

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO**

NOT REPORTABLE

Case No: 61/18

In the matter between:

THE OFFICE OF PREMIER EASTERN CAPE

First Applicant

and

**THE DIRECTOR- GENERAL OF THE OFFICE
OF THE PREMIER, EASTERN CAPE PROVINCE**

Second Applicant

**THE SOUTH AFRICAN YOUTH COUNCIL NPO
EASTERN CAPE CHAPTER**

Respondent

JUDGMENT

MFENYANA AJ

[1] The applicants seek cancellation of an agreement concluded between the first applicant and the respondent. The respondent opposes the application. This court is now required to determine whether the applicants are entitled to the relief they seek.

[2] The relevant facts giving rise to the present application can be gleaned from the terms of the service level agreement between the parties, which can be summarised as follows:

(a) The applicant, having established a youth development unit, appointed the respondent to act as the 'implementing agency' (*sic*) for the implementation of the applicant's provincial youth development strategy;

(b) The (respondent) would provide services in accordance with the provisions of the Agreement, the terms of reference including the project plan, with effect from the commencement date, being the 16th of August 2016, notwithstanding the signature date.

(c) The respondent would provide the first applicant with monthly written reports of the activities undertaken by the respondent, and tasks completed in accordance with the work schedule and project plan.

[3] A Project Steering Committee (PSC) comprising of ten members, five from each of the parties was established. Of significance is that Messrs Mleve and Noludwe formed part of the five members of the PSC on the side of the respondent.

[4] In the founding affidavit the applicants state that the object of the agreement was to form a strategic partnership between the parties, in terms of which the respondent would drive the (youth) programme to achieve the outcomes envisaged by the applicants. Key to this, was the socio- economic development of youth in the (Eastern Cape) province.

[5] The applicants contend that the respondent breached the terms of the agreement to the extent that the agreement has been rendered inoperative, thus making the continued implementation of the contract impossible. They list in this

regard, specific deliverables set out in the terms of reference (Annexure A to the agreement), which the respondent was obliged, but failed to comply with, and which include the establishment of a database of unemployed youth, profiling of youth development projects and monthly reporting on the work performed, among others.

[6] I pause at this stage to briefly set out key events relevant to the institution of the current proceedings.

6.1 On 29 January 2018, the applicants instituted the current proceedings.

6.2 On 9 February 2018 a notice of intention to oppose was filed on behalf of the respondent.

6.3 On 18 February 2018 a further notice of intention to oppose the application was filed purportedly also on behalf of the respondent. It later transpired that the two notices of opposition were filed at the behest of Mr Mleve, the then Chairperson of the respondent and Mr Noludwe, the Treasurer respectively. Mr Mleve did not take his opposition any further and thus nothing further need be said about him. The respondent later filed its answering affidavit, deposed to by Noludwe and the matter proceeded on that basis.

[7] On the day of the hearing of this matter, there was no appearance for the respondent. I was advised at the commencement of the proceedings, by Mr Pienaar, counsel for the applicant, that the respondent's attorneys had withdrawn having duly filed notice to that effect. This is further evident from the notice of withdrawal and communication from Notshe Attorneys advising the respondent of their withdrawal as the latter's attorneys of record. I have satisfied myself that the respondent was duly notified of the withdrawal of his attorneys, as well as the date of the hearing of the matter prior to which the respondent was requested to file its heads of argument.

[8] It is imperative to also set out the history of the apparent dispute between Mleve and Noludwe, to the extent that it is relevant to this application.

[9] Subsequent to the conclusion of the agreement, the respondent was dogged with in-fighting which led to a split between its leadership, with Mleve and Noludwe being on opposing sides. It is not necessary for purposes of the present application to delve into the details of the in-fighting at the respondent's quarters, save to state that it is the applicant's case that the in-fighting frustrated the performance of the agreement and has rendered it inoperative in that none of the deliverables in terms of the agreement were fulfilled by the respondent. It would seem that the infighting was fuelled by a leadership contest between the two, with each claiming supremacy over the other. This adversely affected the relationship between the first applicant and the respondent as the first applicant did not know who the respondent's authentic leader was between the warring factions with whom it should communicate and receive feedback. This adversely affected accountability and communication between the parties.

[10] The applicants state that further as a result of the in-fighting the provincial executive council, which Mleve and Noludwe were members of, was disbanded, resulting in the establishment of a new structure in the form of the Provincial Task Team (PTT). The object of the PTT was to stabilize the situation in the Province and in essence take over the governance of the respondent. This led to a further squabble which ended with a court battle as the previous leadership challenged their dismissal, and prevented the PTT from operating.

[11] Having received no relief following the establishment of the PTT, as the respondent continued to be at war with itself, the applicants on 29 September 2017, served a notice of cancellation in accordance with clause 16 of the agreement. Following receipt of the applicants' notice of cancellation, the two warring factions of the respondent both filed responses to the notice, which while clearly in opposition to each other, did not, according to the applicant, remedy the breach and the agreement continued to suffer.

[12] In the answering affidavit, deposed to by Noludwe, ostensibly on the strength of a resolution passed by the respondent on 16 February 2018, the respondent denies that it is in breach of the agreement and contends that it has '*complied with what is expected of it regarding the Service Level Agreement*'(sic), to the satisfaction

of the first applicant in accordance with which satisfaction, the first applicant paid accordingly. This is the essence of the respondent's defence. This averment is at odds with the applicants' contention and does not seem to be well grounded.

[13] The respondent further avers that the applicants are not entitled to the relief they seek as there is a factual dispute which relates to whether the applicants are entitled to cancel the agreement. No other dispute is raised. The respondent's contention appears more fully from paragraphs 26 of its answering affidavit which reads:

(26) '...the applicants are not entitled on motion hence there is material factual dispute pertaining to entitlement to cancellation...' (sic).

