

SOUTH AFRICA / JUDGMENT

Pro-Plan Consulting Engineers (Pty) Ltd v Nketoana Local Municipality and Another (1574/2021) [2021] ZAFSHC 104 (13 May 2021) [2021] ZAFSHC 104

COURT

Free State High Court, Bloemfontein

BEFORE

Mathebula

CASE / FILE NUMBER

1574/2021

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE STATE

DIVISION, BLOEMFONTEIN

Case

number: 1574/2021

In

the matter between:

PRO-PLAN
CONSULTING ENGINEERS (PTY) LTD
Applicant
and
NKETOANA
LOCAL MUNICIPALITY
First Respondent
MAKHAOTSE, NARASMIMULU
AND
ASSOCIATES
(PTY) LTD
Second Respondent
HEARD

ON:

23 APRIL 2021

JUDGMENT

BY: MATHEBULA, J

DELIVERED ON: 13 MAY 2021

Introduction:

- [1] The application was launched on an urgent basis on 09 April 2021 and enrolled for hearing on 23 April 2021. The applicant is seeking urgent interim interdictory relief against the first respondent to interdict and restrain the first respondent from giving effect to its appointment of the second respondent as the consultant engineer for its Bulk Water Scheme Project. There are other ancillary orders sought as contained in the amended notice of motion. I hasten to add that there is no opposition to the amendment. The application is opposed by the first respondent. No papers were served and filed on behalf of the second respondent in opposition.
- [2] Apparently in response the first respondent served and filed a conditional counter-application. In it an order in the following terms is sought: -
- a) In so far as may be required, condonation is granted in respect of any non-compliance with forms, time-periods and manner of service prescribed by the Uniform Rules;
 - b) Interdicting and restraining the applicant and/or 2nd respondent from performing any work or rendering any services in relation to the bulk water scheme project pending finalization of proceedings to be instituted by the 1st respondent within 30 (THIRTY) days of this order for the review and setting aside of the applicant's appointment as well as the Consulting Engineering Agreement and/or declaring same to be unconstitutional, invalid, unlawful and void;
 - c) Postponing this application to be heard with the 1st respondent's said application for review and/or declaratory order;
 - d) The costs of this application are to stand over for later adjudication;
 - e) Further and/or alternative relief.
- [3] As I understand the logic behind it, the first respondent is only pursuing it in the event that the applicant is successful in the main application. On this occasion the second respondent does not oppose it as well.

Factual

background:

- [4] On 30 October 2017 the Bid Evaluation Committee of the first respondent resolved to appoint the applicant as a consultant engineer to undertake designs and oversee construction of the Bulk Water Scheme Project. The decision was communicated to the applicant in a letter dated 14 November 2017 penned by the then Municipal Manager M.P Menzi. It is common cause that the applicant accepted the appointment in a letter dated 15 November 2017. On 06 September 2018, the first respondent issued a formal instruction to the applicant to proceed with the project. On 11 March 2019 the parties concluded a written agreement for consulting engineering services. I do not intend to repeat the provisions of the written agreement save to mention that the project was placed firmly in the hands of the applicant.
- [5] It appears that the project was undertaken by the first respondent under the auspices of the Department of Water and Sanitation. The reality is that the scope of work was expanded after a series of meetings between the parties. On 18 February 2020 the parties signed an addendum amending the main written agreement. I deem it unimportant to repeat the provisions of the addendum save to emphasize that the applicant complied with its obligations by rendering the agreed professional services.
- [6] In a letter dated 28 October 2020, the newly appointed Municipal Manager M.M Sefantsi terminated the agreement between the parties. His reasons were twofold; (i) that the written agreement concluded in 2017 had lapsed at the time of its appointment in terms of Regulation 32 of the Supply Chain Management Regulations and (ii) the addendum is null and void because the written agreement had lapsed at the time of its conclusion. The attorneys of the applicant engaged the Municipal Manager on the issue. It appears that he relented on the purported termination of the written agreement and the status quo was restored. The first respondent through its attorneys undertook to revert to the applicant's attorneys and never did. Without any warning the contentious appointment of the second respondent was confirmed. It is this appointment that the applicant seeks an order to interdict and restrain and ultimately launch a challenge that it be declared unlawful and set aside.

