



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D7596/2020

In the matter between:

BLESS JOE TRADING CC

PLAINTIFF

and

ETHEKWINI MUNICIPALITY

DEFENDANT

ORDER

In the premises the following order is made:

1. The defendant is directed to pay the market related amount of damages from 1 April 2020 to 17 March 2021 to the plaintiff which the parties may agree upon or which the plaintiff may prove.
2. Interest on the agreed or proved amount at the rate calculated from 1 April 2020 to date of final payment.
3. The defendant is to pay the plaintiff's costs of the action, including the costs of two counsel, on scale C.
4. The defendant's counterclaim is dismissed.
5. The defendant is to pay the plaintiff's costs of the counterclaim, including costs of two counsel on scale C.

JUDGMENT

Mathenjwa J

Introduction

[1] The plaintiff initially brought an application against the defendant for payment of invoices issued by the plaintiff in respect of services rendered in terms of a contract entered into between the parties. The plaintiff further claimed damages arising from the defendant's failure to restore possession of tents and ablution facilities which were leased by the plaintiff to the defendant to accommodate displaced people.

[2] On 22 February 2022 the matter came before Kruger J who referred it to trial. Subsequently the plaintiff delivered its declaration, the defendant delivered a plea and the rules provided for in the conduct of a trial proceedings were applied. The defendant further delivered a claim in reconvention in terms of which it sought an order declaring invalid the contract entered into by the parties.

Historical background

[3] In April 2019 the defendant experienced devastating flooding resulting in homelessness amongst many people who occupied informal accommodation. In line with its constitutional mandate to provide shelter, more specifically emergency housing, the defendant called for quotations for the provision of temporary emergency accommodation in the form of tents and ablution facilities at Tehuis in Umlazi Township. When calling for quotations the defendant deviated from the normal procedures provided for in its Supply Chain Management Policy (SCM policy) in accordance with clause 36 thereof which authorises deviation from normal procurement procedures during emergency or disaster situations.

[4] The plaintiff submitted its bid for the provision of services in the amount of R190 000 per day for a period of 14 days. The bid comprised of;

- (a) one quantity of 15 x 30 Marquees;
- (b) one quantity of 15 x 30 flooring;
- (c) eight public toilets;
- (d) six electricity; and
- (e) 50 chairs.

The plaintiff's bid was successful and it subsequently provided tent and ablution facilities which accommodated 150 people at the site.

[5] The plaintiff continued to provide services in terms of the original contract after the expiry of 14 days. On 31 March 2020, the plaintiff received an email from the defendant terminating the contract and indicating that alternative shelter would be arranged by the defendant for the people who were occupying the plaintiff's tent and other facilities. However, despite the defendant indicating that the people would be placed in alternative shelter, the plaintiff's marquee and ablution facilities were not removed from the premises and the defendant did not provide alternative accommodation for the people. The plaintiff continued submitting invoices for the provision of services to the defendant in respect of its facilities which was used by the occupants after termination of the contract but the defendant failed to pay the plaintiff's invoices in respect of services rendered after 31 March 2020 being the date on which the defendant terminated its contract with the plaintiff. On the date of institution of this proceedings the plaintiff claims for payment of R73 008 000, plus Vat at 15% and interest.

Issues at the trial

[6] The plaintiff called Mr Ndumiso Ndlela, member of the plaintiff company, who testified that he was called by one of the defendant's employees to come on site behind the Durban City Hall for a tender briefing. He attended the briefing together with other service providers. He was told to submit quotations for a marquee and ablution services for 150 people who had been displaced due to the flooding. He prepared the quotation and submitted it on the same date. The following day he was telephonically informed by the defendant's employee Ms Balungile Gasa that his bid was successful and he had to erect the marquee on site. The following day, 27 April 2019 he put up the marquee and other facilities. Two days after he had erected the tent structure it rained and he was asked by a municipal councillor Mr Mthembu who was in company of other people from the defendant's disaster management section to put up water proofing and carpeted flooring to accommodate the rain. After adding the flooring to the quotation, the plaintiff's fees increased from R190 000 to R208 000 per day.

[7] After the expiry of 14 days the plaintiff continued accommodating the displaced people in its tent because the defendant did not have alternative shelter to accommodate the people. According to Mr Ndlela the plaintiff also provided other services to the displaced people including food at its own cost with no charge to the defendant. The defendant continued to pay the plaintiff the amount of R208 000 per day for services rendered even after the expiry of 14 days, which was the time period agreed between the parties for the provision of services. Subsequently Mr Ndlela received an email from Mr Ngubane, an employee of the defendant, informing him that the agreement for provisions of services between the parties was terminated with effect from 31 March 2020.

