



REPORTABLE

CASE NO: SA 10/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**BABYFACE CIVILS CC JV HENNIMMA
INVESTMENTS CC
BABAYFACE CIVILS CC
HENNIMMA INVESTMENTS CC**

**First Appellant
Second Appellant
Third Appellant**

and

**//KHARAS REGIONAL COUNCIL
CHAIRPERSON OF //KHARAS REGIONAL
COUNCIL
MANAGEMENT COMMITTEE OF //KHARAS
REGIONAL COUNCIL
CHAIRPERSON OF THE MANAGEMENT
COMMITTEE OF //KHARAS REGIONAL COUNCIL
//KHARAS REGIONAL TENDER BOARD
MINISTER OF EDUCATION, ARTS & CULTURE
MINISTER OF URBAN & RURAL DEVELOPMENT
KAREN MUNTING ARCHITECT
MINISTER OF WORKS & TRANSPORT**

**First Respondent
Second Respondent

Third Respondent

Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eight Respondent
Ninth Respondent**

Coram: SHIVUTE CJ, MAINGA JA and FRANK AJA

Heard: 24 October 2019

Delivered: 9 December 2019

Summary: Appellants brought an appeal against the judgment of the court *a quo*. The first appellant, a joint venture between the second and third appellants, placed a bid for a tender of which it was successful. It was informed by the architect in a letter dated 8 December 2016 that its bid was accepted on condition that the joint venture provides the quantity surveyors with the following: (1) a detailed bill of quantities within seven days; (2) a performance guarantee of 10 per cent of the contract amount within seven days; and, (3) a satisfactory work programme within 14 days. An extension to provide the performance guarantee within the period set was sought by the appellants. They undertook to fulfil this condition on 12 January 2017, however, the performance guarantee was only delivered to the architect on 9 February 2017. On 13 February 2017 appellants were informed via letter by the architect that there was non-compliance with the performance guarantee which had to be submitted within seven days and as a consequence of this non-compliance, their appointment was cancelled. That letter also informed the appellants that there was a moratorium in place on all capital projects, including the project in question.

On 19 June 2017, appellants lodged a review application in the High Court seeking to set aside the cancellation of the appointment of the joint venture and an order directing the //Kharas Regional Council to enter into an agreement with the joint venture to complete the project. Respondents defended the review application and also brought a counter-application to have the award of the tender set aside as treasury approval was not granted in terms of s 17 of the State Finance Act.

In its findings, the court *a quo* held that neither the architect nor the official from the regional council involved had the authority to cancel the appointment of the joint venture pursuant to s 37(6) of the Regional Councils Act. Only the Minister of Urban and Rural Development in consultation with the regional council has that power. As a consequence, the court *a quo* held that the cancellation was invalid. It also held in respect of the counter application, that because the estoppel raised by the appellants would result in validating an invalid award, due to the non-compliance with s 17 of the State Finance Act, the estoppel point had to fail. The court *a quo* thus dismissed the

main application with costs. As far as the counter application was concerned, the court *a quo* upheld it with costs on the basis that authorisation from Treasury pursuant to s 17 of the State Finance Act was a prerequisite for the making of an award by the Tender Board.

This court was seized with the task of dealing with the issue of the cancellation of the tender award by the architect and the director of the regional council, and the issue of estoppel.

Although the finding of the court *a quo* in relation to the cancellation of the award was correct, it was not dealt with in the correct context. The obligation to deliver a performance guarantee was a condition precedent to a contract being entered into in respect of the project.

It is held that, the use of the word 'cancelled' by the architect must not be understood out of context and in the sense that a legal practitioner will use it, namely to cancel an otherwise binding agreement. As the condition to provide the performance guarantee suspended the conclusion of the agreement, it had the effect of a normal suspensive condition (ie the right of the parties remained in abeyance pending the fulfilment of the condition). Thus, upon the non-fulfilment of the condition, the appointment of the joint venture fell by the wayside. There was no need to cancel anything as the appointment of the joint venture automatically lapsed.

Held that, the authority of the architect or the Director to cancel is irrelevant as they did not cancel anything. The joint venture's appointment simply came to an end when it failed to provide the guarantee timeously. Despite the use of the word 'cancelled' by the architect, it is clear what she intended to say was that there was non-compliance by the joint venture to adhere to the terms of the condition relating to the guarantee timeously and that is what led to the termination of the appointment.

Appellants averred before the court *a quo* that the respondents were estopped from denying authority of the architect to extend the deadline for the submission of the performance guarantee.

It is held that, the court *a quo* was correct in finding that neither the architect nor the Director of the regional council had the authority to agree to the extension. It is clear that neither these persons had express authority to grant extensions. Neither did they have implied or ostensible authority. An architect does not have the implied authority to alter the terms of a contract. To accept such implied authority to extend time periods attached to the conditions precedent would be to allow an architect to resurrect the whole contract when he or she does not have the power to alter a single clause. If the delay in the submission of the performance guarantee was agreed to by the Ministry of Education or the said Ministry had represented to the joint venture that its representative had authority to agree to an extension of the time period involved, it may have been estopped from denying the lack of authority. Where the regional council as agent of the Ministry of Education had agreed to extend the deadline for the filing of the guarantee, then there may have been some basis to argue that it had implied authority to do so. Also, if they had represented to the joint venture that the architect had the authority to extend the deadline to submit the guarantee, the question of estoppel might have arisen.