Urgency:

- [7] This section of the judgment will be confined to the issue of urgency pertaining to the main application. Urgent applications are governed by the provisions of Uniform Rule 6 (12).
- [8] The decision to terminate the written agreement between the parties and subsequent appointment of the second respondent was made in March 2021. The exact date was deliberately withheld in particular by the current Municipal Manager. The application to this court was launched on 09 April 2021. Given the far-reaching consequences of the decision, the applicant acted in haste to bring the matter to court. This was also necessitated by the intransigent stance adopted by the Municipal Manager and also acting unilaterally outside the terms and conditions of the contract.

- [9] The reasons set out by the applicant convince me that the degree of urgency in this matter is of such a nature that the ordinarily applicable rules should be relaxed.[1] The other consideration is whether the applicant will not be afforded a substantial redress if the application is heard in due course. The decision has far-reaching consequences. There is a more vital reason why I am inclined to relax the rules, there is no real opposition from the first respondent. The first respondent has opted not to put any facts before me to the contrary. For the foregoing reasons, I hold the view that the urgency exists and it is not self-created. It is on the basis of the foregoing reasons that I ruled that the application is properly placed before me for adjudication and the matter be heard on an urgent basis.

Amendment of the Notice of Motion:

- [11] The next preliminary issue to be considered is the application to amend the notice of motion in terms of rule 28 of the Uniform Rules of Court. In it the applicant is seeking to insert two
- (2) new prayers. These are to direct the first respondent to furnish written reasons to the applicant for the appointment of the second respondent as a consultant engineer on the Bulk Water Scheme Project. These reasons must be accompanied by the written reports of the bid evaluation and adjudication committees of the first respondent. These reports are premised on sections 5 and 9 of the Promotion of Administrative Justice Act 3 of 2000. The applicant is resorting to these measures because the first respondent has adopted a non-cooperative stance. Letters are unanswered and instead decisions are implemented.
- [12] The important part of the application to amend is that it is not opposed by the first respondent. On this ground I granted it.

Submissions:

- [13] As a starting point, counsel for the applicant made persuasive submissions which will only be just if I repeat them as set out in the contractual regime existing between the parties. Importantly he pointed out that the applicant was appointed to deliver service on all the phases of the project. The said appointment was in terms of Regulation 32 of the Supply Chain Regulations. He contended that the spanner in the works is the purported appointment of the second respondents which in essence is an irrational decision. Therefore, this decision is susceptible to a review.
- [14] Accordingly the first respondent does not set out any credible facts to meet the case brought by the applicant. He argued that the first respondent has replaced the applicant by allocating work to the second respondent which is inherent in the scope of work as per the written agreement. Not only that, but also the allegation that the appointment of the second respondent did not require regular tender procedures was not supported by any documentation. Only bald allegations without substance were made in the opposing affidavit. Overall, he submitted that the case for the applicant has been made and unanswered by the first respondent.

[15] In response counsel for the first respondent outlined the unusual position that both parties wish to pursue an application to review certain written agreements and appointments which appear to be invalid for whatever reason. Counsel was at pains to explain the reasons for the appointment of the second respondent. He conceded that the papers do not disclose the reason for such an appointment. I broached it with him that, if there is no rational reason to appoint the second respondent what is the basis of the opposition to the application. Again, he was at pains to explain that the initial appointment of the applicant could not have complied with requirements of Regulation 32 or provisions of section 110 of the Municipal Finance Management Act 56 of

2003. The only reason advanced why there are no details in the opposing affidavit lies on the fact that the case of the first respondent is based on a legal question viz compliance with Regulation 32. This conclusion is reached, so the argument goes, on the version of the applicant. The contention of the first respondent is that because of the ostensible irregularity of the appointment then there was an obligation to act.

[16] Flowing from the above, it was argued that the applicant cannot be granted the relief sought. Assuming that the initial appointment was invalid, therefore the applicant cannot satisfy the requirement of a prima facie right. Accordingly, the other requirement relating to the balance of convenience has not been met in the circumstances. The submission is based on the consideration that if the interim interdict is granted, there are greater chances of wasteful expenditure of public funds.

