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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

CASE No.: **6311/2023**

In the matter between:

CALVIN AND FAMILY SECURITY SERVICES	Applicant
and	
CENTLEC (SOC) LTD	Respondent

JUDGMENT BY: VAN RHYN, J

HEARD ON: 28 NOVEMBER 2023

DELIVERED ON: 30 NOVEMBER 2023

[1] This is an urgent application issued on 21 November 2023 in terms where of the applicant seeks the following relief:

> "1. That the applicant's non-compliance with the Uniform Rules of Court is condoned and the matter is heard on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court;
>
> 2 The intended termination of contract between the parties as of 30 November 2023 by the respondent be interdicted pending the referral of the parties dispute to arbitration and proper ventilation of the matter by an independent arbitrator.

3. The terms of the Service Level Agreement between the parties are enforced.

4. The respondent pay the costs of this application on an attorney and its client scale."

[2] The applicant is cited as "Calvin and Family Security Services, a private company" represented by Calvin Mojalefa Mathibeli, the Chief Executive Officer of the applicant. The applicant has its registered address at Bloemfontein, Free State Province. The respondent is Centlec (SOC) Ltd, a state owned company as contemplated in section 8(2)(a) of the Companies Act[1] having its registered address at Bloemfontein, Free State Province.

[3] The application was served upon the respondent, presumably per email on 21 November 2023.The respondent had to notify the applicant's attorneys of record on 22 November 2023 of its intention to oppose the application and to file an answering affidavit on 24 November 2023 at 9am, effectively giving the respondent two days to answer to the relief sought. On 27 November 2023 the applicant filed its replying affidavit.

[4] The matter was enrolled for hearing for Tuesday, 28 November 2023. These truncated time periods were provided on the ground that during October 2023 the applicant received a termination note, dated 27 September 2023, that the Service Level Agreement ("SLA") concluded between the parties would terminate on 30 November 2023 due to the budgeted project amount being depleted.

[5] The respondent disputed the urgency of the matter and prayed that the applicant's application be struck from the roll for lack of urgency with an appropriate cost order. To

[1] Act 71 or 2008.

consider the urgency of this matter, the factual background circumstances should be considered.

[6] The applicant was appointed to provide security services for the respondent pursuant to a tender process. The tender process was initiated by a court order subsequent an urgent review application seeking the setting aside of a previous award on tender. The respondent had 14 days to publically invite competitive bids. In terms of clause 31 of its Supply Chain Management Policy, the procedure may only be used for transactions that are for a value less than R 10,000,000.00 (VAT inclusive) ("R10 million").

[7] On 23 May 2022 the deponent to the respondent's answering affidavit, Malefane Sekoboto, the chief executive officer of the respondent, issued a letter of appointment with the reference number CD37/2021(Re-advert) to the applicant. The letter served as confirmation that the applicant was appointed as a service provider for security services (guarding, access control, armed reaction/response) including supply, delivery, installation, commissioning and maintenance of security equipment to the respondent for a period of 36 months.

[8] The appointment was made subject to the successful conclusion of a detailed contract between the applicant and the respondent under the conditions set out in the letter of appointment which, *inter alia*, included the following:

> "3. The appointment shall be for thirty-six (36) months from signing of the contract.
>
> 5. The total amount of the contract should not exceed the amount of R10 000,000.00 (ten million rand) for the completed period of thirty-six (36) months."

[9] The SLA was concluded on 19 July 2022. The 23rd of May 2022 was, notwithstanding the signature date, regarded as the commencement date of the agreement. On 27 September 2023, the acting chief financial officer of the respondent issued a

termination note, per email to the applicant at c[...]@calvinfamily.co.za, informing the applicant that the SLA will be terminated effectively on the 30th of November 2023 due to the budget of R10 million being depleted prior to the aforesaid period of 36 months.

[10] Subsequent to receiving the termination note, the applicant addressed a letter, dated 31 October 2023, to the respondent indicating that the applicant does not accept the unlawful termination of the SLA. It relied on the fact that the SLA did not contain the budgetary limitation clause mentioned in the termination notice.

