

SOUTH AFRICA / JUDGMENT

Ukweza Holdings (Pty) Ltd v MEC for Health: North-west Province (2679/2008) [2009] ZANWHC 1 (15 January 2009)

[2009] ZANWHC 1

COURT

North West High Court, Mafikeng

BEFORE

Landman

CASE / FILE NUMBER

2679/2008

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IN

THE HIGH COURT OF SOUTH AFRICA BOPHUTHATSWANA PROVINCIAL DIVISION
CASE

NO.: 2679/2008

Held

at MMABATHO

In

the matter between:

UKWEZA
HOLDINGS (PTY) LTD APPLICANT
and
THE
MEC FOR HEALTH: NORTH WEST PROVINCE 1ST
RESPONDENT
THE
MINISTER OF HEALTH 2nd
RESPONDENT
DATE
OF HEARING 12 DECEMBER 2008
DATE
OF JUDGMENT 15 JANUARY 2009
FOR
THE APPLICANT ADV U LENNARD
FOR
THE RESPONDENT ADV P KHOZA

JUDGMENT

LANDMAN J:

Introduction

[1] Kuweza Holdings (Pty) Ltd, previously called Unique Capeline Services (Pty) Ltd, the applicant, served an urgent application on the MEC for Health: North West Province and the Minister of Health, the respondents, seeking to review and set aside the decision of the first, alternatively, the first respondent sanctioned by the second respondent, taken on 9 September 2008 that it was unable to grant the applicant a price increase "at this moment". The second respondent abides by any order which this court may make. [2] The applicant won a tender and was awarded a contract to supply catering services to a number of hospitals in the North West

Province. Clause 6.1.7 of the service level agreement provides that all bid prices would be fixed for a period of twelve months and that price adjustments may be negotiated twelve months after the commencement date of the contract. See also clause 6.2 of the general conditions of contract. [3] The applicant sought a price increase after the first period of 12 months expired. After some considerable delay a price increase was granted with effect from 1 April 2007. [4] A second period of 12 months expired on 11 August 2008 and again the applicant sought a price adjustment. It did this by making a fully motivated proposal to the Department of Health. [5] The applicant's proposal elicited the reply that the matter had been considered and that the "Department is unable to grant you the price increase at this moment". [6] The applicant sought to invoke the mediation provisions of the service level agreement. On 14 October the first respondent's legal services advised the applicant that "the price increase therefore stands, subject to the price reviews that the Department may embark on." [7] This application was launched on 31 October. On 11 December, the day before the hearing, the applicant received a letter, dated 10 December, that "Based on the September 2008 CPIX figure, the Department has decided to award your company a price increase of 13% with effect from 01st September 2008." [8] In the light of the letter, Ms Lennard, who appeared for the applicant, now seeks an order reviewing and setting aside the first

respondent's initial administrative decision not to grant the applicant a price increase, and substituting the decision with an order that the applicant be afforded a price increase of 13.9% with effect from 1 September 2008. Ms Khoza, who appeared for the first respondent, objected to the handing up of the letter and says that it would want to explain

matters e.g. the reference to 13.0%. Prima facie the CPIX for September is fixed at 13.9%. [9] The first respondent's defence, during the hearing, was that the matter was not urgent. But it was submitted that I should not strike the application from the roll. I should dismiss it. I am unable to agree to the applicant's request to grant it the relief which it now claims. The reason is a simple one. The Department is not entitled to unilaterally fix a price increase. It must enter into

