



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CIVIL CASE NO. 907/2021

In The Matter Between

TSND Investments (Pty) Ltd

Applicant

And

Ka-Schiele High School

Respondent

Neutral citation: *TSND Investments (Pty) Ltd v Ka-Schiele High School (907/21) SZHC137 [2021] (8 September 2021)*.

Coram : D Tshabalala J

Heard : 10 June 2021

Delivered : 08 September 2021

Summary: Contract law – Application for order for specific performance for payment and access to site in terms of a building contract between the parties. The Pre-contract misrepresentation - the Respondent claims that it was induced to enter into the contract by false representation made by the Applicant's representative and submits the contract is null and void. The Respondent also claims in a counter- application cancellation of the contract alleging that it is

illegal and unenforceable in that the Applicant is not a registered contractor in terms of the Construction Industry Council Act/ 2013 (CIC) and its Regulations.

Held: Misrepresentation having been established and that it induced signing of the contract, it vitiated consent of the Applicant to enter into the contract, and therefore the contract is invalid. Further that section 38 (1) of the CIC is clear that the unregistered status of the contractor precluded it from lawfully undertaking any construction works for a public or private sector contract awarded in terms of competitive tender. The effect of this is, in my view that the awarding of the tender/contract to the Applicant was illegal and as such, unenforceable by this court.

JUDGMENT

[1] This application was launched under a certificate of urgency for an order firstly, directing the Respondent to pay E220, 866 outstanding deposit; grant the Applicant access to the construction site at Ka-Schiele High School to carry-out and complete works per the contract signed by the parties. The Applicant also seeks interdict, restraining the Respondent from granting access to the said construction site to any other person for the purpose of carrying out works. The Court granted an interim restraining order in respect of the latter prayer.

The facts

[2] The Respondent, a public high school situated in Mbabane required additional classrooms, and to achieve this entered into a construction agreement with the Applicant, signed in January 2021. It is common cause that the agreement was signed as a result of award to the Applicant of contested tender. It is also common cause that the parties agreed on the total

contract amount of E1, 402, 889.20; payment of amount of E420,866 to be paid by the Respondent to the Applicant in February 2021; and an equal amount was subsequently to be paid again on or about June 2021. It is also common cause that the Respondent paid the Applicant an amount of E200,000, instead of E420,866. The reasons for payment of reduced payment are a subject of dispute.¹

[3] Trouble started in April 2021 when the Respondent required the Applicant to submit certain documents, which include, among others registration certificate as a contractor indicating its grading. The Applicant alleges that the Respondent unilaterally stopped and interdicted or prevented the Applicant from gaining access to the site to carry out works per a written contract between the parties, in circumstances that amount to self-help, in that it was without a court order.

[4] The Respondent opposed the application. It filed the answering affidavit in which four points *in limine* are raised:

- 1) *non-joinder of the Principal Secretary of the Ministry of Education, School Manager and the Attorney General.*
- 2) *Dispute of facts;*
- 3) *Dirty hands; and*
- 4) *Arbitration clause.*

[5] The Applicant filed its Reply, addressing the points of law raised by the Respondent.

¹ The conditions if any to be fulfilled before payment of the said amount of E488, 286 could be made are not clear. The Applicant says that payment of the reduce amount was arbitrary. The Respondent alleges that it decided to pay the lesser amount because the Applicant failed to set up a proper site, and certain unspecified preliminary activities expected from the Applicant were outstanding.

[6] The Respondent also filed a counter application seeking cancellation of the building contract between the parties on two grounds: firstly, that the Applicant made a misrepresentation to the Respondent which unduly induced the latter to enter into the said contract. The second ground for contract cancellation is alleged illegality of the contract in that the Applicant was not registered as a contractor as required by the Construction Industry Council Act of 2013.

