IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No. **067524/23**

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

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SIGNATURE **DATE**

In the matter between:

BLOEMFONTEIN CORRECTIONAL CONTRACT (PTY) LTD	Applicant

and

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
G4S CORRECTION SERVICES (BLOEMFONTEIN) RF (PTY) LTD	Second Respondent

This matter was heard in open court and disposed of in terms of the directives issued by the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

JUDGMENT

KUBUSHI J

INTRODUCTION

[1] There is a dispute between the applicant and the 1st respondent in regard to a concession agreement that was concluded between them. The concession agreement concerns the operations at the Mangaung Correctional Centre. The applicant, in turn entered into a subcontract with the 2nd respondent relating to the services that should be provided, in terms of the concession agreement at the Centre. Pursuant to that dispute, the 1st respondent seeks to terminate the concession agreement alleging certain breaches of the agreement which it is said are incapable of being remedied. The termination of the concession agreement will, obviously, affect the 2nd respondent.

[2] The applicant is contesting the merits of the termination of the concession agreement by the 1st respondent and had previously approached court on an urgent basis for interim interdictory relief wherein it sought to challenge the 1st respondent's purported cancellation of the concession agreement and to prevent the implementation of the termination without its merits being properly ventilated. By consent between the parties the matter was referred for mediation but could not be resolved. The parties then agreed that the matter be referred for special motion allocation. In the mean while the applicant instituted action against the 1st respondent to prevent the unlawful cancellation of the concession agreement and seeks specific performance of its rights under the concession agreement.

[3] In the above-mentioned proceedings the subcontractor to the concession agreement was cited as the 2nd respondent, except that it was not a party to the mediation process.

[4] In the present proceedings, the applicant seeks interim interdictory relief against the 1st respondent for an order that the 1st respondent not proceed with the termination of the concession agreement, this time pending the finalisation of the action it has instituted against the 1st respondent. The applicant has also in these proceedings cited the subcontractor as the 2nd respondent. No relief is actually wanted against the 2nd respondent and it has been cited in the papers by virtue of its interest in the outcome of the proceedings. Even though no relief is sought against it, the 2nd respondent, has filed an extensive answering affidavit in support of the relief sought in relation to the stay of the termination.

[5] At the commencement of the hearing I was informed that a dispute has arisen between the 1st and the 2nd respondents which requires determination before the application could be heard.

[6] The 1st respondent in rising, raised an in limine point as to the standing of the 2nd respondent to seek the relief sought by the applicant against the 1st respondent together with costs in the event of such relief being granted. It should be stated that the point *in limine* was raised for the first time in court – that is, it was neither covered in the 1st respondent's answering affidavit nor in its heads of argument. This is a concern that was raised by the 2nd respondent in argument. Counsel for the 2nd respondent lamented the fact that he was not informed that the point will be taken, nor were the unreported judgments upon which counsel for the 1st respondent relied for his argument, provided to him for preparation of argument and as such he was not really prepared for argument.

[7] For his argument that the 2nd respondent has no standing in these proceedings, counsel for the 1st respondent relied on the principle of privity of contract, which provides that a party cannot sue or be sued on a contract which it is not a party to. Counsel pointed out that the 2nd respondent was not a party to the concession agreement and there being no privity of contract between the 1st respondent and the 2nd respondent, the 2nd respondent has no standing to assert any rights or obligations which attach to an agreement to which it is not a party. Counsel reinforced his argument by relying on two judgments, namely, *Ndaba v Braithwaite NO* 2013 JDR 1284 LC para 33; and *Manhatten Hotel v South African Gymnastic*

Federation 2017 JDR 0127 GP para 45, whereat the doctrine was applied with approval.

[8] It was argued on behalf of the 2nd respondent that it is not open for the 1st respondent to take the point as it did. The contention being that the 2nd respondent is entitled to participate in these proceedings because it has an interest in the matter. An allegation that has been admitted by the 1st respondent. In this regard counsel referred to paragraph 8 of the founding affidavit that states the reason why the 2nd respondent has been cited. In paragraph 8.1 the reason given is that the 2nd respondent is cited by virtue of its interest in the outcome of the proceedings in its capacity as the operating subcontractor. The paragraph is admitted by the 1st respondent in its answering affidavit, as such there is nothing suggesting that the 2nd respondent has no standing in these proceedings or that it has been improperly cited, so it was argued. In support of this argument, counsel relied on the principle set out in the SCA judgment in *Van Staden and Others NNO v Pro-Wiz (Pty) Ltd* (412/2018) [2019] ZASCA 7 (8 March 2019) para 13, which was further positively referred to *in Lutchman N.O. and Others v African Global Holdings (Pty) Ltd and Others; African Global Holdings (Pty) Ltd and Others v Lutchman N.O. and Others* (1088/2020 and 1135/2020) [2022] ZASCA 66 (10 May 2022), wherein it is stated that ‘ as a matter of principle when a party is cited in legal proceedings it is entitled without more to participate in those proceedings. The fact that it was cited as a party gives it that right.

[9] Counsel for the 1st respondent in his argument was not diametrically opposed to the argument that a party who is cited in legal proceedings is entitled to participate in those proceedings. He actually did not take issue with the 2nd respondent participating in the proceedings like filing an answering affidavit providing the facts to the court. What counsel seemed opposed to was the 2nd respondent coming, as he referred in his argument, by the back door, to seek, in its heads of argument, the relief that is sought by the applicant when there is no *lis* between the 1st respondent and the 2nd respondent, and when the 2nd respondent has not made out a cause of action against the 1st respondent in its papers. Furthermore, there is no existing agreement between the 1st respondent and the 2nd respondent – the concession

agreement that is at issue in these proceedings, is between the applicant and the 1st respondent.