Held that, the architect as agent could not through her representations create an estoppel binding on the Ministry or the regional council. These two entities could only be estopped from denying the authority of the architect if they had made representations that the architect had the necessary authority. This they did not do hence the estoppel did not succeed.

It is held that, the Regional Tender Board acted *ultra vires* its powers when it continued to deal with the project without a mandate. Both the regional council and the Tender Board were aware of the directive by the accounting officer of the Ministry of Education. Their attempt to hide behind the alleged lack of clarity contained in the

directive in this regard cannot be accepted and it was anything but vague, ambiguous or badly conceptualised.

It is held that, the accounting officer of the Ministry of Education through the directive terminated the Tender Board's mandate to evaluate and to award the tender in respect of the project and to award the tender.

Held that, not clear that authorisation from Treasury pursuant to s 17 of the State Finance Act was a prerequisite for a valid award by the Tender Board. However, it was not necessary to decide this point.

Respondents' counter application thus succeeds with costs.

APPEAL JUDGMENT

FRANK AJA (SHIVUTE CJ and MAINGA JA concurring):

A. Introduction

[1] The //Kharas Regional Council (the regional council) per advertisements placed in the print media on 20 September 2016 invited bidders to tender for the building of a school at Oranjemund (the project). By the closing date of the tender on 26 October 2016 a total of 36 bids were received.

[2] The //Kharas Regional Tender Board (the Tender Board) was tasked with the evaluation of the bids so as to determine to which bidder the project had to be awarded. At the meeting of the Tender Board on 7 December 2016 it was resolved to award the tender to the first appellant which was a joint venture between the second

and third appellants (the joint venture). The minutes of the mentioned Tender Board meeting states that it was resolved that the tender 'be awarded to (the joint venture). The total tender amount is N\$81 507 989,84 (incl. VAT)'. The decision by the Tender Board was conveyed to Karen Munting Architect (the architect) per letter from the regional council. The letter of 7 December 2016 from the regional council to the architect directed the latter to inform the joint venture within three days of the award of the project and it further directed that the contract consequent to the award of the project be signed within seven days.

[3] Per letter dated 8 December 2016, the architect informed the joint venture that its bid was conditionally accepted. Three conditions were stipulated. A detailed bill of quantities had to be provided to the quantity surveyors within seven days. A performance guarantee of 10 per cent of the contract amount had to be provided within seven days. A satisfactory work programme had to be provided within 14 days. The letter ended off by informing the joint venture that the agreement relating to the project would only be signed if the conditions were fulfilled. It is obvious from the conditions that a contract would not be signed within seven days as directed by the regional council.

[4] The joint venture on 15 December 2016 informed the architect that it would not be able to provide the performance guarantee (the guarantee) within the time period mentioned but would do so on 12 January 2017. At the beginning of 2017 further correspondence in this regard followed between the joint venture and the architect. Eventually on 9 February 2017 the guarantee was delivered to the architect. The

architect on 13 February 2017 informed the joint venture that there was non-compliance with the requirement that a performance guarantee had to be in place within seven days 'thus your appointment is cancelled'. The letter from the architect also indicated that a moratorium had been placed on all capital projects including the one in question and that the project had thus been halted and that the Ministry of Urban and Rural Development had received written allegations of corrupt practices at the regional council.

[5] The appellants on 19 June 2017 lodged a review application in the High Court seeking to set aside the cancellation of the appointment of the joint venture and an order directing the regional council to enter into an agreement with the joint venture to complete the project.

[6] In the review application the appellants alleged that they were never given a hearing with regard to the allegations of corruption at the regional council and hence the *audi alteram partem* rule was not adhered to. Further, that the moratorium simply entailed a temporary suspension and this did not prevent them from signing the agreement for the project which would be implemented at some future date. As far as the non-compliance with the condition relating to the guarantee is concerned, in neither the founding affidavits nor the supplementary affidavit is it averred that the architect had the authority (express or implied) to grant an extension of the time period to provide the guarantee. Ignoring the fact that the estoppel cannot be a cause of action but is a 'shield of defence', the founding affidavit alleged that the

respondents were estopped from denying the authority of the architect.¹ It is only in the replying affidavit that the actual authority on behalf of the architect is raised.