[7] After all the pleadings had been filed, including points of law raised by the Applicant against the counter application,² by agreement of the parties the court heard combined arguments for both applications on the 10th June 2021, after which judgment was reserved. At the commencement of the arguments the Respondent advised that it was abandoning the points raised *in limine* and that it was pursuing its defence based on misrepresentation and unlawfulness of the building contract. Likewise, the Applicant did not pursue points of law raised in answer to the counter application. For convenience, reference to the parties in the main application is maintained in the counter-application.

[8] On the alleged breach of contract, it is common cause that instead of E420,886 the Respondent paid E200,000 and this was in April 2021. According to the Applicant this was a unilateral decision by the Respondent to deviate from terms of the contract, which constituted a breach. The Applicant further alleges that acting outside the provisions of their written contract the Respondent demanded from the Applicant certain documents as a pre-condition for payment of the balance of the establishment amount and continuation of the work.

² Defective application in that the Respondent claim for cancellation of the contract does not include a prayer for declaration of the contract as void; joinder of parties (2nd and 3rd Applicants in the counter-claim, namely, Principal Secretary in the Ministry of Education and Attorney- General) without demonstrating their interest in the matter.

[9] Respondent's letter to the Applicant dated 21 April 2021 notified the Applicant that all works on site were put on hold following information received by the Respondent that the Applicant was not the company that carried out construction of a structure at St Francis High School as previously believed by the Respondent, stating that it regarded St Francis's project as a reference point for its project undertaken by the Applicant. The Respondent demanded 10 documents to be submitted by the Applicant:

- 1) *Registration certificate as a contractor reflecting Applicant's grading;*
- 2) *Affiliation certificate ACA;*
- 3) *Company profile;*
- 4) *foreman/build profile;*
- 5) *Healthy and safety police, (sic);*
- 6) *Contract signed between St Francis and the Applicant;*
- 7) *Payment receipt by St Francis to Applicant;*
- 8) *Payment receipt by the Respondent;*
- 9) *Contract between Respondent and Applicant;*
- 10) *Applicant's certificate of incorporation, Form C and Form J.*

[10] Applicant's attorneys, by letter dated 22 April 2021, raised queries with the Respondent on the documents sought, and demanded payment of balance outstanding on the deposit, and Applicant's access to the site, failing which threatened legal action.

[11] By letter of the same date Respondent's attorneys requested a meeting which the Respondent obliged. The meeting was convened on the 29th April 2021, with no amicable resolution reached, according to the Applicant. The Respondent on the other hand alleges that the meeting closed with the

Applicant agreeing to furnish the documents requested in the Respondent's letter of the 21 April.

- [12] The Respondent alleges in the counter claim for cancellation of the contract that it awarded the contract to the Applicant and signed the contract on the basis of a misrepresentation made to the Respondent's School committee that the Applicant built a similar structure sought by the Respondent, St Francis High, yet this was not true. The Respondent alleges that it halted the project after learning that in fact another company by the name, Trevor and Grant (Pty) Ltd, where the Applicant's director was a minority shareholder and director was responsible for that project.
- [13] The main shareholder and director of Trevor and Grant, Sizwe Vilane deposed to a confirmatory affidavit to the Respondent answering affidavit, confirming that the Applicant was not the contractor responsible for construction of St Francis structure but his company. Sizwe Vilane painted a picture that his company's foreman, one Mfanukhona Nkambule was secretly and stealthily working for the Applicant on Respondent's project. Vilane avers that the foreman absented himself from work under the pretext that he was on sick leave. Further that building equipment of his company was being used.
- [14] In its reply the Applicant denied Vilanes's depositions and accused him of interference in his company's affairs. The Applicant also accused the Respondent of interference in the squabbles between the Applicant's director and Vilane.

[15] The Respondent further alleges that the building contract should be cancelled because the Applicant is not registered with Construction Industry Council (CIC) as required by the CIC Act.

Analysis and Finding

[16] The Applicant's position is that the written building contract signed between the parties is binding in all respects and that it must be given effect to, arguing that issues raised by the Respondent which do not form part of the written agreement should not affect the parties' obligations set out in the contract. The Applicant maintains that the Respondent is contractually obliged to pay the balance of deposit and allow the Applicant access to the site to carry out construction to completion.

