



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number 616/2023

In the matter of:

MOHOKARE LOCAL MUNICIPALITY

APPLICANT

And

CENTLEC (SOC) LIMITED

RESPONDENT

CORAM: NAIDOO, J

HEARD ON: 9 MARCH 2023

DELIVERED ON: 25 MAY 2023

JUDGMENT

[1] This application came before this court as an urgent application and the order was granted on an urgent basis on 27 February 2023, in the following terms:

“1 the applicant’s non-compliance with the Uniform Rules of Court in relation to time periods, form and service is condoned and the

application is heard as an urgent ex parte application in terms of Rule 6(12)

- 2 A rule nisi is issued, returnable on Thursday 9 March 2023 at 9h30, or such time as the court deems meet in terms of which respondents (sic) are called upon to give reasons why the following orders should not be made:

- 2.1 The Respondent is ordered to forthwith comply with its obligations in terms of the Service Level Agreement concluded between the Applicant and respondent on 14 November 2007 at Zastron [“the Service Level Agreement”], including the following, without derogating from the generality of the order:

- 2.1.1 To deploy technicians/consultants in the municipal area to render the services in accordance with the terms and conditions of the SLA;

- 2.1.2 To register complaints or queries emanating from the Mohokare Local Municipality or members of its community at the Respondent’s call centre and to issue instructions, without delay, to its technicians/consultants to render the services required to resolve the complaint/query;

- 2.1.3 To render the services as contracted for in the Service Level Agreement on the standard as provided for in the Service Level Agreement;

- 2.2 Save in the event of a cancellation in terms of clause 8 and 21 and subject thereto that the Respondent complies with the requirements for cancellation in terms of the aforesaid clauses, the Respondent is interdicted and restrained from giving notice of cancellation of the Service Level Agreement or purporting to cancel the Service level Agreement without duly complying with the dispute resolution provisions stipulated in the Service Level Agreement and thereafter duly complying with the requirements for cancellation on the service level agreement.

3. The relief in prayer 2 above shall operate as an interim interdict with immediate effect, pending the finalisation of this application,
4. The respondent pays the costs of the rule nisi proceedings and/or the application in the event of opposition.”

[2] The applicant, Mohokare Local Municipality (Mohokare) and the respondent, Centlec Soc Ltd (Centlec) entered into a Service Level Agreement (SLA) on 14 November 2007 for the provision, *inter alia*, of the supply of electricity to the municipal area of Mohokare. Prior to this, the provision of the electricity supply to Mohokare was serviced by the Mangaung Local Municipality (Mangaung), through its electricity department known as Bloemfontein Electricity, in terms of a Service Delivery Agreement entered into between Mohokare and Mangaung on 27 February 2002.

[3] In 2002, Mangaung established Centlec, a company wholly owned by Mangaung, whose main object was the generation, distribution and supply of electricity. On 15 March 2004, Mangaung entered into a sale of business agreement with Centlec, in terms of which, Mangaung sold the business of the supply of electricity to Centlec, including its total electricity and distribution network in the area, for which it held a distribution licence issued by the National Electricity Regulator of South Africa (NERSA). The distribution licence included areas falling within the jurisdiction of Mangaung and Mohokare. NERSA transferred to and re-issued the distribution licence in the name of Centlec, and the latter has since continued to carry out Mangaung’s obligations to supply electricity within Mangaung area as well as to Mohokare’s municipal area.

[4] The SLA makes specific provisions for termination of the SLA as well as for dispute resolution, specifying the procedure to be adopted, in respect of each. It is not in dispute that Mangaung and thereafter, Centlec have been supplying electricity to Mohokare’s municipal area for over 20 years. This matter has its genesis in events that arose on 31 January 2023. The areas of Rouxville, Zastron and Smithfield experienced heavy rainfall and thunderstorms, resulting in an electrical outage in the water treatment works supplying Uitkoms and Rouxville. Both areas were, consequently without electricity and water. Two calls were logged by Mohokare’s officials to

Centlec's call centre, but the problem was not attended to on that day or during the following day, 1 February 2023, resulting in a further call being logged to Centlec's call centre at 16h00 on 1 February 2023.