[7] The respondents in their opposition to the review application raised certain defences and also brought a counter application to have the award of the tender to the joint venture set aside. The Permanent Secretary of the Ministry of Education, Arts and Culture (Ministry of Education) deposed to the affidavit filed on behalf of the respondents. It is contended that the appointment of the joint venture terminated as a result of the guarantee not being provided timeously. Further, that as money from the central government would be involved in the project it meant that the source of the funding was the central government and hence that the award could not have been made without treasury authorisation as contemplated in s 17 of the State Finance Act² being in place. As far as the counter application is concerned reliance is placed on a moratorium announced by the Ministry of Finance on 12 September 2016 which directed that no capital projects under the national budget should be proceeded with. The regional council was informed of this but, despite this, the tender process was persisted with and the joint venture conditionally appointed. It is alleged that this conduct meant that the award to the joint venture was *ultra vires* the powers of the Tender Board. Further, that as the Tender Board did not have the Treasury approval mentioned above, the award could not be made.

[8] In answer to the counter application the appellants aver that the moratorium only related to tenders that were dealt with by the Tender Board of Namibia and did

¹ *Rosen v Barclays National Bank Ltd* 1984 (3) SA 974 (W) at 983 and *Mann v Sidney Hunt Motors (Pty) Ltd* 1958 (2) SA 102 (G).

² Act 31 of 1991.

not include tenders that the regional tender board had to deal with. It is further denied that the State Finance Act was of relevance and it is alleged that the Regional Councils Act³ was the applicable legislation. From a factual perspective it is alleged that it appears from documentation from the Ministry of Education, that the funds were indeed available.

[9] The court *a quo* held that the *audi alteram partem* point relating to the allegations of corrupt practises was without merit as those allegations were not levelled at the joint venture (this aspect was not raised on appeal). It further held that, neither the architect nor the official from the regional council involved had the authority to cancel the appointment of the joint venture and that the cancellation was thus invalid. It also held with reference to its decision in respect of the counter application that because the estoppel raised by the appellants would result in validating an award that was not valid, due to the non-compliance with s 17 of the State Finance Act, the estoppel point had to fail and thus the main application was dismissed with costs. As far as the counter application was concerned, the court *a quo* upheld it with costs on the basis that authorisation from treasury pursuant to s 17 of the State Finance Act was a prerequisite to the making of an award by the Tender Board. The appeal lies against both the above orders of the court *a quo*.

B. Relevant parties

[10] It is necessary to deal in some detail with certain parties so as to evaluate their roles in the matter. I should start off to deprecate the practise to cite every person or

³ Act 22 of 1992.

entity one can think of when instituting reviews so as not to be faced with a point of non-joinder being taken. In this matter, to have cited both the chairpersons of the regional council and its management committee in their capacities as such and the regional council and management committee separately amounted to two misjoinders. The chairpersons either represent their respective bodies or they don't. If they do there is no need to cite the body they represent. If they don't they must be cited in their personal capacities.⁴ Further, to have cited the management committee twice in these proceedings, once per the chairperson and once in its own name, when they played no role also amounted to misjoinders. The one person who was correctly not cited, namely the architect led to a non-joiner point being taken against the appellants and hence an application to join which was granted. The architect was allegedly an agent and once the principal was cited there was no need to cite the agent. The principal is bound by what the agent did if the agent acted within his or her mandate and depending on the circumstances the principal may have to use the agent as a witness (deponent) to deal with the factual situation. This does not mean any potential witness must be cited as a party. If the fact of agency is denied or the authority of the agent is denied then only may it become necessary to join the agent.

[11] As will become apparent below it is common cause that the Ministry of Education, delegated the execution of the project to the regional council. This delegation was done pursuant to the provisions of the Decentralisation Enabling Act.⁵

⁴ *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) 667F-669E; *Seagull's Cry CC v Council of the Municipality of Swakopmund & others* 2009 (2) NR 769 (HC) paras 7-13 and *Fire Tech Systems CC v Namibia Airports Company Limited* (A 330-2014) [2016] NAHCMD 220 (22 July 2016) paras 24-36.

⁵ Act 33 of 2000.

In terms of the Decentralisation Act 'delegation' is defined as follows: (I quote only the portion relevant to this appeal):

“delegation” means the transfer by the Minister, . . . , of a function from (the Ministry) to a regional council, . . . , in order to empower and enable the regional council . . . to which the function has been decentralised, to perform the function as an agent on behalf and in the name of the (Ministry),’

It thus follows that the regional council was, in respect of the project the agent of the Ministry of Education. The said ministry could thus, as principal, instruct the regional council on all matters pertaining to the project.

[12] The regional council invited bids for the project by way of advertisements in the print media. The task to evaluate the bids received and to nominate a bidder for the project fell to the Regional Tender Board. The Regional Tender Board could not itself decide what capital projects it would put out on tender and evaluate. The Regional Tender Board received its mandate to do this from the regional council. Thus, if the regional council's mandate (where it acts as an agent) is withdrawn so is that of the Regional Tender Board. If the Regional Tender Board in such circumstances continues with its processes and makes an award, it acts *ultra vires* its mandate (powers) and such act would be invalid. Whether estoppel can arise in these circumstances is not necessary to decide on the facts and pleadings of this appeal.

