

**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

Case No. : 7469/2008

In the matter between:-

**FUTURE BUSINESS ADVICE AND SERVICES CC**

Applicant

*versus*

**THE PREMIER OF THE FREE STATE**

Respondent

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**JUDGMENT BY:** MOCUMIE, J

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**DELIVERED ON:** 4 MARCH 2010

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**MOCUMIE, J**

[1] The applicant, a close corporation based in Midrand, Gauteng Province, seeks from this Court that the respondent ("the Premier of the Free State") be ordered to comply with the terms and provisions of the contract embodied in tender number BDR 4/2008, awarded to the applicant by the Premier on 12 May 2008 by immediately permitting and authorising the applicant to recommence with the provision of the agreed training and

support services, against proper and due payment of all invoices, as set out in the tender and costs.

- [2] The background to this matter is as follows. On 18 April 2008 the applicant responded to an invitation to bid for the supply of training support services to the Free State/Flanders Job Creation/SMME<sup>1</sup> Project. This project was aimed at providing training to at least 5000 SMME's and 10 identified government employees at four Business Support Centres, to wit; Maluti-a-Phofung, Tokologo, Mathabeng and Mangaung. The letter awarding the tender to the applicant was signed by the Acting Director General in the Premier's office. The applicant proceeded to provide training service as set out in the tender document. On 17 July 2008 the Premier suspended the tender unilaterally and instructed the applicant by telephone, through his functionaries, to discontinue all training services. This letter provided no reasons. On 12 August 2008 the applicant received a letter from the Premier, advising that training should be suspended until further notice. The letter reads:

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<sup>1</sup> SMME – This acronym stands for Small and Medium Market Enterprises

- “1. *Kindly be advised that this letter confirms our instructions to you to forthwith suspend the training which you are currently busy with in terms of Bid No.BDR4/2008, until further notice.*
2. *We regret [the] inconvenience caused and trust you will be shortly requested to proceed with the training.*
3. *We wish to stress the fact that the suspension should not be viewed as a repudiation of the legal relationship, which came into being through awarding the tender to you.*
4. *Your kind co-operation shall be appreciated.”* (Emphasis added.)

[3] The applicant requested meetings with the Premier and his Acting Director General as well as other officials responsible for processing and awarding tenders. Such meetings were held on five occasions to try and resolve this impasse on: (a) 17 July 2008, (b) 01 October 2008, (c) 02 April 2009, (d) 06 April 2009 and (e) 25 May 2009 to no avail. The applicant’s last letter dated 13 August 2008 in which he enquired on further developments on the interruption of his services went unanswered until he learned through a letter dated 13 October 2008 that the tender was referred to Forensic Auditors who

have filed a report with the Legislature. The Legislature in turn had referred the audit report to the responsible parliamentary committee on 01 October 2008.

- [4] The tender in the meantime remained suspended. It is for these reasons that applicant believed that after a year and five months without any solution being reached by the parties he had no alternative but to approach this Court. The matter was removed from the roll per agreement to enable the applicant to present settlement proposals to the Premier. The Premier allegedly rejected the proposals because he did not want them to be made a court order and further there were national elections approaching and he wanted to focus on canvassing votes for his party.

- [5] In his plea on the merits the Premier raised two points *in limine*; namely, that the claim was premature and that applicant waived his rights to continue with the application. This point was subsequently abandoned because it was devoid of any merit.

1<sup>st</sup> Point *in limine*: PREMATURITY

[6] The Premier avers that the applicant's claim is premature on the basis that once the parties failed to resolve the dispute the matter should have been referred to mediation in terms of clause 27.1 – 27.3 of the General Conditions of Contract which provides:

“27.1 If any dispute or difference of any kind whatsoever arises between the purchaser and the supplier in connection with or arising out of the contract, the parties shall make every effort to resolve amicably such dispute or difference by mutual consultation.

27.2 If, after thirty (30) days, the parties have failed to resolve their dispute or difference by such mutual consultation, then either the purchaser or the supplier may give notice to the other party of his intention to commence with mediation. No mediation in respect of this matter may be commenced unless such notice is given to the other party.

27.3 Should it not be possible to settle a dispute by means of mediation, it may be settled in a South African court of law.

