

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE HIGH COURT, KIMBERLEY

Case No: 580/11

Date of Hearing: 27.05.2011

Date Delivered: 17.06.2011

In the matter between:

**BABEREKI CONSULTING ENGINEERS (PTY)
LIMITED**

APPLICANT

And

**M & F CONTRACTORS CC
THE PHOKWANE MUNICIPALITY**

**FIRST RESPONDENT
SECOND RESPONDENT**

JUDGMENT

HENRIQUES AJ

INTRODUCTION

1. This an application for a final interdict in which the applicant seeks the following orders:

"...

2. The first respondent be interdicted and restrained from further executing upon the ostensible contract concluded with the second respondent for the provision of works relating to project **PHOKTCP05: The Construction of Internal Sewer Reticulation Network for 1 450 stands in Pampierstad, Northern Cape Province;**
3. The second respondent be likewise interdicted and restrained from acting upon its reciprocal obligations in terms of the unlawful and illegal

agreement so concluded.

4. The first and second respondents be ordered to pay the costs of the application jointly and severally, payment by one the other to be absolved."
2. It is trite that to succeed in obtaining such relief the applicant has to show a clear right, an injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy.¹

THE ALLEGATIONS RELIED ON BY THE APPLICANT

3. Pursuant to a tender process, the applicant was awarded a contract which entailed the rendering of professional consulting engineering services and conducting the physical construction work on Project PHOKTCP05 (hereinafter referred to as "the project").² This is evident having regard to annexure TM1³ and TM2⁴ annexed to the papers⁵ and the founding affidavit.
4. The first respondent had been appointed to perform certain of the construction work on the project as a contractor by means of a written contract concluded with the applicant acting on behalf of the second respondent. Parts of the written portion of the contract concluded between the applicant and the first respondent are annexed to the papers⁶ and reference is made thereto in the founding affidavit.
5. The applicant alleges that after it had given notice to the second respondent suspending its work, being the consulting engineering

1 Setlogelo v Setlogelo 1914 AD 221, Erasmus Superior Court Practice Supplementary Volume E8-6C footnote 13 and the authorities referred to therein.

2 Paragraph 7.2.founding affidavit, page 8 indexed papers.

3 Page 21 of the indexed papers.

4 Pages 22 to 63 of the indexed papers.

5 Paragraph 7.2, page 8 of the indexed papers; Paragraph 7.4,page 9 of the indexed papers page 25 of the indexed papers

6 Annexure TM2, pages 22 to 63 of the indexed papers, paragraph 7.4, founding affidavit, page 8 indexed papers

services as well as the construction work, the first and second respondents concluded an agreement in terms of which the first respondent continued with the construction work.⁷

6. If one considers the annexures to the founding affidavit, the applicant had rendered the consulting engineering services and carried out construction work, for a period of time until it became involved in a dispute relating to non-payment with the second respondent.⁸ This dispute over non-payment appears to have remained unresolved for a considerable period of time when matters came to a head in March 2011.
7. This is when the applicant notified the second respondent that it was intending to “terminate” the works until such time as issues regarding non-payment had been resolved.⁹ A letter notifying the second respondent of the suspension of the works with immediate effect, which was sent to second respondent, is dated 10 February 2011.¹⁰
8. On the same date, the applicant also issued a notice to the first respondent to cease all work under the sub-contract agreement concluded and also annexed a copy of the notice sent to the second respondent.¹¹
9. The second respondent, on receipt of annexure TM 14 responded by way of a letter, which is annexure TM15.¹²

10. In essence the second respondent acknowledged the applicant's

7 Paragraph 7.3, page 8 of the indexed papers

8 According to the paragraph 8.7, page 10 indexed papers such dispute is alleged to have arisen in May 2010. This is also confirmed by the contents of the correspondence exchanged.

9 Annexure TM12, page 83 indexed papers

10 Annexure "TM14", page 86 of the papers
Paragraph 8.18 of the founding affidavit, page 13

11 Annexure TM13, page 85 of the indexed papers

12 Page 87 of the indexed papers

decision to suspend the works but indicated that it would request the sub-contractors, one of whom was the first respondent, to continue with the work until issues surrounding payments were resolved.