[13] The record shows that the architect was appointed nearly a year prior to the award of the tender to the joint venture by the Regional Tender Board. She was

appointed on 12 June 2015 by the Ministry of Works and Transport as the consultant in respect of government capital construction projects. Her services as the consultant were described as 'Technical Documentation', 'Contract Administration' and 'Supervision'. These three broad areas are not described further in any detail. This broad description is latched on by the appellants to allege actual authority by the architect to extend the timeline for the furnishing of the guarantee. By letter dated 12 July 2016, the architect was informed that she was appointed on the project and that payments in respect of the project, such as payments of professional fees and interim payment certificates would be done at regional level. From the record, it appears that the Ministry of Works and Transport is the 'implementer of all government projects'. The relationship between the Ministry of Education and the Ministry of Works and Transport is not further elaborated on. From the little information in this regard it seems to me that the Ministry of Works and Transport represents the Ministry of Education, so as to have oversight of the construction process on the project and the architect in turn is an appointee of the Ministry of Works and Transport, ie independent contractor to the latter mentioned Ministry. As she reports to the Ministry of Works and Transport she can be loosely described as an agent of this Ministry which in turn can be loosely described as an agent of the Ministry of Education.

[14] As pointed out in the introduction above, the architect informed the joint venture that it was the successful bidder but that a contract in respect of the project would only be concluded if it met the three conditions. The fact of the conditions is not disputed at all nor is the authority to have made the appointment of the joint venture a conditional one. Neither the minutes of the Tender Board, where the award to the joint

venture was made, nor the letter from the regional council to the architect directed her that the contract that had to be signed within seven days was conditional and not final. One would expect, at least, the condition relating to a performance guarantee to have featured in any construction agreement of the magnitude of the one involved in the project. The conditions may have been part and parcel of the terms of the tender and this is what I suspect, but how and why these conditions formed part of the communication to the joint venture is not dealt with at all. The legal practitioner for the respondents pointed out in his heads of argument that in terms of the regulations published pursuant to the Tender Board Act,⁶ a regional tender board must 'require a successful tenderer to furnish security for the performance in terms of an agreement to be entered into'. As the Tender Board decision does not reflect these conditions it may be that this was so because of the fact that the requirement was always catered for in the conditions or terms of the tender.

C. Revenue flow

[15] In terms of the Namibian Constitution all income accruing to the State must be paid into a State Revenue Fund⁷. The State Finance Act gives effect to these provisions and provides for all State revenue to be paid into an account held at the Bank of Namibia. In general, the funds in this account may not be dealt with contrary to the provisions of any Appropriation Act in place from time to time.⁸ A department within the Ministry of Finance namely the Treasury is tasked with the administration relating to the State Revenue Fund so as to record transactions flowing through the

⁶ 16 of 1996 reg 52(1)

⁷ Art 125(2).

⁸ Sections 5 and 6 of the State Finance Act.

account and to ensure expenditure is in line with the relevant Appropriation Act.⁹ Here it must be borne in mind that Appropriation Acts do not appropriate financing to specific projects or expenses but simply appropriate financing to the established Ministries so as to cater for all those Ministries' needs for the relevant appropriation period. Thus each ministry is allocated a total amount which it must deal with within the parameters of its own budget. Its 'internal control' is the responsibility of the accounting officer of each ministry.

[16] Section 17 of the State Finance Act prohibits the incurring of expenditure or payments from the State Revenue Fund without approval from the Treasury. The section reads as follows:

'17. Subject to the provisions of this Act and notwithstanding anything to the contrary in any other law contained -

- (a) no expenditure shall be incurred as a charge to the State Revenue Fund;
- (b) no payments shall be made as a charge to the State Revenue Fund;
- (c) no fees or charges, or the rates, scales or tariffs thereof, shall be determined as a charge to the State Revenue Fund;

without the authorisation of the Treasury.'

[17] Where the function has been decentralised the Decentralisation Act provides that income received in respect of such function is to be deposited, 'notwithstanding

⁹ Eg s 13 of the State Finance Act.

anything contained in the State Finance Act, into a separate account of the regional council' which account must be operated specifically for the purpose of decentralised function.¹⁰ Section 5(5)(b) of the Decentralisation Act also provides that a ministry may budget 'for the following financial year for funds to be paid to regional councils . . . in respect of any function which has been devolved'.

[18] Once the regional council has opened the account in respect of the delegated function, this account is operated under the auspices of the Minister of Urban and Rural Development. Prior authorisation from the said Minister is required to incur any expenditure in respect of such account held by the regional council.¹¹

[19] Article 125(3) of the Namibian Constitution does allow for moneys to be paid into accounts other than the State Revenue Fund where it is designated for a special purpose. The Decentralisation Act expressly states that:

'Any provision of this Act relating to the application of moneys accruing to the State in any manner other than the deposit thereof in the State Revenue Fund is enacted upon the authority of Art 125(3) of the Namibian Constitution and shall apply notwithstanding any provision of the State Finance Act.'¹²

[20] The legal practitioner on behalf of the appellants submitted that s 17 of the State Finance Act finds no application once a function has been decentralised. I cannot agree with this as a general proposition. If the moneys relevant to the delegated function is to be transferred from the State Revenue Fund to the special

¹⁰ Section 3(1)(c) and 5(2)(a) of Act 33 of 2000.