27.4 Mediation proceedings shall be conducted in accordance with the rules of procedure specified in the [G]CC<sup>2</sup>.

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<sup>2</sup> [G]CC – Stands for General Conditions of Contract.

27.5 Notwithstanding any reference to mediation and/or court proceedings herein,

- (a) the parties shall continue to perform their respective obligations under the contract unless they otherwise agree; and
- (b) the purchaser shall pay the supplier any monies due the supplier.....”

[7] It is common cause that this matter was not referred to mediation by the parties before the applicant approached this Court for the relief set out in paragraph [1], *supra*. Adv Johnson submitted, on behalf of the applicant, that the series of meetings which took place between the applicant and the Premier should be considered as mediation which had failed. This submission is incorrect. Mediation in legal parlance is a dispute resolution process used in matters of this nature where a neutral third party is brought into the fold to mediate between the parties to come to an agreement. Mediation in its formal meaning is analogous to an arbitration process which according to **The New Shorter Oxford English Dictionary** refers to the settlement of a dispute by a person chosen by the opposing

parties in a dispute to decide the differences between them. The applicant was not given the General Conditions of Contract when the application was approved. He was therefore unlikely to have known about the mediation clause until the Premier filed his opposing papers, to which these conditions were annexed.

- [8] A proper reading of Clause 27 does not make mediation peremptory. The choice, in terms of Clause 27.2, lies with “either the purchaser [the Premier] or the supplier [the applicant] **may** give notice to the other party of his intention to commence mediation.” Clause 27.3 is even more relevant because it stipulates clearly that “Should it not be possible to settle a dispute by means of mediation, it may be settled in a South African Court of law.” (Emphasis added).
- [9] However one interprets these clauses, the jurisdiction of this Court has not been ousted. The current law on arbitration has been stated as follows in **Universiteit van Stellenbosch v J A Louw (Edms) Bpk** 1983(4) SA 321 (a) at 333G – 334B:

*"It has always been recognized that an arbitration agreement does not necessarily oust the jurisdiction of the Courts; see The Rhodesian Railways Ltd v Mackintosh 1932 AD 359 at 375. See also s 3 (2) of the Arbitration Act 42 of 1965. However that may be, when a party to an arbitration agreement commences legal proceedings, a defendant who was party to the agreement and who has entered appearance to defend and not delivered any pleadings is given the right by s 6 of the Act to apply to the Court for a stay of the proceedings. The onus of satisfying the Court that it should not, in the exercise of its discretion, refer the matter to arbitration is on the party who instituted the legal proceedings. See Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd [1970 \(2\) SA 498 \(A\)](#) at 504H. It follows that the plaintiff had to discharge that onus. In Rhodesian Railways v Mackintosh (cited above) at 375 it was said that the discretion of the Court to refuse arbitration, where such an agreement exists, was to be exercised judicially, and only when a "very strong case" had been made out.*

*It is not possible to define, and certainly it is undesirable for any court to attempt to define with any degree of precision, what circumstances would constitute a "very strong case". In Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales*

Co (Pty) Ltd 1971 (2) SA 388 (W) COLMAN J at 391H refers to English authorities which say:

*"there should be 'compelling reasons' for refusing to hold a party to his contract to have a dispute resolved by arbitration".*

*It has also been said that before a court refuses a stay of proceedings it has to be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement. See Bristol Corporation v John Aird & Co 1913 AC (HL (E)) 241 at 252,257 and 260."*

[10] In **PCL Consulting (Pty) Ltd v Tresso Trading 119 (Pty) Ltd**

2009(4) SA 68 (SCA) at 71H – 72D the Court held:

*"If a party institutes proceedings in a court despite such an agreement, the other party has two options:*

- (i) It may apply for a stay of the proceedings in terms of s 6 of the Arbitration Act 42 of 1965; '6(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the*

*proceedings, apply to that court for a stay of such proceedings.*

- (2) *If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just.' or*
- (ii) *it may in a special plea (which is in the nature of dilatory plea) pray for a stay of the proceedings pending the final determination of the dispute by arbitration.*

*The definitive statement of the law in this regard is to be found in B Rhodesian Railways Ltd v Mackintosh 1932 AD 359 at 370 -371 where Wessels ACJ said:*

