IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NUMBER: 099822015

DELETE WHICHEVER IS NOT APPLICABLE

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

12 Nov 2015

DATE SIGNATURE

In the matter between

SS&G PROJECT & FINANCE SOLUTIONS	Applicant
and	
GIBB (PTY) LIMITED	First Respondent
RAND WATER BOARD	Second Respondent
EMFULENI LOCAL MUNICIPALITY	Third Respondent
MINISTER OF WATER AND SANITATION	Fourth Respondent
MINISTER OF FINANCE	Fifth Respondent
MINISTER OF ECONOMIC DEVELOPMENT	Sixth Respondent

JUDGMENT

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[1] This matter has as its genesis the conclusion of a consortium agreement ("the Consortium Agreement") by the applicant and the first respondent ("members of the consortium") in order to submit a tender bid to the third respondent in respect of a mega sanitation project, the Sedibeng Regional Sanitation Project ("the project"). The aspect of the project in respect of which the consortium submitted its bid was the provision of transaction advisory services of both a commercial and engineering nature. The Consortium Agreement would terminate when the project was awarded to the consortium or any other successful bidder.

[2] The consortium members agreed, *inter alia*, that in the event that the tender was awarded to the consortium the applicant would provide the commercial aspect of the project while the first respondent ("Gibb") would provide the engineering aspect, and that there would be no sharing of revenues in respect of their respective aspects of the project. Each would derive revenue solely from the aspect of the project for which they were responsible.

[3] The consortium was awarded the tender and duly concluded a written agreement with the third respondent on 26 October 2012 for the provision of the Public Private Partnership transaction advisory services in relation to the project.

[4] Having concluded this agreement, the third respondent advised the consortium that a policy decision had been taken to integrate the project with a nationally administered project known as the 18th Strategic Project. In essence, implementation of the project in respect of which the consortium was appointed would be removed from the control of the third respondent, and be placed under the auspices of the Minister of Water Affairs and Sanitation, which appointed the second respondent ("Rand Water"), to administer the implementation of the project.

[5] As it appears *ex facie* the settlement agreement to which I refer below, there is no dispute or complaint *per se* about this transfer of control from the third respondent to Rand Water. Members of the consortium appear to have accepted the rationale behind the removal of the project from the control of the third respondent. There is also no dispute that the project is of national importance and that time is of the essence in its implementation. All the parties agree in this regard. The contractual value of the project is estimated at R1, 997, 681, 280.00, and the consortium stands to earn R35 million for Phase 1 only and 10 per cent of the contractual value for Phase 2 of the project. But for the present dispute, the consortium and Rand Water are ready for the implementation of the project and the project has actually commenced.

The urgent application

[6] The transfer of control of the project came with an altered scope in that the involvement of Rand Water as an implementing agent rendered unnecessary the need for a PPP transaction. It is the disagreement around the altered scope that led to the consortium launching urgent proceedings in October 2013. At that point, at least, the consortium members stood on the same side of the dividing line. The precise issues that were in dispute in the urgent application are not necessary to traverse in this judgment. Given the history of the project and the dispute relating thereto, the record is rather voluminous. Although that history and dispute are complex, it is fortunately not necessary for present purposes to traverse them in any great detail.

[7] The dispute was settled on 10 February 2014, the result of which was the conclusion of a written settlement agreement ("the Settlement Agreement"), to which I shall refer as "the settlement agreement". I regard this Settlement Agreement read alongside the Consultancy Services Agreement, as the document on the basis of which this case's immediate dispute must be determined. As a result, I confine myself to the issues that require resolution in this regard as well as the legal principles and facts that justify the order made in this judgment.

[8] Since the starting point in this dispute is, to some extent, whether there has been departure from the settlement agreement, I deem it necessary to record its precise terms, which was recorded in relevant part as follows:

> **"2.2 The Parties hereby agree to and accept the Third Respondent's appointment as the implementing Agent by the Second Respondent to manage and implement the "SEDIBENG REGIONAL SANITATION SCHEME".**
>
> **2.3 The Parties acknowledge and agree to the appointment of the Applicant to undertake and procure the services ("the Services") on behalf of the Third Respondent as set out in the Letter of Offer between Rand Water and Gibb – SS&G Consortium entered in on 10 February 20144, Annexed hereto and marked "A".**
>
> **2.4 The Parties acknowledge and confirm that such Services is a revised schedule of Services awarded to the Applicant by tender issued and procured by the First Respondent under bid No. 11/2012/104.**
>
> **2.5 The Parties acknowledge and agree that the Third Respondent has been assigned the role of First Respondent by the First Respondent in respect of the abovementioned bid in all respects and such role has been assigned by way of Cession/Assignment Agreement, a copy of which is Annexed hereto marked "B".**
>
> **2.6 The parties agree to the appointment of the Applicant to carry out the revised Services in respect of the above mentioned bid.**
>
> **2.7 The parties agree that the revised Services to be carried out is to be specified in a Contract Agreement, to be concluded between the Applicant and the Third Respondent.**
>
> **2.8 The coming into operation of this Settlement Agreement shall be suspended until the Contract Agreement referred to in 2.7 above, is concluded..."**

