

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case Nr: 359/2007

Date delivered: 25/05/2006

In the matter between:

Section I.1 MCB Business Solution t/a Africa Business Solutions

and

Section I.2 The Premier of the Northern Cape

Coram: Olivier J

JUDGMENT

OLIVIER J:

1. The applicant, MCB Business Solutions (t/a Africa Business Solutions), launched this application against the respondent, the Premier of the Northern Cape (representing the Department of Education, Northern Cape), on an urgent basis and set the matter down for hearing on 13 April 2007. On that date the application was postponed to 11 May 2007, when it was eventually argued.
2. The relief which the applicant applied for was a declaratory order that *"there are disputes between the parties as contemplated in paragraph 21 of annexure 'H' hereto"* and an order that the matter be referred to an *"arbitrator"* to determine certain disputes.
3. The word *"arbitrator"* was obviously initially used erroneously (alternately with the word *"mediator"*) and the applicant later applied for an amendment to substitute the word *"arbitrator"* with the word *"mediator"*. No objection was raised to such an amendment and, in view of the fact that the applicant's founding affidavit in any event made it very clear that the application had always been aimed at the appointment of a mediator, such

an amendment can be granted if necessary.

4. The background to the application, very briefly, is that the applicant and the department concluded an agreement by means of a tender by the applicant, the acceptance thereof by the department and the subsequent conclusion of a written contract ("*the contract*"), in terms of which the applicant would rent four printers to the department (and render certain services in the operation of the machines) for a period of three years at a total cost of R492 708.33.
5. The contract commenced on 1 December 2006 (although the machines had apparently already been put into operation by then). During January 2007 representatives of the department complained that the speed at which the machines operated (and other functions of the machines) did not comply with the requirements in the request for tenders or with the specifications in the applicant's tender. After tests were conducted the applicant offered to supply two further machines at no extra cost. There is no indication that such offer was accepted.
6. According to the deponent for the applicant it at no stage conceded that the machines did not comply in any respect whatsoever, while the respondent's version is that this was conceded on more than one occasion.
7. On 19 February 2007 it came to the applicant's attention that the department had discontinued the operation and use of the machines. On the same day the applicant made written enquiries to the head of the department in this regard. When this did not elicit any response the applicant's attorneys directed a letter to the head of the department on 22 February 2007.
8. On 26 February 2007 the applicant received a letter, dated 15 February 2007 but signed on 23 February 2007 (annexure 'K' to the founding affidavit and hereinafter referred to as such), from the head of the department, Mr Williams, in which it was **inter alia** stated that "*the machines cannot deliver at the levels represented in your proposal, and also fall far short of the performance set out in the specifications*". It is the respondent's case

that annexure 'K' served as "*notice of cancellation*" of the contract, an aspect to which I will revert in due course.

9. On 28 February 2007 the applicant replied in writing, proposing the installation of 2 further machines.
10. At a meeting on 6 March 2007 mr Williams, however, informed the applicant's representatives that the contract had been cancelled. The same attitude was adopted by mr Williams in a subsequent letter on 8 March 2007.
11. On 13 March 2007 the applicant's attorneys addressed a further letter to the department, **inter alia** indicating that the applicant would consider having the matter referred to a mediator in terms of clause 21 of the contract. On 14 March 2007 mr Williams replied in writing that, because the contract had already been cancelled, the contract - including clause 21 (which provided for mediation and, if unsuccessful, arbitration) - no longer existed.
12. On 28 March 2007 it came to the applicant's attention that the department had again invited tenders for the rental of printers for the same period. On the same date the applicant's attorneys once again addressed a letter to the department, indicating that they had obtained advice from senior counsel and requesting the department to agree to the appointment of a mediator by no later than 12:00 on 29 March 2007.
13. On 29 March 2007 mr Williams replied in writing that "*we do not consider ourselves bound by any of the terms of the terminated agreement*". On 11 April 2007 this application was served on the respondent at the local office of the State attorney and, as already mentioned, set down for 13 April 2007.
14. In his opposing affidavit on behalf of the respondent mr Williams raised several points **in limine** on behalf of the respondent. In the first place it was submitted that the notice of motion does not comply with form 2(a) of the first schedule to the Uniform Rules of Court (**inter alia** in that it did not state an address, within 8 kilometers of the office of the Registrar, where notice and service of documents would be accepted) and that it should therefore be set aside as an irregular proceeding.