Discussion

Legal principles

[17] The requirements for the granting of an interim interdict are well settled. These are prima facie right, a well-grounded apprehension of an irreparable harm if the interim relief is not granted, that the balance of convenience

favours the granting of the interim relief and lastly that the applicant has no other satisfactory relief.[2] The granting of the interim interdict relief is an extraordinary remedy within the discretion of the court. The court when making

consideration on these requirements must not look at them individually but all are interrelated.

[18] In this matter there is a dispute whether the applicant has established a prima facie right. The approach whether the applicant has established a prima facie right was stated in *Simon NO v Air Operations of Europe AB and Others* to be the following: -

“The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed.”[3]

[19] The first respondent being an organ of state cannot operate in a vacuum but must comply with the laws of the Republic. It is expected that municipalities must act within the confines of the law to support and sustain the constitutional order. Section 217 of the Constitution of the Republic of South Africa Act 108 of 1996 stipulates that the first respondent must procure and contract for goods or services in “a system which is fair, equitable, transparent, competitive and cost-effective”. All procurement acts, regulations, policies and practices must comply with these principles.

[20] The first respondent alluded to the contract between the parties to be invalid because the provisions of

Regulation 32 of the Municipal Finance Management Act 56 of 2003 were flaunted. The regulation makes provision for the procurement of goods and services from contracts secured by other organs of state. Procurement in this manner should be considered as a last resort and only to be used once the contract that the entity wishes to participate in has met the standards laid out in section 217 of Act 108 of 1996. There must also be demonstrable benefits in financial terms.

[21] The first respondent in one of the plethora of defences raised, vaguely referred to Regulation 5 of the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings. Apparently, the advice was given by the Department of Treasury after the Municipal Manager raised certain concerns pertaining to financial misconduct. Regulation 4 makes provision for the establishment of an Independent Advisory Board. The purpose of this board is to assist the council, which is the highest

decision-making body in a municipality, with investigations of misconduct and provide recommendations on further steps to be taken.

Regulation 5 stipulates that on receipt of such recommendations and prima facie evidence of financial misconduct having been committed, a preliminary investigation into such allegations must be conducted. It is envisaged that once a case for financial misconduct has been established the board must report it to the relevant authorities

which include South African Revenue Service and South African Police Service.

[22] The reliance on the regulations discussed in paragraph 21 does not come to the aid of the first respondent. In the context of this matter they are irrelevant and offer no solution. At the outset, the first respondent through its council has not complied with the requirements. The Municipal Manager cannot rely on them because there is no report of financial misconduct tabled before him. If there is, then it has been withheld in the same breath that other information is not disclosed in the papers. If there was, such was before his time and he does not have independent knowledge as he alleges. For that to stand as evidence, there should have been confirmatory affidavits from others to sustain his allegations to that effect. The Treasury Report referred to mention other contractors and not the applicant. It boggles the mind as to how it is then used against the applicant when the applicant is not the subject thereof.

Application of the law to the facts:

- [23] The relationship between the applicant and first respondent is properly regulated by an agreed contractual regime. The rights and duties of the parties as well as the scope of work is clearly defined in a number of binding contracts entered into by them. The applicant has delivered the services and continues to do so according to the prescripts of the written agreement. According to the papers, the applicant has commenced with different phases of the project and is overseeing the completion of the remaining phases. Not only that, the binding written agreement makes provision for dispute resolution mechanism in the event that there is a logjam in the relationship between the parties. The heavy-handed approach by the first respondent which is baseless in both fact and law threaten the existence of a contractual right. At this stage I am satisfied that the applicant has established a *prima facie* right in this regard.
- [24] On the other hand, the allegations made by the first respondent do not cast serious doubt on the version of the applicant. At the outset, the conduct of the Municipal Manager is a textbook example of a public official behaving unconscionably. Those that are exercising public power should not make arbitrary and baseless decisions in the exercise of that power. [4] The opposing affidavit is hamstrung by a startling paucity of detail and every effort to distance his decision from the true reason(s) for taking the action he did. The reasons advanced for the decision are mutually destructive. In the letter dated 28 October 2020, the reason was that the contract had already lapsed.
- [25] Apparently, he had suspicions about the written agreement and also spoke to a number of individuals presumably within the municipality. The people spoken to remain unnamed and their relevance to the contractual regime between the parties is unexplained. The contents of their discussion remain a mystery and there are no confirmatory affidavits from them. The allegation is that the second respondent was appointed in a lawful manner on quotation basis. There are no reports or minutes made available in the papers of the various committees of the council that indeed the whole process was above board. Despite being the custodian of such information, he either negligently or deliberately withheld it from scrutiny. That is an inescapable conclusion made in the prevailing circumstances. If the appointment was above board, it is startling that the first respondent will approach this court by way of a counter-application to interdict a contractor who has been properly appointed from performing services.
- [26] The inescapable conclusion is that the Municipal Manager relied on seemingly baseless suspicions. This led him to act imprudently to terminate the contract without regard to its provisions. Not only that, but also made an appointment which is not only irrational but on the face of it outside the prescripts of the law. In my view the conditional counter-application is an acknowledgement that the first respondent through its officials has transgressed the law.

