

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 21/58814

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|---------------------------------------|
| 1. REPORTABLE: NO |
| 2. OF INTEREST TO OTHER JUDGES:
NO |
| 3. REVISED: NO |
-

27 JUNE 2023

In the matter between:

MAKHADO PROJECT MANAGEMENT (PTY) LTD

Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL,

DEPARTMENT OF INFRASTRUCTURE DEVELOPMENT,

GAUTENG PROVINCIAL GOVERNMENT

First Respondent

HEAD OF DEPARTMENT,

DEPARTMENT OF INFRASTRUCTURE DEVELOPMENT,

GAUTENG PROVINCIAL GOVERNMENT

Second Respondent

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 12h00 on 27 June 2023.

JUDGMENT

OLIVIER, AJ:

1. The applicant is a company with limited liability, incorporated in terms of the company laws of the Republic of South Africa. It operates in the building and construction sector.
2. The first respondent is the Member of the Executive Council (MEC), Infrastructure Development, Gauteng Provincial Government, who is cited in his representative capacity as political head of the Department of Infrastructure Development, Gauteng Provincial Government (“the Department”).
3. The second respondent is the Head of the Department, who is responsible for the day-to-day operations of the Department.

BACKGROUND FACTS

4. The applicant and the Department, through their duly appointed representatives, concluded a written NEC3 Engineering and Construction agreement (“the agreement”) on 2 June 2020, in terms of which the applicant

would provide general building services, including renovations and repairs, to the respondents at the Anglogold Health Services Hospital in Carletonville, Gauteng (“the project”).

5. At some point during the project a dispute arose between the parties regarding payment, which the applicant referred for adjudication, in terms of Option W1 of the agreement. Mr Michele Rivarola, who was nominated by the South African Institute of Civil Engineers (SAICE), was appointed as Adjudicator. The dispute (labelled ‘Dispute 001’) was decided in favour of the applicant, on 21 September 2021. In short, the respondents were directed to pay the applicant the amount of R 15,385,151.22 plus VAT.¹ The respondents have to date not complied with the Adjudicator’s ruling, despite demand.
6. The project was performed to completion by the applicant and a Certificate of Completion was issued by the Adjudicator in a subsequent decision dated 23 May 2022.
7. The agreement provides that the decision of the Adjudicator is final and binding if neither party has within the period stipulated in the agreement notified the other party that it is dissatisfied with the decision of the Adjudicator and intends to refer the matter to the ‘tribunal’.² It is common cause that the respondents did not file a notice of dissatisfaction or give notice of any referral or review. The Adjudicator’s ruling is, therefore, in terms of the agreement, final and binding on the parties.
8. The applicant seeks enforcement of the Adjudicator’s decision. The respondents oppose the application. According to the respondents, they advised the applicant on 15 February 2022 that proceedings had been instituted in terms of the Special Investigating Units and the Special Tribunals Act, 74 of 1996 as

¹ According to the applicant’s counsel, this amount included the costs of the respondents’ half share of the adjudicator’s costs, which already included VAT. The correct amount payable by the respondents is R15,376,264.77 plus VAT.

² Clause W1.3(10) of the agreement.

amended ('the SIU Proceedings') against the applicant and sixteen others. The applicant is the tenth respondent in that matter. The allegation is that the applicant and other service providers against whom the Special Investigating Unit (SIU) has launched proceedings, overcharged and were, as a result, overpaid. According to the respondents, the costs of the construction project had ballooned from an initial R 50 million, to over R 588 million. The SIU seeks to declare the agreements, including the agreement on which this application is based, invalid in terms of section 172(1)(b) of the Constitution of the Republic of South Africa, 1996, and further seeks an order against the applicant to repay an alleged overcharge in the amount of R34 163 715,26.

