Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates:	**NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

CASE NO: UM105/22

In the matter between:-

SAMONTY PROJECTS (PTY) LTD Applicant

and

PERSEVCON CONTRACTORS (PTY) LTD 1st Respondent

PERSEVERANCE MADODA 2nd Respondent

DEPARTMENT OF RURAL DEVELOPMENT 3rd Respondent

STANDARD BANK OF SOUTH AFRICA 4th Respondent

FEM PLAN (PTY) LTD 5th Respondent

CORAM: MFENYANA J

Summary: Civil procedure – rule *nisi* – self- help inimical to rule of law – fairness – reasonableness – justice between contracting parties.

This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be **27 November 2023**.

ORDER

(1) The fourth respondent is ordered to immediately release the amount of R652 310.37 currently held in the first respondent's bank account and pay it over to the applicant's account at: Samonty Projects (Pty) Ltd; FNB Cheque account number: 6263 4676 673.

(2) The rule nisi granted by this court on 1 June 2022 freezing an amount of R652 310.37 from the first respondent's bank account with account number: 300 5964 72, held with the fourth respondent, is confirmed subject to order (1) above.

(3) The first and second respondents shall pay the costs of this application including the reserved costs of 1 June 2022 and 6 October 2022, jointly and severally the one paying the other to be absolved.

JUDGMENT

Mfenyana J

[1] On 1 June 2022, this court, per Gura J issued a rule *nisi* calling upon the respondents to show cause on 30 June 2022 why a final order should not be granted that the fourth respondent (Standard Bank) be ordered to freeze an amount of R652 310.37 from the bank account of the first respondent (Persevcon). In terms of the order, the first and second respondents were also interdicted from withdrawing the said amount, or deal therewith, in any way. Costs were reserved.

[2] The order of the court followed upon an *ex parte* application brought by the applicant (Samonty). Naturally, there was no service on the respondents.

[3] On 30 June 2022, the rule was extended to 7 July 2022. The order incorporated an agreement between the parties pertaining to the filing of further papers. In terms of the order, all parties had to file their heads of argument by 4 July 2022, ahead of the hearing on 7 July.

[4] On 7 July 2022 the matter was postponed for hearing in the opposed roll. The rule was extended to 6 October 2022. On 6 October 2022 the matter was postponed to 17 February 2023 for argument. Costs were reserved. In the current proceedings, the applicant seeks confirmation of the rule.

[5] The first and second respondents have opposed the application and seek an order discharging the rule. They also seek a cost order against the applicant, including the reserved costs of 30 June and 6 October 2022. It is apposite at this point to state that on 30 June 2022 costs were not reserved.

[6] The dispute between the parties has its genesis in an oral agreement concluded between the applicant and the first respondent in August 2020, in terms whereof the first respondent subcontracted the applicant to construct a cattle auction centre

facility at a specified site in Makweleng, North West (the site), on behalf of the first respondent. The material terms of the agreement are not in dispute between the parties.

[7] Prior to the conclusion of the oral agreement, on 12 August 2020, the first respondent had been awarded a contract by the third respondent (the department),to carry out construction work at the site. It is not in dispute that the first respondent was not able to progress with the construction and thus enlisted the services of the applicant. The applicant contends that this was due to lack of financial resources, skills and expertise on the part of the first respondent.

[8] In the founding affidavit, the deponent, Mr Tinos Mudenge (Mudenge) contends that in terms of the oral agreement between the applicant and the first respondent, it was agreed that the applicant would use its financial resources to implement the contract with the department. It is not in dispute that in terms of the oral agreement, the first respondent would make payment to the applicant for its professional services, as the first respondent received payment from the department in line with the terms of its agreement with the department,

[9] It was further agreed, relevant to the current proceedings, that the first respondent would have no duty to make payment to the applicant until the first respondent had itself received payment from the department.

