



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 5226/2021

In the matter between:

NEXOR 312 (PTY) LTD
t/a VNA CONSULTING

Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL
OF THE FREE STATE DEPARTMENT OF PUBLIC
WORKS & INFRASTRUCTURE

Respondent

HEARD ON: 13 OCTOBER 2022

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date

and time for hand-down is deemed to be 09h00 on 22 February 2023.

[1] In this opposed application the applicant seeks payment for two claims in the respective amounts of R17 613 073.40 and R10 333.440.00 together with

costs and interest at the rate of 12% per annum calculated from 1 November 2020 to date of payment.

- [2] The applicant is a construction project management firm with specialization in Infrastructure Delivery Management Services (IDM services), Capacitation, Management and Empowerment Programs Implementation including Engineering, Program and Portfolio Management Services.
- [3] On the papers, it is common cause that on 3 August 2018 the parties concluded a contract based on IDM services to be rendered by the applicant for a period of three years with effect 1 April 2018 to 31 March 2021.¹ It is also not in dispute that pursuant to rendering the said services, the applicant submitted invoices to the respondent for the sums of R17 613 073.40 and R10 333.440.00.
- [4] The relief sought by the applicant is premised on the respondent's failure to pay the said invoices.
- [5] It is the applicant's case that:

5.1. On 9 July 2021 letters of demand² were transmitted to the respondent's Supply Chain Director of Management of the Public Works Department, Mr. Khaya Radebe and the head of its Project Management Unit Mr. Freddy Tokwe respectively.

5.2. Messrs Radebe and Tokwe responded by providing written undertakings to pay the invoices. Annexures "VN4" dated 13 July 2021 and "VN7" dated 15 July 2021 are the written undertakings stating the following:

*"re: Outstanding IDMS fee claims
Dear Mr Raghbir*

¹ Annexure "VNA1" of the applicant's Founding Affidavit.

² Annexures "VNA2" and "VNA6" of the applicant's founding affidavit.

The Free State Department of Public Works and Infrastructure herewith acknowledge receipt of your letter dated 09 July 2021.

Due to the COVID-19 pandemic, all government allocated funds of the Department were, and are still, being reprioritised in fighting and curbing the pandemic. This together with the reduced budget has impacted negatively on the day to day business of the Department.

The Department of Public Works and Infrastructure are committed in honouring its commitment to VNA Consulting once the Department's budget allocation for the 2021/22 financial year has been confirmed and finalised.

Further to the above, please be so kind as to provide more clarity on the description of work under invoice FS1048.

I trust that you find this in order."

5.3. The respondent was furnished with the requested details pertaining to invoice FS1048 on 14 July 202.

[6] The applicant submits that the respondent's inability to pay its debts due to budgetary constraints is of no concern to it. The applicant is severely prejudiced by the respondent's failure to make the payments as the invoices have been outstanding for a considerable time and the interest set by the respondent at 2% per annum for unpaid invoices is quite meagre considering the prevailing current interest rates.

[7] Before I turn to the basis of the respondent's opposition, the respondent seeks condonation for the late filing of its answering affidavit.³ The affidavit was filed on 25 August 2022 approximately 7 months out of the time indicated in the notice of motion including the 8 days after the date on which the answering affidavit was due as per the court order of 21 July 2022. Despite the extreme lateness, the respondent has provided no tangible explanation for its ineptitude except to fleetingly aver in para 2.7 of the answering affidavit that:

³ Paras 2.7 to 2.8.

“It was expected of me to submit the answering affidavit as per the court order and explain that the Respondent did not receive the requested documents to enable it to put up a proper defence and not just to ignore to file, I apologise profusely to this court for such a conduct. Having complied with the court order, I know turn to deal with the averments in the main application.”

