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

Case No.: 2234/2013

In the matter between:

INNOVENT RENTAL & ASSET MANAGEMENT SOLUTIONS (PTY) LTD	Applicant
and	
THE MEC FOR THE PROVINCIAL DEPARTMENT OF HEALTH, FREE STATE PROVINCE	Respondent

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CORAM: L. Le R. POHL, AJ

HEARD ON: 21 NOVEMBER 2013

DELIVERED ON: 05 DECEMBER 2013

INTRODUCTION:

[1] In these motion proceedings the applicant in essence seeks payment of rentals allegedly due to it by the respondent, in terms of a written rental agreement. The subject matter of the rental agreement was certain surveillance equipment and cameras hired by the respondent at a certain monthly rental. The respondent's main defence to this application is that the relevant written rental agreement is null and void, because of the parties' failure to adhere to the relevant Supply Chain

Management Policy, the Public Finance Management Act, Act 1 of 1999 and the relevant sections of the Constitution of South Africa.

THE NOTICE OF MOTION:

[2] For the proper conceptualisation of this judgment it is appropriate at this stage to refer to the relief sought in the notice of motion. The notice of motion reads as follows:

> "1. The Applicant's non-compliance with the six months' period provided for in Section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, Act 40 of 2002, insofar as it may be necessary, condoned as provided for in Section 3(4)(a) of that Act;
>
> 2. The Respondent is ordered and directed to forthwith return to the Applicant:
>
> 2.1 the goods forming the subject matter of the Rental Schedule Number 1128DOH0001 and the extension thereof numbered 1128DOH0001a; and
>
> 2.2 the goods forming the subject matter of the Rental Schedule Number 1128DOH0001.1 and the extension thereof numbered 1128DOH0001.1a;
>
> attached to the founding affidavit as Annexures 'FA3(1)', 'FA3(2)', 'FA4(1)' and 'FA4(2)', respectively;
>
> 3. The Respondent is further ordered to pay to the Applicant:
>
> 3.1 damages in respect of the goods referred to in prayer 2.1 above in the amount of R54 759.90 per month, calculated from 1 December 2011 to date of return; and

3.2 damages in respect of the goods referred to in prayer 2.2 above, in the amount of R57 346.22 per month, calculated from 1 December 2011 to date of return;

together with interest on the aforesaid amounts at the rate of 15.5% per annum *a tempore morae*;

4. <u>In the alternative to prayers 2 and 3:</u> Judgment is entered against the Respondent for payment of the market value of the equipment forming the subject matter of:

4.1 Rental Schedule Number 1128DOH0001 and the extension thereof numbered 1128DOH.0001a, in the amount of R657 118.80; and

4.2 Rental Schedule Number 1128DOH0001.1 and the extension thereof numbered 1128DOH0001.1a, in the amount of R688 154.64;

together with interest on the aforesaid amounts at the rate of 15.5% per annum, *a tempore morae*;

5. The Respondent is ordered to pay the costs of this application;

6. Further and/or alternative relief is afforded to the Applicant."

<u>CONTRACT:</u>

[3] The relevant portion of the contract reads as follows:

"**14. NOTICE**

14.1 The User shall give Hirer at least 90 days written notice before the expiry of the initial rental period of the User's intention to terminate and return the goods.

14.2 Should the User fail to:-

14.2.1 give notice in accordance with clause 14.1 above or;

14.2.2 give notice but fail to return the goods in terms of clause 10 or;

14.2.3 both give notice and return the goods,

Then the rental period shall be automatically extended indefinitely for at least a 90 day period from the initial rental period expiry date."

[4] Clause 10 of the relevant rental agreement reads as follows:

"**10. RETURN OF GOODS**

10.1 The User shall, on termination of this agreement return the goods in good working order, fair wear and tear excluded, together with all applicable documents to the Hirer's stipulated address at the User's cost and expense. The User shall ensure that the goods are returned in such a manner so as to protect the goods and preserve their value;

10.2 In the event that the User fails to return the goods in accordance with the provisions of this agreement, the Hirer may at its election accept payment of an amount equal to the market value of the goods. A certificate duly completed by any manager of the Hirer indicating the amount of the market value shall be *prima facie* proof of the contents thereof for all purposes."

