



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2022/8025

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

DATE
SIGNATURE

In the matter between:

DV8 TECHNOLOGY GROUP (PTY) LTD

Applicant

and

MOBILE TELEPHONE NETWORKS (PTY) LTD

First Respondent

NATIONAL HEALTH LABORATORY SERVICE

Second Respondent

HUAWEI TECHNOLOGIES SOUTH AFRICA (PTY) LTD

Third Respondent

JUDGMENT

MOORCROFT AJ:

Summary

The applicant seeks interim interdicts against the second respondent, an organ of state, and the first respondent, a party to a service level agreement with the second respondent, to interdict them from allowing any party other than the applicant to provide subcontracting services to the second respondent in respect of a tender awarded to the first respondent, pending mediation or arbitration of a dispute between the applicant and the first respondent, and a review of the second respondent's decision to reject the applicant as a subcontractor to the first respondent.

The applicant was nominated as a subcontractor in terms of an agreement between the applicant and the first respondent. When the agreement was cancelled, the possibility of the applicant being nominated and accepting appointment as a subcontractor of the first respondent fell away and the application became moot.

The applicant never had any rights to enforce against the second respondent, and could not obtain an interdict against the second respondent in order to enforce perceived rights against the first respondent.

Order

[1] In this matter I make the following order:

1. *Part A of the application is dismissed;*
2. *The applicant is ordered to pay the costs of the application incurred by the first and second respondents, such costs to include the costs of two counsel in respect of each of these respondents.*

[2] The reasons for the order follow below.

Introduction

[3] DV Technology Group (Pty) Ltd (“*DV8 Technology*”) seeks to interdict -

3.1 the first respondent, the National Health Laboratory Services (“*NHLS*”) from appointing or allowing any other service provider other than DV8 Technology from rendering services as a partner and/or subcontractor of Mobile Telephone Networks (Pty) Ltd (“*MTN*”) or in any like capacity in respect of tender number RFB103/20/21 (“*the 2021 tender*”),

and to interdict

3.2 the second respondent, MTN, from appointing or allowing any other service provider, save for DV8 Technology, from rendering services as a subcontractor of the NHLS,

pending the outcome of a dispute¹ between DV8 Technology and MTN that was referred to mediation or arbitration, and Part B of the application in terms of which DV8 Technology seeks to have reviewed and set aside a decision by the NHLS to reject the nomination of DV8 Technology as MTN’s subcontractor in respect of a tender, or alternatively, and if it is found that no decision was taken, then an order that the NHLS’s failure to take a decision is declare unconstitutional, invalid and unlawful, and is reviewed and set aside, and directing the NHLS to consider the nomination of DV8 Technology by MTN as MTN’s subcontractor in respect of the tender.

¹ The dispute so declared related to information and undertakings sought in a letter of 7 February 2022.

[4] The application is opposed by the first and second respondents, MTN and NHLS, referred to collectively as *“the respondents.”* No relief is sought against the third respondent and it is cited because of its possible interest in the matter.

[5] The application was launched as an urgent application and set down as a special motion for two days. Urgency was not conceded by the respondents but it was submitted that a judgment be given on the merits so that it need not be necessary for another Judge to also read the papers.

[6] DV8 Technology’s claim against MTN is contractual and its claim against the NHLS is said to be based on public law principles.

Background

[7] The application involves the activities of the NHLS,² MTN, and two related firms, namely DV8 Technology and DV8 Consulting (Pty) Ltd (*“DV8 Consulting”*). There is an overlap of directors, shareholders and personnel between DV8 Consulting and DV8 Technology.

[8] In 2016 the NHLS awarded a tender issued in 2015 (*“the 2015 tender”*) to DV8 Consulting and the parties entered into a service level agreement (the *“2016 SLA”*) in terms of which the NHLS appointed DV8 Consulting to render Multi-Protocol Label

² The NHLS is an organ of state established in terms of the National Health Laboratory Service Act, 37 of 2000. It is said to be the largest diagnostic pathology services in South Africa and it provides services to 80% of the population. It plays a central role in health care and specifically in the country’s epidemiology surveillance and response activities.

Switching Wide Area Network³ (MPLS WAN) services to the NHLS for a period of three years.