- [27] Undoubtedly, this irrational decision which is devoid of any reasonableness has potential to cause irreparable harm not only to the applicant but also those indirectly affected by it. The applicant has been working on this project for some time. Certainly, it has expended funds to establish itself and that a number of employees derive their livelihood from the continuation of this relationship. The threat of retrenchment and labour disputes is real than imagined. The impact on smooth service delivery will be huge denying the affected community a basic commodity such as water.
- [28] It is inevitable that the appointment of the second respondent to do works in the same project will lead to the duplication and escalation of costs. While it may be so that the applicant is pursuing own interests, the interests of the fiscus will indisputably be affected by this decision. Clearly this is against the spirit and letter of section 217 of Act 108 of 1996. Concomitant with it is the many disputes arising as a result of the overlapping of duties and disagreements on fees et cetera.
- [29] Given the many apparent difficulties that are prone to arise, the balance of convenience favours the applicant. The applicant stands on a brink of financial ruin purely because of a decision which is patently based on ulterior motives than the proper application of the law. It appears without expressing an opinion on it, that the applicant stands a better chance of succeeding on review. In preceding paragraphs, I have referred to the fact that the first respondent also seeks the order to review and set aside the decision to appoint the applicant. On this ground also the applicant must succeed.
- [30] This brings me to the last consideration whether there is any other satisfactory relief pending the outcome of the review application. The simple answer is that there is none. I have outlined the magnitude of the irreparable harm that may ensue. In these circumstances a claim for damages has its own problematic issues. However, in this matter a real right has been established which is strong. For these reasons, I am satisfied that the applicant has established a case and is entitled to the relief as per the notice of motion.

Conditional counter-application:

- [31] On receipt of the papers for the main application, the first respondent adopted a retaliatory posture and launched the conditional counter-application. This is only proceeded with on condition that the applicant is successful in the main application. The distinct feature of the conditional counter-application is that it is brought on semi-urgent basis.
- [32] The first respondent seeks an interim interdict restraining the applicant and/or second respondent from performing any work or rendering services in relation to the project. This interim interdict is pending the finalisation of proceedings to be instituted by the first respondent within thirty (30) days of the order for the review and setting aside of the appointment of the applicant in terms of the consulting engineering agreement.

Preliminary

issues:

[33] Two (2) preliminary issues were raised in this matter, namely lack of urgency and condonation for the late filing of the replying affidavit.

Urgency and condonation for the late filing of the replying affidavit:

[34] I have dealt with the principles on urgency in the preceding paragraphs. These are equally applicable to this counter-application. Perhaps I need to reiterate that a person approaching the court on an urgent basis must set out the circumstances justifying the hearing on an urgent basis and that he will suffer an injustice if the matter is heard at a later stage. The first respondent does not set reasons why this application must be heard on an urgent basis. The only reason that stands out is that it must be heard because the applicant has launched an urgent application against it. That is not good enough. These two (2) applications are premised on two (2) different causes of action and are distinctly different from each other.