¹¹ Section 37 of Act 33 of 2000.

¹² Section 8(1) of the Decentralisation Act.

account created for this purpose by the Regional Authority such transfers can only be effected with the authority of the Treasury. Once the moneys have been deposited in the special account of the regional council the supervisory function of the Treasury with regard to such moneys falls away and s 37 of the Regional Councils Act kicks in and the supervisory function shifts to the Minister of Urban and Rural Development. This Minister must then authorise expenditure from this special account. Should the regional council in performing the delegated function receive, for example, fees; levies or fines, these would not have to be paid into the State Revenue Fund but, can be paid directly into the special account. In other words any moneys received directly (and not from the State Revenue Fund) as a consequence of the delegation to it of a function from the central government can be deposited into the special account and not into the State Revenue Fund.

[21] Accounts are kept in the Treasury for the respective Ministries in which each ministry's expected total allocation from an Appropriation Act will be reflected. This account will also reflect payments from the amounts standing in favour of any ministry to such ministry. Depending on the nature of the needs of a ministry, Treasury will make payment to a ministry to in turn honour its obligation to its service providers, provided the ministry remains within its Appropriation amount (budget) and from an internal perspective also within the parameters of its own ministerial budget. These amounts are paid into accounts held with ordinary commercial banks by the Ministries for use to cover its ordinary operational expenses.¹³ It goes without saying that the payments made from these accounts at ordinary commercial banks do not require

¹³ Section 3 and s 13 of Act 31 of 1991.

Treasury approval. Thus, transfers of payments are made by Treasury to the Ministries over any given period in the above fashion. Whether instalment payments in respect of capital projects are dealt with in this fashion or whether Treasury will pay this directly does not appear from the record. The averment is that the money was to come from the budget of the Ministry of Education.

[22] In the present matter no allegations are made as to whether the funds for the project were in the State Revenue Fund, an account of the Ministry of Education with a commercial bank or whether it was held in an account of the Regional Authority opened for this purpose. It does seem however, that the funds still had to come from the State Revenue Fund and hence the point taken in this regard. It should be mentioned that it is common cause that it was for the central government to fund the project through the Ministry of Education.

[23] The court *a quo* reasoned that even if the funds were in the special account of the regional council, this would not assist the appellants as there was no proof that the expenditure that would be incurred was authorised by the Minister of Urban and Rural Development. This issue was not raised in the review application and should not have been dealt with by the court *a quo*. I do not deal with this aspect any further save to mention that, the conclusion reached in respect of the point relating to the authority from the Treasury may have a bearing on how the point relating to the lack of authority from the Minister of Urban and Rural Development should be approached once it is established such authority (where relevant) had not been forthcoming.

D. Further relevant background facts

[24] As already mentioned the Ministry of Works and Transport informed the architect on 12 July 2016 that she would be employed in respect of the project which had been decentralised. However, on 12 September 2016 the Ministry of Finance (within which ministry the Treasury is housed) per letter to the chairperson of the Tender Board of Namibia directed that 'no tender award should be made' until such time as budget review had taken place relating to reprioritising capital projects. In this letter, Accounting Officers (of which the deponent to the respondents' affidavit was one) were informed that the directive also applied to 'capital projects that are funded under the national budget' but whose execution fall under other authorities. According to the accounting officer, this directive was brought to the attention of the regional council. This directive was referred to by the parties as a moratorium on the award of tenders.

[25] On 30 September 2016 the Ministry of Works and Transport sent out a circular to all its consultants (which included the architect) to inform them of the moratorium and pointing out amongst others that during the moratorium 'there will be no awarding of tenders on new projects'.

[26] It is evident that the regional council, the Regional Tender Board and the architect simply ignored the directive. Thus, the regional council advertised the tender after the directive was issued, namely on 12 September 2016. The advertisements were not withdrawn nor were any steps taken to withdraw the advertisements or to notify the bidders prior to the closing date for the bids, ie 20 October 2016. On the

contrary the Regional Tender Board considered the bids and made an award on 7 December 2016.

[27] The covering email of 8 December 2016 to which the letter of the conditional appointment of the joint venture was attached also raised the matter of the guarantee stipulated in the letter. The architect enquired whether the joint venture would be able to provide the guarantee within the next week. She informed the joint venture that her office would close on Tuesday 15 December 2016. On that date namely, 15 December 2016 the joint venture informed the architect that the performance guarantee would only be provided by 12 January 2017. On 10 January 2017 further information relevant to the project was requested by the joint venture from the architect who responded with information on the same day.

[28] On 23 January 2017, the quantity surveyor on the project indicated to the joint venture and the architect that a performance guarantee was needed 'before the project goes to site'. On 26 January 2017 the joint venture forwarded a draft performance guarantee for scrutiny and input from, amongst others, the architect. On the same day, the architect responded with certain comments and recommendations. The architect then stated that the guarantee should be amended 'per our recommendation, and submitted to us at the earliest opportunity'. The quantity surveyor in an email (copied to the architect) on 27 January 2017 stated that the guarantee had to be in place until 90 days after practical completion.