[10] Counsel for the 1st respondent's suggestion is that the interest contended for must be a direct interest and should not be indirect. Counsel argued that the 2nd respondent's interest is financial interest and that such an interest does not translate to legal interest. In support of this submission, counsel referred the court to the SCA judgment in *Medihelp v Minister of Finance NO* (1387/2018) [2020] ZASCA 29 (26 March 2020) where the court at paras 7 -9 remarked as follows:

> "[7] A person might lack standing to sue or be sued in either of two circumstances. The first is where the person is in law not capable of suing or being sued, such as an unassisted minor or a person suffering from a mental disorder. The second is where the person indeed has such capacity, but has insufficient interest in the proceedings.
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> [8] In respect of the latter circumstance the general rule is that a party claiming relief in respect of any matter must establish a direct interest in that matter. A direct interest is one that is not academic, abstract or hypothetical. An interest which all citizens have, would generally be too remote to found standing. An actual and existing interest in the matter is required.
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> [9] Standing is thus determined without reference to the merits or demerits of the claim in question."

[11] Counsel for the 2nd respondent on the other hand argued that the interest that the 2nd respondent is contending for is extensive interest and not only financial interest. The interest includes the interest of employees of the 2nd respondent, the inmates at the Centre and public interest. This allegation, according to counsel, is only noted in the 1st respondent's answering affidavit, and should be taken as admitted.

[12] The question that arises in this matter is whether the 2nd respondent is entitled to participate in these proceedings and to seek the relief sought by the applicant against the 1st respondent, even if it is in support of the applicant, in circumstances where there is no *lis* between them.

[13] Participation in this matter would be for the 2nd respondent to file an answering affidavit to the applicant's founding affidavit, to file heads of argument and to argue the matter in court as counsel for the 2nd respondent seeks to do.

[14] That the 2nd respondent has filed an answering affidavit to the applicant's answering affidavit is not at issue. Counsel for the 1st respondent, correctly so, conceded that it was expected of the 2nd respondent, like in this matter, to file an answering affidavit in order to provide facts and information to the court. What counsel for the 1st respondent places in issue, is the filing of heads of argument and argument in court. Is the 2nd respondent entitled to do so?

[15] The argument by the 1st respondent's counsel that there should be a lis between the parties that entitles the 2nd respondent to participate in the proceedings seems to be persuasive. However, the 2nd respondent's contention is that it has a substantial interest in the matter. The Supreme Court of Appeal in the *Medihelp* held that, the general rule is that a party claiming relief in respect of any matter must establish a direct interest in that matter. There appears to be no direct interest that can be attributed to the 2nd respondent's claim. Its interest together with the interest of its employees and the inmates is dependent on the success of the applicant's claim. The requirement as set out in *Medihelp* is not substantial or extensive interest as argued by the 2nd respondent, but direct interest.

[16] Furthermore, the applicant seeks in these proceedings, as earlier stated, interim interdictory relief. The 2nd respondent in paragraph 83 of its answering affidavit states that:

> "83. for these reasons, G4S [which is the 2nd respondent] supports the relief sought in relation to the stay of termination."

However, in the heads of argument this is not what the 2nd respondent is contending for. The rights which the 2nd respondent is said to be asserting, as argued by the 1st respondent's counsel, is the relief that the 2nd respondent seeks as per paragraph 63 and 64 of its heads of argument. The said paragraphs read as follows:

> "63. In the circumstances, and the reasons set out above, all the requirements for an interim interdict have been satisfied and the interim interdict ought to be granted pending the outcome of the action.
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> 64. G4S [which is the 2nd respondent], insofar as it has supported the application and made common cause against it, also seeks its costs, including the costs of 2 counsel."

[17] The relief contended for in the answering affidavit is not the same relief the 2nd respondent wants in the heads of argument. In the answering affidavit the 2nd respondent supports the relief sought by the applicant in relation to the termination of the concession agreement. The termination of the concession agreement is not an issue before this court. The relief the 2nd respondent seeks in the heads of argument which it wants to argue before court, is for the granting of the interim interdict. This submission was never raised in the answering affidavit, hence the argument by the 1st respondent that the 2nd respondent is coming through the back door.

[18] It is common cause that the 2nd respondent is not a party to the concession agreement and that in accordance with the well-established doctrine of privity of contract it cannot sue or be sued in terms thereof. Therefore, for purposes of these proceedings, it is accepted without any conclusion being made, that the doctrine of privity of contract finds application in the circumstances of this matter. The 2nd respondent is not a party to the concession agreement that is at issue in these proceedings, there is therefore no privity of contract between the 1st respondent and the 2nd respondent. Additionally, the 2nd respondent has not, in its papers, raised an existing lis between it and the 1st respondent.

[19] It is on the basis of the aforementioned reasons that it is found that the 2nd respondent cannot be allowed to seek relief against the 1st respondent as it seeks to do in the heads of argument. In fact, it should not be allowed to participate in these proceedings at all. The decision reached is only in respect of the proceedings that are before this court.

[20] The question of costs was not argued.

[21] The following order is granted:

1. The point *in limine* raised by the 1st respondent is upheld.
2. The 2nd respondent is not to participate in these proceedings.

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KUBUSHI J

Judge of the High Court

Gauteng Division

Appearances:

For the applicant:	Adv Warren Pye SC
Instructed by:	Fasken Attorneys
For the first defendant:	Adv PG Cilliers SC Adv TWG Bester SC Adv M Rantho
Instructed by:	AM Vilakazi INC Attorneys
For the Second defendant:	Adv Bruce Leech SC Adv Luke Choate
Instructed by:	Webber Wentzel Attorneys
Date of judgment:	17 April 2024