these payment suspensive clauses, a cause of action cannot possibly be established without the pre-condition being met. The applicant has

also not alleged that the respondent has been paid by EWSC. There is in fact correspondence between the applicant and EWSC clearly confirming that the respondent has not been paid for the work by EWSC. The applicant has, in my view, failed to place evidence which, if accepted, will establish a cause of action. To that extent, the applicant has not, in my finding, established a *prima facie* cause of action when regard is given to the terms of the subcontract agreement. The court therefore makes a finding in favour of the respondent.

[52] On the issue of costs, I am satisfied that the respondent is an entitled to an order for costs. It had to deal with this matter under the extreme circumstances brought about by the urgency by which the matter was brought to court. It also had to undergo the inconvenience of not having access to its assets due to the attachment which was sought and granted *ex parte*. The attachment, in my view, resulted in a loss of other business opportunities for the respondent.

[53] The following order is issued:

1. The application fails and is accordingly dismissed.
2. The *rule nisi* issued on 20 October 2020 is hereby discharged.
3. Costs are granted in favour of the respondent, including costs of counsel in terms of Rule 68 (2) of the Rules of this Court.

T. L. DLAMINI
JUDGE OF THE HIGH COURT

For Applicant : Mr. M. Tsambokhulu
For Respondent : Adv. Van de Walt instructed by Currie-Wright Associates