[29] On 9 February 2017 the final performance guarantee is forwarded to the architect and she is informed to 'kindly let us know when it will be suitable to have the contract signing'. It is clear that the architect referred the issue of the guarantee to the regional council. Thus, in a letter dated 10 February 2017 from the regional council to the architect, it is stated that the matter was taken up with the Ministry of Education to discuss three matters namely, the moratorium, the 'outstanding performance guarantee' and a letter from the Ministry of Urban and Rural Development relating to alleged corrupt practises by the regional council. The letter then recorded that it was agreed between the representatives of the Ministry of Education and the regional council that 'contractor (joint venture) automatically disqualified themselves due to the non-submission of the performance guarantee by the date as set'.

[30] On 17 February 2017 the Regional Tender Board held a special meeting to discuss allegations of corrupt practises relating to the award of the tender made on 7 December 2016. The first item discussed was the award of the tender despite the moratorium that was imposed. It appears from the minutes of this meeting that the Tender Board rejected the allegations of impropriety levelled against it. As far as the moratorium is concerned, it was not easy to make sense of the minutes but it seemed that the Tender Board felt that the moratorium was not clearly spelled out. Thus, the minutes record that 'the moratorium has not indicated a clear message by specifying the intended project for halting but conceptualised the idea on offices and not schools'. That the moratorium 'should have been better handled by the line minister'. According to the minutes of the meeting the Regional Tender Board exercised its mandate to award tenders and in doing so followed the proper procedures.

[31] What is clear from the minutes of the Tender Board of 17 February 2017 is that, the Tender Board was aware of the moratorium but formed the view that it was not applicable to the project in question. According to the minutes, the terms of the moratorium were ambiguous and unclear and hence the Tender Board could proceed with its mandate to evaluate the bids and make an award.

[32] Per letter dated early March 2017 the Ministry of Education, Arts and Culture informed the regional council that after considering the commitments of the ministry in respect of capital projects already 'under construction' the project will remain suspended until the 2018/2019 year when it will be revisited as it was not removed from the said ministry's budget and it will be 'reactivated immediately when funds are available'.

E. The main application

[33] The *audi alteram* point was dismissed by the court *a quo* on the basis that the alleged corrupt activities were not levelled at the joint venture but at the regional council. This aspect does not form the basis of any of the grounds of appeal and thus, need not be considered by this court.

[34] As far as the cancellation of the tender was concerned, the court *a quo* held that the officials involved had no authority to cancel the tender in terms of s 37(6) of the Regional Councils Act as this could only be done by the Minister of Urban and Rural Development in consultation with the regional council. As far as the estoppel

point is concerned, the court *a quo* held that neither the architect nor the Acting Chief Regional Director of the regional council had the power to extend the timeline for the delivery of the performance guarantee and that as the tender was granted without authorisation in terms of s 17 of the State Finance Act¹⁴ which was a statutory requirement, estoppel could not be raised. This is so because estoppel cannot be raised to permit or recognise something that is not permitted in law.¹⁵

[35] In my view, the cancellation of the appointment of the joint venture as the successful bidder was not dealt with in the correct context. The obligation to deliver a guarantee was a condition precedent to a contract being entered into in respect of the project. The signing of the contract would obviously cement the appointment of the joint venture. Without the contract coming into existence, their appointment would fall by the wayside. This is made very clear in the notification to the joint venture by the architect. The letter of 8 December 2016 informed the joint venture that its tender was accepted 'subject to the following conditions' which included the submission of a guarantee within seven days. This conditionality is again referred to at the end of the letter where it is expressly stated that the contract (following the award of the tender) can only be finalised and signed once the conditions had been fulfilled. It is also clear from the letter of the regional council attached to the architect's letter of 13 February 2017 that the regional council was of the view that the 'contractor disqualified himself' by not submitting the guarantee timeously. The architect advised the joint venture that as there was non-compliance with the timeline for the presentation of the guarantee 'your appointment is cancelled'.

¹⁴ Act 22 of 1992.

¹⁵ *Strydom v Die Land – en Landboubank van Suid Africa* 1972 (1) SA 801 (A) at 815.

[36] In my view, the use of the word 'cancelled' by the architect must not be understood out of context and in the sense that a legal practitioner would use it, namely to cancel an otherwise binding agreement. As the condition suspended the conclusion of an agreement, it had the effect of a normal suspensive condition, ie the rights of the parties remained in abeyance pending the fulfilment of the condition.¹⁶ Thus, upon non-fulfilment of the condition the appointment of the joint venture fell by the wayside. There was no need to cancel anything. Indeed there was nothing to cancel once the condition, was not fulfilled as the appointment of the joint venture automatically lapsed. The authority of the architect or the director to cancel is irrelevant as they did not cancel anything. The joint venture's appointment simply came to an end when it failed to provide the guarantee timeously. Despite the use of the word 'cancelled' by the architect, it is clear what she intended to say was that there was non-compliance by the joint venture to adhere to the terms of the condition relating to the guarantee timeously and that is what led to the termination of the appointment.