[11] On 3 November 2023 the respondent replied and affirmed the validity and enforceability of the termination note issued to the applicant on 27 September 2023 on the basis that prior to entering into the SLA the applicant had been informed that the budget allocated for the contract amounts to R10 million for the entire 36 months. The applicant was directed to the Termination Clause (clause 14) and the Dispute Resolution Clause (clause 19.3) and furthermore relied upon the strict compliance with the contractual stipulation of the 60-day termination period.

[12] In paragraph 9 of the letter the respondent was notified that, subsequent to 30 November 2023, the applicant will not be entitled to any compensation for any services rendered and the presence of the applicant at the premises of the respondent will be considered as trespassing.

[13] On 8 November 2023 the applicant's attorneys of record responded to the reply received from the respondent and indicated that the letter serves as a written notice in terms of clause 19.2 of the SLA that a dispute regarding the lawfulness of the notice of termination exists and requesting the respondent to agree to a mediation process to be initiated. The respondent was requested to give an undertaking that the termination will be put on hold pending the finalization of the mediation and/or arbitration process, should mediation fail. The undertaking had to be made by Friday, 10 November 2023

at 11h00, failing which the applicant intended to approach the court on an urgent basis to stop the termination.

[14] On 14 November 2023 the parties held a mediation meeting, however no solution was reached. On 15 November 2023 the applicant informed the respondent that they are referring the dispute to arbitration in terms of the SLA and proposed an arbitrator. The application was then issued on 21 November 2023.

[15] On behalf of the respondent Mr Molotsi SC argued that the applicant provided particularly unreasonable time periods having regard to the history of the matter and the fact that the application was brought as one of extreme urgency. The applicant failed to indicate in its founding affidavit when the termination notice was received and merely mentioned, “during October”. The initiation of dispute resolution proceedings is not a pre-condition for the launching of the application for the relief sought by the applicant with the result that the application could have been issued prior to 8 November 2023 or even subsequent to the mediation process failing on 14 November 2023. Accordingly, the urgency in the matter, if any, is self- created.

[16] Only in its replying affidavit did the applicant address the time period that lapsed since it received the termination notice dated 27 September 2023. According to the applicant the notice was not seen until 31 October 2023 when Mr Mathibeli, the deponent, opened his, so called, “spam” emails. The termination notice was not sent to the project manager with the result that it remained unnoticed until 31 October 2023. It is denied that the applicant is bound by what is stated in the appointment letter on the basis that it is not a reflection of the terms agreed upon by the parties.

[17] In its reply the applicant furthermore relies upon an email supposedly received during the past week that the respondent has sought the advice of National Treasury regarding the termination of the SLA. The applicant appended a copy of an email

purportedly received from National Treasury indicating that the term regarding the total amount of the contract not exceed R10 million, was not included in the SLA.

[18] The first issue to consider is whether the applicant has made a case for urgency, failing which the matter may be struck off the roll. If the applicant was successful in showing urgency, the issue would be whether the termination of the SLA was justified. In dealing with the requirements of Rule 6 (12) the court in **East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others**,[2] held that:

> "[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An Applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the Court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress."

[19] The High Courts would be unable to function efficiently if the normal roll is continually interrupted by urgent applications being brought by litigants in matters, such as the matter at hand, which has been enrolled for hearing on such short notice. What is common cause is the fact that the applicant's SLA with the respondent was terminated in a letter dated 27 September 2023, sent per email to one of the addresses provided for notices in terms of clause 21.11.2 of the SLA. The reason for the termination of the SLA is due to the budgeted project amount being depleted.

[20] On 31 October 2023, approximately a month later the applicant addressed a letter to the respondent claiming that the termination is unlawful and that it never bound itself to limit its fees to below R10 million. From 31 October 2023 to 21 November 2023, when the application was issued, correspondence was exchanged between the

[2] (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

parties. The application was enrolled on the urgent roll for hearing on 28 November 2023.

[21] The interdict sought by the applicant is linked to the finalisation of the purported arbitration proceedings. In terms of clause 19.6 of the SLA the referral to arbitration must be made within 10 business days after mediation. This did not occur.