*'All that sec 6(1) Of Act 8 of 1928 (Southern Rhodesia), quoted at 367-368 of the judgment, which is (for present purposes) to the same effect as s 6 of the current South African Arbitration Act quoted above, n3. lays down is that you cannot adopt the cheaper and speedier procedure therein provided when once you have delivered pleadings or taken any other step in the proceedings. If you have taken any step in the proceedings, then you can no longer adopt the speedier and less costly procedure of applying to the Court to stay proceedings but you must file your pleadings in*

*the ordinary way. In pleading, however, you can raise the defence that the case ought to be decided by arbitration; this can be done by a special preliminary plea.'*

*In the present proceedings, the defendant has simply pointed out that the lease contains an arbitration clause in wide terms. That is not sufficient. The defendant was obliged to go further and set the terms of the dispute."*

The Premier has taken none of these procedural steps or has done so totally inadequately to enable a Court to non-suit the applicant. The point *in limine* in this respect is dismissed.

[11] The Premier seems to suggest that there was an agreement that the applicant would withdraw his application before the suspension of the contract could be uplifted, and that because he failed to do so he has breached the agreement or has repudiated the tender contract. In the result, the contention went, the Premier was entitled to cancel the contract. The Acting Director General in the office of the Premier, Mr Albertus

Johannes Venter (“Venter”) in his opposing affidavit went on to say:

“It has in any event subsequently come to my attention that the applicant has breached the agreement since the outset. The applicant failed to provide capacity development programs and training for Government employees employed at the Business Support Centres, and furthermore failed to provide continuing support to SMME’s at the respective Business Support Centres. Respondent has therefore terminated the agreement in terms of clause 23.1 of the General Conditions of Contract. A copy of the said termination is annexed hereto as annexure ‘AJV6’.”

[12] Clause 23.1 of the General Conditions of Contract provides:

**“23.Termination for default**

23.1 The purchaser, without prejudice to any other remedy for breach of contract, **by written notice of default sent to the supplier**, may terminate this contract in whole or in part:

- (a) if the supplier fails to deliver any or all of the goods within the period(s) specified in the contract, or within

any extension thereof granted by the purchaser pursuant to GCC Clause 21.2;

- (b) if the supplier fails to perform any other obligation(s) under the contract; or
- (c) if the supplier, in the judgment of the purchaser, has engaged in corrupt or fraudulent practices in competing for or in executing the contract.”

[13] Clause 23.1 must not be read in isolation but in conjunction with clause 21.2 to which it refers, which provides that:

**“21. Delays in the supplier’s performance.**

If at any time during the performance of the contract, the supplier or its subcontractor(s) should encounter conditions impeding timely delivery of the goods and performance of services, the supplier shall promptly notify the purchaser in writing of the fact of the delay, its likely duration and its cause(s). As soon as practicable after receipt of the supplier’s notice, the purchaser shall evaluate the situation and may at his discretion extend the supplier’s time of performance, with or without the imposition of penalties, in which case the extension shall be ratified by the parties by amendment of contract.”

[14] The submission on behalf of the Premier that the applicant did not perform his obligations in terms of the contract is, in my view, an afterthought. It was in fact the Premier who impeded the performance of the contract by the applicant. That is why the alleged breach was not raised from the onset as a counterclaim or during the numerous meetings held with the Premier or his officials. In any event the Premier failed to satisfy certain requirements set out in the very clauses on which he seeks to have the contract cancelled.

14.1 He must have sent a written notice of default to the supplier (clause 23.1);

14.2 He should have evaluated the situation first with or without imposition of penalties (clause 21.2). This much was conceded by the Premier's counsel, Mr Claasen; and

14.3 He may even, in his discretion, have extended the supplier's time for performance (clause 21.2).

[15] Mr Claasen further submitted that the contract/tender document was not clear in so far as the exact responsibilities of the Premier are concerned. This submission is, in my view,

somewhat disingenuous. The tender document is a standard document that was engineered by the Premier. If there was anything wrong with the tender document the Premier through his functionaries was at liberty to improve it. However, as the tender document stands it is clear and unambiguous; otherwise it would have been construed against the Premier because that office composed the document. See Patel v Le Clus (Pty) Ltd 1946 TPD 30 at 34; Horty Investment Pty Ltd v Interior Acoustics (Pty) Ltd 1984(3) SA 537 (W) at 540A-B