15. I do not deem it necessary to spend too much time on this argument. Even if the notice of motion does not strictly speaking comply with form 2(a), it does contain the address of the applicant's attorneys and there is no indication (let alone an allegation to this effect) that the respondent was prejudiced by this. In any event the respondent did not comply, in its "*application*" for the notice of motion to be set aside, with the provisions of Rule 30. It did not take the necessary steps in this regard within 10 days of the date on which the notice of motion was served on the respondent and the applicant was not given any opportunity of removing the cause of the complaint.
16. The other points **in limine** taken in the opposing affidavit concern the short notice (of the application) given to the respondent. Despite the fact that almost a month lapsed between the date for which the matter had initially been set down and the date on which the application was eventually heard, and the fact that opposing and replying affidavits have been filed, it was argued on the respondent's behalf that the application should be dismissed on this basis alone, alternatively "*on the cumulative grounds of not making out a case for urgency and its deviation from the rules relating to the form, service and sitting of this Court*".
17. In my view the applicant has indeed not satisfactorily explained why such short notice was given to the respondent. The respondent's letter of 14 March 2007, and its reaction to the applicant's reference to clauses 21.2 and 21.3 of the contract (and to the possibility of mediation), must have made it very clear to the applicant that the respondent would not agree to mediation.
18. No explanation was furnished by the applicant's attorneys for the delay from 14 March 2007 to 28 March 2007 (apart from stating that they were "*in consultation with*" counsel at some stage), and the same applies to the delay from 29 March 2007 (when it was once again made clear that the department was not going to agree to mediation) to 10 April 2007 (when the application was eventually lodged, only two court days before the initial date of set down). The facts of this matter are therefore distinguishable from those in **Transnet Ltd v Rubenstein** 2006 (1) SA 5914 (SCA).
19. The facts that the department has stopped its payments to the applicant, that the applicant is still obliged to pay the supplier from which it had purchased the machines or that other parties might

in the meantime incur expenses in reaction to the respondent's new invitation for tenders would not in themselves justify the short notice given to the respondent.

20. I do not, however, think that it would be appropriate to dismiss the application on this ground, or even "*cumulatively*" on the grounds suggested on behalf of the respondent. Whatever prejudice might have been caused by the short notice can in my view be adequately addressed by a suitable costs order, and mr Reinders, who appeared on behalf of the applicant, conceded that it would be fair to order the applicant to pay the wasted costs occasioned by the postponement on 13 April 2007.

21. This brings me to the merits of the matter. The applicant relies on the provisions of clause 21 of the contract and contends that it enjoins the department, in the event of a dispute such as this, to subject itself to a process of mediation. Under the heading "*DISPUTE RESOLUTION*" clauses 21.1 and 21.2 provide as follows:

"21.1 Amicable settlement

The Parties shall make every effort to resolve any complaints or disputes in the monthly meetings before any further action is considered.

21.2 Referral to Mediator

If the Parties are unable to resolve any complaints or disputes within 14 ... days ... the Parties shall refer the complaint or dispute to a neutral mediator. ... if the Parties accept the recommendations in an agreement, it shall be legally binding on them."

22. In clause 21.3 of the contract provision is made for arbitration in the event that "*the Parties do not accept the recommendations or corrective steps of the mediator*".

23. What immediately strikes one is the repeated use of the word "*shall*" in these provisions. It could be argued to be an indication that the parties intended these provisions to be peremptory and to apply in the event of "any" complaint or dispute.