[10] Mudenge avers that the applicant took over the site on 15 October 2020. He further avers that due to incorrect calculations in the bills of quantities, inadequate construction information, lack of response from the project consultants, lack of understanding of drawings by the first respondent and the effects of Covid-19, the implementation and execution of the contract was hampered, which required the first respondent to incur costs, doing remedial work. It nonetheless performed the remedial work and proceeded with the project.

[11] On 11 November 2020, a month after the applicant took over the site, the first respondent submitted an invoice to the department in the amount of R1 067 312.00 for work done up to that point. This, the applicant avers is an indication that work was progressing, if compared to the small invoices submitted by the first respondent before the applicant took over the site. Mudenge further contends

that the applicant injected funds and continued with the project despite the numerous challenges it encountered. When the department threatened to levy penalties against the first respondent for delays in the project, Mudenge contends that it was the applicant who successfully objected to the imposition of penalties leading to the department suspending the penalties.

[12] Between 11 November 2020 and 19 May 2022, the applicant further contends, various invoices had been submitted, and the first respondent paid to it an amount equal to 90% of the invoice amount, in accordance with their oral agreement, after receiving payment from the department.

[13] On 13 May 2022 the second respondent (Madoda), the director of the first respondent, informed Mudenge that she had decided to terminate the agreement between the applicant and the first respondent, citing as a reason, that the applicant had no capacity to execute the project, and had caused delays in the project. This, the applicant avers, came as a shock as it was abrupt. At the time, the applicant avers that it had submitted an invoice of R724 789.00 which had already been approved by the principal agent for payment. According to the applicant, all its subsequent attempts

to engage the first respondent to establish the real cause of the termination, came to naught as Madoda simply ignored all of the applicant's telephone calls.

[14] It is the applicant's further contention that after informing the applicant of her decision to terminate the agreement, Madoda proceeded to return equipment which had been hired by the applicant, to the supplier. This, he states, exposed the applicant to further loss, and on 27 May 2022, Madoda requested payment certificates from the principal agent as well as submissions made by the applicant, virtually taking over the project. All these signalled that the first respondent was taking over the site.

[15] The applicant asserts that on 30 May 2022, it was informed by a representative of the department that the last invoice submitted, to the amount of R724 789.00 had already been paid to the first respondent by the department. It later transpired that the said payment had been effected by the department as early as 19 May 2023. The applicant thus avers that the respondents acted with malice, as Madoda inevitably knew at the time she decided to terminate the agreement that payment was imminent. She had no

intention of paying over to the applicant what was due to it and was refusing to engage with the applicant.

[16] It is on that basis that the applicant approached the court, and further contends that the first respondent is obliged in terms of the agreement to pay over to the applicant, an amount of R652 310.37, being 90% of the invoice paid by the department in accordance with their agreement. It is further the applicant's contention that it is entitled to 90% of the remainder of the contract value between the first respondent and the department.

[17] In resisting the application, the first and second respondents (respondents) contend that the applicant has not made out case for the relief it seeks. They contend that in order to succeed with the applicant must satisfy all the elements of an (interim) interdict. They contend that the applicant has failed to do this, and for that reason, the application should be dismissed.

[18] It is the respondents' contention that no harm could reasonably be apprehended by the applicant as there has not been any indication that the first respondent would dissipate the amount paid to it by the third respondent or that it would not be able to satisfy a

damages claim should it be found liable. They further contend that the applicant has not shown that the first respondent has no *bona fide* defence to its claim.

[19] The remainder of the respondents' submissions in this regard pertains to the reasons they have opted not to pay the amount of R652 310.37 to the applicant. Key to these is that the respondents contend that they have a "good defence" for not paying the amount over to the applicant. In this contention lies a concession that the applicant is entitled to 90% of the invoice amount, but for the reasons stated by the respondents, have not been placed in possession thereof. This, in my view obviates any dispute, potential or otherwise, pertaining to the parties' agreement with regard to whether the said amount has become due and payable to the applicant.

[20] For these reasons, the respondents aver that the rule should be discharged and the application dismissed with costs.

