



**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

Application No. 3116/2015

In the matter between:

MATJHABENG LOCAL MUNICIPALITY

Applicant

And

PHAKAMA SECURITY SERVICES CC
[Registration number: 2005/183456/23]

Respondent

In re:

PHAKAMA SECURITY SERVICES CC
[Registration number: 2005/183456/23]

Applicant

And

MATJHABENG LOCAL MUNICIPALITY

Respondent

JUDGMENT BY: VAN ZYL, J

DELIVERED ON: 5 AUGUST 2016

[1] This is an application wherein the applicant seeks the following relief:

- “1. Rescission of the order granted by the above Honourable Court in favour of Phakama Security Services CC on 6 August 2015;
2. Declaring that the agreement set out in annexure “KM5” to the applicant`s founding affidavit be declared illegal and invalid;
3. Costs of suit.”

[2] The respondent previously launched an application (“the main application”) against the applicant and in the absence of opposition, Daffue J granted the following order in favour of the respondent, being the order which the applicant now seeks to be rescinded:

- “1. It is hereby declared that the respondent is obliged to pay applicant for security and guarding services provided by it, a monthly fee reckoned according to the monthly fee which was applicable at the time of expiry of the fixed term contract which expired on **30 September 2012**, concomitantly and proportionately increased in accordance with the annual increase in minimum wages prescribed for security guards by Private Security Industries Regulatory Authority (“PSIRA”) from time to time since **1 September 2014**.
2. It is declared that respondent is indebted to applicant in the amount of **R4 275 143.95**, being the difference between the amounts for which applicant actually debited respondent since 1 October 2012 and the amount of the increased monthly fees owing to applicant (reckoned as in prayer 1 above) from **1 September 2014** until **May 2015**.
3. Respondent pay the amount of all the monthly invoices submitted to it by applicant for the provision of guarding

services, on or before the 15th day of the month following the supply of the service in the said invoice, but for any material dispute pertaining to the service supplied or the amount of such invoice.

4. Should respondent fail to effect payment of the full amount of any such invoice, it shall report to the above Honourable Court in writing within 48 hours of the due date, by way of an affidavit sworn to under oath by its municipal manager stating the full reasons for the non-payment, the steps it intends to take to rectify non-payment and when compliance is anticipated;
5. Respondent pay the costs of this application on the scale as between attorney and client.”

I will refer to the parties as in the current application.

Background:

- [3] The relevant background facts and the allegations set out in the founding affidavit of the main application are mostly common cause between the parties. During 2009 and following a formal procurement process, which included the submission, allocation and awarding of a tender, the respondent was appointed by the applicant to provide security- and guarding services, which included the guarding of personnel and buildings as well as other assets of the applicant in relation to various service points. A copy of the draft written contract concluded between the parties was attached to the said founding affidavit as annexure “RM2” (“the contract”). The erstwhile municipal manager of the applicant, the late Mr T.H.E. Pietersen, signed the contract on behalf of the

applicant. The deponent to the respondent's affidavits, Mr R.J. Molifi, who is the sole member of the respondent Close Corporation, signed the contract on behalf of the respondent. The respondent rendered the services set out in the contract, whilst the applicant remunerated the applicant for the services in accordance with the agreed contract price. The contract price was a fixed amount for the entire three years. The contract regulated the provision of security- and guarding services by the respondent to the applicant for the period 1 October 2009 until 30 September 2012.

- [4] The Private Security Industry Regulatory Authority ("PSIRA") is the regulatory authority in the private security industry. The mandate of PSIRA is derived from the Private Security Industry Regulatory Authority Act, 56 of 2001. The minimum wages of private security guards and their conditions of employment is specifically regulated in law by the Sectoral Determination for the Private Security Sector ("the Sectoral Determination"), which came into effect on 10 December 2001. Minimum wages increase annually in accordance with the Sectoral Determination. Every worker in the private security sector who guards or protects fixed property, premises, goods, people or workers, is protected by the Sectoral Determination and every employer who employs private security guards for rendering such services, is covered by and bound by the Sectoral Determination. This protection extends to so-called secondary employers who outsource their security requirements to security businesses such as the respondent. One of the obligations of the respondent which was stipulated in the contract is the following:

“The Service Provider shall, at all material times be a member of the Private Security Industry Regulation Authority in good standing and shall retain such membership for the duration of this contract. It is the Service Provider’s obligation in terms of this agreement to comply with all other obligations including the payment of subscription membership fees, imposed by the relevant legislation and prescripts applicable to the Security Industry.”