[14] In their replying affidavit, the applicants aver that the contract has been rendered inoperative that the respondent no longer has presence at the offices of the first applicant. This led to the applicants ceasing payment to the respondent as according to them the only portion of payment they were paying at that stage, was for human resources.

[15] The applicants seek final relief. They rely on the rules set out in **Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd**¹ as qualified in **Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd**², that an applicant who seeks final relief on notice of motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

'where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or

¹ 1957 (4) SA 234 (C).

² 1984 (3) SA 623 (A) 634E – 635C.

uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected'³ This is an age old rule which has been accepted by our courts and sets the standard with which such disputes should be resolved.

[16] I now turn to deal with the contentions raised by the respondent as contained in the answering affidavit. Noludwe contends that there is no relation between the respondent, which is the entity he represents, the South African Youth Council (SAYC) and the South African Youth Council Eastern Cape (SAYCEC). I am not in the least, concerned about this distinction, whether it be real or perceived, as it is not in dispute that the agreement was concluded with the NPO.

[17] Noludwe further contends that the respondent has complied with the agreement and that the applicants have paid the respondent accordingly. Throughout the answering affidavit, the respondent relies on the averment that the applicant paid for the services rendered by the respondent and further avers that this translates to the applicants' satisfaction with the services rendered. This, he believes justifies the respondent to in turn conclude that it did not breach the agreement. He states in paragraph 34 of the answering affidavit:

'No payment would be effected if the 1st Applicant is not satisfied. I aver that since the 1st Applicant was satisfied with our work he effected payment therefore complying with the provisions of the service level agreement.' Rather curiously, Noludwe did not dispute that the payment was made for human resources only.

[18] In arriving at a decision whether to refuse or grant the relief sought by the applicants, this court has a duty to interrogate the dispute of fact alleged by the respondent to determine whether it meets the test for a material dispute of fact.

³ Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Induser and Another 2009 (3) SA 187 (W) at para 19.

‘A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied’⁴. The court stated further that it is necessary that each material averment be ‘met and answered appropriately (and) not enveloped in a fog which hides or distorts its reality’⁵.

[19] The respondent’s case is simply that it has not breached the agreement as the first applicant has paid, presumably for the services it rendered. The respondent does not take the matter any further than that. It does not take the court into its confidence by demonstrating with any level of *bona fides* that it indeed fulfilled its obligations as stipulated in the agreement. It is trite that at times the denial of a fact by the respondent may not be sufficient to raise a real and genuine dispute of fact. This is one such instance. On its own version, the respondent admits that there is in-fighting between members of the respondent, and while admitting the extent thereof, falls short of acknowledging its effect in fulfilling its obligation in terms of the agreement. With two of the members of the Project Steering Committee at the centre of the squabble and various court challenges, it is untenable to even suggest that the applicants are not affected by the in-fighting within the respondents’ leadership. In all fairness the facts raised in the applicants founding affidavit remain largely

⁴ Wightman t/a JW Construction v Headfour (Pty) Ltd and Another [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at para 13.

⁵ At para 16

undisputed. That, coupled with the respondent's version does not, in my mind create any real opposition to the applicant's allegations that the respondent has frustrated the agreement.

[20] It is trite that where a termination clause exists in an agreement, the terms of such clause should be considered first. Clause 16 of the agreement which deals with breach, states:

'should either party commit any breach.... and should such breach be incapable of being remedied, or be capable of being remedied and not be remedied ...within fourteen days after receipt of written notice to that effect,...the non- defaulting party shall be entitled to (inter alia) cancel the agreement...'

[21] In accordance with the above provision, the applicants elected to cancel the agreement as they were entitled to. The respondent does not gainsay or place in any real dispute that the applicants were entitled to cancel the agreement.

[22] It is argued by the applicants that in addition to the above, the respondent's conduct has rendered the performance of the agreement impossible, and that the interruption has continued for a long time, which entitles the applicants to cancel. The applicants argue further that even if no fault can be attributed to the respondent, the applicants are entitled to cancel by virtue of the supervening impossibility which has rendered the performance of the (respondent's) obligations impossible.

[23] It is apparent that the respondent is unable to resolve its internal disputes. These disputes have, and continue to adversely affect the agreement and consequently, the applicants. Even if this was not the case, it has been submitted on behalf of the applicants that the contract is not performing and the respondent has abandoned the first applicant's premises thus abdicating its obligations in terms of the agreement. The opposition mounted by the respondent is rather spurious and raises no legitimate dispute. The respondent's failure to deal adequately with the issues raised by the applicants amounts to a bare denial. This court is none the wiser about the details of the dispute alleged by the respondent. On the respondent's

own version, the applicants are entitled to cancel. As argued on behalf of the applicants, if one cuts to the bone of the issue in this matter, it is clear that the applicant's case is unassailable. I therefore find the basis for the respondent's averment that it did not breach the agreement implausible. This being the basis of the respondent's entire opposition, the application must therefore succeed. I can find no reason why the applicant should be caught in the middle of the internal skirmishes between the members of the respondent, and be strung along while the respondent attempts to get its house in order if at all. No just purpose can be served in allowing the situation to continue unabated.

[24] I do not consider it necessary to deal with the alternative relief sought by the applicant. In any event, such relief was dependent on this court holding that a factual dispute exists and as such the applicant did not move for that relief.

In the premises, I make the following order:

- (a) The agreement entered into between the first applicant and the respondent is hereby cancelled.
- (b) The respondent shall pay the costs of the application.

SM MFENYANA

ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicants:

Mr BJ Pienaar SC

Instructed by:

State Attorney, East London

For the Respondent:

No appearance

Date heard:

14 March 2019

Date handed down:

23 April 2019