

REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: YES / NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED.

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DATE

SIGNATURE

Case No: 2023/01880

In the matter between:

MARU SPACES CONSORTIUM
Applicant

and

**GAUTENG PROVINCIAL GOVERNMENT:
DEPARTMENT OF INFRASTRUCTURE DEVELOPMENT**

Respondent

JUDGMENT

BARNES AJ

Introduction

- [1] This is a claim for the payment of money, in the sum of R14 808 636.80 (fourteen million, eight hundred and eight thousand, six hundred and thirty six rands and eighty cents), for professional services rendered by the Applicant to the Respondent in terms of a Service Level Agreement concluded between the parties on 15 August 2017.

- [2] The Applicant is Maru Spaces Consortium, a consortium led by Maru Spaces (Pty) Ltd, a private company based in Midrand, Gauteng.

- [3] The Respondent is the Gauteng Provincial Government: Department of Infrastructure Development.

- [4] Before dealing with the merits of the matter, it is necessary to deal with the points *in limine* raised by the Respondent. The Respondent initially raised three points *in limine*. The first was that the Service Level Agreement contains an arbitration clause by which the parties are bound. The Respondent accordingly sought the stay of the application and the referral of the matter to arbitration. The Respondent's second and third points *in limine* alleged non-compliance on the part of the Applicant with various provisions of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

- [5] Ultimately, the Respondent did not persist with the second and third points and sought to pursue only the first point *in limine* ("the arbitration point"). When the matter came before me on 15 February 2024, the parties indicated that they wished to argue the arbitration point first and obtain a ruling thereon, prior to addressing the merits of the matter. I agreed that this was the proper approach to follow, given that the arbitration point, if upheld, would result in

the stay of the application.

[6] Accordingly on 15 February 2024, I heard argument from the parties on the arbitration point, whereafter I delivered an *ex temporae* judgment in which I dismissed the point.

The Ex Temporae Judgment

[7] My *ex temporae* judgment was as follows:

“The Respondent has raised a point in limine to the effect that the Service Level Agreement in this matter, in terms of which the main dispute arises, contains an arbitration clause and seeks the stay of this application pending the referral of the dispute to arbitration.

The arbitration clause in the Service Level Agreement provides as follows:

‘26 DISPUTES

26.1 Any dispute arising from this Agreement shall be subject to the following dispute resolution procedures:

26.1.1 In the event of any dispute in relation to the obligations provided for in this Agreement, the Parties agree to arrange a meeting of the senior representatives, from each party, which representative from the GDID shall include the legal manager, to first attempt to resolve the dispute. If, after 10 (ten) Business Days, this process fails, the Parties then agree to submit such dispute on written demand by either party to arbitration in terms of an agreement between the Parties, by a court of competent jurisdiction.

26.1.2 The Arbitration shall be held in Johannesburg in accordance with the rules of the Arbitration Foundation of South Africa (“AFSA”) by an arbitrator or arbitrators appointed by the AFSA and agreed by the Parties. Should the parties fail to agree on an arbitrator within 10 (ten) Business Days after arbitration has been demanded, the arbitrator shall be nominated at the request of any Party by the AFSA.

I pause to mention that the reference to “by a court of competent jurisdiction” in clause 26.1.1 of the arbitration clause is obviously an error.

It is well established that the onus is on the party applying to stay a matter by reason of an arbitration clause to show:

- a. the existence of the arbitration agreement or clause;*
- b. that there exists a dispute between the parties;*
- c. that the dispute between the parties is covered by the arbitration agreement or clause; and*
- d. that all pre-conditions contained in the agreement for the arbitration have been complied with.*

In this case I am satisfied that the requirements set out in paragraphs (a) to (c) above have been fulfilled.

However, as far as requirement (d) is concerned, it is not in dispute between the parties that the steps required in terms of clause 26.1.1 of the arbitration clause have not been taken. That clause required the parties first to arrange a meeting of senior representatives, which representative in the case of the GDID was to include the legal manager, in an attempt to resolve the dispute. If after 10 business days, that process failed, either party was entitled to submit a written demand for arbitration. It is common cause that none of this has happened.

The pre-conditions required for the arbitration have accordingly not been complied with and the Court cannot sensibly or permissibly, in these circumstances, make an order referring the matter to arbitration. See in this regard Richtown Construction Co (Pty) Ltd v Witbank Town Council 1983 (2) SA 409 (T). See also Omar v Inhouse Venue Technical Management (Pty) Ltd 2015 (3) SA 146 (WCC) at 163C-D.