24. The question is if a dispute about whether the machines functioned as undertaken by the applicant, could be viewed as one to which the parties had intended clause 21 to apply. Upon its ordinary grammatical meaning the wording of the provisions of clauses 21.1 and 21.2 of the contract would seem to apply to *"any ... disputes"* and there is no clear indication in the contract that the word *"any"* should not in this case be given its ordinary wide meaning (see **Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd** 1983 (1) SA 254 (A) at 261B-E, **Proctor & Gamble SA (Pty) Ltd v Carlton Paper of South Africa (Pty) Ltd and Another** 1997 (3) SA 292 (T) at 296G and **Manyasha v Minister of Law and Order** 1999 (2) SA 179 (SCA) at 190).
25. Furthermore it could be argued that this would correspond with the even wide wording of clause 27.1 of the General Conditions of Contract (GCC), which also apply *"... to all bids, contracts and orders including bids for ... services ... hiring, letting ..."* (clause 2.1 of the GCC), except where such provisions would be in conflict with those of a contract like the one concerned here (clause 2.3 of the GCC). Under the heading *"Settlement of Disputes"* clause 27.1 of the GCC also provides that *"any dispute or difference of any kind whatsoever"* should be attempted to be amicably resolved.
26. On the other hand it could possibly be argued that the reference in clause 21.1 of the contract to *"monthly meetings"* where disputes could be addressed, could be interpreted to mean that the parties intended those provisions to apply only to disputes arising during the course and execution of the contract (as opposed to a disputed regarding the actual conclusion of the contract).
27. When considering the meaning of the provisions of clause 21 they should obviously be considered in the context of the contract as a whole, and more specifically also against the background of the provisions of clause 7.2 (to which I will revert in due course) and the problem is that, as will be seen below, there are indications that the intention was that the delivery of the *"correct"* machines would form part of the services to be rendered by the respondent, and therefore arguably of the execution of the contract.
28. This brings me to the question of cancellation, and the provisions of clause 7.2 at the contract. In its opposing affidavit the respondent made various

(and somewhat confusing) averments regarding the legal basis upon which it had allegedly cancelled the contract. It was submitted that the fact that the specifications provided by the applicant were “false” brought it within the ambit of section 2 (1) (g) of the Preferential Procurement Policy Framework Act, 4 of 2000 (the PPPF Act), and that on this basis the respondent would have been entitled to cancel.

29. I fail to see how the provisions of the PPPF Act could possibly have any bearing at all on this case. Even if the applicant had supplied “false” information regarding the attributes of the machines this would have had nothing to do with the purpose of the PPPF Act, as set out in its preamble and read with the applicable provisions of the Constitution. In view of what follows, and also because it is not necessary for the purposes of this application to decide whether there was a factual basis (as opposed to legal provision therefore) for cancellation, I deem it unnecessary to lend any further consideration to this contention.
30. The same applies to the suggestion by Mr Williams that the furnishing of the specifications amounted to “*corrupt or fraudulent practices in competing for ... the contract*”, as envisaged in clause 23.1 of the GCC, although I have to mention that, apart from the fact that on the face of it clause 23.1 of the GCC deals with the remedies of a “*purchaser*” (which the respondent is not), the respondent has not even made the allegation that the applicant acted fraudulently or corruptly in furnishing the specifications. Mr Sibeko quite correctly conceded that Mr Williams was wrong in relying on the provisions of clause 23.1 of the GCC.
31. In my view the provisions of clause 7.2 (read with those of clause 7.2.3) of the contract are of more importance. It provides that, “*If the client determines that the services are not rendered as contemplated in this agreement, the bid document and ‘Schedule A’ hereto the client may - ... Cancel this agreement with immediate effect ...*”.
32. The question is whether these provisions, viewed in isolation and if the provisions of clause 21 are disregarded for the moment, would have provided the respondent with the remedy of cancellation on the ground that the machines which the applicant had delivered, did not comply with the requirements of the initial invitation for tenders or with the specifications in the applicant’s tender.

33. To answer this question one would have to determine whether the delivery of machines which did so comply would constitute a “service” as envisaged in clause 7.2. On behalf of the applicant it was argued that this is not the case and that the provisions of clause 7.2 pertain only to services as envisaged in the preceding clause (clause 6). It was argued that the delivery of the correct machines would not have constituted a service as envisaged in clause 6.
34. The heading of clause 6 is “THE SERVICES” and according to clause 6.1 *“The services that are intended in terms of this Agreement in the service area are as follows:*
- a) *Delivery of photocopy machines*
 - b) *...”*
35. It is clear that the reference “*photocopy*” machines was intended to be a reference to the printing machines which are the subject of the agreement. “*Service Area*” is defined in clause 1.8 of the contract as “... *the areas in which the services are to be rendered ...*”.
36. It is not clear at all whether it was intended that the provisions of clause 6 of the contract could only apply to such services as would actually be rendered on a daily and continuing basis “*in the services area*” (like the installation and maintenance of the machines) – and not to the question whether the machines delivered did in fact comply with certain standards – and, even if so, whether the provisions of clause 7.2 were intended to be limited in its application to services as envisaged in clause 6.
37. In clause 1.7 of the contract the word “*Services*” is defined as meaning “... *the services to be rendered by the Service Provider to the Client in terms of this agreement*”. When regard is had to the rest of the provisions of the contract (apart from those of clause 6) the following appears:
- 37.1. In terms of clause 7.2 “*services*” would be rendered “*as contemplated in this agreement, the bid document and ‘Schedule A’ hereto*”.
 - 37.2. In clause 5.1 it was agreed, under the general heading “*SCOPE OF SERVICES*”, that “*The services ... shall ... include the services as*