[37] If the delay in the submission of the guarantee was agreed to by the Ministry of Education or the said ministry had represented to the joint venture that its representative had authority to agree to an extension of the time period involved, it may have been estopped from denying the lack of authority. Where the regional council as agent of the Ministry of Education had agreed to extend the deadline of the filing of the guarantee, then there may have been some basis to argue that it had

¹⁶ *Quirk's Trustees v Liddles Assignees* (1885) 3 SC and *Leo v Loots* 1909 TS366.

implied authority to do so. Also, if they had represented to the joint venture that the architect had the authority to extend the deadline to submit the guarantee, the question of estoppel might have arisen. On the facts of this matter, as will become apparent below, it is not necessary to decide the ambit of the authority of the regional council. The court *a quo* found that neither the architect nor the Director of the Regional Council had the authority to agree to the extension. In my view, this finding was the correct one. It is clear that none of these persons had express authority to grant extensions. I must point out in passing that, there is no evidence to suggest that any official from the regional authority granted any extension. Nor did they have implied or ostensible authority. An architect does not have the implied authority to alter the terms of a contract.¹⁷ To accept such implied authority to extend time periods attached to the conditions precedent would be to allow an architect to resurrect the whole contract when he or she does not have the power to alter a single clause. This, in my view, cannot be the position in law. It was the representative of the regional council who discussed this issue with an official of the Ministry of Education (the principal). Subsequent to this discussion, the letter from the architect followed stating that the joint venture had disqualified itself by not fulfilling the condition. The principal thus, certainly did not authorise the extension of this time period for the submission of the guarantee. Neither did the principal's agent, namely the regional council do anything to suggest that the period could be extended.

[38] I have already alluded to how estoppel was raised as a cause of action rather than a shield of defence. This in itself should have been the end of the application in

¹⁷ *R H Morris Ltd v Barlow* 1953 PH A1 (C) and *O'Connell, Manthe, Gragg and Partners v Charles* 1970 (1) SA 7 (E) at 8.

the normal course. However, actual authority was raised in reply and the respondents did not take issue with this in the court *a quo* or in this court. It seemed that the legal representatives of the parties were of the view that, all the relevant facts relating to the issue of authority and estoppel were before court, hence, they should be determined. These are the circumstances under which I also deal with these aspects.

[39] I must point out that the estoppel issue was raised in the context of the main application. In other words, the applicants averred that the respondents were estopped from denying the authority of the architect to extend the deadline for the submission of the guarantee. No estoppel was raised in respect of the counter application. Thus, there was no allegation that the respondents were estopped from denying that authorisation for the project had been given by the Treasury. The court *a quo* however dealt with the estoppel issue as if an estoppel was raised against the respondents so as to neutralise the point that there was non-compliance with s 17 of the State Finance Act. This was a misdirection as estoppel was not raised in this context.

[40] For an estoppel to have succeeded on the authority point in respect whereof it was raised, the appellants had to establish that the principal, namely, the Ministry of Education had represented to it that the architect had the authority to extend the applicable time limit for the delivery of the guarantee. In other words, the principal must have made this representation and not the agent.¹⁸ In this matter, the agent may have made such representations by allowing the delay and even participating in the

¹⁸ *Monzali v Smith* 1929 AD 382-385 quoted in *Rodgers v SWE Power and Pumps* 1990 NR 230 (SC) at 236A-C.

process by commenting on changes to be made to the draft guarantee provided after the stipulated time period had already lapsed. There is however, simply no evidence that the principal represented to the joint venture that the architect had the authority to grant the extension, she in effect condoned. In fact, the first time anything on record appears from the principal, the guarantee is rejected as being out of time. It thus follows that the appellants failed to establish the estoppel they relied upon.

[41] In view of the foregoing, the main application was correctly dismissed with costs by the court *a quo*.

F. The counter application

[42] The tender for the project was put on hold until further notice. It is clear that the Tender Board knew about this. There is no suggestion in the minutes of the meeting of 17 February 2017 that they were not aware of the moratorium. Instead, they attempted to hide behind the alleged lack of clarity contained in the directive in this regard and the position being badly handled by the Ministry of Education. The directive which was brought to the attention of the regional council and consequently the Regional Tender Board by the accounting officer of the Ministry of Education (the line ministry) is anything but vague, ambiguous or badly conceptualised. Instead it could hardly be clearer in stating 'no tender award should be made' and that the directive applied to 'all new capital projects that are funded under the national budget' the execution whereof was delegated to other government agencies. The accounting officer of the Ministry of Education through the directive terminated the Tender Board's mandate to evaluate and to award the tender in respect of the project. For the

Regional Tender Board to persist with its stance taken at the initial meeting where the tender was awarded and stating that it only carried out its mandate is simply incorrect. The Tender Board clearly did not appreciate the fact that it no longer had the mandate to deal with the project and hence acted *ultra vires* its powers when it continued to deal with the project without a mandate.