9. The respondents gave notice of opposition on 4 January 2022. However, they failed to file their answering affidavit within the prescribed period. The application was subsequently placed on the unopposed roll. On 10 June 2022, Vally J postponed the matter *sine die*, and ordered the respondents to file their signed answering affidavit within 10 days (by 27 June). The affidavit was filed only on 1 July 2022, but it was neither signed nor certified. The applicant nevertheless filed a replying affidavit, pointing out the deficiencies in the respondents' affidavit. The 'corrected' answering affidavit, signed and properly certified, was uploaded to CaseLines only two days before the hearing of this matter.

RELIEF

10. The applicant seeks the following specific relief, as set out in the notice of motion:³

1. That the first respondent and/or second respondent (collectively referred to as "the respondents") shall upon service of an Order of Court give immediate effect to

³ In the adjudication proceedings the applicant was referred to as 'the Contractor', the Gauteng Department of Infrastructure Development ('the GDID') as 'the Employer', and the Project Manager as the 'PM'.

paragraphs 80, 81, 82 and 83 (including all subparagraphs thereto) of the adjudicator's decision in respect of the Dispute 001 as published by the appointed adjudicator, Mr Michele Rivarola, on 21 September 2021 ("the decision") as follows:

80. Revision to the Completion Date: The Employer is required, within one day of publication of this decision, to instruct the PM to revise the Completion Date to 7 May 2021 to reflect the original completion date extended by the number of days which the PM has assessed and notified. In addition the Employer is simultaneously required to instruct the PM to issue two Payment Certificates, within 1 week of the publication of this decision, to reverse the penalty deductions and to compensate the Contractor for interest as follows:

80.1. One Payment Certificate in the amount of R 9,563,434.59 (plus VAT) representing the total penalty deductions

80.2. One Payment Certificate for the interest on all penalty deductions from the date on which a payment certificate containing a deduction was due to be paid, to the date of publication of this decision calculated in accordance with Clause 50 and Clause 51 as amended in the Contract Data

81. Revision to the Price: The Employer is required, within one day of publication of this decision, to instruct the PM to compensate Makhado for the implementation of compensation events CE001 to CE006 listed in its Referral which the PM has assessed and notified. In addition the Employer is simultaneously required to instruct the PM to issue two Payment Certificates, within 1 week of the publication of this decision, as follows:

81.1 One Payment Certificate equal to the aggregate value of the compensation events CE001 to CE006 which the PM has assessed and notified in the amount of R 5,753,587.18 (plus VAT)

81.2. One Payment Certificate for the interest for each assessed and compensation event from the date on which the corresponding payment certificate containing the valuation of the assessed compensation event was due for payment to the date of publication of this decision calculated in accordance with Clause 50 and Clause 51 as amended in the Contract Data

82. In addition, within one day of publication of this decision, the Employer is required to instruct the PM to determine the interest amounts in conjunction with the Contractor to avoid further disagreements. Should any disagreement arise on the calculation of interest each party is required to submit their calculations to the undersigned for determination, in which case the date for the end of the interest calculation will be extended to the date of my further determination. 83. Whilst each party is required to carry its own half share of the adjudication costs where one party has paid the other party's share, the payer is entitled to issue immediately on publication of this decision an invoice equal to the amount that it has paid on behalf of the defaulting party. The payment due date is immediately on presentation or receipt of the invoice.

2. That the first respondent, alternatively the second respondent, shall pay the applicant, immediately upon service of an Order of Court, the amount of R68,129.45 in respect of the adjudicator's fees which the applicant paid on behalf of the respondents, together with interest thereon from 21 September 2021 (being the date of presentation or receipt of the invoice referred to in paragraph 83 of the decision detailed above) to date of payment at the rate prescribed in the Prescribed Rate of Interest Act as determined by the Minister, from time to time, currently being 7.25% per annum.

3. That the first respondent, alternatively the second respondent, shall pay all amounts due to the applicant listed in paragraph 1 above within 14 calendar days upon service of an Order of Court.

4. In the event of the respondents (or its Project Manager) failing to comply with paragraphs 1, 2 and/or 3 above, that the applicant be entitled to approach this Court on papers duly supplemented, declaring:

- a. the respondents to be in contempt of court, for failing to comply with the Court Order;

- b. committing the first respondent to imprisonment as the Member of the Executive Council responsible for the Gauteng Department of Infrastructure Development; and
- c. committing the second respondent to imprisonment as the Departmental Head responsible for the day-to-day operations of the Gauteng Department of Infrastructure Development.