[9] On 29 March 2019, the President of the Republic of South Africa caused a proclamation⁴ to be published in terms of which the President referred various matters in respect of the affairs of the NHLS for investigation to the Special Investigating Unit (“SIU”).⁵ The SIU was tasked to investigate, *inter alia*, any unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property and the unlawful or improper conduct by any person which has caused or may cause serious harm to the interest of the public or any category thereof, in respect of the procurement of or contracting for goods, works or services by or on behalf of the NHLS in relation to, *inter alia*, the provisions of multi-protocol label switching wide area network services to the NHLS for a period of three years in terms of the 2015 tender.

[10] The SIU was also to investigate any unlawful or improper conduct by the employees or officials of the NHLS or applicable service providers, or any other person or entity in relation to the allegations set out. This would then involve investigations, *inter alia*, into the activities of DV8 Consulting and into the activities of *inter alia* any of its officers, directors, shareholders, or employees, whether acting on behalf of DV8 Consulting or on behalf any other entity such as DV8 Technology. In short, the SIU investigation focused on both DV8 Consulting and DV8 Technology, as well as the NHLS and many others. To date no report has been published.

³ A multi-protocol label switching network directs data traffic within a telecommunications network more efficiently than the older internet protocol (IP) techniques.

⁴ Proclamation No. R18 of 2019 of 29 March 2019 published in *Government Gazette* 42338.

⁵ Established by Proclamation No. R118 of 31 July 2001.

[11] The 2016 SLA led to litigation between the NHLS and DV8 Consulting when the NHLS issued a new tender in March 2019. DV8 Consulting contended for an option that would enable it to extend the 2016 SLA for a further two years, until 2021. The company obtained an interim interdict in May 2019 to prevent the NHLS from awarding the 2019 tender and compelling the NHLS to continue to perform in terms of the 2016 SLA, pending -

11.1 arbitration proceedings in which DV8 Consulting sought a declaratory order that the service level agreement have been extended until 2021,

11.2 and a review and setting aside of the 2019 tender in terms of the Promotion of Administrative Justice Act, 3 of 2000, and / or the principle of legality.

[12] As a result of the interim interdict the 2016 SLA would remain in place pending the outcome of the arbitration and the review application.

[13] In September 2019 the arbitrator handed down an award dismissing DV8 Consulting's claim in the arbitration proceedings. The 2019 tender was subsequently withdrawn and the review application was settled on the basis that DV8 Consulting would withdraw its review (Part B of its application) against payment of its costs.

[14] There was therefore no 2019 tender and no new appointment of a service provider. It was then agreed that DV8 Consulting would continue to render services on a month to month basis until a new service provider had been appointed.

The Co-Operation Agreement of December 2019 between DV8 Technology and MTN

[15] In December 2019 DV8 Technology and MTN entered into a written agreement styled a Co-Operation Agreement (*“the co-operation agreement”*) in terms of which the parties agreed to submit one or more tenders relating to multiprotocol label switching and other telecommunications service to the NHLS⁶ with MTN as the lead bidder⁷ and contractor, and with DV8 Technology as a partner. The parties were to co-operate⁸ to prepare tender presentations and to secure a Prime Contract, defined⁹ as a contract entered into between one or both of the parties and the NHLS.

[16] It was agreed¹⁰ that MTN shall be the prime contractor in relation to the NHLS tender and the parties would use their best efforts to produce a tender incorporating the scope of work required by NHLS, and to work towards the acceptance of DV8 Technology as nominated sub-contractor for a portion of the scope of work. Unless otherwise agreed, DV8 Technology shall also be MTN’s exclusive small medium micro enterprise partner¹¹ in regard to the eventual tender and all future related opportunities or services that may be required by NHLS from MTN. Future opportunities shall be pursued jointly and MTN shall have the right to include other parties where neither MTN nor DV8 Technology has the capability to enhance the scope as required by NHLS or any potential customer.

[17] In clause 3.2 of the co-operation agreement under the heading *“Recordal”* it is recorded that the parties *“are currently working together in relation to a tender that was awarded by NHLS to DV8”*. DV8 is defined¹² as *“DV8 Technology Group (Pty) Ltd”* and this statement is patently false as DV8 Consulting had been awarded the tender referred to in paragraph 3.2 and not DV8 Technology. DV8 Technology had

⁶ Clauses 2.2.8, 2.2.12

⁷ Clause 5.1.

⁸ Clause 5.2.

⁹ Clause 2.2.15.

¹⁰ Clause 6.

¹¹ Clause 7.

¹² Clause 2.2.6.

never been awarded a tender by the NHLS and never stood in a contractual relationship to the NHLS.

[18] This confusion between the identity of DV8 Technology and of DV8 Consulting runs like a thread through the papers. The untrue allegation that DV8 Technology was a party to the 2015 tender was, for instance, repeated in a letter on behalf of DV8 Technology to MTN on 26 October 2021 two years later during the war of words that preceded the launching of this application.