[5] Clause 7.1.3 of the rental agreement reads as follows:

> "7.1.3 Notwithstanding the provisions of this agreement, should User in breach of its obligations fail to return the goods on termination of this agreement then, in addition and without prejudice to any other claims that Hirer may have against User pursuant thereto, User shall be liable to continue to pay the rentals to Hirer as if this agreement had not been so terminated."

THE RELEVANT BACKGROUND:

[6] The initial period in terms of this rental agreement was from 1 December 2008 to 30 November 2011.

[7] On 7 February 2011 the respondent wrote a letter to the applicant, the relevant portion of which reads as follows:

> "TERMINATION OF MASTER RENTAL AGREEMENT
> Please be advised that the Department of Health Lejweleputswa District Health Services, terminates this agreement at the end of its term in November 2011.

The termination of the agreement was thus done well within the period provided for in clause 14.1 of the relevant rental agreement, quoted above.

[8] The respondent, however, failed to return the goods on 30 November 2011 or to date.

[9] The applicant's claim against the respondent in the present application is thus based on the provisions of clause 7.1.3, 10.2 and 14.2.3 of the master rental agreement, quoted above.

THE VALIDITY OF THE CONTRACT:

[10] In its opposing affidavit the respondent's deponent, *inter alia*, declares as follows:

"4.

4.1 At all material times the respondent was obliged in contracting with applicant for supply of goods and services to:

4.1.1 Comply with the peremptory provisions of section 217(1) of the Constitution of the Republic of South Africa, Act no. 108 of 1996.

4.1.2 To implement a supply chain management policy which was fair, equitable, transparent, competitive and cost effective covering a competitive bidding process as well as procedures for the evaluation of bids and the combating of fraud and corruption.

4.1.3 In selecting an external service provider such as the applicant, to do so by means of a process which complied with respondent's Supply Chain Management policy which included a competitive bidding process allowing for all prospective service providers to have equal access to information relative to such bidding process.

5.

5.1 At all material times hereto:

5.1.1 The respondent had a Supply Chain Management Policy in place as envisaged in terms of the said Finance Management Act; and

5.1.2 Both the applicant and respondent were obliged to deal and contract with each other in terms of such Supply Chain Management Policy.

5.2 I aver further that:

5.2.1 The then HOD, Dr Ramela, did not have the necessary delegated authority to:

9.1.1.1 Conclude a contract contrary to the prescribed procedure;

9.1.1.2 To facilitate payment or any orders

5.3 In concluding the contract as alleged, both applicant and the HOD failed to comply with the relevant provisions of the aforementioned statues and the respondent's Supply Chain Management Policy to the extent as referred to above.

6.

6.1 On or about early December 2008 the respondent invited quotations for the supply and installation of surveillance, alarm and access control and attendance systems for its offices at Kopanong Regional office and surveillance and alarm systems at 8 designated clinics in Lejweleputswa district.

6.2 The successful quotation would be awarded a contract for a period of three 3 years commencing 01 January 2009 to 31 December 2011.

6.3 The respondent received three 3 quotations from the following companies, Khula IT Solutions, Inkamva and Phoenix.

6.4 It merits mentioning that the applicant failed, *alternatively*, neglected to submit its quotation in the premises the applicant was not short listed for adjudication.

6.5 The respondent's adjudication panel recommended that Khula IT be approved for reward of the contract, for the reason that its quotation had scored the highest points.

See a copy of quotation recommendation adjudication attached as annexure **'A'**

6.6 On 10 December 2008 Khula IT requested the respondent direct both orders due to it be transferred to Corporate Finance Solutions (PTY) Ltd.

See a copy of a letter attached as annexure **'B'**

6.7 In the premises the respondent forwarded payments to Corporate Finance Solutions (PTY) Ltd for all the goods and services rendered by Khula IT up until the contract expired on 31 December 2011.

(I do not attach the said invoices due to their voluminous nature. The said invoices will be placed before the court during the hearing of this application.)

6.8 I aver that at all the relevant times the respondent never dealt with the applicant in any capacity whatsoever.

7.

7.1 On 07 February 2011 the respondent gave a written notice to terminate the contract with applicant at the end of its term in November 2011.

7.2 However, I reiterate the averments in 3.4, 4, 5 and 6 above.

> 7.3 IN THE PREMISES the applicant cannot insist on extending a contract that was never implemented by both parties."

