



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

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

Case number: 6204/2022

In the matter between:

BOFFIN AND FUNDI (PTY) LTD LIMITED

Applicant

(Registration No: 2001/0226469/07)

And

BLOEMWATER

1st Respondent

MATJHABENG LOCAL MUNICIPALITY

2nd Respondent

THE MINISTER OF WATER AND SANITATION

3rd Respondent

HEARD ON:

13 DECEMBER 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 12h00 on 23 January 2023.

- [1] This matter came before me on 13 December 2022 as duty judge, barely a week after the end of the fourth term. After hearing the arguments in respect of both the urgency and the merits I reserved judgement for the reason that, this application was the fourth opposed urgent application I heard on this particular day. By the end of my duty on 18 December 2022 I had presided over twenty-seven (27) urgent applications. The respondent's opposing papers were filed in the afternoon preceding the hearing at 15h50 due to the severely truncated time periods provided by the applicant and the applicant filed its replying affidavit at 10h30 on the day of the hearing.
- [2] The situation was compounded by the bulky papers which were in excess of 550 pages and this is despite the fact that the matter was considered to be urgent by the applicant. The filing of voluminous papers in urgent applications cannot be countenanced. I agree with Werner, J that *"if a matter becomes opposed in the urgent motion court and the papers become voluminous there must be exceptional reasons why the matter is not to be removed to the ordinary motion roll."*¹
- [3] The relief sought by the applicant is the following:
- "1. That condonation be granted to the Applicant for non-compliance with the Uniform Rules of Court pertaining to service, time limits, form and procedure and that this application be heard as an urgent application as contemplated in Rule 6(12);*
 - 2. That condonation be granted to the Applicant for the non-compliance with the provisions of Section 35 of the General Law Amendment Act, 62 of 1955;*
 - 3. That the Applicant be granted leave to serve the application on the Respondents by transmitting copies thereof via email to the representatives of the Respondents, whilst service in terms of the Uniform Rules is effected and that the Applicant proof service via email by way of a service affidavit;*

¹ Several Matters On Urgent Roll 18 September 2012 **(2012) 4 All SA 570** (GSJ) at paragraph 15 and the unreported judgment by Cachalia, J in *Digital Printers vs Riso Africa (Pty) Limited* case number **17318/02** of the same division.

4. *That the Applicant be allowed to present argument in this matter on copies of the founding and confirmatory affidavits, and/or annexures thereto, on condition that an order of court shall be uplifted prior to the original affidavits and annexures is filed on the court file;*
5. *That a rule nisi be issued calling upon the First Respondent to show cause, if any, to this Honourable Court on 26 January 2023 at 09:30, why the following orders should not be granted and made final:*
 - 5.1. *that the First Respondent be interdicted and prevented from interfering with and/or obstructing the performance by the Applicant of its contract with the Second Respondent in respect of the Assessment Wastewater Treatment Works, Pump Stations and Reticulation Networks in Matjhabeng Local Municipality;*
 - 5.2. *that the First Respondent be interdicted from appointing consulting engineers to provide services to or for the Second Respondent on Projects, or phases of projects; for which the Second Respondent appointed the Applicant in respect of the wastewater treatment projects in Matjhabeng municipality;*
 - 5.3. *that the First Respondent, as the implementing agent of the Third Respondent, be directed to involve the Applicant in the projects for refurbishment and, or upgrade of the Second Respondent's Waste Water Treatment Works at Thabong in Hennenman in accordance with the Applicant's contract with the Second Respondent;*
 - 5.4. *that the Respondents be ordered to provide the Applicant with a copy of the tri-partite agreement concluded in terms of the Third Respondent's intervention directive; and*
6. *That the order contained in paragraphs 5.1 to 5.4 operate as an interim interdict with immediate effect.*
7. *That the First Respondent be ordered to pay the costs of application;*
8. *Alternatively, and in event of other Respondents opposing the application, that such Respondents opposing the application be ordered to pay the costs of the application;*

- [4] The application is directed against the first respondent (“Bloem Water”) only and it is premised on the grounds that Bloem Water has transgressed the contract between the applicant and the second respondent (“the Municipality”). The applicant complains that Bloem Water has usurped the Municipality’s functions and obligations by requiring the applicant to sign another service level agreement in relation to same projects the applicant was appointed for.
- [5] The background facts upon which the applicant relies on are as follows: on 25 March 2022 the applicant and the Municipality concluded service level agreements in terms of which the applicant was appointed on a pool of consulting firms for projects involving the construction, refurbishment and/or repair of the Municipality’s sanitation infrastructure (“the projects”).
- [6] It is the applicant’s case that in July 2022, approximately three months after the applicant was appointed the third respondent intervened in the Municipality in terms of section 41 of the Water Services Act² and appointed Bloem Water as the implementing agent of the intervention project in terms of a supposed tri-partite agreement. The details under which the said tri-partite was concluded are unknown to the applicant as the respondents have failed to provide the applicant with the copy of the said agreement.
- [7] On 1 August 2022 Bloem Water issued the applicant with a letter of appointment for the same project the applicant had already been appointed by the Municipality. The applicant accepted the appointment on 4 August 2022 and proceeded to render the required services.
- [8] The applicant did not sign the service level agreement provided by Bloem Water because its material terms differed substantially with the term of the service level agreement the applicant concluded with the Municipality and, it was in any event unnecessary.
- [9] On 26 August 2022, the applicant submitted its invoices for the work done to Bloem Water. The invoices were not paid. The applicant’s request for payment

² Act No, 108 of 1997.

was met with an undertaking to pay and a request for the applicant to sign the service level agreement. By 13 October 2022 the invoices were still outstanding as a result, the applicant issued a notice of demand against Bloem Water in terms of section 3 of the Institution of Legal Proceedings Act³ ("The Act). Bloem Water responded by repudiating the applicant's contract and also terminated the applicants' contract.

