



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Not Reportable

Case No: 8786/2021P

In the matter between:

ETHEKWENI MUNICIPALITY

PLAINTIFF

and

MORAR INCORPORATED

RESPONDENT

ORDER

The following order is granted:

1. The respondent is ordered to deliver to the applicant all time sheets and further documentation explaining and justifying all charges raised by the respondent, all invoices delivered by the respondent to the applicant, and all work product (including reports, memoranda, recommendations and the like) generated and/or delivered to the applicant, pursuant to the following alleged appointments:
 - 1.1 Annexure RM1 to the founding affidavit: 20 March 2018 – letter of engagement: review of supply chain management;
 - 1.2 Annexure RM2 to the founding affidavit: 14 May 2018 – letter of engagement: forensic investigation services;

- 1.3 Annexure RM4 to the founding affidavit: 27 August 2018 – letter of engagement: review of supply chain management;
 - 1.4 Annexure RM6 to the founding affidavit: 6 February 2019 – letter of engagement: appointment of a service provider to provide support to the office of the City Manager in implementing consequence management processes;
 - 1.5 Annexure RM7 to the founding affidavit: 5 July 2019 – letter of engagement: appointment of a service provider to review the current status of enhancement requests for the revenue management system; and
 - 1.6 Annexure RM8 to the founding affidavit: 22 November 20219 – letter of engagement: appointment of a service provider to implement the consequence management (disciplinary process) against various implicated employees/officials of the applicant.
2. The respondent is ordered to pay the costs of this application.
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JUDGMENT

Laing AJ

Introduction

[1] At issue in this application is whether the respondent is obliged to deliver to the applicant, and I quote from the notice of motion:

‘all time sheets and further documentation explaining and justifying all charges raised by it, all invoices delivered by it to eThekwini and all work product (including reports, memoranda, recommendations and the like generated and/or delivered to eThekwini, pursuant to the following alleged appointments’,

as amplified in the notice of motion and referred to in annexures RM1; RM2; RM4; RM6; RM7 and RM8.

Background

[2] It appears that there was a contract in place between the applicant and respondent.

[3] In terms of this contract an amount of more than R36 million was paid by the applicant to the respondent for services allegedly rendered.

[4] As a result of information received, a decision was taken to investigate the appointment of and circumstances surrounding the payments made to the respondent. In this regard Nexus Forensic Services (Nexus), a firm of private investigators was assigned to investigate the contract and the payments made to the respondent.

[5] As a result of this decision, in March 2020, the respondent launched an urgent application in this court under case number 2296/2020P interdicting Nexus and the applicant from pursuing this investigation. This matter is still pending. The applicant subsequently brought the present application during December 2020.

Common cause

[6] It is not disputed by the respondent that the items asked for do in fact exist nor is it disputed that payment was received. It has not put up any defence as to why those items claimed for, which I will out of convenience refer to as 'the documents', should not be handed over. So it is safe to assume that the items do exist and they are in the possession of the respondent.

Issues

[7] All the respondent has indicated in its opposition is that this application is an *abuse* of the process as all affidavits have been filed in case no 2296/2020P and as a result 'there is no obligation on the respondent to furnish documents at this late stage'. I may mention that I was provided with a copy of the file of case no 2296/20 and noticed that the last time there was any movement in that file was in June 2020 when the replying affidavit was filed by the respondent (applicant in case no 2296/20), but this does not mean anything.

[8] It is suggested that because the work was delegated to Nexus, this application by the applicant usurps that authority given to Nexus and under the circumstances is an abuse.

[9] The reply by the applicant is that this appointment of Nexus does not render the applicant sterile to pursue the present application. On the contrary, it suggests that annexure RM 10 on page 49 of the first application, is a letter of appointment, dated 21 February 2020, where the cooperation of the applicant is necessary and not excluded.

[10] Secondly, the other suggestion as to why this is viewed as an abuse by the respondent is because Nexus does not have the authority to investigate the applicant (I assume this is as a result of the interdict brought by the respondent). It is argued that the applicant is thus trying to bring this application through the back door so to speak.

[11] The applicant's response is that the locus of the applicant is not affected by the mandate given to Nexus.

[12] It must in the circumstances be asked whether this application is to achieve an illegitimate purpose as stated in *Beinash v Wixley*:¹

‘There can be no all-encompassing definition of the concept of “abuse of process”. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.’

Although not raised in the papers, the respondent raised the issue of *lis pendens* in their heads of argument. The submission is that the application is linked to the proceedings under case number 2296/2020P. This argument was abandoned by Mr Potgieter SC on the basis that it was not pleaded.

[13] However, the issue of whether these proceedings are an abuse must still be addressed.