[8] Subsequently on 31 March 2020 Mr Ndlela went to the site to collect the marquee and other equipment, but was prevented by the occupants of the tent from removing it, who angrily told him that they would not relocate because the defendant had not provided them with alternative accommodation. On 27 May 2020 he received an email from an employee of the defendant, Mr Patel, asking him to reduce the daily fee for rendering services by 40 percent to which he did not agree. On 15 July 2020 he received an email from the defendant's attorneys requesting him to remove his tent and other equipment from the site. When he went to the site to remove the tent the occupants again did not allow him to remove it and the equipment. He was finally able to remove the equipment and the tent as well on 17 March 2021 when he was assisted by the defendant who provided security and secured the presence of members of South African Police Services on the site.

[9] Under cross-examination by the defendant's counsel Mr Ndlela stated that he could not remember the name of the person who called him to attend the briefing on the site. However, on arrival at the site he found Mr Mbhele, an employee of the defendant, addressing the people. Mr Mbhele told him that once he had completed the quotation he had to deliver it at the disaster section of the defendant. When it was put to him by the defendant's counsel that one of the quotations which he also delivered to Ms Gasa belonged to Crismarly Trading Pty Ltd in which he was a former director, he admitted that he was a former director of Crismarly, but he had sold it to one Wiseman. When he was confronted with the fact that in his quotation and invoice he charged the defendant R14 400 per day for electricity whereas the

electricity was connected to a hostel where it was supplied by the defendant, he contended that he had an informal agreement with the people from the hostel to pay them for the electricity which was connected to the hostel. When asked whether he could produce a bill or invoice issued by the hostel for the electricity charge he contended that he would pay R5 000 cash to the hostel for the duration of the contract but he was not officially billed for consumption of the electricity at the site.

[10] When asked whether he informed the defendant that on 31 March 2020 he was at the site to remove his equipment, he responded that he did not do so, neither did he phone the defendant whilst on site to inform it that he was on site, nor did he call the police to ask for assistance because the occupants of the marquee were preventing him from removing it. He made a second attempt to remove the equipment on 27 July 2020 after he had received an email from the defendant's attorneys informing him to remove his equipment from the site. When he was informed by the defendant's counsel that both employees of the defendant, Messrs Ngubane and Patel who were administering the tender from the side of the defendant never dealt or communicated with him but they were communicating with a certain Mr Msimango on all issues relating to the tender and therefore Ndlela had no knowledge of the issues he was testifying about in court, he contended that he would be present at other meetings between Mr Msimango and the defendant's employees.

[11] The defendant called Ms Gasa who is the administration manager at the defendant's disaster management unit to testify. She stated that she received three quotations contained in one envelope that was delivered by Mr Ndlela to her. Her manager had phoned informing her that someone would come and deliver the quotations. She stated that when the defendant procures services under an emergency situation such as in the present circumstances it would call prospective service providers either among the service providers they had previously worked with or ones who had provided similar services to a provincial department. She disputed that she called Mr Ndlela to inform him that his bid was successful and she denied that she negotiated the terms of the contract with him. She did not receive any other quotations other than Mr Ndlela.

[12] Under cross-examination by the plaintiff's counsel Ms Gasas disputed that she communicated with Mr Ndlela informing him that his bid was successful but admitted that someone from the defendant's office would have phoned him. She was consistent in stating that she received the three quotations contained in one envelope from Mr Ndlela. She confirmed that when the tender was awarded to Mr Ndlela during the state of disaster the provision of clause 36 of the defendant's SCM policy on procurement was properly applied.

[13] Mr Patel Phalu, the head of the defendant's department of human settlement testified that on 31 March 2020 he received instructions from Mr Ngubane informing him that the plaintiff's services with the defendant had been terminated and he had to ensure that the people occupying the plaintiff's tent were placed in another shelter. On 31 March he could not relocate the displaced people because there was no alternative accommodation available, the country was under lockdown level five and people were not allowed to move. He continued looking for a place to move the people for at least a period of six months after 31 March 2020. He also wrote to the plaintiff requesting a reduction of daily fees because some of the occupants of the tent had already moved away from the site and returned to their original places. After the negotiation for a reduction failed Mr Patel informed Mr Msimango with whom he was communicating that the defendant would not continue with the original contract because the fees charged by the plaintiff was extremely high.

[14] Eventually the defendant built houses for the displaced community about three kilometres away from the site where they were accommodated. On 17 March 2021, the people were moved and only then did the plaintiff remove its tent and other facilities from the defendant's site. Under cross-examination by the plaintiff's counsel Mr Patel said that even if Mr Ndlela were to remove the tent on 31 March 2020 the defendant would not have placed the people in an alternative accommodation because it did not have such accommodation.