[21] During argument, it was argued on behalf of the respondents that the applicant had failed to institute proceedings in respect of Part B of the notice of motion despite its undertaking that it would do so

by 15 June 2022. It was on that basis that the rule *nisi* was issued, the respondents further contended. They further contended that Part B has no merit, and that also on that ground, the rule falls to be discharged. I must immediately mention that the relief granted by the court made no reference to Part B.

[22] Turning to the basis for the decision to terminate the agreement, the respondents refer to letters in which the fifth respondent (the principal agent) raised concerns about delays and the slow progress of the project in light of looming deadlines, and calling for a recovery plan. In this regard, the applicant retorted that while it is aware of the principal agent's concerns, these were addressed in a meeting which the respondents did not attend. They contend that the department offered to come to the aid of the applicant / first respondent as discussed in a meeting which the respondents, of their own volition did not take part in.

[23] As regards the reasons for non- payment or refusal to pay, the respondents aver that the applicant is indebted to the first respondent for amounts the latter expended for payment of suppliers which had not been paid by the applicant. Notably, the respondents submit that they would lodge a counterclaim when the

applicant proceeds with Part B for the determination of the matters pertaining to the implementation of the agreement. They provide no evidence of this claim to, on a balance of probabilities establish this claim.

[24] In essence, the respondents' opposition is premised on some or other set off for the an unspecified amount it alleges to be owed by the applicant for payments it made. In addition to the fact that this claim has no bearing on the current proceedings, it amounts to self -help.

[25] According to the respondents, given the concerns and warnings by the principal agent, and the applicant's failure to comply therewith, "the first respondent had no choice but to terminate the subcontractors agreement" on 13 May 2022 due to the applicant's breach of the terms of the agreement. Curiously, the respondents do not elaborate how the applicant had breached the terms of the agreement.

[26] Strangely, the respondents state that the terms of the agreement were *inter alia* that:

"16.5 Should the main contract be terminated by the department for breach, the first respondent would look to the applicant for its recourse; and

16.6 The first respondent, without prejudice to any other remedy for breach of contract, may terminate the agreement after having afforded the applicant an opportunity to remedy such breach."

[27] The above terms are not aligned with the respondents' reliance on breach for the following reasons. First, there is no suggestion that the main agreement has been terminated by the department. It has not been. Second, the first respondent did not afford the applicant an opportunity to remedy the alleged breach. The first respondent has thus, not complied with the very agreement it seeks to rely on for withholding payment to the applicant.

[28] In *Beadica 231 CC and Trustees, Oregon Trust and Others*[1](*Beadica*), the Constitutional Court asserted the need for fairness, reasonableness and justice in between contracting parties. While the issue in *Beadica* was the enforceability of contractual terms, I here posit that the these principles equally find application in the present case. The effect of it is that it does not

[1] [2020] ZACC 13, 2020 (5) SA 247 (CC).

accord with fairness, reasonableness and justice for the respondents to seek compliance with an agreement which they themselves have failed to comply with.

[29] Of significance is that the applicant contends that the department has not cancelled the agreement with the first respondent. This is common cause. Thus the respondents cannot invoke these provisions of the agreement as are simply not applicable at this stage.

[30] The respondents have essentially taken the law into their own hands. To remedy this, they aver that any prejudice which may be suffered by the applicant can be compensated with a damages claim, while on the other hand they themselves have not opted to follow the same course to recover the unspecified amount they contend is owed to them by the applicant. This cannot be. It cannot avail the respondents to resort to self- help and in the same breath prescribe how the applicant should deal with their unlawful conduct.

[31] It is also not for the respondents to prescribe to the applicant if and when it should pay its suppliers, by holding over payment of an

amount which by the respondents' admission is, in terms of the agreement, due and payable to the applicant. There is simply no basis in law for the respondents' conduct.

[32] As the Constitutional Court held in *Chief Lesapo v North West Agricultural Bank*[2], " self- help is inimical to a society in which the rule of law prevails, as envisaged in section 1(c) of our Constitution."