11. The letter further reads as follows:

“However, I must also mention that we have exhausted our MIG allocation and therefore we will not be able to do payments on the bulk sewer line which are legally due to you until we got funds from MIG.

The Municipality will also want to request the contractors i.e. MF Contractors and Lubbe Construction to continue with the works while issues around professional fees are resolved. The Municipality commits to pay Lubbe Construction and MF Contractors for any work that will be done during this period of professional fees dispute. This letter will also be copied to the two contractors.”

12. This letter appears to suggest that there was not a dispute in respect of amounts due but rather that the second respondent did not have sufficient funds to effect payment to the applicant. This is confirmed to some extent if one has regard to Annexure TM16¹³. It would further appear that a response was provided to the request set out in Annexure TM 16 on 1 March 2011 by applicant having regard to Annexure TM17¹⁴.
13. Despite the letter of suspension issued by the applicant to the first respondent, the first respondent continued with work on the project. The applicant alleges that this is a clear violation of the agreement concluded between itself and the first respondent.¹⁵
14. The applicant draws an inference that the first respondent performs the work under an “agreement” concluded with the second respondent, as it is of the view that the first respondent would not perform the work

13 Page 90, Indexed papers

14 Page 91, Indexed papers

15 Paragraph 9.8, page 16 indexed papers

without payment and further as the second respondent continues to make payment to the first respondent directly.¹⁶ No where do the respondents deny that an “agreement” has been concluded nor is it denied that the first respondent is continuing to render services on the project.¹⁷

15. The applicant avers that this subsequent "agreement" between the first and second respondents is illegal as same has not been concluded in accordance with section 217 of the Constitution and national legislation, namely the Preferential Procurement Policy Framework Act, which governs the awarding of service contracts by organs of state.
16. The applicant submits that this application is urgent in light of the fact that the schedule of work will be completed within the next three to four months should it be allowed to continue, there is no oversight of the work being conducted nor any oversight in so far as the safety of the construction site is concerned.¹⁸
17. The first respondent, opposes the application, on the following grounds, namely:-
 - 17.1. that there has been non-compliance with rule 18(6) of the uniform rules of court in that the founding affidavit contains no details as to *“whether the alleged contracts were written or oral and when or where they were concluded and, if written to annex copies thereof to his founding affidavit”*,¹⁹ consequently the application is

16 The applicant had also objected to the second respondent not complying with the terms of the agreement and making payment directly to the first respondent.

17 Having regard to the heads of argument filed on behalf of the respondents and considering the submissions made by Counsel for the respondents, the respondents acknowledge that the first respondent continues to carry out construction work on the project and alleges it is entitled to do so either as it has to honour its obligations to the second respondent and or because it is free to business as of right in terms of section 22 of the Constitution.

18 Paragraph 10.2 page 17 indexed papers and paragraph 10.9. pages 18 and 19 indexed papers.

19 Paragraph 6.3 page 98 of the indexed papers

an irregular step²⁰

- 17.2. that *"there is a dispute of fact on the papers"* having regard to paragraphs 8.7 to 9.1, particularly paragraph 8.9 and the correspondence annexed to the papers. The applicant ought to have proceeded by way of summons and not by way of application; consequently, the first respondent requests the court to dismiss the application, alternatively, to refer the matter to trial or for the hearing of oral evidence.
18. The affidavit of the first respondent is deposed to by Modisaemang Frans Modisa, in his capacity as managing director who avers that *"he has not entered into any oral or written agreement with me"*²¹, referring to the applicant.
19. The second respondent, in its affidavit deposed to by its Municipal Manager, Moeketsi Dichaba, merely confirms issues raised by the first respondent in its affidavit, and aligns itself with the grounds of opposition set out by the first respondent in its opposing affidavit and requests that same be read as if specifically incorporated.²² It also seeks an opportunity to respond to the allegations should the points *in limine* not be upheld.²³
20. Dichaba avers that the second respondent is unable to properly respond to the allegations in the founding affidavit until such time as it has been furnished with a true copy of the written agreement upon which the applicant relies.²⁴

20 Paragraph 6.4 page 98 of the indexed papers

21 Paragraph 7.1, page 99 of the indexed papers

22 Paragraph 7, page 103 of the indexed papers

23 At the hearing of the matter, the respondents counsel did not seek leave to have the matter adjourned for the filing of further affidavits.