[16] In my view the Premier has not shown that there was any justification for suspending the performance of the contract by the applicant. In addition there is no evidence that the applicant has breached the terms of contract. It is accordingly the Premier who has repudiated the contract. The applicant being the innocent party is entitled to seek an order for specific performance, as it has done. The party wishing to claim specific performance in terms of a contract must:

16.1 allege and prove the terms of the contract;

16.2 allege and prove compliance with any antecedent or reciprocal obligations or must tender to perform them.

See: SA Cooling Services v Church Council of the Full Gospel Tabernacle 1955 (3) SA 541 (D); RM Van de Ghiste (Pty)Ltd v Van de Ghiste 1980 (1) SA 250 (C).

16.3 allege non-performance by the defendant; and

16.4 claim specific performance. See **LTC Harms Amler's Precedent of Pleadings**, 356.

- [17] Specific performance, which an innocent party may choose to enforce, is an order to perform a specified act or to pay money in pursuance of a contractual obligation. (**Christie The Law of Contract**, 5<sup>th</sup> Edition, 522). A final mandatory interdict in a contractual matter is an order for specific performance. (**Klimax Manufacturing Ltd v Van Rensburg** 2005 (4) SA 445 (O). Assuming the innocent party makes out a case, his claim will be granted, subject only to the Court's discretion. The *locus classicus* is the judgment of Innes CJ in **Farmers' Co-op Society (Reg) v Berry** 1912 AD 356:

“Prima facie every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by Kotze CJ in *Thompson v Pullinger* (1894) 1 OR at p301, ‘the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt’. It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance will be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money. For in the words of Storey (Equity Jurisprudence, sec 717(a),) ‘it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for breach of it.’ The election is rather with the injured party, subject to the discretion of the Court.”

[18] **De Villiers AJA** said in **Haynes v King Williamstown Municipality** 1951 2 SA 371 (A) at 378G:

“The discretion which a court enjoys, although it must be exercised judicially, is not confined to specific types of case, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.” (**Christie**, *supra*, 523).

See too **Santos Professional Football Club (Pty) Ltd v Igesund and Another** 2002 (5) SA 697 (C) at 701E. It was for the Premier to allege and prove facts on which the court must exercise its discretion in his favour. Although specific performance is a discretionary remedy, the general rule is that where, owing to the difficulty of assessing damages or otherwise, it is not possible to do justice by an order for the payment of money, and where it is in the power of the Premier to carry out his undertaking, then a decree of specific performance is the only appropriate remedy. (**Farmers' Co-Operative Society (Reg ) v Berry** (*supra*); **BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk** (*supra*) and also **Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd** 1982 (1) SA 398 (A) at 426.

[19] In my view the applicant has satisfied the above mentioned requirements and has shown that it is possible for the Premier to perform its obligations in terms of this contract. The Premier has failed to show why this Court should exercise its discretion against the grant of the order prayed for.

[20] Insofar as costs are concerned, the applicant was forced to come to court after negotiations had failed and there was no willingness on the part of the Premier to resolve the impasse soon or at all. I am inclined to agree with Mr Johnson that this matter was not complicated to have two counsel represent the Premier. The Premier must accordingly bear the costs of this application.

[21] **In the circumstances I make the following order:**

**Order:**

**[1] The respondent (the Premier) is ordered to comply with the terms and provisions of the contract embodied in tender number BDR 4/2008, awarded to**

**the applicant (Future Business Advice and Services CC) by the respondent on 12 May 2008 permitting and authorising the applicant within one month of this order to recommence with the provision of agreed training and support services, against proper and due payment of all invoices, as contemplated in the tender.**

- 2. The respondent is ordered to pay the costs of this application on a party and party scale.**

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**B.C. MOCUMIE, J**

On behalf of the applicant:      Adv. J.M.C. Johnson  
Instructed by:  
Naudes  
BLOEMFONTEIN

On behalf of the respondent:      Adv J.Y Claasen (SC)  
& Adv. A. Williams  
Instructed by:  
State Attorney  
BLOEMFONTEIN