[9] The letter of offer to which the settlement agreement refers reads in relevant part that:

> **"1. Rand Water hereby confirms its appointment as the Implementing Agent by the Department of Water Affairs to manage and implement the above-mentioned scheme. Rand Water is therefore assuming the role of Emfuleni Local Municipality in respect of Bid 11/2012/104.**
>
> **2. Rand Water further hereby confirms your appointment to carry out a portion of the work in respect of the above Bid…**
>
> **4. On completion of the revised feasibility study, GIBB – SS& G Consortium ("the consortium") shall proceed with the detailed design, procurement (excluding evaluation and adjudication) and construction monitoring of the scheme at a fee value of 10% (excluding VAT) of the Construction value of the scheme's new infrastructure as per the original appointment set out in the Table 4.1 of the GIBB March 2010 Draft MSA Section 78 (3) Feasibility Study being:**
>
> **4.1 the new Regional Waste Water Treatment Works (WWTW);**
>
> **4.2 New Pumpstation and Outfall sewer to the New WWTW;**
>
> **4.3 Upgrading of the existing network and pumpstations.**
>
> **5. All work shall be undertaken in accordance with a contract to be concluded between Rand Water and the consortium…"**

[10] It is common cause that the letter of offer of 10 February 2014 followed a series of engagements. These engagement are of no real moment for the present issue for determination. For present purposes, it suffices to state that it is this letter, the settlement agreement and the contract agreement that became the basis of engagement and are central to the present dispute. The consortium and Rand Water engaged in a series of negotiations regarding whether the Service Level Agreement was to be entered into on a public-private partnership ("PPP") basis or the Engineering Council of South Africa (""ECSA") guidelines. However, the

real dispute in this regard was within the consortium itself rather than with any of the respondents. As it was argued on behalf of all the respondents, the basis of the project since the involvement of Rand Water as an Implementing Agent, would be the ECSA guidelines.

[11] I was referred to correspondence which reveal that as between the members of the consortium, there was also some difference of opinion about this issue. These differences notwithstanding, the consortium eventually signed the Consultancy Service Agreement. As I understand it, as between the consortium members, there is a dispute regarding the authority of Mr. Vries who signed on behalf of the consortium. There was a great deal of oral argument in this regard during the hearing. The real issue is whether from the point of view of the second to sixth respondents, such internal differences within the consortium are of any relevance.

[12] The matter seems to have remained dormant for most of 2014. In its founding affidavit (paragraph 53) the applicant makes reference to an attempt at mediating the impasse between the "consortium partners" during April 2014, but nothing further was done in this regard. Apart from confirming the existence of differences between the members of the consortium, nothing much turns on this issue.

[13] On 25 February 2015 Rand Water addressed a letter to the consortium inviting it to attend the signing of the Consultancy Service Agreement on 26 February 2015. The applicant makes much of the fact that this particular correspondence only reached Gibb. It was argued rather strenuously on behalf of the applicant that Rand Water should have known that the members of the consortium had internal differences regarding the fact that the project would no longer be in terms of PPP. As I understand it, counsel for the applicant sought to suggest that Rand Water should have resisted signing with the consortium in the absence of Mr. Gqoli of the applicant component of the consortium, or as it is stated in the heads of argument filed on the applicant's behalf, Rand Water should have enquired **"...whether Gqoli had received the invitation to the signing, to find out where he was or even whether he agreed to the signing."**

[14] Rand Water and the consortium signed the Consultancy Service Agreement on 26 February 2015 as planned. The applicant takes issue with the fact that no attempts were made by Rand Water to ascertain whether it was in agreement with the Gibb component of the consortium about the signing of the Agreement. It is not clear to me why this obligation fell on the shoulders of Rand Water, given the fact that, at least from the point of view of Rand Water, the consortium was indeed represented at the signing ceremony.