- [5] The official, Mr Thejane, was advised by a call centre agent that she received instructions not to assist with any problems or reports from Mohokare and that any complaints were to be referred directly to the municipality. Mr Thejane made further enquiries about the availability of Centlec technicians in the Zastron area and found that they were no longer residing there. Mohokare was unaware of when they left. He then contacted one of the Centlec technicians, who advised him that he had received instructions from Centlec not to assist Mohokare with any electricity enquiries or issues. Mohokare was obliged to engage an outside contractor in order to undertake the repairs that were needed at the time.
- [6] Mohokare then wrote a letter to Centlec, on 1 February 2023, pointing out that they are in breach of the SLA by not performing in terms thereof and calling upon Centlec to rectify this breach, failing which, Mohokare will obtain a court order. Centlec's response, on 2 February 2023, was to point out a media statement made by Mohokare three months earlier in November 2022 that there was no valid Service Delivery Agreement between it and Centlec, and that the original agreement which was signed in 2007 was never revised. Centlec proceeded to refer to a letter it had addressed to Mohokare in October 2022, in respect of monies owed by Mohokare to Centlec, to which it never received a response. It also referred to the monthly expenditure it incurs to assist Mohokare, which is also owed to it by the latter. In response to Mohokare's complaint that the Centlec technicians have left the area, in breach of the SLA, Centlec alleged that it still has *"some resources in Mohokare to assist as and when required"*. Centlec's letter ended with the assertion that it expects outstanding payments from Mohokare within fourteen days from the date of receipt of that letter. Mohokare alleges that it viewed this response by Centlec as a repudiation of the SLA
- [7] On 5 February 2023, in order to resolve the matter and avoid incurring legal costs, a meeting was arranged with Centlec and various roleplayers from the relevant municipalities and provincial government officials. The Mayor of

Mohokare and the deponent to the Founding Affidavit, being the Municipal Manager of Mohokare and the Chief Executive Officer of Centlec were also present. Mohokare alleges that Centlec demanded payment of grant monies allocated by the national government for electricity projects. Mohokare claims that it only authorises payments, in accordance with work done. The monies are paid to another District Municipality, which, in turn, pays to Centlec.

[8] It is not clear if the issues were resolved, but Mohokare alleges that such is not relevant for this application, as it requires Centlec to comply with the SLA. The contents of Annexure E, being the letter that Centlec wrote on 2 February 2023, which included the issue of monies owed, is a matter for another forum to decide. Mohokare alleges that Centlec cannot simply cease to provide services it contracted to provide, without following the procedures set out in the SLA. There are still no technicians in the area to perform the services in accordance with the SLA, Centlec has neither cancelled nor declared a dispute, as required by the SLA.

[9] Centlec alleges that it has not cancelled the SLA and it has always been complying with the SLA, in that it has continued to provide electricity as well as electricity maintenance services, via its technicians who are stationed in the Mohokare municipal area. Centlec set out extensive details of the monies it claims that Mohokare owes to it. Centlec appeared to agree with Mohokare that the SLA is still in force and by implication, that both parties are bound by the provisions thereof. Centlec raised, in its Answering Affidavit, the challenge that the relief claimed by Mohokare is incompetent because they seek specific performance, without tendering performance on their part in terms of the SLA. With regard to prayer 2.2, Centlec alleges that clauses 8 and 21 of the SLA regulate termination of the SLA, and that clause 27, which provides for dispute resolution, does not find application where a party elects to cancel or terminate the SLA. I pause to mention that this prompted Mohokare to amend prayer 2.2, to include, at the beginning of the prayer, the proviso that save in the event that Centlec cancels the SLA and complies with the requirements for cancellation, it would be restrained from giving notice of cancellation of the SLA, without complying with the dispute resolution provisions of the SLA.

- [10] Centlec also raised certain preliminary points, being the lack of authority of Mr Molatelo Johannes Kanwendo, the deponent to the Founding Affidavit and the lack of urgency. I note that the matter was set for hearing on 23 February 2023, but Centlec complained that the Replying Affidavit was filed late and that it needed time to consider the Replying Affidavit. Centlec also sought leave to file a further affidavit, which was granted, after the application was opposed by Mohokare and the matter was argued. Heads of Argument were filed by both parties and the matter was heard on 27 February 2023, and the order I referred to earlier was granted. Centlec filed Supplementary Heads of Argument on 8 March 2023, the day before the hearing in this court on 9 March 2023. This court's function is to decide whether the *rule nisi* granted on 27 February 2023 should be confirmed.
- [11] The court on, 27 February 2023, clearly considered the case put forward by each party, including the various challenges raised by Centlec against the case of Mohokare, and granted the order accordingly. In argument before me, Mohokare argued that Centlec withheld its services and withdrew its technicians from the area, without warning and following a demand for payment of monies it says were owed to it. Mohokare argues that this is contrary to the SLA, as Centlec is aware that it (Mohokare) does not have the capability to undertake electricity generation or maintenance of the network. It alleges further that Centlec repudiated the contract, without following the procedure provided for in the SLA. In this regard, Mohokare relies on exhibit E attached to the Founding Affidavit, being a letter from Centlec dated 2 February 2023, in response to Mohokare's letter dated 1 February 2023, which I have referred to above.
- [12] Mohokare pointed out that Centlec's version as appears from the Answering Affidavit, changed somewhat in the Further Affidavit that it filed. This relates, *inter alia*, to the number of technicians that were in the area and the withdrawal of some of them, the assertion that its technician undertook the repairs to the water treatment works, the denial of the meeting on 5 February 2023 and the denial that the District Municipality is tasked with paying to Centlec monies in respect of project grants. Mohokare also denied that Centlec is entitled to rely on the principle *exceptio non adimpleti contractus* (the adimpleti principle). Mohokare persists in its prayer for the confirmation of the *rule nisi*.