In the circumstances, the Respondent is not, in my view, entitled to an order staying the application.

The point in limine is accordingly dismissed.”

[8] Following my delivery of the *ex temporae* judgment, I heard argument from the parties on the merits of the application.

The Merits

[9] It is not in dispute that on 15 August 2017, the Applicant and the Respondent entered into a Service Level Agreement, in terms of which the Applicant was to provide the Respondent with professional services, in the nature of architectural and multi disciplinary engineering services in respect of a costed maintenance implementation plan for certain hospitals in the South corridor of Gauteng.

[10] The Service Level Agreement provided that the Applicant would invoice the Respondent for services rendered and that invoices were payable by the Respondent within 30 days of receipt thereof.

[11] The Applicant commenced the provision of services on 26 July 2017. All went well for a period of some two and a half years until February 2020 when the Respondent ceased making payment for services rendered. The Respondent however gave repeated assurances that payments would be forthcoming, and on the strength of this, the Applicant continued rendering services.

[12] By December 2021 it had become impossible for the Applicant to continue rendering services in the absence of payment and on 7 December 2021 the Applicant informed the Respondent that the rendering of services would be suspended until all outstanding payments had been made. The Applicant did so in terms of the provisions of clause 11 of the Service Level Agreement which made provision for the suspension of services in these circumstances.

[13] As at 7 December 2021, when the Applicant suspended the provision of services, the Respondent owed the Applicant the sum of R14 808 6366.80 inclusive of VAT made up as follows:

a. R9 510 237.68 for services rendered in respect of the Sebokeng

Hospital;

- b. R4 794 625.48 for services rendered in respect of the Kopanong Hospital; and
- c. R503 773.60 for services rendered in respect of the Heidelberg Hospital.

[14] The invoices making up each of the aforesaid amounts constituted part of the Applicant's application. So too did memoranda accompanying each invoice, bar one, in terms of which the Respondent confirmed that the relevant services had been rendered to a satisfactory standard and approved each invoice for payment. The memoranda were addressed by the Respondent's Acting Deputy Director: Health Infrastructure and Technical Portfolio to the Director of the Department of Health Infrastructure Management and were in identical terms. The memoranda, in relevant part, provided as follows:

"Approval of Invoice Payment

The Professional consultants services provided by Maru Spaces has been executed to a satisfactory standard as assessed by GDID. The amounts as indicated on the invoice are correct and the GDID therefore supports the payment as indicated on the attached invoice NO's."

[15] While, as stated above, there is no memorandum accompanying one of the invoices, there was no suggestion by the Respondent in its papers that there was any difficulty with this invoice, or with the quality of the professional services that had been rendered by the Applicant in respect thereof.

[16] In fact, on 22 May 2023, shortly after the launch of the application, the Respondent's Acting Deputy Director Health, Infrastructure and Technical portfolio, addressed an e-mail to the Applicant in which he:

- a. confirmed that the invoices received from the Applicant for services rendered totalled R14 808 636.76;
- b. stated that the amount of R8 914 370.22 could be paid immediately; and
- c. stated that the balance of R5 894 266.54 still needed to be approved by the Department of Health.

[17] Notwithstanding the above, no part of the R14 808 636.76 claimed by the Applicant has yet been paid by the Respondent.

[18] The Respondent's defence to the Applicant's claim is articulated as follows in its answering affidavit:

"It is denied that the Respondent should pay the Applicant for all the amounts claimed. When Specialist Services were procured there was no appropriated budget to undertake this service.

An investigation by the respondent found that PSPs were appointed by the Respondent on the instruction of the Gauteng Department of Health without funding allocated in the Estimates of Capital Expenditure.

The Applicant was at all times aware of this and of the attempts to try and remedy the situation and get approval. This has proved unsuccessful, and the respondent is not liable to pay all the amounts claimed as same is unauthorised."

[19] In argument before me, Ms Abrahams who appeared for the Respondent, sought to contend that the Service Level Agreement had been entered into without authority on the part of the Respondent. She was however constrained to concede that this was not the Respondent's pleaded case and did not persist with this argument.

[20] Ultimately, as is evident from the Respondent's pleadings, its sole defence to the Applicant's claim is that the professional services contracted for in the Service Level Agreement were not budgeted for. This is however pleaded in the vaguest of terms. There is no explanation for how or when the alleged budgetary omission came about. Nor is there an explanation for how it was that the Applicant was paid for its services rendered in terms of the Service Level Agreement for over two years. In any event, despite its contention that the services were not budgeted for, it is not the Respondent's case that the Service Level Agreement was entered into without authority, or that it falls to be set aside on any basis. On the contrary, the Respondent has effectively conceded, as set in the e-mail quoted above, that it is indebted to the Applicant in the amount of R14 808 636.76.