outlined in 'Schedule A' ...". When regard is had to schedule A the services would then have included "To deliver ... machines ... as provided for in schedule B". Schedule B provides for the supply of printers with certain specified and agreed capabilities.

38. These provisions, read together and in context, could be interpreted to mean that one of the services which the applicant had been intended to render, was not merely to deliver printing machines, but specifically to deliver printers complying with particular specifications. If so, the delivery of non-compliant machines could be interpreted to be a failure to render a "service", as contemplated in clause 7.2 of the contract.
39. On this interpretation, and disregarding for the moment clause 21 and its widely worded provisions, the contract would then have provided the respondent with the remedy of cancellation in the event that the machines delivered by the applicant did not comply with the specifications agreed upon.
40. Clause 7.2 does not prescribe the method of cancellation or the manner in which notice of cancellation should be given. To determine whether the respondent had indeed "*made an election to cancel is a question of fact to be decided on the evidence*" (see **Peters and Others NNO v Schoeman and Others** 2001 (1) SA 872 (SCA) at 882A-B).
41. There is no basis upon which it can be found that the respondent had not made such an election, at the latest by 6 March 2007, when mr Williams informed the representatives of the applicant that the contract had been cancelled. Insofar as it might be argued that the applicant placed the fact that such an election had been made in dispute (although it admitted that this was what mr Williams had declared at the meeting of 6 March 2007), the fact would remain that the application is for final relief and that the respondent's version in this regard will normally prevail (see **Staatsdiensliga van Suid-Afrika en andere v Minister van Waterwese** 1990 (2) SA 440 (NK) at 443G and **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634E-635C).
42. In his opposing affidavit mr Williams referred to annexure 'K' as the notice of cancellation and he stated that the contract was cancelled "*as set out in annexure 'K'*". In the said letter mr Williams did indeed inform the applicant

that “... we are left with no option but to ... give you notice of the termination of the contract in whole. The termination is without prejudice to any other legal remedy we may have for breach of contract”. Had mr Williams left it at this, there would have been no doubt that the applicant had also been given clear notice of cancellation.

43. In the last paragraph of annexure ‘K’ mr Williams, however, went on to inform the applicant as follows:

“It is procedural to allow a remediation solution to be proffered by the defaulting party. You thus have an opportunity to present such a solution. It must be clear that the solution cannot, in effect, change the specifications of the tender nor the assertions made in your tender application. Any solution that does this would be considered to be in conflict with Supply Chain Management policy and regulations. You thus have 48 hours to proffer a viable solution, failing which the contract will be terminated with immediate effect.”

44. As already mentioned, annexure ‘K’ eventually reached the applicant on 26 February 2007. On 28 February 2007 the applicant responded by proposing the delivery of two further machines. When the respondent failed to respond to the applicant’s letter of 28 February 2007, the applicant called for a meeting and at that meeting, which took place on 6 March 2007, mr Williams informed the representatives of the applicant that the contract had been cancelled.
45. Even though annexure ‘K’ could be argued not to have been a clear and unequivocal notice of cancellation (see **Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd** 2001 (2) SA 284 (SCA) at 299F-300I, **Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases** 1985 (4) SA 809 (A) at 830E-F, **Kragga Kamma Estates CC and Another v Flanagan** 1995 (2) SA 367 (A) at 375C-F and **Peters and Others NNO v Schoeman and Others, supra**, at 882C-D), the applicant’s representatives were informed of the election to cancel in no uncertain terms at the meeting on 6 March 2007, long before the respondent was requested to partake in mediation.
46. I am of the view that in this case, and especially in view of what follows, a cancellation in terms of clause 7.2 of the contract would indeed have terminated the contract in its entirety. It is simply inconceivable that the

intention could have been to provide, on the one hand, for cancellation “*with immediate effect*”, and indeed “*without any prejudice to the rights of*” the department (clearly referring to its common law contractual rights and remedies), while on the other hand providing for arbitration even after such cancellation. An obligation to subject to arbitration in respect of a certain issue would in my view be completely irreconcilable with an entitlement, in respect of the same issue, to cancel as envisaged in clause 7.2.