5. That the costs of this application be paid by the first respondent, alternatively by the second respondent, on a scale as between attorney and client, including the costs of Senior Counsel where employed.

6. Further and/or alternative relief.

DISCUSSION

11. Respondents' counsel argued that it would be just and equitable and in the interest of justice that the SIU proceedings should be finalised first before this court makes an order to enforce the adjudicator's ruling; alternatively, that if this court grants an order in favour of the applicants, that the order should come into effect only once the SIU proceedings had been finalised. The respondents submitted that the circumstances are so exceptional that the court must intervene. The matter involves public monies, and the applicant should not be allowed to benefit from unlawful conduct.

12. The first difficulty faced by the respondents is that they have not made an application to condone the late filing of their answering affidavit in terms of Rule 27(3). This was conceded by the respondents' counsel during oral argument. It can justifiably be asked whether the answering affidavit is properly before the court. Leaving the affidavit aside for the moment, even

should there have been a successful application for condonation, the respondents would still face another, more substantive hurdle.

13. Applicant's counsel argued that there is in essence no substantive opposition to the application that complies with the Rules. The respondents' only 'opposition' is to seek a stay of the enforcement of the adjudicator's decision, which the applicant submitted is not properly before court.
14. Applicant's counsel submitted that the relief for a stay should have been brought by the respondents in the form of a counter application, or by way of interlocutory application after filing a counterclaim for payment of the alleged overpayment. There is neither a counter application before the court, nor a counterclaim for payment of the alleged overpayment. A putative counterclaim could not be the basis for a stay of the application.
15. Respondents' counsel conceded that ordinarily a party would make an application to court to stay proceedings. It was submitted, however, that nothing prevents this court from considering the facts as set out in the affidavit, even in the absence of an application. They argue that a court has an inherent discretion to grant a stay of proceedings.
16. The respondents seek an order from this court to stay the enforcement of the adjudicator's ruling. This is specific relief that in my view should have been brought by way of a counter application on notice of motion in terms of Rule 6. All that is before the court is an answering affidavit, which was delivered late and for which condonation has not been sought. An answering affidavit cannot form the basis for a court to grant substantive relief in the absence of an application for the particular relief. This is not a mere technical deficiency or deviation from the Rules that can without more be condoned by the court.

17. The applicant and the respondents agreed to a particular dispute resolution process when they concluded the agreement. This process was followed properly. The Adjudicator ruled in favour of the applicant. The respondents did not object to the Adjudicator's ruling within the stipulated period, and the ruling became final and binding.
18. The applicant has made out a clear case on the papers. The respondents' papers do not address the merits of the application, focusing almost exclusively on the alleged illegality of the agreement, and the SIU proceedings.
19. The respondents' non-compliance with the Adjudicator's decision is in breach of the agreement. As argued by the applicant's counsel, disregarding the outcome of the adjudication and its force would defeat the object and purpose of the adjudication process provided for in the agreement.
20. The fact that public monies are involved does not exempt the respondents from complying with their contractual obligations, or from complying with the Rules.
21. For the above reasons, the applicant is entitled to the relief it seeks.

22. The SIU process must run its course. The SIU has not been joined, but it should nevertheless be informed of the outcome of this application. I consider it prudent under the circumstances to order that a copy of this judgment be forwarded to the SIU.

COSTS

23. It is trite that in awarding costs, a court has a discretion, which must be exercised judicially upon a consideration of all the facts, the circumstances of

the case, the issues in the case, and the conduct of the parties. This discretion is wide, but not unlimited. As a rule of thumb, a successful party is entitled to their costs. A court should make an order that would be fair and just between the parties.⁴

24. The applicant seeks a punitive order against the respondents. Applicant's counsel argued that the respondents had been dilatory in their failure to comply with the court order of 10 June 2022, and had shown a general disregard for the Rules.
25. A punitive costs order is made only in exceptional cases, such as where a court wants to show its displeasure with the way in which the losing party had conducted its case. In my view, this is clearly such an instance. It would be unfair in the circumstances not to award the applicant costs on an attorney and client scale, including the costs of senior counsel where employed. I shall make an order to that effect.