[15] Therefore, the issues for determination in this matter are:

- (a) Firstly, whether the continued occupation of the plaintiff's marquee and ablution facilities by the displaced people who were placed on the property in

terms of the lease agreement between the plaintiff and the defendant after the termination of the lease agreement constituted an act of holding over of the plaintiff's property.

- (b) Secondly, if so, whether the defendant, being a sphere of government responsible for providing emergency accommodation to the displaced people is liable to the plaintiff for the holding over of its property by the displaced people.
- (c) Finally, in arriving at a conclusion that the defendant is liable to the plaintiff for the conduct of the displaced people I have to determine whether the conduct of the defendant either by omission or action made it practically impossible for the plaintiff to take possession of its property after the termination of the lease agreement.

Analysis

[16] The fierce debate between the parties was whether the plaintiff was prevented by the occupants of the tent to remove and take possession of the tent. The defendant submitted that the plaintiff voluntarily refrained from taking possession of the tent for purposes of continuing to charge the defendant exorbitant fees while the displaced people remained in occupation of the tent. It is worth mentioning that the only witness called by the plaintiff to support its version was evasive and not impressive when answering questions. However, in light of the evidence by the defendant's own witness that even if the plaintiff was not prevented by the occupants from removing the tent the defendant would not have moved the people because there was no alternative accommodation, the issue of whether the people remained in the tent because they prevented the plaintiff from taking possession thereof has become academic.

[17] Section 26 of the Constitution grants everyone the right of access to adequate housing. It is trite that the provision of emergency accommodation by government forms part of this right and the defendant as a sphere of government is constitutionally obliged to provide relief to people who are living in 'intolerable conditions or crisis situations'.¹ It is apposite that the plaintiff leased the tent and

¹ *Cape Town City v Commando and Others* 2023 (4) SA 465 (SCA) para 6.

other facilities to the defendant. This was in line with the constitutional duty imposed on the defendant. It is a trite principle of our law that 'the hirer of an article is obliged to return it in the same condition in which it had been at the outset of the period of hire'.² Therefore, it was incumbent upon the defendant to remove the people from the tent at the expiration of the agreement to enable the plaintiff to take possession of the tent. The defendant, if it had the will to remove the people from using the plaintiff's property, could have secured assistance from law enforcement agencies. It is understandable that the defendant could not remove the people because it had no alternative accommodation to place them. Therefore, it is the failure by the defendant to remove the people from the plaintiff's tent and place them in alternative accommodation that resulted in them occupying the tent after the defendant had terminated its agreement with the plaintiff.

[18] It is common cause that the defendant initially informed the plaintiff that the agreement for accommodating the displaced people was terminated with effect from 31 March 2020. It is not in dispute that after 31 March 2020 the defendant did not remove the people from the tent because there was no alternative accommodation available. Further, it is common cause that the defendant had approached the plaintiff for a new contract which would result in a reduction of fees by 40 percent from the original contract. The reason for the reduction being that some of the people who had initially occupied the property had moved back to their original accommodation and the number of people occupying the property had been reduced from 150 to 70. It is further common cause that the parties could not agree on a new contract with reduced fees. Therefore, the occupation of the tent by the displaced people after the cancellation of the contract constituted a holding over. The people held over the tents and prevented the plaintiff from taking possession thereof.

[19] The defendant's instruction to the plaintiff to remove its tent knowing that there was no alternative accommodation to place the people was a mockery. It is quite clear that the plaintiff would not have been able to remove people from the tent when the people did not have alternative accommodation. If the defendant were genuine about moving people from the tent it would have assisted the plaintiff to do

² *Mutual Construction Co (Tvl) (Pty) Ltd v Komati Dam Joint Venture* 2009 (1) SA 464 (SCA) para 6.

so and make available an alternative accommodation for the displaced people. I do not agree with the argument that it was not the plaintiff's concern whether there was alternative accommodation for the people. This matter involves vulnerable people who owing to their socio-economic conditions were exposed to intolerable conditions, at the peak of the COVID 19 pandemic. It would not have been humanly possible for the plaintiff to remove them from the tent and leave them in an open space with no shelter over their heads.