[17] The Applicant's response to the issues raised by the Respondent in support of its claim that the contract is a nullity are curious. The Applicant states in the replying affidavit that,

*"It is trite that where parties have entered into a written agreement no extrinsic aids are sought in determining the state of mind of the parties because by virtue of executing the written contract the parties are ad idem hence appending their respective signatures."*³

[18] The Applicant asserts that alleged representation that the Applicant did work for St Francis does not appear *ex facie* the contract, and therefore was not part of the contract, and cannot be used as an extrinsic aid to the terms that the parties agreed and signed for.

³ Paragraph 26 of Applicants Reply affidavit.

[19] It is noted, however, that the Applicant does not equivocally deny that its director Nanazi Dlamini told Respondent's team during interview leading to award of the tender that the Applicant was responsible for construction of a double storey structure at St Francis. I say this because Applicant's denial of this allegation is not consistent in the main application and in the counter-application. In the main application he made a bare denial of deposition of Sydney Nyembe,⁴ that he made the said false representation to the Respondent's committee during the selection interview of tenderers. Whereas in the answering affidavit to the counter claim the Applicant seemed to argue that there was no misrepresentation because in any event the Applicant's director was involved in the St Francis project and that the same labour was used for the two projects. This is what the Applicant's director stated in the answering affidavit to the Respondent's founding affidavit⁵ on the misrepresentation allegation:⁶

"The Respondent is indeed not new in construction as it has done a couple of projects and the personnel which did the work at St Francis High School, inclusive of me (as supervisor), is the same as the one doing the works at 1st Applicant, and my undertaking to the deponent was that I would use those personnel, which I did until the unlawful and wrongful interdiction of the works by the 1st Applicant."⁷[Emphasis added.]

⁴ Chairman of Respondent's school committee.

⁵ In the Respondent's counter application.

⁶ Respondent's head teacher Nokuthula deposed at paragraph 11 of founding affidavit: "The respondent's director Sebonakaliso Dlamini during the interview stated that they were not new in construction as they have been involved in various projects. The director made particular emphasis that they have been responsible for the construction of the double storey at St Francis High School Mbabane. This fact induced the 1st Applicant (the Applicant in main application) to enter into a building contract with the Respondent (Applicant in the main application). Reference is made in the answering affidavit in the main application." The Respondent's head teacher continues at paragraph 12: "...The committee made the decision to award the contract to the respondent...largely based on the on the fact that the Respondent had done construction works at St Francis High School and the 1st Applicant wanted a similar structure."

⁷ Applicant's director's answering affidavit in the counter application at paragraph 11, in answer to the respondent's founding affidavit, at paragraph 11, captured at footnote 6 herein.

[20] The Applicant should effectively be understood to say to this Court that, *yes, the Applicant was not responsible for carrying out St Francis project as its director may have made the Respondent to believe, but that is immaterial because in any event the same labour and supervisor that was engaged for St Francis project was the same that the Applicant was using for the Respondent's project, therefore there is no big deal it was under a different company.* It is not clear why the true position of the Applicant was not disclosed to the Respondent and instead the Applicant masqueraded as the company that did the St Francis job. This was indeed a misrepresentation of a fact. Identity of the entity that did the referenced job is at the centre of misrepresentation in this case, not the individual members of the workforce. The Applicant is therefore wrong to say in its Reply: *"...it is none of Respondent's concern and / or business as to whose employees Applicant is using because in terms of the agreement between the parties the Applicant was enjoined to provide staff ..."*⁸

[21] Misrepresentation on the identity of the Applicant as the company that did the referenced job at St Francis is relevant and material in that the Applicant intended by such misrepresentation, to influence decision of the Respondent in favour of the Applicant by giving the impression that it had the capacity and skill to carry-out the job that the Applicant and other companies were competing for. As a result, the Respondent was made to believe that the applicant had the capacity it actually did not have, as it turned out that the Applicant relied on unauthorized use of Trevor and Grant's foreman and personnel, including equipment. This is according to the evidence of Sizwe Vilane which this court accepts as credible. The main Application ought to

⁸ Paragraph 30 of Applicant's Replying affidavit in the main application.

fail on the ground that conclusion of the contract was tainted with misrepresentation which vitiated consent, rendering it invalid.