[19] The co-operation agreement was signed and concluded on 3 December 2019 and was intended to “*continue indefinitely*”¹³ but was terminable by either party upon the giving of 90 days’ written notice of termination after the expiry of the indefinite contract period.¹⁴ The termination of the co-operation agreement “*shall not affect any Prime Contract, which shall be terminated in accordance with its terms.*”¹⁵

[20] In April 2021 the NHLS issued a new tender to supersede the 2016 tender. MTN was appointed as the main contractor and on 29 June 2021 the NHLS gave notice to DV8 Consulting of the cancellation of the month to month arrangement that had been in place since 2019. MTN took over from DV8 Consulting at the end of July 2021. The NHLS and MTN entered into a service level agreement early in 2022 (“*the 2022 SLA*”).

[21] The legal relationship between the NHLS and MTN is solely governed by the 2022 SLA.

¹³ Clause 2.2.4.

¹⁴ Clause 4.1.

¹⁵ Clause 4.2.

[22] On 26 October 2021 DV8 Technology's attorneys addressed a letter to MTN making the allegation that the third respondent had been appointed by MTN in breach of the co-operation agreement and requesting undertakings from MTN. No undertakings were forthcoming.

[23] On 10 January 2022, MTN wrote to the NHLS to seek approval of the appointment of nine Exempted Micro Enterprises¹⁶ and Qualifying Small Enterprises¹⁷ as per the Central Supplier Database,¹⁸ among them a QSE identified as "DV8." MTN and the NHLS both believed the firm being nominated was the firm that had been a party to the 2015 tender and the 2016 SLA.

23.1 MTN believed it was nominating DV8 Technology, the company it had a co-operation agreement with and that was described as the firm to which a previous tender was awarded by the NHLS, and that was already assisting MTN in fulfilling its obligations under the 2021 tender;

23.2 the NHLS believed the nomination referred to DV8 Consulting, the firm that had been providing services on a month to month basis and that was a party to the 2015 tender and the 2016 SLA, and that was being investigated by the SIU.

[24] The NHLS rejected the nomination. On 19 January 2022 MTN informed DV8 Technology of the rejection.

¹⁶ EME's.

¹⁷ QSE's.

¹⁸ The CSD. See also the Preferential Procurement Regulations of 2017 adopted by the Minister of Finance in terms of s 5 of the Preferential Procurement Policy Framework Act, 5 of 2000.

[25] DV8 Technology's attorneys demanded *inter alia* that the third respondent cease all work on 21 January 2022 and on the 25th MTN's attorneys responded that the third respondent was not a sub-contractor.

The termination of the co-operation agreement between MTN and DV8 Technology

[26] MTN purported to cancel the co-operation agreement by giving 90 days' notice in writing on 31 January 2022. The letter was however addressed to "DV8 Technologies (Pty) Ltd" and DV8 Technology responded in writing on 2 February 2022 to say that the "*notice is defective and/or invalid as it is addressed to the wrong entity which is unknown to us.*" It must have been obvious however that MTN intended to refer to DV8 Technology and nobody else.

[27] A letter was then sent to DV8 Technology, accurately described, on the same day and it is common cause that the co-operation agreement came to an end ninety days later. The validity of the termination cannot be disputed.

The effect of the termination

[28] If clause 4 of the co-operation agreement were to be interpreted literally it would have meant that the co-operation agreement could never be terminated by giving 90 days' written notice of termination in terms of clause 4.1, because notice may only be given after the expiry of the contract period which is an indefinite period in terms of clause 2.2.4. If notice could only be given at the end of infinity, the co-

operation agreement could only be terminated consensually and not upon 90 days' notice.

[29] This is not a sensible interpretation and it is common cause between the parties that the co-operation agreement was indeed terminated by giving 90 days' notice. When interpreting¹⁹ the co-operation agreement it is clear that it was the intention of the parties that either party would be able to cancel the co-operation agreement on notice, and be able to do so at any time. It was not a right that accrued only after the expiry of a certain period of time.

[30] What is in dispute is the interpretation of clause 4.2 of the co-operation agreement in terms of which termination "*shall not affect any Prime Contract, which shall be terminated in accordance with its terms.*"

[31] The termination of the co-operation agreement has no effect on the continued existence of any Prime Contract between MTN and NHLS. It is common cause that DV8 Technology is not a party to any multi-party Prime Contract with the NHLS and MTN. Clause 4.2 has no bearing on DV8 Technology's rights. Had DV8 Technology been a party to a Prime Contract, the Prime Contract would have survived the termination of the co-operation agreement because of clause 4.2 but this never happened.