[43] Even if they did for some inexplicable reason think that the directive relating to the moratorium on capital projects was unclear or ambiguous, the Tender Board should have cleared the matter up with the Ministry of Education. Once there was reason for the Tender Board to doubt its mandate to continue with the tender process, it was under a duty to establish the actual position and to confirm whether it still had a mandate. This it did not do and hence, its decision to continue with the evaluation of the bids and make the award of the bid to the joint venture was also unreasonable.

[44] It follows that the counter application was correctly granted with costs.

[45] The granting of the counter application was, however, based on the fact that there was no authorisation in place from the Treasury to indicate that there was funding available for the project. It seems that the legal representatives involved as well as the court *a quo* assumed that the absence of the approval in terms of s 17 of the State Finance Act invalidated any subsequent act. The submissions in this regard on behalf of the respondents centred around s 17 of the State Finance Act and certain dicta *President of the Republic of Namibia & others v Anhui Foreign Economic Construction Group Corporation Ltd & another*¹⁹. The legal practitioner for the

¹⁹ 2017 (2) NR 340 (SC).

appellants' response was not that non-compliance with s 17 of the State Finance Act would not amount to a fatal omission but it was submitted that the matter did not fall within the ambit of the State Finance Act but resorted under the Regional Councils Act. I have already dealt with this aspect above and it is not necessary to deal with it again.

[46] Although the issue of the effect of the absence of Treasury approval as contemplated was raised in the *Anhui* case, it is clear from a reading of the judgment in that case that this was not the reason why the contract in that case was set aside. What led to the contract in the *Anhui* case being set aside was the fact that the contractor was appointed in contravention of the Tender Board Act which the contractor knew was to be adhered to in that matter. The point taken in respect of s 17 of the State Finance Act is mentioned in passing but does not form part of the *ratio decidendi* of the court.²⁰

[47] Where a functionary of the State who has implied authority to enter into agreements on behalf of the State concludes an agreement, such agreement remains valid even where the State does not appropriate money for such an agreement. This seems to be the common law position both in England²¹ and South Africa.²² If the

²⁰ Para 41 of *Anhui* case.

²¹ *Quintessence Co-Ordinators (Pty) Ltd v Govt of the Republic of Transkei* 1993 (3) SA 184 (TkGD) at 192G-I.

²² *Pro-Rite (Edms) Bpk v Delportshoop Munisipaliteit & another* [1999] JOL 506-1 (NC) at 14 which is translated in P Bolton *The law of Government Procurement in South Africa* at p 97 as follows: 'In the absence of any proof or even reference to a legal basis upon which the district council could refuse to make available the amount in question, and in light of the fact that the municipality had apparently convinced the district council to increase the amount of R807 809.32 to R858 939.34, there could be no talk of impossibility of performance on the part of the municipality. The municipality failed to prove that it was impossible for it to comply with its obligations in terms of the tender contract. All that the documents before the court serve to disclose are conditional threats on the part of the district council

agreement cannot be executed for this reason, then the normal contractual and or delictual remedies, if any, become relevant. I should mention in passing that due to the manner in which money is appropriated in this country, namely a globular amount per ministry, the issue of there being no appropriation by parliament is very unlikely to arise.

[48] To determine the effect of non-compliance with s 17 of the Finance Act must be considered in the context of the Act as a whole and in conjunction with legal requirements relating to public procurement. This is so because the non-compliance with an Act does not necessarily lead to invalidity.²³ The question as to the consequences of a failure to obtain prior Treasury authorisation (especially where money was appropriated and budgeted for in the ministry) cannot simply be determined with reference to s 17 of the State Finance Act without an analysis of how the section applies in the context used and in which circumstances (if the expenditure that is about to be incurred has been budgeted for) the Treasury can refuse to authorise it.

[49] In short, it should not have been assumed or accepted without a proper analysis of the State Finance Act and the role of s 17 of this Act read with the legal requirements apposite to public procurement that the effect of non-compliance with s 17 was to invalidate the granting of the tender. Neither in the court *a quo* nor in this that it will not pay. It would have been easy for the municipality to obtain an oath from a member of the district council setting out the grounds for the refusal to pay – assuming that there was a refusal and not simply an unwillingness to pay. If there were indeed a legal basis for the alleged refusal, it would have been very easy to place the necessary documentation before the court.'

²³ *Claud Bosch Architects CC v Auas Business Enterprises Number 123 (Pty) Ltd* 2018 (1) NR 155 (SC); *Oilwell (Pty) Ltd v Protec International Ltd & others* 2011 (4) SA 394 (SCA) and *Barclays National Bank Ltd v Thompson* 1985 (3) SA 778 (A) at 795I-J.

court was this issue properly ventilated in argument and I thus refrain from expressing any definitive view in this regard.

[50] In the result the appeals against both the order granted in respect of main application and the order granted in respect of the counter application by the court *a quo* are dismissed with costs such costs to include the costs of one instructing and one instructed legal practitioner.

FRANK AJA

SHIVUTE CJ

MAINGA JA

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