- [9] According to the applicant, the urgency of this application arose on 2 December 2022 when the applicant discovered that Bloem Water was side-lining it by holding site inspections with other role players without involving the applicant.
- [10] The applicant states that as a result of Bloem Water's interference with the applicant's contractual rights and obligations flowing from its contract with the Municipality, the applicant has been hindered from executing its duties at the prejudice of the applicant and the Matjhabeng community. There are no other alternative remedies that can avail to the applicant to enable the continuation of the project except for an interdict.
- [11] It is not in dispute that Bloem Water was appointed by the third respondent as an implementation agent in the refurbishment and upgrading of the Municipality's sanitation infrastructure.
- [12] According to Bloem Water, the appointment arose from a tri-partite agreement involving Bloem Water, the Municipality and the third respondent.⁴ It regulates the scope, rights and obligations of the parties concerned. Following its appointment, Bloem Water appointed the applicant as the professional service provider on 1 August 2022. In terms of the said appointment, the applicant was required to sign a service level agreement outlining the terms of the appointment. The applicant accepted the appointment but refused to sign the service level agreement.

³ Act No, 40 of 2002.

⁴ Annexure "BW4" of the answering affidavit

- [13] The application is opposed on the grounds of lack of urgency, that the relief sought by the applicant is incompetent and that the requirements for an interdict have not been met.
- [14] Bloem Water contends that the applicant has approached this court for the relief it has already sought against Bloem Water in terms of the notice of demand issued over two months ago on 13 October 2022. On that basis, it cannot be said that the matter is urgent. Furthermore, Bloem Water is not a party to the agreement involving the applicant and the Municipality and due the applicant's refusal to sign a service level agreement with Bloem Water, there is no contractual relationship between the applicant and Bloem Water. Accordingly, there is no basis for the orders sought by the applicant.
- [15] The applicant's notice of demand dispels the contention that the applicant is without an alternative remedy. The said notice alleviates any harm that can befall the applicant in the event this order is not granted in that, the applicant has expressly asserted that it will institute legal action to enforce its rights in terms of the service level agreement whereas, if the order is granted the services which are urgently required by the Matjhabeng community will be severely impacted.
- [16] The law on urgency is trite, the authorities in that regard are legion therefore I don't deem it necessary to traverse it here.
- [17] Bloem Water's complaint that there has been a substantial delay in bringing the application is warranted. On the papers it is clear that the dispute between the applicant and Bloem Water arose at least in October 2022 when Bloem Water cancelled the applicant's contracts. The delay is extreme and there has been no attempt to explain how it came about however, having heard the arguments in respect of the merits I am of the view that it is apposite that the merits are determined.

[18] As regards the requirements for an interim interdict, the onus is on the applicant to prove on a preponderance of probabilities a clear or prima facie right even if it is open to some doubt; a well-grounded apprehension of irreparable and imminent harm if the interim relief is not granted; that the balance of convenience favours the grant of the interdict and also the absence of another or adequate remedy. These factors are judged together and not in isolation.

[19] I am of the view that the facts of this matter do not support the relief sought by the applicant for the reason that, the prevention of performance with the terms of a contract must be due to the fault of or at the instance of the contracting party.

[20] In this matter, it is indisputable that Bloem Water is not a party to the contract the applicant seeks to enforce accordingly, the doctrine of privity of contracts is germane to these facts. See *Christie's Law of Contract in South Africa*, 7th edition at page 302 where the doctrine is explained as follows:

"The basic idea of contract being that people must be bound by the contracts they make with each other it would obviously be ridiculous if total strangers could sue or be sued on contracts with which they are in no way connected. The doctrine which prevent this ridiculous situation arising is usually known as the doctrine of privity of contracts: parties who are not privy to a contract cannot be sue or be sued on it."

[21] It is for these reasons above, that I hold that Bloem Water cannot be guilty of repudiating a contract that it is not a party to. The right which the applicant seeks to protect in this regard is merely invented, it does not exist.

[22] Similarly, it would be ridiculous to hold Bloem Water accountable for ensuring that no other service providers are appointed to perform the work that the applicant has been appointed to perform by the Municipality. There are sufficient safeguards against the breach of the terms of the contract by the Municipality.

[23] It is common cause that the applicant has since been provided with a copy of the tri-partite agreement. I am in agreement with Bloem Water's contention that the fact that the third respondent's signature does not appear on the said agreement does not warrant the applicant's persistence with the relief sought as the validity of the agreement has not been challenged.

[24] In conclusion, having regard to the available facts, I am not satisfied that the applicant has satisfied the requirements for the granting of the relief sought. The remedy that would be appropriate under these circumstances would be to dismiss this application.

[25] On the aspect of costs, I have found no reason for the departure from the general rule that costs follow the result.

[26] In the premises, I make the following order:

1. The application is dismissed with costs.

N.S. DANISO, J

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