24 Paragraph 6, page 103 of the indexed papers

THE RESPONDENTS OPPOSITION

21. I propose to deal with the respondents' opposition. Rule 18(6) of the Uniform Rules of Court reads as follows:

"A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof of or of the part relied on in the pleading shall be annexed to the pleading."

22. Rule 18 relates to pleadings generally. Advocate Grobler, who appeared for the applicant, submitted that an affidavit is not a pleading and relied on the commentary in Erasmus for this submission²⁵.

23. The *point in limine* in my view is without merit. The applicant alleges in its founding affidavit that a contract existed between the itself and the first respondent. A copy of the relevant portion of the written contract on which it relies is annexed to the papers. When I raised this during the course of argument with Adv. Schreuder, who appeared for the respondents, he indicated that the first respondent had not signed such document and no reliance could therefore be placed on it.

24. This is not correct in light of the fact that the deponent to the first respondent's affidavit Modisa's signature appears in his capacity as CEO of the first respondent²⁶ and his initials appear on the document as well. I also find it disingenuous of Modisa to state under oath as he has done, that he has not concluded any agreement either oral or written with the applicant in light of this and when it is also apparent from the correspondence exchanged that first respondent has in fact been performing such construction work, which has been acknowledged by the second respondent.

25. I am further of the view that the reference to the failure to annex a copy

25 Erasmus Superior Court Practice page B1-44

26 Page 26, Indexed papers

of the contract as constituting an irregular step, is also without merit. This is compounded in that the respondents have not complied with the provisions of Rule 30 in this regard either.

26. It is trite that a respondent should file an affidavit on the merits at the same time that it takes a preliminary objection on a point of law.
27. A respondent must admit or deny, confess and/or avoid the allegations in the applicant's affidavit failing which the court must for the purposes of the application accept the allegations as correct.²⁷
28. This is what I am faced with – the respondents content themselves with a point *in limine* and proffer no response to any of the allegations made by the applicant in its founding affidavit. Neither are any attempts made to deal with the contents of the annexures to the papers. I must, in the absence of any challenge to the applicant's allegations, accept them.
29. This is so if one considers the second ground upon which the respondents challenge the application namely that there exists a serious dispute of fact on the papers.
30. What is meant by a dispute of fact? This is set out in **Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd**:²⁸

"1. When the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary. He or she may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence *viva voce* if subpoenaed.

2. When the respondent admits the applicant's affidavit evidence but

27 See: **Erasmus, Superior Court Practice**, B1 to 44

Moosa v Knox 1949 (3) SA 327 (N) at 331

United Methodist Church of South Africa v Sokufundumala 1989 (4) SA 1055 (O) at 1059A

28 1949 (3) SA 1155 (T) at 1163

alleges other facts which the applicant disputes.

3. When the respondent concedes that he or she has no knowledge of the main facts stated by the applicant, but denies them, putting the applicant to the proof and himself or herself gives or proposes to give evidence to show that the applicant and his or her deponents are biased and untruthful or otherwise unreliable, and that certain facts upon which the applicant relies to prove the main facts are untrue. The absence of any positive evidence possessed by a respondent directly contradicting the applicant's main allegations does not render the matter free of a real dispute of fact.”
31. It is trite that a court faced with an allegation of a dispute of fact must determine whether there is a real dispute of fact failing which a respondent would be able to raise fictitious issues of fact and thus delay the hearing of the matter. Vague and insubstantial allegations are insufficient to raise the kind of dispute of fact that should be rendered for oral evidence.²⁹
32. If I consider the opposing affidavits filed by the respondents, nowhere do they attempt to deal with the factual basis of the application. I must thus accept the applicant's allegations pertaining to the contractual relationship between itself and the first respondent. In fact, the respondents do not in any way deny that they have concluded an agreement or some sort of arrangement with the first respondent for the rendering of services. These allegations remain unchallenged. In addition if one has regard to the papers filed it is clear that there can be no dispute that a contract does exist.
33. The correspondence refers to a dispute that exists between the parties insofar as payment is concerned, not that payment is not due. In fact, the correspondence put up by the second respondent specifically annexure TM15³⁰ indicates that the second respondent will continue to