[32] DV8 Technology's right to be nominated and all its other rights flowing from the co-operation agreement were thus terminated. If DV8 Technology had a claim

¹⁹ See *Glenn Brothers v Commercial Agency Co Ltd* 1905 TS 737 at 740 – 741; *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA), [2008] 4 All SA 117 (SCA) paras 16–19; *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA), [2009] 2 All SA 523 (SCA) para 39; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA), 2012 (4) SA 593 (SCA) para 18.

against MTN arising out of the termination of the co-operation agreement, such a claim would be a claim for damages or for specific performance.

[33] No such claim or cause of action is identified in the affidavits. DV8 Technology's stated cause of action is the alleged failure by MTN to nominate it and its failure to use its best efforts to secure the appointment of DV8 Technology as a subcontractor, before the valid termination of the co-operation agreement.

The requirements for an interim interdict

[34] The requirements for an interim interdict are –

- 34.1 a *prima facie* right, though open to doubt, coupled with the balance of convenience favouring the applicant, or a clear right that makes consideration of the balance of convenience irrelevant;
- 34.2 a reasonable apprehension of imminent harm; and
- 34.3 the absence of a suitable alternative remedy.²⁰

[35] In the absence of *mala fides* a court will be hesitant to grant an order against an entity exercising statutory powers.²¹

²⁰ *Setlogelo v Setlogelo* 1914 AD 221; *Webster v Mitchell* 1948 (1) SA 1186 (W) 1189; *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) paras 43 to 47.

²¹ *Molteno Brothers v South African Railways* 1936 AD 321 at 329 to 331; *Gool v Minister of Justice* 1955 (2) SA 682 (C).

[36] The NHLS rejected the nomination of what it believed was DV8 Consulting, an entity it had been involved with since 2016 in a relationship under investigation by the SIU. In reality the entity being nominated was DV8 Technology, but this was a related entity, the same individuals were involved, and those individuals were also under investigation. No finding of *mala fides* can be made.

A prima facie right

[37] DV8 Technology does not have a clear right or a prima facie right as against either of the respondents. The facts set out by DV8 Technology together with the facts set out by MTN and the NHLS (such as the termination of the co-operation agreement, the SIU investigation, and the confusion caused by the role of DV8 Technology in the 2015 tender) do not establish a *prima facie* right.

The balance of convenience

[38] If one were to postulate the existence of a *prima facie* right though open to some doubt, the balance of convenience would not favour DV8 Technology. It seeks orders that would seriously inhibit the services provided to patients by the NHLS and would cause prejudice to MTN and all subcontractors appointed or to be appointed as a result of the 2021 tender and the 2022 SLA.

38.1 MTN is permitted to subcontract to third parties. In terms of the Preferential Procurement Regulations of 2017 all subcontractors must

be approved by the NHLS. The 2022 SLA refers to eight subcontractors approved by the NHLS.

38.2 DV8 Technology also insists on an exclusive appointment, excluding all other actual or potential subcontractors.

[39] The interim orders sought would prejudice MTN, the NHLS, the public, the eight approved subcontractors, other possible future subcontractors, and possibly other ancillary service providers at least until such time as the review application and the arbitration were finalised, yet be aimed at relief that would have no practical effect because the co-operation agreement between MTN and DV8 Technology was terminated. MTN can not be compelled to accept DV8 Technology as its subcontractor.

Harm and causation

[40] The harm allegedly suffered by DV8 Technology arose not from its nomination or the rejection of the nomination, but from the lawful termination of the co-operation agreement.

[41] Any harm suffered by DV8 Technology as a result of the termination can not be laid at the door of the NHLS nor should the NHLS be prevented from continuing with its activities because of a dispute between MTN and DV8 Technology that has nothing to do with the NHLS.

The accrued rights

[42] It is argued on behalf of DV8 Technology that the right it seeks to enforce against MTN is the right to be nominated as a subcontractor and the right to insist that MTN use its best efforts to procure the acceptance of the nomination by the NHLS. The submission loses sight of the fact that because the co-operation agreement has been terminated, and validly terminated as DV8 Technology can not dispute the termination, any acceptance of DV8 Technology as a subcontractor will be without any effect as the co-operation agreement in terms of which it was to function as subcontractor to a main contractor, MTN, no longer exists.

