

SOUTH AFRICA / JUDGMENT

Aurus Capital (Pty) Ltd v Matjhabeng Municipality (2962/2015) [2015] ZAFSHC 148 (6 August 2015)

[2015] ZAFSHC 148

COURT

Free State High Court, Bloemfontein

BEFORE

Kruger

CASE / FILE NUMBER

2962/2015

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FREE

STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC

OF

SOUTH AFRICA

Case

No. : 2962/2015

In

the matter between:-

AURUS

CAPITAL (PTY)

ITD

Applicant

and

MATJHABENG

LOCAL

MUNICIPALITY

Respondent

HEARD

ON: 30
JULY 2015

JUDGMENT

BY: KRUGER, J

DELIVERED ON: 6 AUGUST 2015

[1] This is the extended return day of a rule nisi issued on 26 June 2015:

“2. A rule nisi is issued, returnable on Thursday, 23 July 2015 at 9h30 or as soon thereafter as the applicant’s counsel may be heard, calling

upon the respondent to show cause why the following order should not be granted as final relief, to wit:

2.1 The respondent be ordered to comply with its obligations in terms of the contract entered into between it and the applicant on 3 March 2015;

2.2 That the respondent be interdicted and restrained from, directly or indirectly, preventing the applicant from performing or hindering the applicant in the execution and performance of its obligations in terms of the contract between the parties referred to in paragraph 2.1 above;

2.3 That the respondent be interdicted and restrained from, directly or indirectly, preventing or interfering with the applicant’s access to and removal of sewerage from the area adjacent to the Thabong Waste Water Treatment Works, identified in the papers as the dumpsite;

2.4 That the respondent pays the costs of the application on the scale as between attorney and client;

3. The relief in paragraph 2.1, 2.2 and 2.3 operate as rule nisi with immediate interim effect pending the finalisation of this application.”

[2] The applicant’s case is that it has a contract, partly written and partly oral, in terms whereof it cleans digesters at the Thabong, Witpan and Theronia sewer treatment plants and designated adjacent areas where sewerage spills and dumping have taken place, without charge to the respondent for a fixed term from 5 March 2015 to 31 August 2015. The respondent’s case is that no contract was entered into between the parties, all that happened was that applicant was granted permission to clean the digesters, as is stated in the response of the respondent to the proposal. The respondent has now withdrawn that permission as it was entitled to do. Respondent says the applicant never got any rights.

- [3] As background it can be mentioned that the actions of the applicant were caused by the fact that the sewerage system of the respondent is not functioning properly. The digesters which are intended to chemically purify sewerage are overloaded or blocked, and there are vast areas of sewerage spill adjacent to the digesters at the three sewerage works of the respondent in question, namely at Thabong, Witpan and Theronia. Applicant gives considerable detail in the founding affidavit of how the sewerage system is supposed to work and its present state, which caused the applicant to make a proposal to the respondent to clean the digesters and clear the adjacent areas, as set out in the proposal and the later oral agreement with the Municipal Manager.
- [4] In the founding affidavit the applicant gives details of the respondent's inability to conduct its sewerage operations and how health hazards are created. It sets out how Zama Zamas (illegal miners) work in the untreated sewerage and break sewerage pipes in their endeavour to find gold which has come into the sewerage deposits. The applicant's return lies in the ability to sell the sewerage that is removed. It has entered into a contract with Mintel Gold SA (Pty) Ltd to whom applicant must deliver pre-estimated tonnages of sewerage on a daily basis. The digesters will be drained relieving pressure on the sewerage system.
- [5] The applicant made a proposal to the respondent in the following terms:

"Proposal for Thabong sewerage systems

To Whom It May Concern (Matjhabeng Local Municipality)

I Jacques Olckers propose for the cleaning and rehabilitation of Thabong, Witpan and Theronia Sewers. (Site next to Thabong sewerage system)

Within this proposal I Jacques Olckers confirm to clean and rehabilitate these sewer sites without any cost to the Municipality of Matjhabeng.

The sites to be cleaned and rehabilitated can be supervised by the Matjhabeng plant operators at all times.

All sites worked on will definitely be left at the state original environment was found in.

My company will be expected to be on site 16 February 2015 for a period of and not exceeding 31 August 2018.

Regards

Jacques Olckers

[.....]"