²⁹ Erasmus, B1-48D and B1-49

King Williams Town Transitional Local Council v Border Alliance Taxi Association
2002 (4) SA 152 (E) at 156 I-J

³⁰ Page 87 of the indexed papers

make payment to the first respondent while it resolves issues relating to non-payment of the applicant's fees. The respondents attempt to rely on the correspondence to found a dispute of fact is misguided.

34. I have considered the paragraphs referred to, relied on by the respondents for alleging that a dispute of fact exists and find no merit in this submission specifically if one has regard to the Room Hire case and the manner in which disputes of fact arise.

HAS THE APPLICANT SATISFIED THE REQUIREMENTS FOR AN INTERDICT AND IS THE APPLICANT ENTITLED TO THE RELIEF THAT IT SEEKS?

Does the Applicant have a clear right?

35. The first page of annexure TM2 is titled "*Construction Work Contract in connection with Project PHOKTCPO5 between Babereki Consulting Engineers CC and MF Contractors CC.*"³¹ As already pointed out the signature of Modisa on behalf of the first respondent appears on page 26.³²
36. At paragraph 1.1.14 the employer is defined as Babereki Consulting Engineers on behalf of the second respondent.³³ Clause (b) under part C1.1.1 on page 25 of TM2 reads as follows:

"This document formalises the legal process of offer and acceptance. It contains:.....

(b) confirmation from the employer that he accepts the tender offer following his tender evaluation, and that a contract therefore exists; and

31 Page 22, indexed papers.

32 During the course of argument Advocate Schreuder, correctly in my view did not pursue the submission that because the contract was not signed it had not come into existence.

33 Page 35 indexed papers

37. Page 35 of annexure TM2 clause C1.2 thereof deals with the special conditions of contract. It reads as follows:

"The following amendments of the general conditions of contract 2004 apply to this contract.

38. Annexure TM2 thus provides that the general conditions of contract for construction work 2004 applies. Clause C1.3 which is an appendix to the form of the tender provides that the general conditions of contract for construction work (2004) is applicable to this contract and requires the contractor to secure his own copy.³⁴
39. Clause 4 of the contract provides that a contractor shall in carrying out his aforesaid obligations comply with the engineer's instructions on any matter relating to the works.³⁵ Clause 4.4 specifically provides that a contractor shall only take instructions from the engineer.
40. Clause 39 of the general conditions deals with the suspension of the works. It provides that a contractor shall on the written order of the engineer suspend the progress of the works.³⁶
41. Insofar as the first respondent is concerned, it is clear that there is a contract between the applicant and the first respondent in terms of which the first respondent was appointed as "sub-contractor" to carry out the construction works. The contract is clear. The applicant, in its capacity as engineer, can instruct the first respondent to cease and/or suspend the works.
42. As regards the second respondent, the applicant was appointed as its

34 Page 45 indexed papers. In light of the fact that only portions of the general conditions of contract (2004) were annexed to the papers, so as not to render them too bulky, I had requested that a full copy thereof be filed. The parties' representatives had agreed to do so.

35 Clause 4.3 general conditions of contract 2004

36 39.1 The Contractor shall, on the written order of the Engineer, suspend the progress of the Works or any part thereof for such time or times and in such manner as the Engineer shall order and shall, during such suspension, properly protect the works insofar as is necessary.

turnkey agent. Insofar as the second respondent is concerned, Advocate Grobler submitted that the basis for seeking the interdict is two-fold. One, that there is no privity of contract between the second respondent and the first respondent and secondly that insofar as the second respondent is concerned, it is engaged in illegal activity specifically in contravention of Section 217 of the Constitution and in breach of national legislation.