[21] In the circumstances the Respondent has provided no legally cognisable defence to the Applicant's claim. The Respondent's alleged failure to follow proper budgetary procedures, (even if this were clearly established on the evidence) cannot justify its failure to pay in circumstances in which a valid and binding Service Level Agreement has been concluded between the parties, professional services have been rendered to the satisfaction of the Respondent and payment of the Applicant's invoices has fallen due. This is so not only as a matter of contract law, but also, where, as here, one is dealing with a State party, as a matter of constitutional accountability.

[22] In this regard, the Constitutional Court in *Kwa-Zulu Natal Joint Liaison Committee v MEC Department of Education, Kwa-Zulu Natal and Others* 2013 (4) SA 262 (CC) held as follows (at paragraphs 62 to 65):

"... The respondents provide no answer to the legally enforceable obligation the Norms and KZN regulations imposed to pay the amounts promised in the Notice by 1 April 2008. It cannot be countenanced legally or constitutionally that the amount of the subsidy be reduced unilaterally after the date for payment by regulation has already fallen due. This is so regardless of whether the intended beneficiary would

have been able to divine the possibility of a cut. The respondents' hands were tied once the due date for payment stipulated in the regulation had passed.

The reasons lie in reliance, accountability and rationality. First, reliance. The schools budgeted for the whole year in reliance on the 2008 notice. The reduction in the subsidy announced in the latter of May 2009 would severely disappoint them. But they could adjust their future outlays. They could not do so in relation to the tranche that had already fallen due. Their entitlement should therefore be taken to have crystallised.

Second, accountability. Governance is hard, and the hardest part is no doubt budgeting. Government officials are slaves to the resources allocated to them. Hence courts should respect the effects of budget cuts. But their impact on those to whom undertakings have been made should be announced quickly.

As smartly as possible. Constitutional accountability and responsiveness demand this. It can never be acceptable in a constitutional democratic state for budget cuts to be announced to those to whom undertakings have been made after payment has by regulation already fallen due.

Last, rationality. Government officials must, in dealing with those who act in reliance on their undertakings, act rationally. A budget cut made in relation to payments promised but not yet made would be regrettable. But it may be rational. Behaviour and expectations can be tailored to it. But it is impossible to tailor behaviour and expectations to a promise made in relation to a period that has already passed. Revoking a promise when the time for fulfilment has already expired does not constitute rational treatment of those affected by it." (Emphasis added)

[23] While the above case dealt not with a contractual obligation to pay, but an obligation in terms of Government Regulations, the applicable principles are the same. The Respondent cannot, where a binding contract has been

concluded and payment has fallen due in terms thereof, seek to evade payment on the basis that it has not been properly budgeted for.

[24] The Applicant is accordingly entitled to the payment of R14 808 636.76 for professional services rendered to the Respondent.

[25] Mr Siyo, who appeared on behalf of the Applicant, urged me to make a punitive costs order, on the attorney and client scale, against the Respondent. He did so on the basis of his contention that the Respondent had no *bona fide* defence to the Applicant's claim and had opposed the claim, using State funds, purely in order to delay and frustrate the Applicant. For the reasons set out above, the Respondent's defence is not good in law and stands to be rejected. I am however not satisfied that the Respondent's opposition to the claim, while it may have been inept, rises to the level of bad faith. I am therefore not inclined to grant a punitive costs order.

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

Order

1. The Respondent is ordered to pay the Applicant the sum of R14 808 636.80 (fourteen million, eight hundred and eight thousand, six hundred and thirty six rands and eighty cents) inclusive of VAT, within 30 days of the date of this judgment.
2. The Respondent is ordered to pay interest at the prescribed rate on the amount of R14 808 636.80 (fourteen million, eight hundred and eight thousand, six hundred and thirty six rands and eighty cents) *a tempore mora* to date of final payment.
3. The Respondent is ordered to pay the Applicant's costs.

BARNES AJ

**JUDGE OF THE HIGH COURT
JOHANNESBURG**

Heard: 15 February 2024

Judgment: 25 June 2024

Appearances:

Applicant:

Adv L Siyo

Instructed by Steven Maluleke Attorneys

Respondent:

Adv L Abrahams

Instructed by the State Attorney