- [6] The following response was received dated 3 March 2015:

"CLEANING OF DIGESTERS AT THABONG, WITPAN AND THERONA SEWER TREATMENT PLANTS

Permission is hereby granted as per proposal for the cleaning of Digesters at the above-mentioned sewer treatment works of the Municipality.

You will conduct your activities under the supervision of the municipal plant operators at all times. All access and other

ad-hoc arrangements must be handled through the operator for the specific plant.

Matjhabeng Municipality will not be liable for any liabilities, costs or arising as a result of your activities on site. It will be also be expected that where the environment is affected, it shall be rehabilitated to its original state.

Your Company is expected to be on site as from 05 March 2015 for a period not exceeding 31 August 2015. Your duration on site shall be subject to the continued approval by the Acting Executive Director Infrastructure or the Executive Director/Municipal Manager should you not complete the scope as set above.

YOURS FAITHFULLY

.....

MAKOFANE T.

ACTING EXECUTIVE DIRECTOR: INFRASTRUCTURE”

[7] There was a meeting on site on 7 April 2015 attended by Mr Mzweli (the then Acting Municipal Manager), Mr Kghotso Menyatso (the Member of the Mayoral Committee responsible for infrastructure), Mr Jan Hendrik Blom (Acting Senior Manager (Civil) of the respondent) and Mr Olckers on behalf of the applicant. At that site meeting Mr Mzweli requested a copy of applicant’s letter of appointment, which was handed to him. According to the affidavit of Blom, which is attached to the applicant’s replying affidavit, Mzweli was satisfied that the applicant proceed with the cleaning of the area adjacent to the digesters, and he consented that the applicant proceed as intended. Blom makes it clear that the version put up by the respondents is untenable. Blom works for the respondent and was present when the applicant was given the right to proceed cleaning the dump-sites adjacent to the digesters. This is the part of the agreement that was not in writing. The persons who in the answering affidavit deny that such agreement was made on site were not present when that agreement was made. The applicant’s version must be accepted. This is the oral part of the agreement upon which the applicant relies.

[8] The applicant sets out the terms of the agreement in paragraph 109 of the founding affidavit:

“109. The respondent and applicant therefore entered into and concluded a partly written and partly oral agreement at Welkom on 3 March 2015 of which the express, alternatively salient, alternatively implied terms are as follows:

109.1 The applicant is granted permission to, as per its proposal, clean digesters at the Thabong, Witpan and Theronia sewer treatment plants and designated areas where sewerage spills and dumping has taken place.

109.2 The activities are conducted under supervision of the municipal plant operators whom are also responsible for access and ad hoc arrangements.

109.3 The respondent shall not be liable for any liabilities of costs arising out of the activities on site, in other words the respondent does not pay the applicant for the services rendered

109.4 The applicant must, where the environment is affected, rehabilitate the environment to its original state which includes the cleaning up of the sewerage dump site identified. The Court will appreciate that the applicant will rehabilitate the environment, although the removal of the raw sewerage from the environment is in itself already rehabilitatory in nature.

109.5 The contract is for the fixed term, with date of inception 5 March 2015 and date of expiry 31 August 2015.”

[9] In interpreting a contract which is partly written and partly oral, a court can have regard to the subsequent conduct of the parties in implementing the contract (*Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Limited* 2012 JDR 1734 (SCA) par [15]). In this case the Municipal Manager on site on 7 April, a month after the applicant had started

work on site, and more than a month before the notice of termination, approved of the work being done by the applicant. This conduct supports the allegations by the applicant as to the nature of the contract. In order to execute its mandate applicant has already spent half a million rand to acquire plant. The applicant is using 22 trucks.

[10] On 19 Jun 2015 Mr T Makofane, in his capacity as Acting Director: Infrastructure wrote the following letter, which was given to Mr Olckers on 20 June 2015, and which letter precipitated the urgent application on 26 June 2015, when the rule nisi was issued:

“Dear Sir

The matter identified in this letter bears reference.

I have given consent for your company to clean our water and waste water pipe-works without due regard to the impact on our environment when I acted in the Department of Infrastructure in Matjhabeng Local Municipality.

This letter therefore serves to notify you that I am withdrawing my consent for you to continue cleaning the municipal pipe-works with immediate effect. All activities that are conducted as a result of your request and the consent given therefore must stop immediately.