43. Section 217(1) of the Constitution provides that an organ of State such as a municipality which contracts for goods and services must do so in accordance with the system which is fair, equitable, competitive and cost effective. This constitutional imperative is echoed in the Local Government: Municipal Systems Act, 32 of 2000 and the Local Government: Municipal Finance Management Act, 56 of 2003. A municipality is obliged by such statutory prescripts when concluding a service delivery agreement to act openly in accordance with a fair, equitable, competitive and cost effective system and in terms of a supply chain management policy designed to have that effect.
44. Our courts have in a number of decisions held that contracts concluded without compliance with such constitutional and statutory prescripts are invalid.³⁷ In fact our courts have gone so far as to enjoin our courts not to condone such conduct. In **Standard Bank of South Africa Ltd v Swartland Municipality and Others**³⁸ the court held as follows:

The unauthorised and illegal conduct of the third respondent is contra boni mores and contrary to public policy, and cannot be condoned by the court. It militates against the doctrine of legality, which forms an important part of our legal system, and more especially since the Constitution became the supreme

37 See in this regard: **Premier, Free State and Others v Firechem Free State (Pty) Ltd** 2000 (4) SA 413 (SCA)

Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC 2010 (1) SA 356 (SCA)

38 2010 (5) SA 479(WCC) at paragraph 22

law of the country. Chaskalson CJ (as he then was) said in Pharmaceutical Manufacturers of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)(2000(3) BCLR 241) in para 20 that:

The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law.

This statement was quoted with approval in Oudekraal Estates(Pty) Ltd v City of Cape Town and Others 2002(6) SA 573 (C) ([2002]) 3 All SA 450 at 593B-D

45. In light of the authorities mentioned, and on the facts before me, it appears that the first respondent continues to perform the construction work at the request of the second respondent in the absence of compliance with procurement policy and national legislation governing the awarding of such contract and or /tenders.
46. As such the applicant is entitled to approach the court to request this court not to condone this conduct.

Has there been any harm committed?

47. Insofar as the second requirement for an interdict is concerned, namely whether or not there is any harm, it is clear from the papers and annexures, that this requirement has been satisfied.

Alternative Remedy

48. I now turn to consider the aspect of whether or not the applicant has an alternative remedy.
49. Insofar as the first respondent is concerned, it has no alternative remedy but to obtain the interdict in light of the fact that a letter to suspend the works has not been heeded.

50. Insofar as the second respondent is concerned, Advocate Grobler submitted that strictly speaking the applicant could sue for damages in terms of the contract. However, his argument went further in this regard. The first respondent continues to perform construction work for the second respondent in violation of national legislation relating to the procurement of services. This court ought not to sanction such conduct. In light of this, the applicant has no alternative remedy but to approach the court to interdict such conduct, and accordingly is entitled to the interdict.
51. During the course of argument and in his heads of argument, Adv Schreuder, submitted that the applicant had no legal right to compel the first and second respondent to breach “contractual obligations.” In the alternative, he submitted that the respondents are free to do business as envisaged in terms of section 22 of the Constitution. What this argument fails to take into account is the following.
52. On the papers before me, there is an allegation that the first respondent performs construction work by virtue of an agreement concluded in the absence of compliance with national legislation. The respondents have not denied this and have indicated by conduct that such work will continue. There is no oversight of the actual construction work nor in so far as the safety of the site is concerned.
53. Accordingly, I am of the view that the third requirement has also been met and the applicant is on the facts of this matter entitled to the relief it seeks.

I thus grant an order as follows:

- 1. The applicant’s non adherence to the to the rules of court pertaining to time periods and service be condoned;**

2. The first respondent is interdicted and restrained from further executing upon the ostensible contract concluded with the second respondent for the provision of works relating to project PHOKTCP05: The Construction of Internal Sewer Reticulation Network for 1 450 stands in Pampierstad, Northern Cape Province;
3. The second respondent is interdicted and restrained from acting upon its reciprocal obligations in terms of the unlawful and illegal agreement so concluded.
4. The first and second respondents are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.

J I HENRIQUES

ACTING JUDGE

Appearance for Applicant: Advocate S Grobler instructed by Du Toit Attorneys, Kimberley

Appearance for Respondent: Advocate J Schreuder instructed by BG Bojosinyane and Associates, Hartswater