[20] This case is distinguishable from a case where the lessor cancels the contract and the lessee continues occupying the leased property after cancellation thereof. In that instance, the lessor would be entitled to sue the lessee for the past rental amount because the lessee had not vacated the leased premises.³ I agree with Hawthorne's view that 'termination of the lease agreement causes the obligation to pay rent to be replaced with an obligation to return the leased thing'.⁴ Therefore, in the present case where the lessee cancelled the contract because it disagreed with its terms; attempted to negotiate for a new contract on different terms; failed to reach agreement with the lessor about the new contract, but holds over the leased property, the lessor's claim against the lessee is based on the conduct of the lessee in failing to return the leased property to the lessor after termination of the contract. Consequently, the lessor is entitled to consequential damages as a result of the holding over of its property by the lessee.⁵

[21] Based on the evidence before court it is not disputed that in 2019 the plaintiff rendered services to 150 people; in 2020 the number of people was reduced to 70. Thus, the people catered for by the plaintiff was reduced by more than a half. In the original contract the plaintiff charged the defendant the amount of R14 400 daily for electricity consumption at the site whereas the electricity was connected at the hostel where it is supplied by the defendant. In the event that it is found that the plaintiff charged the defendant for electricity for which it did not incur costs for its connection to the site, that is likely to reduce the daily fee for the electricity. In the light of the

³ *Sapro v Schlinkman* 1948 (2) SA 637 (A) at 644.

⁴ L Hawthorne 'The nature of the claim for holding over: South African Law' *Fundamina* 16 (2) 2010, 52 at 58.

⁵ *Phil Morkel Ltd v Lawson and Kirk (Pty) Ltd* 1955 (3) SA 249 (C) at 254E-F.

above the court is not able to fix a market related costing for the parties because no information was placed before court in respect thereof.

The counterclaim

[22] This brings me to the counterclaim. Regarding the contention by the plaintiff's counsel that the defendant should not be condoned for the late filing of its counterclaim it is instructive that Uniform rule 24(1) requires a defendant to deliver its counterclaim together with the plea within the prescribed time frame. In the present matter the plaintiff instituted the action and the defendant delivered its counterclaim at the same time with its plea to the plaintiff's declaration. Therefore, the defendant acted within the time frame prescribed by the rules for delivery of a counterclaim. In this regard condonation was not required by the defendant.

[23] The defendant's counterclaim is broadly based on its failure to comply with the provisions of s 217 of the Constitution, Preferential Procurement Policy Framework Act⁶ and SCM policy. A conclusion on whether the award of the tender to the plaintiff was illegal should be based on evidence led before court. The version of the defendant's own witnesses is that the tender was awarded in terms of its SCM policy which allowed deviation from the normal tender process during times of emergency and disaster. It is the defendant's own version that neither the Constitution nor any legislation was contravened when it procured the plaintiff's services.

[24] Despite contending that all three quotations were delivered by Mr Ndlela to Ms Gasa in one envelop, the defendant does not demonstrate how the delivery of three different quotations from different bidders by one person contravened the provisions of fair and transparent procurement of services in terms of the Constitution and legislation. Mr Ndlela is a former director of one of the bidding companies, but he is no longer the director of that company.

[25] The court does not have to accept the *ipse dixit* of the defendant's witness, more particularly because corruption will only occur if the defendant's employees

⁶ Preferential Procurement Policy Framework Act 5 of 2000.

collude with some of the bidders. It is worth mentioning that particularities of the tender such as the daily fee of R190 000 which was ultimately increased to R208 000 for accommodating 150 people and the daily fee of R14 400 for electricity supply which was allegedly connected at the hostel where it was supplied by the defendant, may raise eye brows. However, the defendant was in a good position to investigate these issues and place evidence before court regarding irregularities committed during the procurement process, if any. In light of the defendant's own witnesses confirming that the tender process was correctly followed no irregularities were committed, and in the absence of any evidence to the contrary, this court has no basis to conclude that the award of the tender to the plaintiff during the state of disaster was illegal. For that reason, the counterclaim must fail.

Costs

[26] There is no reason to deviate from the principle that costs should follow the results. Therefore, in respect of the main action the defendant is liable to pay the plaintiff's costs which include the costs of the two counsel, on scale C. The complexity of the matter required the attention of two counsel, including senior counsel. Likewise, the defendant should bear the plaintiff's costs for the counterclaim.

Order

[27] In the premises the following order is made:

1. The defendant is directed to pay the market related amount of damages from 1 April 2020 to 17 March 2021 to the plaintiff which the parties may agree upon or which the plaintiff may prove.
2. Interest on the agreed or proved amount at the rate calculated from 1 April 2020 to date of final payment.
3. The defendant is to pay the plaintiff's costs of the action, including costs of two counsel, on scale C.
4. The defendant's counterclaim is dismissed.
5. The defendant is to pay the plaintiff's costs of the counterclaim, including costs of two counsel on scale C .

Mathenjwa J

Date of hearing: 17, 18, 19 and 20 March 2025

Date of judgment: 11 June 2025

Appearances:

Plaintiff's counsel: Mr I Pillay SC

Assisted by: Ms Z Rasool

Instructed by: Anitha D Chetty & Associate

Defendant's counsel: Ms K Shazi

Instructed by: Luthuli Sithole Attorneys