[15] Gibb contends on the other hand that the Applicant is concerned because the scope of services pursuant to the Consultancy Service Agreement has

decreased its profit share and increased that of the Gibb component of the consortium. It was contended on behalf of Gibb that the change came about as a result of the imposition of Rand Water as an Implementing Agent, which dispensed with the need for a PPP transaction. The parties later concluded a settlement agreement in this regard. The disputes that relate to this agreement are briefly dealt with later in this judgment.

THE ISSUES FOR THE PRESENT APPLICATION

[16] In its Notice of Motion as originally framed, the applicant sought the following orders:

> **1. Dispensing with the forms, service and the time periods stipulated in the Rules for the Conduct of proceedings in the above Honourable Court, and disposing of this application as an urgent application in accordance with the provisions of Rule 6(12).**
>
> **2. Interdicting and prohibiting the first and second respondents from proceeding with the implementation of the written "Consultancy Service Agreement" which was signed by them on or about 26 February 2015 ("the impugned Consultancy Services Agreement").**
>
> **3. Interdicting and prohibiting the first and second respondents from proceeding to implement any form of execution plan which may have been submitted pursuant to that impugned Consultancy Services Agreement.**
>
> **4. Declaring that the first respondent had no authority to enter into and sign that impugned Consultancy Services Agreement on behalf of the Gibb-SS&G Consortium, being a consortium compromised of the applicant and the first respondent.**
>
> **5. Declaring that such impugned Consultancy Services Agreement is null and void and unenforceable.**

6. Directing the second respondent to enter into a new Consultancy Service Agreement with the aforesaid consortium, on the basis:

6.1 as contained an described in the Settlement Agreement concluded under case number 37977/2013 in this Honourable Court, as read together with the incorporated letter of the second respondent dated 10 February 2014 (both of which documents are annexed to the founding affidavit herein);

6.2 that, for the avoidance of any doubt, Stage 2 of the relevant Scope of Services will be executed and implemented on the basis of the already agreed public-private partnership, and not in terms of any form of ECSA Guideline.

7. Directing the fourth respondent to instruct the second respondent, as her implementing agent, to immediately conclude such a new Consultancy Service Agreement on the basis as detailed in paragraph 6 above.

8. Directing that the fifth respondent is to:

8.1 ensure that all funds which have been allocated to the relevant Consultancy Services related to the planning of the Sedibeng Regional Sewer Scheme and the detailed design and implementation of the new infrastructure related to such scheme ("the Scheme") are only expended on the basis and under the auspices of the new Consultancy Agreement to be executed on the terms as detailed in paragraph 6 above.

8.2 prohibit the expenditure of any funds or the incurrence of any monetary obligation on the basis as set out in the impugned Consultancy Services Agreement, or on any other basis apart from the contained in the new Consultancy Services Agreement which is to be concluded as aforesaid.

9. Directing that the sixth respondent is to manage all requisite supervision and control over the Scheme so as to ensure, firstly, the timeous and proper implementation and execution of that Scheme and, secondly, as to facilitate such execution and implementation, the conclusion of the new Consultancy Services Agreement in the terms as detailed in paragraph 6 above.

10. Directing that the first respondent is, in good faith, to enter into negotiation and to conclude with the applicant a written Consortium Agreement for the purposes of implementing and executing the new

Consultation Services Agreement which is to be concluded on the terms as detailed in paragraph 6 above.

11. Directing the first and second respondents to pay the costs of this application on a scale as between attorney and client, jointly and severally.

12. Granting further and/or alternative relief as this Honourable Court may deem necessary."

[17] Having framed the issues this way in its notice of motion, the applicant later sought to distinguish between the prayers it sought. In this regard, it categorised as Round 1 prayers 2 to 5. Herein the applicant sought an order interdicting and prohibiting Gibb and Rand Water from implementing the Consultancy Service Agreement. The applicant contended in argument that the facts relating to Round 1 are common cause. Included in what the applicant contends are common cause facts, is the very issue of Gibb's authority to sign the Consultancy Service Agreement on behalf of the consortium.

[18] Obviously, it was argued on behalf of the applicant that it is common cause that Gibb did not have the authority. To the extent that the applicant contends that this issue is common cause, I disagree. There is a clear dispute of fact on whether or not Mr. Vries had the requisite authority to sign on behalf of the consortium.

[19] The respondents contend that the issues upon which the applicant bases its Round 1 are intertwined with the facts in respect of which there are material disputes, which are not capable of resolution without referral to oral evidence. It

was argued on behalf of all the respondents that this demarcation of the dispute into Round 1 and Round 2 is artificial.