- [8] Furthermore, the respondent merely refers to its application for a postponement of the proceedings of 21 July 2022 without elaborating and explaining what documents were needed in order to respond to the applicant’s claim, who was supposed to provide them to the respondent, when were they requested and when were they ultimately received.
- [9] It is a well-established principle that condonation cannot be had for the mere asking. It is an indulgence which a court has a discretion on whether to grant it or not. The respondent must show sufficient cause entitling it to the court’s indulgence by giving a full explanation for the non-compliance with the court rules so that the court can understand how the delay came about.⁴ Having regard to what is averred in the answering affidavit, the respondent appears to have abrogated itself from the responsibility of providing this court with a full and sufficient explanation of its failure to comply with the rules of this court. Nonetheless, despite the sparse explanation, I am inclined to condone the late answering affidavit as no prejudice has been indicated by the applicant. I am also of the view that it would be in the interests of justice including that of the applicant that this matter is progressed and duly determined on the merits.
- [10] The respondent has raised a cocktail of dilatory defences. *In limine*, the claim is resisted on the grounds that: the application is irregular for want of compliance with Rule 41A of the Uniform Rules of Court and section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act⁵ (“The Act”); the dispute between the parties cannot be properly determined by way of application proceedings the matter must accordingly be referred for oral

⁴ *Uitenhage Transitional Local Council v SA Revenue Services* [2004] (1) SA 292 (SCA) at 297 I-J.

⁵ Act No, 40 of 2002.

evidence and; the applicant's founding affidavit is defective in that, the resolution authorizing the deponent to depose to the said affidavit was not attached on the founding affidavit.

[11] Rule 41A states:

“(2)(a) in every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.

(b) A defendant or respondent shall when delivering a notice to defend or a notice to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation.”

[12] It is common cause that when the application was served on the respondent it was not accompanied by the notice as contemplated in Rule 41A (2) (a). Similarly, the respondent's notice to oppose the application and the subsequent answering affidavit was served without the Rule 41A (2) (b) notice.

[13] The object of Rule 41A is to afford litigants with an opportunity to resolve their disputes through mediation as an alternative to litigation. It requires both parties to comply with the Rule and while the applicant has explained that the failure to serve the notice simultaneously with the application was an oversight while the respondent has not offered any explanation for its non-compliance with the Rule. The respondent's compliance is not dependent on the applicant's compliance, if the respondent was of the view that the matter was capable of being mediated the respondent should have filed the required Rule 41A (2) (b) notice. In those circumstances, the respondent would have been entitled to invoke the provisions of Rule 49A (9) (b)⁶ which provide a remedy against a party who unreasonably avoids mediating a matter. It is for the respondent to set out grounds why it was of paramount

⁶ A party who unreasonably avoided mediating a matter which was capable of being mediated may be mulcted with a cost order at the end of the proceedings when the court considers the issue for costs of the application.

importance that Rule 41A ought to have been complied with in the context of this matter. Nowhere in the answering affidavit is it alleged that this matter is cable of being mediated. For these reasons, I am not persuaded that the applicant's non-compliance with Rule 41A constitutes an impediment to the determination of this matter.

- [14] There is also no explanation why the respondent is of the view that this dispute cannot be judged on papers. A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in its affidavit seriously and unambiguously addressed the fact said to be disputed. See *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*⁷ para 13. In this matter, it is indisputable that the applicant rendered the IDM services and that the invoices submitted in that regard were not disputed by the respondent instead, an undertaking to pay was made. The issue of whether the undertaking to pay is enforceable against the respondent or not does not, in my view constitutes a real, genuine and *bona fide* dispute of fact warranting the dismissal of the application or a referral to oral evidence.
- [15] The respondent has merely scantily alleged that that the applicant's letters of demand do not comply with section 3 of the Act without disclosing the grounds for this objection and the material facts upon which the defence is based. That aside, on the facts germane to this matter, the applicant's various letters of demand, Annexures "RA2", "VNA2" and "VNA6" were issued and served on the respondent respectively on 13 August 2019, 21 May 2020 and 9 July 2021 well within the six months' period specified in section 3 of the Act. In the said letters the basis of the debt and the amounts due are duly set out and the application was instituted on 10 November 2021 approximately three months after the letters of demand were served in that regard, I am satisfied that that the letters of demand comply with the provisions of section 3 of the Act.

⁷ [2008] ZASCA 6; 2008 (3) SA 371 (SCA).