negotiations with the applicant at the end of each 12 month period. This obligation envisages offer and counter offer. The negotiations must be bona fide. What has happened to date is that the applicant made an offer. The first respondent has belatedly made a counter offer, which it seems to think, is the end of the negotiations. But if the applicant is not satisfied with this offer it may make its own counter offer and, if a stalemate is arrived at, invoke the mediation process agreed upon in the contract. It is not for this court to make a bargain for one party to the contract. It is unnecessary to review the refusal to enter negotiations "for the moment". The Department has itself revoked this act. Should the applicant wish to apply for further relief there is nothing which prevents it from doing so. In my view the applicant is entitled to a cost order but a limited order for costs, because: (a) The first respondent is correct in submitting that the applicant's papers do not deal thoroughly with the grounds for urgency. However, in view of the increase in prices of food and that the purpose of the contract is to provide for patients in public hospitals and that applicant must bear the costs of this increase until a settlement is negotiated, it is clear that there is some urgency. Insufficient time was given to the first respondent to respond to the application. (b) On 7 November the first respondent agreed to file an answering affidavit by 28 November and the agreement was made an order of court. However the answering affidavit was only filed on 5 December

2008. No application for condonation has been filed and no explanation has been proffered. The first respondent's version is not properly before me. A party may not blithely ignore a court order even if the order is predicated upon an agreement by the parties. The first respondent makes some serious allegations concerning the ethics of the applicant without justifying them on its papers. This is not an answer for its failure to negotiate with the applicant. The first respondent also says that it had to wait for all its services providers before it could decide on a price increase. This reason was eventually set out in correspondence. But it is not an answer because the contract between the Department and applicant does not envisage that its negotiations must be held with or delayed by negotiations with other parties. Of course it is a prudent thing to do. But then it should be a term of the tender and the contract.

Without entering into litigation it is unlikely that the first respondent would have done what it was obliged to do, namely to enter into bona fide negotiations to decide on a price adjustment, if any, as contemplated by the service level agreement. [13] In the result the first respondent is ordered to pay the applicant's costs save for the costs incurred on 7 November 2008. AA
LANDMAN JUDGE OF THE HIGH COURT ATTORNEYS: FOR THE APPLICANT SMIT & STANTON
FOR THE RESPONDENT STATE ATTORNEY

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- [2] The applicant won a tender and was awarded a contract to supply catering services to a number of hospitals in the North West Province. Clause 6.1.7 of the service level agreement provides that all bid prices would be fixed for a period of twelve months and that price adjustments may be negotiated twelve months after the commencement date of the contract. See also clause 6.2 of the general conditions of contract.
- [3] The applicant sought a price increase after the first period of 12 months expired. After some considerable delay a price increase was granted with effect from 1 April 2007.
- [4] A second period of 12 months expired on 11 August 2008 and again the applicant sought a price adjustment. It did this by making a fully motivated proposal to the Department of Health.
- [5] The applicant's proposal elicited the reply that the matter had been considered and that the "Department is unable to grant you the price increase at this moment".
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It is unnecessary to review the refusal to enter negotiations "for the moment". The Department has itself revoked this act. Should the applicant wish to apply for further relief there is nothing which prevents it from doing so.

In my view the applicant is entitled to a cost order but a limited order for costs, because:

- (a) The first respondent is correct in submitting that the applicant's papers do not deal thoroughly with the grounds for urgency. However, in view of the increase in prices of food and that the purpose of the contract is to provide for patients in public hospitals and that applicant must bear the costs of this increase until a settlement is negotiated, it is clear that there is some urgency. Insufficient time was given to the first respondent to respond to the application.
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2008. No application for condonation has been filed and no explanation has been proffered. The first respondent's version is not properly before me. A party may not blithely ignore a court order even if the order is predicated upon an agreement by the parties.

The first respondent makes some serious allegations concerning the ethics of the applicant without justifying them on its papers. This is not an answer for its failure to negotiate with the applicant. The first respondent also says that it had to wait for all its services providers before it could decide on a price increase. This reason was eventually set out in correspondence. But it is not an answer because the contract between the Department and applicant does not envisage that its negotiations must be held with or delayed by negotiations with other parties. Of course it is a prudent thing to do. But then it should be a term of the tender and the contract.

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JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE APPLICANT SMIT & STANTON

FOR THE RESPONDENT STATE ATTORNEY

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