[22] Having regard to the contentions of the respondent, the outcome of the mediation process and the inability to agree on the way forward, I would have expected the applicant to make haste to launch their dispute with an arbitrator as soon as possible. However, this has not happened. Since the applicant took notice of the termination letter dated 27 September 2023, whenever that may be, it has not yet launched the arbitration proceedings which will inevitable prolong the continuation of the SLA in the event of the application being successful. The respondent argued that the arbitration process, having regard to the fact that the yearend holiday season is pending, will only be finalized in 3 to 4 months.

[23] The grounds for the termination of the SLA are that the tender was submitted for an amount of R10 million and the total contract value in the said amount is for the period of 36 months, which amount will be depleted by 30 November 2023. The respondent contends that it was entitled to cancel the SLA due to the budget allocated to this project being depleted prior to the lapse of the period anticipated, namely 36 months. With reference to sections (4(1)(d), (4(2)(a), 95(d), 99(1) and 100(a) of the Municipal Finance Management Act[3] (the “MFMA”) it is contended that the provisions of the MFMA requires of the respondent to take action and to prevent fruitless and wasteful expenditure as well as unauthorised expenditure.

[24] The MFMA was enacted to secure sound and sustainable management of financial affairs of municipalities and other institutions in the local sphere of government to

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[3] Act 56 of 2003.

ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively. It would therefore be unlawful for the respondent to make any further payments to the applicant in respect of the tender awarded to it and the SLA concluded between the parties. The respondent furthermore relied upon the provisions of clause 31 and se 32 its supply Chain Management Policy.

[25] The applicant argued that it will suffer financial harm due to the respondent's failure to comply with the SLA in that it has acquired vehicles and other equipment specifically for the purpose of the SLA. The applicant has incurred debt and financing from financial institutions which it will be unable to repay should the contract be terminated. The applicant furthermore contends that it has no alternative remedy than to seek this urgent interdict. For the applicant to institute proceedings to claim damages in the ordinary course is of no comfort and the intended termination is likely to cause irreparable harm to the applicant.

[26] In respect of these contentions on behalf of the applicant, the respondent argued that there is no irreparable harm to be suffered as the applicant has been paid as per the contract value, namely. R10 million and to proceed with the terms of the SLA, beyond the limit of the contact amount would be unlawful. The applicant has sufficient alternative remedies available in the form of arbitration in terms of the SLA and/or claiming damages, if any, from the respondent.

[27] In clause 3.2 of the SLA, under the heading 'Interpretation" that:

"This agreement shall be interpreted according to the following provisions, unless the context requires otherwise." In clause 3.2.9 the following is recorded in the SLA:

"3.2.9 The Annexures to this Agreement are an integral part of this Agreement and reference to the Agreement shall include the Annexures."

The proposal, tender documents and the declaration for procurement above R10 million are annexures to the SLA. Clearly the applicant's arguments that the contents of the proposal, bidding documents and appointment letter do not from part of the SLA and are not binding upon the applicant, are misplaced.

[28] The application was issued just over a week before the expiry of the termination period. The termination notice was issued on 27 September 2023, two months prior to the hearing of this urgent application. I agree with the submission on behalf of the applicant that this was a deliberate attempt to create urgency. The procedure adopted by the applicant and the time limits imposed upon the respondent are completely unjustified and are not supported by the facts relied upon by the applicant. Whatever urgency exists, if indeed it exists at all, is entirely self- created. The applicant failed to comply with the requirements of an interim interdict in that, to my mind, no prima facie right was established.

[29] Regarding the costs of this application, Mr Molotsi SC argued that the respondent was dragged to court on an extremely urgent basis in an endeavour to prolong its contract with the respondent and in the hope of receiving payments from a contract which has run out of its allocated budget. Therefore, a punitive costs order on the scale between attorney and client is prayed for. I agree with his contention.

[30] **ORDER:**

In the result the following order is issued:

1. The application is dismissed.

2. The applicant shall pay the costs of the application on the scale as between attorney and client.

I VAN RHYN
JUDGE OF THE HIGH COURT,
FREE STATE DIVISION, BLOEMFONTEIN

On behalf of the Applicant:	**ADV. Z BUTHELEZI**
Instructed by:	NW PHALATSI & PARTNERS BLOEMFONTEIN
On behalf of the Respondent:	**ADV. H MOLOTSI SC**
Instructed by:	RAMPAI ATTORNEYS BLOEMFONTEIN