[22] The second question is whether the Applicant was registered with CIC, and if not, whether such non-registration affected validity of the contract that the Applicant seeks to enforce against the Respondent.

[23] The Applicant does not dispute that it was not registered with CIC. Rather the Applicant contends that the fact that it is not registered is irrelevant and immaterial. The Applicant states, both in the main and the counter applications that the CIC Act does not prohibit payment to a construction company for work done for want of registration. Further that the Council has no power to stop any unregistered company to carry on business in the Construction industry.⁹ The Applicant further alleges that the registration with CIC is a voluntary and not compulsory. The Applicant makes reference to Section 9 of the Act which details the functions of the CIC governing board. However, nothing in the provisions of the cited Sections 8 or 9 of the Act support such a proposition.

[24] The relevant provisions of CIC Act on registration of industry players are Sections 27 and 38, which the Applicant argues cannot assist the Respondent to resile from the contract. Section 27 provides thus:

“27 (1) A contractor shall not carry on business in the construction industry in Swaziland unless the contractor is registered under this Act.

....

⁹ Paragraph 45-46

(7) *The Council shall upon registration, issue the Applicant with a certificate of registration.*

(11) *A person registered under this Act shall not obtain a commission or a contract before the payment of the annual subscription fees.*

“28 A contractor registered under this Act shall not undertake construction work in a category in respect of which that person is not registered.”

[25] Then there is Section 38 which deals with unregistered contractors:

“38 (1) A contractor shall not undertake, carry-out or complete any construction works or position of such works for either a public or a private sector contract, awarded in terms of competitive tender or quotation, unless the contractor is registered with the Council and holds a valid certificate issued by the Council according to categorization of contractors.”

[26] There is a penalty prescribed against anyone who undertakes any construction works in contravention of subsection (1) of section 38:

“ (2) Any person who contravenes subsection (1) commits an offence and shall be liable, on conviction, to pay a fine equivalent to 10% of the gross estimated value of the project or to imprisonment for a period not exceeding ten years or both

(3)...

(4) Any contractor who carries out or attempts to carry out any construction works or portion of such works under a public or

private sector contract and who is not a registered contractor ... commits an offence and shall be liable to, on conviction, to a fine equivalent to 10% of the gross estimated value of the project or to imprisonment for a period of ten years or to both

[27] Section 39 further prohibits award of a tender to un registered contractor

“39 (1) A person shall not award a contract for any construction works of such value as the Minister, upon the recommendation of the Council, may determine to another person unless that other person is registered under this Act.”

[28] And the above sections / provisions of the CIC Act are self-explanatory and point to the prohibition of contractors to undertake construction work unless they are registered, in particular there is a prohibition of awarding public or private tenders by a competitive bidding to un registered contractors. The contract between the parties *in casu* is indeed as a result of a competitive bidding. The arguments advanced by the Applicant that the parties' contract is binding and enforceable by this Court is unsustainable. The Applicant as an unregistered contractor cannot lawfully carry-out the works detailed by the contract. It is therefore not foreseeable how the Court can order enforcement of a contract premised on illegality.

[29] There is no doubt from the reading of the provisions quoted above that the Applicant seeks the Court to grant him relief to carry-out what he is in law prohibited from doing. The main application is therefore dismissed and the counter-application is granted with costs at ordinary scale.

A handwritten signature in black ink, appearing to read 'D Tshabalala', is written over a horizontal dashed line.

D Tshabalala
Judge

For Applicant: L Dlamini of Linda Dlamini & Associates

For Respondent: W. Maseko of Waring Attorneys