47. On behalf of the applicant it was contended that the provisions of section 3 (1) of the Arbitration Act, 42 of 1965, would have prevented such a cancellation. These provisions read as follows:

“Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.”

48. Apart from the fact that, on the above interpretation of clause 7.2 of the contract, it could be argued that the parties had in fact indeed contractually agreed that such a cancellation would be competent, the problem is simply that the applicant has in my view not made out any case at all why the provisions of clause 21 (of which the arbitration clause forms part) should on these facts and in these circumstances apply to the exclusion of those in clause 7.2.
49. The two sets of provisions are completely irreconcilable. While clause 21 would appear to have been intended to subject any possible form of dispute to mediation and arbitration (to the exclusion of a remedy like cancellation by one of the parties), clause 7.2 provides for unilateral cancellation.
50. The available evidence provides no solution to this inconsistency and no acceptable method of interpretation would, on the face of it, solve the problem. An interpretation (or even the implementation of the **contra proferentem** principle– see **The Law of Contract**, Christie, 4th ed, pp255-257) to the effect that the provisions of clause 21 were intended to deprive the respondent of the normal remedy of cancellation, would be completely arbitrary and without any factual basis, would lead to the absurd result that the provisions of clause 7.2 would be rendered nugatory and would moreover be inconsistent with the presumption against the waiver of a right normally conferred by law (see **Le Roux v Odendaal** 1954 (4) SA

432 (N) at 441 and **Van Aswegen v Van Aswegen** 2006 (5) SA 221 (SE) at 247); for such an interpretation would in effect impute to the respondent an intention to waive the remedy of cancellation or rescission.

51. Apart from this, and even if it were to be accepted that clause 21 was intended also to apply to disputes regarding the attributes of the machines, the fact is that there is on the papers a factual dispute regarding whether, as at the meeting of 6 March 2007, there was in fact any dispute about whether the machines complied with specifications (see paragraph 6 above). Once again the respondent's version in this regard would have to prevail (see the **Staatsdiensliga** and **Plascon-Evans** cases referred to above), which would mean that the Court would have to accept that at the time of cancellation of the contract, there was no dispute to subject to mediation or arbitration.
52. It follows that I am of the view that the application should be dismissed and that the applicant should be ordered to pay the costs thereof, including those wasted by the postponement on 13 April 2007.
53. On behalf of the respondent mr Sibeko argued that such costs should include the costs of two counsel. As grounds for such an order he advanced the fact that the application was brought on an urgent bases while there existed no grounds therefore and that the respondent had to comply with certain time constraints in the filing of its opposing affidavit and heads of argument (which, so it was argued, rendered the matter complicated) and he argued that the case was of "*sufficient*" interest and importance to the respondent to justify such an order.
54. In my view there is no merit in any of these grounds. The absence of urgency could certainly not in itself be a ground for such an order. Furthermore the parties agreed (on 13 April 2007) on the periods within which the further affidavits and heads of argument would be filed (within the period of just less than a month before the hearing) and I cannot see how this could have justified the costs of two counsel. The mere fact that the matter might be of importance to the respondent is, obviously, also not a ground for such an order. In my view the matter was not complex and there is no reason why the costs should include the costs of two counsel.
55. In the premises the following orders are made:

- 1. The application is dismissed.**
- 2. The applicant is ordered to pay the costs of the application, including the wasted costs occasioned by the postponement on 13 April 2007.**

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the Applicant: Adv S J Reinders
On behalf of: Du Toit Bomela Attorneys, KIMBERLEY

For the Respondent: Adv L T Sibeko, SC & Adv A P S Nxumalo
On behalf of: The State Attorney, KIMBERLEY

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