I hope you will find the above matter to be in order.

Regards,

Mr. T. Makofane

Executive Director: Strategic Support Services

Signed the letter as Acting Director: Infrastructure”

Vagueness

- [11] Mr Reinders, on behalf of the respondent, says the crux of the matter is whether the applicant and the respondent have entered into an agreement on the terms and conditions set out by the applicant. The respondent contends that the order to be confirmed is vague and cannot be made an order of court. The deponent to the answering affidavit says the order in paragraphs 2.1 and 2.2 is cast in general terms, and the respondent does not know what its obligations are. The deponent says the order does not specify how the respondent should refrain from allowing the applicant to clean the digesters. Respondent’s case is that applicant is not entitled to an order interdicting the respondent from directly or indirectly preventing or interfering with the applicant’s access to and the removal of sewerage from the area adjacent to the Thabong Sewerage Works.
- [12] Mr Reinders says at best applicant has an agreement to agree, as contemplated in *Lambons (Edms) Bpk v BMW (Suid-Afrika) (Edms) Bpk*
- [1997] ZASCA 51; 1997 (4) SA 141 (SCA). In the *Lambons* case the trial court found that the plaintiff did not prove that the statements that had been made by a person constituted an offer with the intent that if accepted, an enforceable contract would come into being (at 149C-D). Mr Reinders says the applicant merely got permission, it obtained no contractual rights. In the *Lambons* case the evidence was that after the date of the statements on 28 January 1993, the parties had the intention to negotiate the terms of the standard contract (153C-E). In the present case the applicant immediately started to execute its mandate on 5 March, the date given in the proposal, and the terms were modified in the oral agreement with the Municipal Manger on site on 7 April 2015. The facts of the *Lambons* case differ from the present facts.

Authority

- [13] Mr Reinders contends that the applicant did not prove that the person who concluded the agreement had the authority to conclude it with reference to *Glofinco v Absa Bank Limited t/ a United Bank* 2002 (6) SA 470 (SCA) and *Absa Bank Limited v Arif and Another* 2014 (2) SA 466 (SCA). Mr Snellenburg, for applicant, says the applicant does not know the powers of the various officials of the respondent, and is not aware of the various delegations that may exist. In the answering affidavit the deponent says that when the respondent enters into agreements, it does so by at least entering into a written service level agreement. No resolution was taken to enter not such agreement. Where there has not been proper consent or a resolution, Mr Reinders says a jurisdictional fact to create liability is absent, and the

agreement is invalid ab initio, with reference to Ferndale Crossroads Share Block (Pty) Ltd and Others v Johannesburg Metropolitan Municipality and Others 2011 (1) SA 24 (SCA) par [22]. In the Ferndale case the court dealt with the letting of immovable property, which is expressly covered by section 79(18)(b) of the Local Government

Ordinance 17 of 1939. In the present case there is no legislative provision expressly covering the work done by the applicant at no cost to the respondent.

[14] In argument Mr Reinders conceded that the respondent can also enter into oral agreements. He referred to the Local Government: Municipal Systems Act 32 of 2000 and to the Local Government: Municipal Finance Management Act 56 of 2003. Chapter 8 of Act 32 of 2000 deals with the provision of municipal services. Section 83 details competitive bidding. With reference to *Clur v Keil and Others* 2012 (3) SA 50 (ECG) at pars [13] and [14] Mr Reinders says that employees of government can only perform functions authorised by the empowering provision, with reference to *The Monastery Diamond Mining Corporation (Edms) Bpk v Schimper en Andere* 1983 (3) SA 538 (O) at 549B-F. Municipal employees may exercise no power and perform no function beyond that conferred upon them by law (*Clur* at par [14]). The question is whether Mr Makofane, in his capacity as Acting Director: Infrastructure and Mr Mzweli, the Acting municipal Manager on 7 April 2015, had the authority to allow applicant contractually to do the work in terms of the permission.

[15] The need for proper controls when the spending of public funds is involved is important, and many such controls can be found in the statutes dealing with municipal finance. The important point to bear in mind the present case is that the contract on which the applicant relies imposes no financial burden on the respondent. The respondent can supervise the works. The proposal states that the work is to be done at no cost to the municipality. If it had been the case of the municipality that it has now appeared that this is a very lucrative business, and that the work can be put out on tender, and the municipality can possibly make some money out of selling sewerage, one would have expected the letter of cancellation and the answering affidavit to say that. On the contrary, the reason given for the cancellation in the letter dated 19 June is that the person who signed to consent did not give due regard to the impact on the environment. There is no allegation in the cancellation letter that the work done by the applicant has had a detrimental effect on the environment. There is also no such allegation in the answering affidavit.