[43] The right to be nominated ended when the co-operation agreement came to an end.

DV8 Technology's rights against the NHLS

[44] DV8 Technology never had any rights to enforce as against the NHLS. It never entered into a contract of any kind with the NHLS, and the NHLS was not a party to the co-operation agreement. There is no *status quo* to preserve pending a review application, and DV8 Technology has no public law rights to enforce against the NHLS. It can also not enforce perceived contractual rights against MTN by seeking an interdict against the NHLS

[45] DV8 Technology did not submit a tender and has no standing to challenge the 2021 tender.²²

²² Compare *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2012 JDR 2298 (CC).

[46] DV8 Technology claims that if urgent interim relief were not granted, the NHLS would not be able to function as DV8 Technology would not be able to provide services. There is no substance to this argument as it has and never had any right to provide such services. If it did provide such service, it did so in the guise of DV8 Consulting and without the knowledge of the NHLS. There is therefore no evidence of public harm.

[47] From the NHLS's point of view DV8 Consulting was nominated and rejected by the NHLS. The NHLS did not knowingly take a decision involving DV8 Technology and there is nothing to review. The decision taken by the NHLS involved DV8 Consulting and DV8 Consulting is not a party to this application. Nor is there any ground for a mandamus – there is no decision on DV8 Technology required from the NHLS.

[48] The co-operation agreement having been terminated, it is no longer possible for the NHLS to approve DV8 Technology as a subcontractor of MTN as there is no extant contractual relationship between MTN as main contractor and DV8 Technology. The relief sought is moot.

[49] The NHLS is not obliged to consider a nomination which is impossible to make at this point in time. DV8 Technology has no right to be considered, whether a clear right or a prima facie right.

[50] The fact that DV8 Technology qualifies for nomination as a subcontractor to contractors that contract with entities such as the NHLS because of its status as a QSE, does not entitle it to nomination in this instance. It merely makes nomination possible. DV8 Technology's status as a QSE is not infringed on the facts of this matter.

Non-joinder

[51] MTN argues that its subcontractors ought to have been joined to the application as they have a direct and substantial interest in the relief sought. DV8 Technology relies on an exclusive right to be appointed as MTN's subcontractor.

[52] Joinder must be evaluated from the point of view of the potential effect of the order on the parties not joined, rather than the subject matter of the litigation.²³ The test is always whether the party to be joined has a direct and substantial interest,²⁴ in other words a legal interest rather than a mere financial interest.

[53] If the interim interdict were granted, the eight subcontractors identified in the 2022 SLA would no longer be allowed to render their services. They have a direct and substantial interest and their non-joinder is fatal to the application. This is not a matter where their non-joinder can perhaps be rectified by a rule *nisi*.

Urgency

²³ *Collin v Toffie* 1944 AD 456 at 464; *Tshandu v Swan* 1946 AD 10 at 24–5; *Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A) 521; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) 657; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA) 226F–227F; *Burger v Rand Water Board* 2007 (1) SA 30 (SCA); *Haroun v Garlick* [2007] 2 All SA 627 (C); *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) ; *City of Johannesburg v SALA* (2015) 36 ILJ 1439 (SCA).

²⁴ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 (4) SA 337 (SCA) 359D; *Standard Bank of SA Ltd v Swartland Municipality* 2011 (5) SA 257 (SCA) 259E–260A; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) 317A; *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) 176H–I; *In re BOE Trust Ltd and Others NNO* 2013 (3) SA 236 (SCA) 241H–I; *Absa Bank Ltd v Naude NO* 2016 (6) SA 540 (SCA) 542I–543C; *South African History Archive Trust v South African Reserve Bank* 2020 (6) SA 127 (SCA) para 30; *115 Electrical Solutions (Pty) Ltd & Another v City of Johannesburg Metropolitan Municipality & Another* [2021] JOL 50031 (GP) para 76.

[54] The matter is not urgent. In October 2021 DV8 Technology already knew of the alleged breach and on 19 January 2022 the rejection of the nomination of DV8 Technology was communicated to it. The application was then launched on 25 February 2022, four months after the alleged breach of the co-operation agreement, and weeks after the dispute was referred to mediation.

[55] The parties were however *ad idem* that I should deal with the whole application and not merely with the aspect of urgency.

Conclusion

[56] For all the reasons set out I make the order set out in paragraph 1 above.

**J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **1 JUNE 2022**.

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DATE OF THE HEARING:

23-24 May 2022

DATE OF JUDGMENT:

1 June 2022