[35] Even if I am wrong on this aspect, the facts on the version of the Municipal Manager do not support any submission for urgency. It would appear that shortly after his appointment in October 2020, it occurred to him that something was amiss with the written agreement. This led to a purported cancellation letter dated 28 October 2020. After the intervention of the attorneys for the applicant he went to ground only to surface months later. It can be safely accepted that as far as that date, the circumstances to sustain a review application were already in existence. The first respondent did nothing for a prolonged period of time. More than five

(5) months to be exact elapsed before any proceedings could be instituted. On these facts, any allegation of urgency is ludicrous and a typical example of a self-created urgency.

[36] There is one slight issue that does not sit well with me and that is service of the conditional counter-application on the second respondent. I am not convinced that proper service was effected and as such the second respondent who would naturally be adversely affected by any order made is not properly before court. On these two (2) grounds, I would strike the conditional

counter-application off the roll.

[37] I alluded to the prayer for condonation regarding the late filing of the replying affidavit. It will serve no purpose to express an opinion on this issue in the light of the order I intend to make.

Costs:

[38] There exists no reason(s) why a usual costs order that the losing party must bear the costs should not be made. The costs must follow the result.

Order:

[39] Accordingly I make the following order: -

39.1. The applicant's non-compliance with the Uniform Rules of Court is condoned and this application is heard on an urgent basis in terms of Uniform Rule 6 (12).

39.2. It is ordered and directed that the first respondent is interdicted and restrained from implementing and/or giving effect to, in any manner and/or respect whatsoever, the appointment by the first respondent of the second respondent and which appointment was to monitor, report on and supervise the pressure testing of the first respondent's Bulk Water Scheme Project under reference numbers NKT135/2015 and NKT106/2013; and

39.3. It is ordered and directed that all monitoring and reporting and supervision of pressure testing related to the first respondent's Bulk Water Scheme Project is to be performed by the applicant in accordance with its current scope of works as contained in the Consulting Engineering Agreement concluded between the applicant and the first respondent.

39.4. It is ordered and directed that the first respondent must furnish the applicant with the written reasons for the first respondent's decision to appoint the second respondent as the consultant engineer to monitor, report on and supervise the pressure testing of the first respondent's Bulk Water Scheme Project under reference numbers NKT135/2015 and NKT106/2013 ("the Impugned Decision") within 10 days of this Court Order as contemplated in terms of the provisions of section 5 as read with section 9 of the Promotion of Administrative Justice Act, No. 3 of 2000.

39.5. It is ordered and directed that the aforesaid written reasons must include the written reports of the first respondent's bid evaluation committee and bid adjudication committee, if any ("the

Record of Decision").

39.6. It is ordered and directed that the relief sought in terms of paragraphs 39.2 above will have immediate effect and will operate as an interim interdict pending: -

39.6.1. The final determination of either the institution of an arbitration or action proceedings by the applicant within 30 days of receipt of the Record of Decision in respect of all disputes arising from the Consulting Engineering Agreement concluded between the applicant and the first respondent in respect of the dispute resolution proceedings contained in clause 8 of the aforesaid agreement; and/or

39.6.2. The final determination of review proceedings to be instituted by the applicant within 30 days of the receipt of the Record of Decision to review and set aside (i) the Impugned Decision, and (ii) any agreements concluded between the first respondent and second respondent in respect of the Impugned Decision.

39.7. It is ordered and directed that the relief sought in terms of paragraphs 39.2 above will lapse in the event of the applicant failing to institute the proceedings set out in paragraph 39.6 above.

39.8. It is ordered and directed that the first respondent must pay the costs of this urgent application.

39.9. The conditional counter-application is struck off the roll with costs.

-- _____

M.A. MATHEBULA, J

On behalf of applicant: Adv.

W Pocock

Instructed by: Tiefenthaler

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On behalf of first respondent: Adv. JMC Johnson

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[1] Diba v Minister: Department of Justice and Constitutional Development and Others (2010) 31 ILJ 112 (LC).

[2] Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another 1973 (3) SA 685 (A) at 691C-F.

[3]

[1998] ZASCA 79; 1999

(1) SA 217 (SCA) at 228G-H.

[4] Ex parte President of the Republic of South Africa and Others [2000] ZACC 1; 2000 (2) SA 674 (CC) at para 85.

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