[33] It is common cause that in seeking the interim relief on 1 June 2022, the applicant averred that the relief was sought subject to the finalisation of Part B, in which it would bring an application "dealing with the termination of the agreement for implementation and execution of the contract entered into with the first respondent". Part A, was for a rule *nisi* for payment of the amount of R652 310.37 due to the applicant. Part B was sought as further and / or alternative relief. The upshot of this is that this created no obligation on the applicant to institute proceedings in pursuance of Part B should that be its election, Part B having been sought in in the alternative.

[2] [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 11.1

[34] Contrary to what the respondents assert, the order was not granted subject to the determination of Part B, but was subject to the respondents showing cause why the order should not be made final.

[35] It is not necessary in these proceedings to deal with the issue of urgency as averred by the respondents, it being so that this aspect was determined by the court on 1 June 2022, and the matter dealt with on that basis. I align myself with that decision.

[36] As to prejudice, there is no gainsaying that any suggestion that the applicant should be prevented from employing its funds as it elects to, continues to cause prejudice on the applicants. Moreover, in the replying affidavit the applicant avers that it has in recent times received demands and a summons issued by its suppliers in respect of the agreement. This, the applicant avers is detrimental not only to its business but also its reputation.

[37] This dispels any notion by the respondents that it bears any responsibility to pay the applicant's suppliers. The demands and summons provided by the applicant are sufficient evidence that

suppliers look up to the applicant, and not the respondents for payment. It is therefore cold comfort to the applicant for the respondents to avow that they have no intention of dissipating any assets or disposing of the amount.

[38] Conversely, no such prejudice can be ascribed to the respondents, nor can it be said they would suffer any prejudice should the law take its course as they can lawfully lay no claim to the amount of R652 310.37. I have already found that the said claim is no basis for the respondents to resort to self-help.

[39] Counsel for the applicant submitted that danger still looms large for the applicant. On the other hand, counsel for the respondents retorted that because the amount claimed by the applicant is not ring-fenced, the respondents are at liberty to use it, if it so requires in the course of their operations. What this argument overlooks is that nothing in law entitles the respondents to hold on to the amount to begin with.

[40] I do not agree with the respondents' contention that the applicant has no valid claim to the amount claimed. I refrain from dealing with the parties' averments in respect of breach of contract, for the

simple reason that the rule *nisi* issued was specifically to preserve the applicant's funds which are retained by the respondents.

[41] Having said that, I am of the view that simply confirming the order without anything more, would serve no practical purpose and render the order by this court of no effect, and a hollow victory for the applicant. The relief sought by the applicant in the first place was for the release of the immediate payment of the funds held by the fourth respondent into the applicant's bank account, pending the relief sought in Part B. The relief granted by the court was to freeze the funds without reference to any further action.

[42] I am satisfied that the applicant has made out a case for its entitlement to the amount of R652 310.37 held by the fourth respondent in the first respondent's bank account.

[43] As regards costs, the general rule is that costs follow the result. I can find no reason in the circumstances of this matter to justify a departure from this enduring principle.

Order

[44] In the result, I make the following order:

(1) **The fourth respondent is ordered to immediately release the amount of R652 310.37 currently held in the first respondent's bank account with account number: 300 5964 72 and pay it over to the applicant's account at: Samonty Projects (Pty) Ltd; FNB Cheque account number: 6263 4676 673.**

(2) **The rule nisi granted by this court on 1 June 2022 freezing an amount of R652 310.37 from the first respondent's bank account with account number: 300 5964 72, held with the fourth respondent, is confirmed subject to order (1) above.**

(3) **The first and second respondents shall pay the costs of this application including the reserved costs of 1 June 2022 and 6 October 2022, jointly and severally the one paying the other to be absolved.**

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JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

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For the 3rd, 4th & 5th respondents	:	No appearance
Date reserved	:	17 February 2023
Date handed down	:	27 November 2023