



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

Namasthethu Electrical (Pty) Ltd v City of Cape Town and Another (Case no 201/2019) [2020] ZASCA 74 (29 June 2020)

From: The Registrar, Supreme Court of Appeal

Date: 29 June 2020

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgment of the Supreme Court of Appeal

Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal against an order of the Western Cape Division of the High Court, Cape Town (Boqwana J, sitting as court of first instance). The appeal was dismissed with costs.

The matter concerned the validity of a contract concluded between the first respondent, the City of Cape Town (the City), and the appellant, Namasthethu Electrical (Pty) Ltd (Namasthethu), following on the City's award of a tender to it in 2014. In issue was whether the City was within its rights to terminate the agreement and in fact validly did so, or whether, as the appellant contended, the disagreement between the parties was a dispute which fell to be decided in the manner provided for in the contract.

The City had advertised a tender in March 2014 for the supply, retrofit and installation of energy efficient luminaries at the Cape Town Civic Centre. Namasthethu was the successful bidder and was awarded the tender in August of that year. A contract was subsequently concluded between the City and Namasthethu during November 2014.

The contract included, amongst other things, a clause regulating the settlement of disputes. It provided that any 'disagreement', arising out of or concerning the tender agreement or its termination, if not resolved between the parties within ten days after either party having given the other party notice thereof, was to be regarded as a 'dispute' and then referred to either adjudication or litigation, in both alternatives at the instance of the party giving such notice. The contract also made provision for the circumstances in which the contracting parties could lawfully terminate the agreement. One such

instance was the City's right to cancel in the event of Namasthethu having committed a corrupt or fraudulent act, either during the procurement process or in the execution of the contract.

Less than a month after awarding the tender to Namasthethu, the City's decision was challenged by one of the unsuccessful bidders through an internal appeal. Therein it claimed that Namasthethu and its erstwhile directors, Mr Ravan Chetty (R Chetty) and his wife, Ms Shamla Chetty (S Chetty), had been convicted of fraud and corruption in 2013. The City subsequently instructed the Forensics, Ethics and Integrity Department (FEID) to investigate the allegations against Namasthethu. The City regarded this as serious for, if it were true, it meant that Namasthethu had been guilty of a fraudulent misrepresentation. In the declaration of past supply chain management practices it was explicitly required of each tenderer to indicate whether it, or any of its directors, had been convicted by a court of law for fraud or corruption during the past five years. Namasthethu answered that question in the negative. It also confirmed this choice by marking as 'not applicable' the space provided for the details of any such convictions.

The City informed Namasthethu of the information that had come its attention and requested a response on the accuracy of the allegations made against it. S Chetty, who was indicated to be the chief executive officer of Namasthethu, replied by stating that neither her nor Namasthethu had been convicted of fraud or corruption in August 2013, nor of any other charge during any other period. However, the City was provided with further information from the Construction Industry Development Board (CIDB) which also indicated that Namasthethu and/or its directors had been found guilty and sentenced. Namasthethu responded with a letter, ostensibly from Colonel K Naidoo of the South African Police Service (SAPS) Anti-Corruption Task Team, confirming that no conviction was obtained against Namasthethu or Chetty under the relevant case numbers. The allegations were however ultimately confirmed by the findings of the FEID.

S Chetty had thus been guilty of three separate misrepresentations during the precontractual phase of the tender process: First, when she falsely stated that neither the company nor any of its directors had been convicted by a court of law for fraud or corruption during the past five years; secondly, when she included Namasthethu's CIDB certificate in the tender application while knowing that her husband, R Chetty, admittedly obtained it through corrupt and fraudulent means; and, thirdly, when she indicated in the tender bid that the local business address of Namasthethu was 7 15th Avenue, Kensington, Maitland, which was later discovered to be false.