[14] South African High Courts possess inherent jurisdiction to prevent abuse of their process by staying proceedings in certain circumstances, but the power to do so will be exercised sparingly and only in exceptional cases.²

[15] This should be done with very great caution, and only in clear cases.³

[16] Proceedings will be stayed when they are vexatious or frivolous or when their continuance, in all the circumstances of the case, is, or may prove to be, an injustice or serious embarrassment to one or other of the parties.⁴

Merits of the application

¹ *Beinash v Wixley* 1997 (3) 721 (SCA) at 734F.

² *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 274; *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 at 518-519; *Hudson v Hudson* 1927 AD 259 at 267.

³ *Fisheries Development Corporation of SA Ltd v Jorgensen and another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and others* 1979 (3) SA 1331 (W) at 1338E-H.

⁴ *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 274.

[17] It is common cause, and it is not disputed, that the applicant paid the respondent in excess of R36 million for services rendered.

[18] It is common cause that the respondent is on the applicant's list of service providers. The issue of whether the services were actually provided is not really an issue at this point, but the applicant has reserved the right to pursue this aspect, I suppose, once its investigation is complete.

[19] On 10 February 2021, the respondent put up what it refers to as a 'conditional answering affidavit' as it reserves the right, so it says, to supplement this affidavit once it is in receipt of the information requested by way of notice in terms of rule 35(12). That notice was served on the applicant on 9 February 2021. This affidavit has not been supplemented since. Furthermore, there is no indication of what has become of that notice. The time for reply has lapsed so it is safe to assume that it has been abandoned. Likewise, it is safe to assume that the respondent effectively closed the door it tried to leave open to supplement its affidavit. The abandonment of the *lis pendens* argument also confirms that.

[20] The respondent does not dispute that it has the documents in its possession, nor does it dispute the applicant's right to them. In effect, the respondent does not have a proper defence on the merits to the applicant's claim and must have submitted the documents in question to substantiate the fees due. If they did not do so, then the question that arises is why were they paid? This is perhaps the reasons for the investigation. There is nothing illegitimate about this application. The applicant is a public body and is responsible to the public. It has an obligation to investigate wasteful and unnecessary expenditure. There is absolutely nothing abusive in the process that has been followed neither is there any suggestion of prejudice to the respondent. The opposition put up by the respondent coupled with the interdict to prevent any investigation is concerning.

[21] When one weighs up the arguments put forward by the respondent against the intentions of the applicant one cannot but help realise that there is more out there than what meets the eye. What immediately comes to mind is that the hands of the respondent do not appear to be clean and perhaps that is what the applicant intends resolving, after all it is in the public interest to do so. This is not to suggest that the hands of those in the employ of the applicant are clean.

[22] The main thrust of the respondent's case is that the applicant has abused the court process. Mr Boulle for the applicant submitted if that is the case, then the respondent should not be relying on the submission that it is an abusive process as they have abandoned the *lis pendens* defence.

[23] This is a separate application to that under case number 2296/2020P, where an interdict was sought.

[24] The intention of the applicant cannot be said to be frivolous nor can it be said to be vexatious.

Order

[25] Under the circumstances, I grant an order in the following terms:

1. The respondent is ordered to deliver to the applicant all time sheets and further documentation explaining and justifying all charges raised by the respondent, all invoices delivered by the respondent to the applicant, and all work product (including reports, memoranda, recommendations and the like) generated and/or delivered to the applicant, pursuant to the following alleged appointments:

- 1.1 Annexure RM1 to the founding affidavit: 20 March 2018 – letter of engagement: review of supply chain management;
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- 1.3 Annexure RM4 to the founding affidavit: 27 August 2018 – letter of engagement: review of supply chain management;
 - 1.4 Annexure RM6 to the founding affidavit: 6 February 2019 – letter of engagement: appointment of a service provider to provide support to the office of the City Manager in implementing consequence management processes;
 - 1.5 Annexure RM7 to the founding affidavit: 5 July 2019 – letter of engagement: appointment of a service provider to review the current status of enhancement requests for the revenue management system; and
 - 1.6 Annexure RM8 to the founding affidavit: 22 November 20219 – letter of engagement: appointment of a service provider to implement the consequence management (disciplinary process) against various implicated employees/officials of the applicant.
2. The respondent is ordered to pay the costs of this application.



LAING AJ

DATE OF HEARING : 28 July 2021
DATE OF JUDGMENT : 24 August 2021
FOR THE APPLICANT : Mr A J Boulle
INSTRUCTED BY: Venns, Durban
Locally represented by:
Venns, Pietermaritzburg
FOR THE RESPONDENT: Mr A E Potgieter SC
INSTRUCTED BY: Schoerie & Sewgoolam Inc
Pietermaritzburg