[11] The relevant annexures to the opposing affidavit confirms the relevant allegations in the quoted paragraphs 4, 5, 6 and 7, *supra*. The applicant's name is also conspicuously absent from the said annexures. This is a clear indication that the applicant did not take part in the applicable Supply Chain Management Policy, which was followed by the respondent at all relevant times hereto.

[12] Mr Manye, who appeared on behalf of the respondent, thus submitted that the rental agreement signed on the 7th day of May 2009, was null and void for want of compliance with the applicable Supply Chain Management Policy, read with the Public Finance Management Act, Act 1 of 1999 and section 217 of the Constitution of the Republic of South Africa. He also relied in this regard on the decision of **Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC** 2010 (1) SA 356 (SCA).

[13] It is important to have regard to the fact that the applicant filed a replying affidavit, but in this affidavit there is no allegation to the effect that the applicant complied with the relevant Supply Chain Management Policy and the relevant statutes.

[14] In paragraph 18 of the applicant's replying affidavit the applicant's deponent declares as follows:

"18.

The construction of the contractual relationship was as follows:

18.1 Khula IT was the supplier of the goods;

18.2 Corporate Finance Solutions (Pty) Ltd ('*Fintec*') financed a major portion of the purchase price in respect of the goods;

18.3 the Applicant financed the remaining portion of the purchase price in respect of the goods. In the industry, this remaining portion is known as the '*residual*';

18.4 Khula IT invoiced the Applicant in respect of the full purchase price of the goods;

18.5 In terms of a separate agreement between the Applicant and Fintec, Fintec provided the finance referred to above to the Applicant. The Applicant then supplemented that amount with the residual and it paid Khula IT the full purchase price of the goods. The Applicant, upon payment as aforesaid and delivery of the goods directly to the Respondent, became the owner of the goods, which it hired to the Respondent. The Applicant, as security for its investment ceded its right, title and interest in the goods to Fintec, to be ceded back at the end of the initial term of the first and second rental schedules;

18.6 as a practical arrangement, the Respondent made payment of the rental amounts directly to Fintec, in order to pay off the financing provided by Fintec within the period of the agreement in terms of the applicable rental schedule;

18.7 at the end of the period of the applicable rental schedule, Fintec was paid off, that debt was extinguished and the right, title and interest of the goods were ceded back to the Applicant;

18.8 however, the residual, as financed by the Applicant, had not been paid off;

18.9 the residual would, in normal circumstances:

18.9.1 be paid off should the rental schedule be extended; or

18.9.2 if not, be recovered by the Applicant by re-hiring or selling the goods in the secondary market after the return thereof, through its designated division in the secondary market, Q-Rent,

and in these circumstances, and only then, would the Applicant recover its residual and also earn a profit on its initial investment."

[15] Mr Van Rhyn, who appeared on behalf of the applicant, submitted that based on the business construction as set out in paragraph 18, *supra*, of the replying affidavit, the applicant in practical effect "piggy-backed", as he put it on Khula IT, the supplier, who did comply with the relevant supply chain procedures. His argument was thus that the applicant falls under the umbrella of the legitimacy of Khula's involvement almost as if it had taken part in the supply chain procedures itself. He submitted that the court should therefore find that the rental agreement was thus valid.

I do not agree with Mr Van Rhyn. Such a construction would, to my mind, defeat the object of the supply chain procedure and the relevant statutory provisions, which are *inter alia* designed to facilitate a fair, equitable, transparent, competitive system which combats the possibility of fraud, corruption and favouritism.

[16] It needs mentioning that in the present application before me, respondent did not bring a counter-application to have the relevant rental agreement declared null and void and/or unlawful. The question is thus whether or not the respondent should have done so for this court to take that into account in adjudicating the merits of this application. To my mind the answer to that question lies in an assessment of whether or not the issue was substantially and comprehensively raised in the opposing affidavit. If so, then it was not necessary to bring a counter-application. It is thus a question of substance rather than form. In this regard it is apposite to refer to the decision of **Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC**, *supra*, at page 365, paragraph [26]:

> "[26] While I accept that the award of a municipal service amounts to administrative action that may be reviewed by an interested third party under PAJA, it may not be necessary to proceed by review when a municipality seeks to avoid a contract it has concluded in respect of which no other party has an interest. But it is unnecessary to reach any final conclusion in that regard. If the second appellant's procurement of municipal services through its contract with the respondent was unlawful, it is invalid, and this is a case in which the appellants were duty-bound not to submit to an unlawful contract, but to oppose the respondent's attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application. In doing so it raised

> the question of the legality of the contract fairly and squarely, just as it would have done in a formal review. In these circumstances, substance must triumph over form. And while my observations should not be construed as a finding that a review of the award of the contract to the respondent could not have been brought by an interested party, the appellants' failure to bring formal review proceedings under PAJA is no reason to deny them relief."