As a result of its findings, the FEID recommended amongst other things that the City terminate the contract with Namasthethu. Thus, on 15 March 2016 the City wrote to Namasthethu informing it that the contract was being cancelled with immediate effect due to the fraudulent acts committed during the tender process, which had resulted in the tender being awarded to it. Namasthethu disputed the City's right to cancel the contract. It insisted that the dispute be adjudicated in accordance with the dispute

resolution procedure provided in the contract. It approached the Association of Arbitrators Southern Africa who then appointed Mr James Garner, the second respondent, a construction consultant and surveyor, as adjudicator. Mr Garner decided the issue on the papers and other documents supplied to it by Namasthethu, but without hearing evidence. Various claims of were upheld against the City.

The principle issue for determination by the SCA was thus whether the dispute resolution clause of the contract survived the termination of that contract by the City for fraud. An ancillary issue was whether the City should be held to have waived its right to rescind the contract with Namasthethu, alternatively, whether the City should be regarded as having elected not to do so, in both instances by virtue of the time taken by it in investigating the allegations of fraud against Namasthethu.

Namasthethu contended that the dispute resolution clause was widely worded so as to encompass disputes of whatever nature. According to it the City had, in any event, waived its entitlement to terminate the contract and/or elected not to do so because of the considerable amount of time taken by it in investigating the allegations of fraud against Namasthethu and making a decision in relation thereto. The City's view was that the contract was void, alternatively voidable, as a result of the specified fraudulent misrepresentations and non-disclosures by Namasthethu. When it was satisfied that there had in fact been fraud on the part of Namasthethu, on the strength of a comprehensive forensic investigation, it elected to terminate and validly did so.

The SCA held that the City and other state entities were entitled to be concerned about the integrity of company directors with whom they envisaged doing business. It found this to be the reason that the tender documents required answers to questions about convictions relating to fraud and corrupt activities. It agreed with the finding of the high court that all of the requirements of a fraudulent misrepresentation had been met. This had rendered the contract voidable at the instance of the City, which it then legitimately elected to terminate.

On whether the City could be compelled to submit to an arbitration process in accordance with the dispute resolution clause in the contract, the SCA began by reiterating the principle that fraud vitiated every transaction known to the law. It held that an arbitration or similar adjudication clause could not stand once an agreement that was found to be induced by fraud had been rescinded by the aggrieved party. In general, disputes regarding the validity or enforceability of contracts induced by fraudulent misrepresentation and non-disclosures were not intended to be arbitrable. Only where specific provision was made, using very particular language, could contracting parties be said to have made provision for the submission to arbitration of a dispute as to whether the contract ever bound them or continues to do so.

Having regard to the wording of the dispute resolution clause in issue and taking into account the context in which the agreement was concluded, the SCA held that the dispute resolution clause clearly

contemplated a dispute arising out of an agreement that was accepted to be valid from the outset. It found that there was no suggestion that the clause covered fraud or that it involved an exception to the general rule as stated above.

The SCA distinguished the situation of fraud or corrupt activity from other instances of breach for the failure to perform a contractual obligation. While the right to terminate the contract for breach of a contractual obligation necessitated a prior notice of default, this was held not to be case in respect of fraud, which was a separate and distinct basis for termination. The SCA found that an innocent contracting party cannot be expected to give notice to the fraudulent counterpart to cure the fraudulent or corrupt conduct. The dispute resolution clause did not enable an adjudicator to determine whether the contract was induced by fraud and, if so, whether it was void or voidable as a result.

The SCA held that the referral of the dispute to Garner was invalid and unlawful and that the court *quo* was correct in setting aside his determination. It found that the City had not waived its entitlement to terminate the contract due to the considerable amount of time taken to investigate the allegations against Namasthethu; it was merely intent on obtaining accurate information before making a final decision. The SCA noted the widespread nature of fraud and corruption, and its corrosive effect on society, and found that a punitive costs order on appeal was justified.

In the result, the appeal was dismissed with costs on the scale as between attorney and client, such costs to include the costs attendant upon the employment of two counsel.