The applicant contended that the aforesaid provision recorded the applicant’s recognition of its own obligation to comply with not only labour laws in general, but also the specific obligations from the Sectoral Determination.

- [5] The respondent is indeed registered with PSIRA, as it is obliged to be, as a provider of private security- and guarding services. The guards who are employed by the respondent similarly have to be and are registered as such by PSIRA.
- [6] PSIRA is the competent authority for the determination of the contract pricing structure when procuring security- and guarding services, which is done in accordance with the Illustrative Contract Pricing Structure (“ICPS”) of PSIRA. The price stipulated in the contract was indeed calculated using the ICPS of PSIRA.
- [7] The respondent is not the sole service provider of security services to the applicant. The applicant also uses other security companies. The applicant has allocated different assets to each service provider, to guard on its behalf.

- [8] When the three-year period of the contract expired, and at or about the end of September 2012, the respondent was appointed on a month-to-month basis to continue rendering the same services to the applicant as are stipulated in the contract, with effect from 1 October 2012 (“the month-to-month appointment”). The month-to-month appointment was done verbally by the same Mr Pietersen who previously signed the contract. He was empowered to do so in accordance with the delegated powers vested in him. Mr Molifi again represented the respondent. The respondent continued rendering the agreed services ever since the month-to-month appointment and the applicant has continued to pay the respondent for such services, although not in accordance with the ICPS.
- [9] Since the month-to-month appointment until September 2014 the monthly invoices submitted to the applicant by the respondent did not make provision for any concomitant increase brought about by annual increases in minimum wages for security guards and prescribed by the Sectoral Determination. At the time of the month-to-month appointment there was no specific agreement concluded regarding the monthly fee payable for the agreed services. The respondent, however, have since the month-to-month appointment repeatedly requested various officials of the applicant that the respondent be paid an increased monthly amount for the services rendered, reckoned and calculated on the basis of the ICPS of PSIRA; in other words, by increasing the monthly amount proportionately with the increase in minimum wages prescribed by PSIRA. According to the respondent it is at least a tacitly implied term of the month-to-month appointment that the respondent is

and has been entitled to invoice the applicant on the aforesaid basis.

- [10] Eventually a meeting was held on 3 September 2014 between the applicant's present municipal manager, Mr M Lepheana, Mr Molifi on behalf of the respondent and the representatives of the other security companies. The issues of increased remuneration and a prompt date of payment were discussed. An extract of the ICPS of PSIRA from 1 September 2014 to 31 August 2015, a copy of which is attached to the founding affidavit in the main application as annexure "RM4", was handed to Mr Lepheana. During the meeting Mr Lepheana agreed that the respondent (as well as the other service providers rendering security and guarding services) were entitled to be paid an increased amount for services rendered in accordance with the month-to-month appointment, reckoned according to the ICPS, with effect from 1 September 2014.
- [11] Subsequent to the said meeting, the operational manager of one of the other security companies, Mr C Malan, prepared a minute of the meeting and handed it to Mr Lepheana. A copy of the minutes is attached to the founding affidavit in the main application as annexure "RM5". A confirmatory affidavit by Malan was also attached. Mr Molifi also confirmed the correctness of the essential issues recorded in the said minutes and that it accords with the discussions and agreement that was concluded during the meeting. The following are the relevant extracts from the minutes:

- "1. The MM instructed Mr Suping that he must start the process to give the current security service providers a three year contract,

or to put out new tenders for security service providers. The MM said that it was unfair towards the companies to give a month to month contract, as we cannot plan according to that.

2. The MM instructed Mr Suping that the necessary documents regarding payments to security companies must reach him by no later than on the 8th of every month, and that all security companies must be paid by no later than the 15th of every month. ...
3. The MM told Mr Suping that it is unacceptable for them to take such a long time to pay service providers.
4. ...
5. The MM instructed Mr Suping to adjust our rates according to PSIRA pricing structure with immediate effect. The MM instructed Mr Suping that the companies must be paid as from today 3 September 2014.”

Mr Suping is the Executive Director of the respondent's department of Community Services & Law Enforcement.