IT IS ORDERED:

1. That the first respondent and/or second respondent (collectively referred to as "the respondents") shall upon service of an Order of Court give immediate effect to paragraphs 80, 81, 82 and 83 (including all subparagraphs thereto) of the adjudicator's decision in respect of the Dispute 001 as published by the appointed adjudicator, Mr Michele Rivarola, on 21 September 2021 ("the decision") as follows:

80. Revision to the Completion Date: The Employer is required, within one day of publication of this decision, to instruct the PM to revise the Completion Date to 7 May 2021 to reflect the original completion date

⁴ *Fripp v Gibbon & Co* 1913 AD 354 at 363.

extended by the number of days which the PM has assessed and notified. In addition the Employer is simultaneously required to instruct the PM to issue two Payment Certificates, within 1 week of the publication of this decision, to reverse the penalty deductions and to compensate the Contractor for interest as follows: 80.1. One Payment Certificate in the amount of R 9,563,434.59 (plus VAT) representing the total penalty deductions

80.2. One Payment Certificate for the interest on all penalty deductions from the date on which a payment certificate containing a deduction was due to be paid, to the date of publication of this decision calculated in accordance with Clause 50 and Clause 51 as amended in the Contract Data

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82. In addition, within one day of publication of this decision, the Employer is required to instruct the PM to determine the interest amounts in conjunction with the Contractor to avoid further disagreements. Should any disagreement arise on the calculation of interest each party is required to submit their calculations to the undersigned for determination, in which case the date for the end of the interest calculation will be extended to the date of my further determination. 83. Whilst each party is required to carry its own half share of the adjudication costs where one party has paid the other party's share, the payer is entitled to issue immediately on publication of this decision an invoice equal to the amount that it has paid on behalf of the defaulting party. The payment due date is immediately on presentation or receipt of the invoice.

2. That the first respondent, alternatively the second respondent, shall pay the applicant, immediately upon service of an Order of Court, the amount of R68,129.45 in respect of the adjudicator's fees which the applicant paid on behalf of the respondents, together with interest thereon from 21 September 2021 (being the date of presentation or receipt of the invoice referred to in paragraph 83 of the decision detailed above) to date of payment at the rate prescribed in the Prescribed Rate of Interest Act as determined by the Minister, from time to time, currently being 7.25% per annum.
3. That the first respondent, alternatively the second respondent, shall pay all amounts due to the applicant listed in paragraph 1 above within 14 calendar days upon service of an Order of Court.

4. In the event of the respondents (or its Project Manager) failing to comply with paragraphs 1, 2 and/or 3 above, that the applicant be entitled to approach this Court on papers duly supplemented, declaring:
 - a. the respondents to be in contempt of court, for failing to comply with the Court Order;
 - b. committing the first respondent to imprisonment as the Member of the Executive Council responsible for the Gauteng Department of Infrastructure Development; and
 - c. committing the second respondent to imprisonment as the Departmental Head responsible for the day-to-day operations of the Gauteng Department of Infrastructure Development.
5. That the costs of this application be paid by the first respondent, alternatively by the second respondent, on an attorney and client scale, including the costs of Senior Counsel where employed.
6. That a copy of this judgment be forwarded to the Special Investigative Unit within 5 (five) days of the date of this order.

M. Olivier
Judge of the High Court (Acting)
Gauteng Division, Johannesburg

Date of judgment: 27 June 2023

On behalf of Applicant: L.J. Van Tonder SC

Instructed by: Tiefenthaler Attorneys Inc.

On behalf of 1st and 2nd Respondents: L. Adams (Ms)

T. Mayosi (Heads of argument)

Instructed by: State Attorney, Johannesburg