- [13] Centlec argued that Mohokare seeks specific performance, without tendering its own compliance with the provisions of the SLA and that is impermissible. Therefore, it is entitled to rely on the *adimpleti* principle, namely that he does not have to perform in terms of the agreement if there is no corresponding performance or tender of performance from the other party. Mr Thompson argued that Centlec has established that Mohokare owes it large amounts of money and has not denied owing it money. Therefore, Mohokare has failed to establish its case, and Centlec seeks the dismissal of the *rule nisi*, with costs.
- [14] As I indicated, this court's function is to decide if the *rule nisi* should be confirmed. It usually allows the respondent to present evidence or give an explanation that would persuade the court that the *rule* should be discharged. The challenges and preliminary issues raised in the Answering Affidavit would have been dealt with by the court on 27 February 2023, leading to the grant of the *rule nisi* on that day. Those issues were not pursued in argument before me, and I accordingly find it unnecessary to deal any further with them. Mr Thompson dealt with the issues of its compliance with the SLA and also pursued the argument that, in the absence of a tender of performance from Mohokare, together with the fact it had established that Mohokare owes it money, it was entitled to invoke the *adimpleti* principle.
- [15] It is common cause that both parties regard the SLA to be still in force and binding upon them, that Centlec has, since the signing of the SLA, been delivering the services in terms of the SLA and that there were monies that were historically due by Mohokare to Centlec, which debt was incurred by the previous management of Mohokare. It is also not in dispute that both Mohokare and Centlec are entities providing public services, and that Mohokare is constitutionally mandated to provide basic services to the members of the public in its jurisdiction. The issues are that Centlec failed to deliver services to Mohokare in terms of the SLA and did not follow the procedures for cancellation of dispute resolution prescribed in the SLA. The further issue is that Mohokare's failure to tender performance, namely the paying of monies owed in terms of the SLA to Centlec, disentitles it to the order it seeks.

- [16] It is perhaps useful to start at the point which gave rise to the dispute between the parties. As I alluded to earlier, due to the floods, the Water Treatment Works which supplies water to Uitskoms and Rouxville needed urgent repair. As was the practice, officials of Mohokare logged calls to Centlec's call centre but were told that the call centre staff were instructed not to assist but to refer such reports or queries directly to the municipality. Upon investigation Mohokare ascertained that Centlec's technicians had left the area. Upon contacting one of them, Mr Els, the latter advised Mohokare that he was instructed by Centlec not to assist Mohokare. This is denied by Centlec who insists that there were two technicians always available to render the required services, namely Mr Andile Fonya and Mr Izak Christiaan Els.
- [17] Confirmatory Affidavits from both these officials were attached to the Answering Affidavit. Centlec denied that an outside contractor undertook the urgent repairs that were needed and insisted that it was in fact Mr Fonya who did the repairs. A spreadsheet reflecting Centlec's call history, which included the dates in question, were also attached to the Answering Affidavit. Mr Fonya alleges in his Confirmatory Affidavit that he attended to a complaint at Zastron On 30 January 2023 with reference number N230130161 and on 31 January 2023, he attended to complaints in Rouxville bearing reference numbers N230131574 and N230131533. He finalised and closed the complaints on those same days.
- [18] Mohokare in its Founding Affidavit, alleged that Mr Raboko, a technician at Mohokare logged a call with Centlec's call centre early in the morning of 31 January 2023 to report the problem at the water treatment works, and was given reference number N230130161. Later that morning, Mr Thejane, who is Mohokare's Technical Services Director, logged a further call with Centlec to report the problem and was furnished with reference number N230131533. By the afternoon of 1 February 2023, the problem was not attended to and Mr Thejane then followed up with a further call to Centlec's call centre and was given the reference number N230131574. It was during this call that he was informed that instructions were given by Centlec that Mohokare should not be assisted. Mr Thejane and Mr Raboko also deposed to Confirmatory Affidavits in this regard.