[17] The fact that this decision deals with a municipality and in this case before me, the respondent is the Provincial Department of Health, matters not. The respondent is still an organ of State, which is subject to the Constitution and the relevant legislation applicable to it.

[18] It is trite law that in motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues, because they are not designed to determine probabilities. It is well established under the **Plascon-Evans** rule that where in motion proceedings, disputes of fact arise on affidavits, a final order can be granted only if the facts averred by the applicant have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched or so clearly untenable that the court is justified in rejecting them merely

on the papers. (Compare: **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A).)

[19] It is common cause that the applicant did not take part in the supply chain process that was in place at the time. This, together with the other facts alleged by the respondent in raising the defence of invalidity of the contract, has the inevitable effect that the rental agreement is invalid and cannot be enforced. (Compare: **Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC,** supra**,** read with the **Plascon-Evans** case, *supra*.)

[20] The basis of the relief sought by the applicant in prayers 3 and 4 of the notice of motion, quoted in paragraph [2], *supra*, is premised on the validity of the rental agreement. My finding that the contract is invalid and unenforceable, by necessary implication precludes the applicant from obtaining such relief.

The same applies to prayer 2, i.e. the prayer for the return of the goods. This prayer has at its foundation in clause 2.5 of the rental agreement and the applicant's allegation in paragraph 5 of the founding affidavit, that in terms of the rental agreement, (which I have found to be invalid), it retained the ownership of the goods. It must furthermore be seen in the context of the somewhat complex business arrangement and in particular the cessions referred to by the applicant itself in its replying affidavit, quoted in paragraph

[14], *supra*. This finding does not mean that the applicant is left remediless with regards to the return of the goods. It may well be advised to pursue that remedy by way of a different procedure and on a different basis.

[21] The respondent also alleged in its opposing affidavit that it was incumbent on the applicant to give the respondent timeous notice in terms of the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act, Act 40 of 2002 of these proceedings. It is common cause that the applicant did give the respondent such notice but not timeous. Whether or not it was legally necessary to give such notice in the circumstances of this case, is once again dependant on an interpretation of the contract and the definition of debt in Act 40 of 2002.

If the claim is for damages stemming from a contractual cause of action, then, in terms of Act 40 of 2002, the applicant had to give the proper timeous notice. If the claim, on a proper interpretation of the contract, was for a specific performance or arrear rentals, the applicant did not have to give such notice. (Compare: **Director General, Department of Public Works v Kovac Investments** 2010 (6) SA 646 (GNP.)

The notice of motion has a prayer for condonation. Suffice it to say that even if the applicant had to apply for condonation, I would have refused same as the allegations in the application falls far short of the requirements of same.

(Compare: **Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd** 2010 (4) SA 109 (SCA).)

My previous finding that the contract is invalid and unenforceable makes it however unnecessary to deal with this defence raised by the respondent as it once again entails the interpretation of the contract. (which I have already found to be invalid)

COSTS:

[22] The matter first came before the court on 1 August 2013. Counsel informed me that by that time, no opposing and replying papers had been filed. The matter was then removed from the roll and it was ordered that the costs must stand over. No substantial, compelling and convincing reasons were placed before me as to why the final order as to costs in this matter should not follow suit, including the costs of 1 August 2013.

THE ORDER:

[23] In the premises I make the following order:

1. **The application is dismissed with costs, including the costs occasioned by the appearance of the parties on 1 August 2013.**

L. le R. POHL, AJ

On behalf of applicant:	Adv G P van Rhyn Instructed by: Otto Krause Inc Illovo c/o Honey Attorneys BLOEMFONTEIN
On behalf of respondent:	Adv T L Manye Instructed by: State Attorney BLOEMFONTEIN

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