- [16] The respondent's objection against the authority of the applicant's deponent simply on the basis that there was no authorisation attached to the founding affidavit is unsound. It is not required for a deponent to an affidavit in motion proceedings to be authorised by the party concerned, it is the institution of the proceedings and the prosecution thereof that must be authorised.⁸
- [17] Based on the reasons above, I am inclined to determine the objections in favour of the applicant. The points *in limine* are accordingly dismissed.
- [18] Turning to the reasons for non-payment. According to the respondent the applicant is not entitled to payment because of its failure to comply with the pre-conditions of the contract clauses 3 and 6 in that, the applicant failed to attach on the founding affidavit the allocation letter signed by the respondent as proof of the scope and allocation of the services to be rendered by the applicant including a programme submitted to the respondent for the performance of the said services and the detailed timesheets relating to the amounts claimed therefore, having not complied with these pre-conditions the respondent's obligation to pay the invoices has not risen.
- [19] As regards, the written undertakings to pay given by Messrs Radebe and Tokwe on behalf of the respondent, it is the respondent's case that these officials are not the respondent's accounting officers. They acted without the authority of the accounting officer and without such authorization their decisions are invalid and accordingly not binding on the respondent.
- [20] There is no merit to the respondent's defences. As correctly pointed out by the applicant in reply, the respondent should have the allocation letter in its records as it was the responsibility of the respondent to issue the said letter to the applicant in fact, the allocation letter was duly issued on 31 January 2019.⁹ Similarly, the contention that the applicant is not entitled to the order sought as the amount claimed has not been established is also unsound. I have already alluded to the fact that at no stage were the invoices disputed by the

⁸ *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 SCA para 19.

⁹ Annexure "RA3" of the applicant's replying affidavit.

respondent. In terms of the contract, the respondent is not entitled to refuse to make payment without providing the applicant with a notice and the reasons in that regard. See clause 4.4 of the contract:

“If any item or part of an item in an invoice submitted by the Service Provider is disputed by the Employer, the latter shall, before the due date of payment, give notice thereof with reasons to the Service Provider, but shall not delay payment of the balance of the invoice.”

[21] As regards, the enforceability of the undertaking to pay “the acknowledgment of debt,” I am of the view that the Supreme Court of Appeal in *Meadow Glen Homeowners Association v City of Tshwane Metropolitan Municipality*¹⁰ at para 23 summed up this issue aptly and confirmed that:

“... Section 82 of the Local Government: Municipal Structures Act 117 of 1998 determines that the municipality must appoint a municipal manager as the person responsible for the administration of the municipality and such person will also be the accounting officer of the municipality.

In terms of s 56(3) of the same Act, the executive mayor, in performing his duties must monitor the management of the municipality’s administration in accordance with the direction of the municipal council (s 56(3)(d)) and oversee the provision of services to communities in the municipality in a sustainable manner (s 56(3)(e)). Section 54A of the Local Government: Municipal Systems Act 32 of 2000 also provides that the municipal council must appoint a municipal manager as the head of administration of the municipal council. Furthermore, s 55 sets out the responsibilities of the municipal manager as head of the administration, subject to the policy directions of the municipal council. Section 55(1)(b) determines that the municipal manager is responsible and accountable for the management of the municipality’s administration. Section 60 of the Local Government: Municipal Finance Act 56 of 2003 provides that the municipal manager is the accounting officer of the municipality.”

[22] The respondent’s assertion that the respondent’s accounting officer cannot be seen to be perpetuating a wrong committed by its officials when acts of irregularity have been discovered does not take the respondent’s case any

¹⁰ **(2015 (2) SA 413** (SCA); *City of Johannesburg Metropolitan Municipality and Others v Hlophe and Others* **2015 All SA 251** (SCA) at [19] and; *Phoko & Others v Ekurhuleni Metropolitan Municipality* (No. 2) **2015 (5) SA 600** (CC) at [58] and [59].

further. It was pointed out in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*¹¹ at para 26 that:

“The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.”

[23] In the circumstances, I am satisfied that the applicant has made a case for the relief it seeks. The applicant’s claims prevail.

[24] Resultantly, the following order is made:

1. Judgment is granted in favour of the applicant in respect of:

1.1. Claim 1, payment in the amount of R17 613 073.40 together with interest at the rate of 12% per annum calculated from 1 November 2020 to date of payment.

1.2. Claim 2, payment in the amount of R10 333.440.00 together with costs and interest at the rate of 12% per annum calculated from 1 November 2020 to date of payment.

2. The respondent shall pay the costs.

NS DANISO, J

APPEARANCES:

Counsel on behalf of Applicant:

Adv. A.K. Kissoon Singh SC

Instructed by:

Lovius Block Attorneys

BLOEMFONTEIN

Counsel on behalf of Respondent:

Adv. L.R. Bomela

¹¹ 2004 (6) SA 222 (SCA).

Instructed by:

State Attorney
BLOEMFONTEIN