- [19] The spreadsheet with the call log that I referred to reflects the calls and reference numbers I have alluded to above, but it is not apparent what action was taken and by whom. Mohokare alleges that all three calls related Rouxville, while Mr Fonya alleges that he attended to a complaint in Zastron and two in Rouxville. Centlec provided no evidence, in the form of documentation in this regard, while it criticised Mohokare is criticised for only attaching a quotation and authority to perform the work in respect of the outside contractor who had to be engaged urgently. Furthermore, no explanations were furnished on how to read the information contained in the call log to enable a better understanding thereof.
- [20] In the Answering Affidavit, Centlec admits that there were six technicians stationed in Mohokare's municipal area, but in the Further Affidavit it alleges that there were two and it recalled other technicians for operational reasons. Mohokare further alleged, and this does not appear to be in dispute, that Mr Fonya was forcefully detained by the community to prevent him leaving. They removed the keys of his vehicle and handed it to the police station for safekeeping.
- [21] These explanations by Centlec and the stance it adopted appears to me to be an attempt to substantiate its assertion that it had continued to render services in terms of the SLA. It is not clear whether the technicians did in fact render any services, and in addition it appears that two technicians would not have been able to render a full and proper service as required by the SLA , for the entire Mohokare municipal area.
- [22] Another aspect which raises questions is Centlec's outright denial, in its Answering Affidavit, that a meeting was held on 5 February 2023, as outlined by Mohokare, but seems to have had a change of mind in the Further Affidavit, in which it alleges that a meeting (an ANC Legotla) was held on that day, and the meeting referred to by Mohokare was incidental to that "legotla", hence it did not consider it a proper meeting. No attempt was made in the Answering Affidavit to tender this explanation. Similarly it is strange that Centlec would not be aware that the District Municipality was making payments of grant funding to it (Centlec). It begs the question whether it queried why those payments were made to it, if it was unaware of the

arrangement between the Department of Minerals and Energy, Mohokare and Xhariep District Municipality.

- [23] It would appear that Mohokare did not have much choice but to approach the court for urgent relief, directing Centlec to comply with its obligations in terms of the SLA. This is particularly so as approximately Ten Thousand Two Hundred and Fifty (10 250) residents within Mohokare's jurisdiction were without the basic amenities of water and electricity, obliging Mohokare to go beyond the SLA and appoint an outside contractor to restore these amenities. When it found that the attitude of Centlec at the meeting of 5 February 2023 was still unrelenting, it launched this application.
- [24] The purpose of the *rule nisi* was to obtain interim relief in order to protect the interests of the public affected by the conduct of Centlec and give the latter an opportunity to explain and give reasons to assist the court in deciding whether the *rule* should be confirmed. The filing of the Further Affidavit gave no new insights to persuade the court not to confirm the *rule*. Centlec raised issues which would more appropriately be heard in another forum after proper process in terms of the SLA is followed. Centlec, in fact, agreed with this assertion made by Mohokare in its Founding Affidavit. I, therefore, do not deem it necessary to deal at any length with the issues raised by Centlec. On its version it has continued to provide services in terms of the SLA. What is apparent is that Centlec is determined to recover monies due to it by Mohokare, and understandably so. Mohokare must also perform in terms of the SLA, as Centlec appears to be owed large sums of money. However, the court is very mindful of the interests of the people resident within the Mohokare municipal area, and must safeguard those interests, lest those residents become entangled in legal battles, not of their own making, and suffer the lack of basic amenities while those disputes are being resolved.
- [25] Both parties should be mindful that they need to act within the provisions of the SLA. Confirmation of the *rule nisi*, will cause no prejudice to Centlec, who alleges that it has always provided the required services. The interests of the public will be protected and Centlec will still be able to proceed for the recovery of the monies it alleges are due to it, after due process is followed. Both parties addressed me on costs, correctly pointing out that the award of costs is in the discretion of the court. Mohokare proposed that each party be

ordered to pay its own costs, while Centlec sought an order for costs on the attorney and client scale.

[26] An award on the punitive scale as sought by Centlec would normally be made to show the court's displeasure at the behaviour of a particular litigant. In this matter. Both parties were eminently aware of their obligations in terms of the SLA and, more importantly, to serve the public interest. It is the public purse that is implicated in these proceedings, and the court is very mindful of that. Entities, such as the parties in this matter, ought to make a greater effort to resolve issues in accordance with the instruments that bind them, and be very slow to fight their battles in court, at the expense of the public. The costs order that I will make will attempt to be fair to both sides. The court had previously ordered the respondent to pay the costs of the application to file a Further Affidavit. The costs of the application for 23 February 2023 stood over. In my view, the applicant's failure to file the Replying Affidavit timeously occasioned the postponement on that day, and there is no reason why it should not pay those costs

[27] In the circumstances I make the following order:

27.1 The *Rule Nisi* is confirmed;

27.2 The applicant is directed to pay the costs of 23 February 2023

26.3 Each party is directed to pay its own costs of the application

S NAIDOO J

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