Conclusions

[16] An important consideration in this matter is to look at the parties who were involved:

- (i) The proposal was done by Olckers on behalf of applicant.
- (ii) The permission is granted by Mr T Makofane in his capacity as Acting Executive Director: Infrastructure.

(iii) At the oral part of the agreement on which the applicant relies, Mr Mzwali (the Acting Municipal Manager) and Kgotso Mnyatso (Member of the Mayoral Committee) and Blom (Acting Senior Manager of the respondent) were present, as well as Olckers.

[17] As to the Opposed Motion:

The founding affidavit is signed by Olckers, who as involved at every stage.

The Answering affidavit is made by Mr Lepheana (Municipal Manager) with a supporting affidavit by Tumelo Makofane (Executive Director: Strategic Services).

At the replying affidavit a supporting affidavit is made by Blom (Acting Senior Manager (civil)) at the Respondent.

[18] Not one of the three persons who represented the respondent on site on 7 April 2015, mentioned in par 15 (iii) above made any affidavits on behalf of respondent. Mr Lepheana, who makes the answering affidavit of the respondent, was not involved in the signing of the permission, or on site on 7 April 2015. He can have no personal knowledge of the negotiations and agreements between Olckers and the respondent's employees. These being motion proceedings, one has to accept the version of the applicant in so far as not denied by the respondent, unless the denials are bald and far-fetched. Bearing in mind who the persons involved in the negotiations and the permission were, and in particular the fact that Blom, and employee of the respondent breaks ranks with the respondent and supports the applicant in the replying affidavit, the finding must be made that the version of the respondent must be rejected and that of the applicant accepted as far as the contract is concerned. This is particularly the case with the oral aspect which was done on 7 April on site. On that version a contract as set out by the applicant in paragraph 109 of the founding affidavit came into being. The respondent has not put up any evidence of any of the officials or persons who were involved in the oral part of the agreement on site on 7 April 2015. The Acting Municipal Manger was on 7 April satisfied with what applicant was doing. This agreement imposes no financial burden on the respondent, and no resolution or delegation was needed.

[19] One cannot be blind to the time periods. The respondent was apparently content to allow the applicant to do the work from 5 March up to 19 June, almost half of the agreed term of the contract. Then the respondent repudiates that agreement for a reason that has no basis in the facts, namely that the person who gave the permission, and who is now withdrawing it, did not consider an aspect of the environment. There is no allegation of any breach by the applicant. The respondent was not entitled to cancel the contract on that basis.

[20] As to the remedy of specific performance sought by the applicants in this case, there is no reason why such remedy should not be allowed (MEC for Health, Gauteng v 3P Consulting (Pty) Ltd 2012 (2) SA 542 (SCA) par [33]). The applicant is entitled to be allowed to do what it was given permission to do. The applicant has incurred costs and other contractual obligations, and should be allowed to continue to do the work. There is no prejudice to the

respondent. The applicant is assisting the respondent to do its work, namely to get rid of sewerage, at no cost to the respondent.

- [21] The applicant has been granted permission to do the work. In terms of the permission, quoted above, the applicant does the work under the supervision of the municipal plant operators at all times. The respondent, in the letter of 19 June 2015 seeks to withdraw that permission, and that is the letter that precipitated the present application to court. The applicant does not ask for more than it had before 19 June 2015. The order must be interpreted as meaning that the applicant wants to restore the status quo ante before 19 June 2015.
- [22] The rule nisi is not vague and there is no reason to clarify it. The parties have been on site for almost the entire period of the contract. It is clear from their conduct and the wording of the order that all that the respondent is obligated to do is to allow the applicant to do its work, and to supervise if it deems it necessary.

ORDER

The Rule nisi is confirmed with costs.

A. KRUGER, J

On behalf of Applicant Adv N Snellenburg

Instructed by:

Honey Attorneys

BLOEMFONTEIN

On behalf of Respondent: Adv SJ Reinders

Mhlokonya Attorneys

wm/

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