



Privity of Contract in Construction Contracts: the case of Mitsubishi Hitachi Power Systems South Africa (Pty) v Murray and Roberts Ltd and Another [2020] ZASCA 110 (29 September 2020).

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In this case, Murray & Roberts Ltd (“subcontractor”) sought a disclosure by Mitsubishi Hitachi Power Systems Africa (Pty) Ltd (“contractor”), of information concerning the initiative/incentive arrangements concluded between the contractor and Eskom Holdings Soc Ltd (“employer”).

The subcontractor sought the disclosure for purposes of assessing its entitlement to contractual benefits in terms of the subcontract entered into between itself and the contractor, stating that it has a right to information recognized as an incident of the contractor’s duty of good faith and the cooperation required of parties to have an informed understanding of their rights and duties and, in defence, the contractor argued confidentiality in respect of the benefits it is entitled to in terms of the contract entered into with the employer.

The subcontractor relied on clause 11.3 of the subcontracts as a basis for its contractual right to disclosure by the contractor. This clause provides that the “Contractor, upon receiving any contractual benefits from the Employer under the [Main] Contract, [shall] pass on to the Subcontractor such proportion thereof as may relate to the Subcontract Works”.

The contractor argued that the contractual benefits referred to in clause 11.3 do not include contracts to which the subcontractor is not a party and therefore not for its benefit, (the “privity argument”).

The Court averted that the language of clause 11.3 clearly stipulates that the contractor, shall pass on to the subcontractor a proportionate share of the contractual benefit received from the employer (the “pass-on obligation”).

The Court also stated that nothing in clause 11.3 requires that the subcontractor must be in privity of contract with the employer.

The Court followed the business efficacy principle, and held that it is improbable that the parties would have intended that the confidentiality obligation would apply as this would lead to absurd consequences which would leave the subcontractor significantly impaired in seeking to enforce its entitlement to the contractual benefits.

Furthermore, the principle of good faith dictates that, under circumstances where the subcontractor cannot have insight into the Main Contract from which its entitlements flow, the contractor, who receives the contractual benefits, must play open cards so as to place the subcontractor in a position to assess its entitlement to the portion of the contractual benefits promised to it under clause 11.3 and the subcontractor can only do so by requiring disclosure.

In conclusion, the Court ordered the disclosure by the contractor to the subcontractor.