[20] For the remainder of the relief sought in its Notice of Motion the applicant concedes that in respect of prayers 6. 7, 9 and 10, categorized as Round 2, the disputes of fact are of such a nature that they cannot be decided on the papers. Accordingly, the applicant asks in terms of Rule 6 (5) (g) that Round 2 should be referred to oral evidence or, preferably, trial.

[21] The issues of dispute in this case therefore arise from what the applicant regards as the departure from terms of the settlement agreement that had been reached by the parties after a brief dispute. The disputes accordingly emerge from the integration of the project into the 18th Strategic Project and its contention that Gibb and/or Mr. Vries did not have any authority to sign the Consultancy Service Agreement on behalf of the consortium. If one leaves aside the concession by the applicant that parts of its prayers are based on disputed facts, the issues involved in this application are the following:

- Whether or not it was foreseeable that the disputes of fact are of such a nature that the entire case was incapable of resolution by way of motion proceedings.

- Whether the Consultancy Services Agreement constitutes a departure from the terms of the settlement agreement reached on 10 February 2014; and

- Whether or not the first respondent had the requisite authority to sign the Consultancy Services Agreement on behalf of the Consortium;

FORESEEABILITY OF DISPUTES OF FACT

[22] With the applicant having conceded that the remainder of the Notice of Motion is incapable of resolution without referral to oral evidence, I deem it prudent that I first deal with the issue of material disputes of fact and whether a finding thereof has an impact on the entire case. It is logical to commence with determining the demarcation that the applicant has drawn between the facts in respect of its application in terms of Rule 6 (5) (g) of the Uniform Rules. Rule 6 (5) (g) provides that:

> **"(g) Where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, and without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross examined as a witness or it may refer the matter to trial with appropriate directness as to pleadings or definition of issues, or otherwise."**

[23] Having filed its case as one to be determined on the papers, the applicant admitted later that there are material disputes of fact that render the matter in capable of resolution on the papers. In so doing the applicant divided its case into two parts, one part (Round 1) which it claims is capable of resolution on the papers, and the other (Round 2) it concedes is mired in material disputes of fact and ought to be referred to oral evidence or trial. In respect of prayers 6, 7, 9 and 10 of the Notice of Motion the applicant accepted the presence of material disputes of fact. In respect of Round 2, the real question is whether the applicant foresaw or should have foreseen the existence of the disputes of fact which it later regarded as incapable of resolution on the papers.

[24] In prayers 4 and 5 the applicant seeks declaratory orders to the effect that the signing of the Consultancy Service Agreement was not authorized and consequently that it is null and void. Logically, the interdictory orders succeed only if the declaratory orders sought in prayers 4 and 5 succeed. The applicant contends in support of this prayer that the facts relating to its "no authority" claim are common cause. It says so on the basis, as it alleges, that it did not receive the notice of the signing ceremony on 25 February 2015 and that it had objected the conclusion of the Consultancy Service Agreement in the form in which it was signed. The applicant argues, *inter alia*, that it is common cause that Gibb had no authority to sign. There are two relevant enquiries to make in this regard. The first enquiry is whether the facts relating to Round 1 are not so intertwined with those relating to Round 2 as to render artificial the demarcation that the applicant

draws between them. The second enquiry is whether such facts are not themselves mired in material disputes of fact as to render Round 1 itself incapable of resolution on the papers.

[25] I need only highlight the competing contentions contained in the affidavits and eventually argued by all the parties to show that the applicant's view regarding what it refers to as common cause issues in this regard may be too optimistic. Given the competing versions of the parties, it appears that whether Mr. Vries actually had authority to sign on behalf of the consortium is an issue in dispute in this particular case.

[26] It appears that the applicant relies on the fact that in terms of the Consortium Agreement, it is the applicant component of the consortium that is the authorized signatory to sign on behalf of the consortium. Clause 4.2, clause 4.3 and clause 4.4 of the Consortium Agreement provide as follows:

> **"4.2. The Members hereby appoint the Representative of the Consortium as SS and G."**
>
> **4.3. The Members agree that the Representative is authorized to sign the Proposal on their behalf.**
>
> **4.4. The representatives of the Members signing this agreement are duly authorized to do so by the members/directors of their respective organisations, as applicable."**

[27] The above clauses do not resolve the dispute that seems to have arisen regarding the question of authority to sign on behalf of the consortium. This is so

for two reasons. First, members of the consortium are not in agreement about which member of the consortium had such authority beyond the duration of the Consortium Agreement. Second, clause 10 of the Consortium Agreement dealing with the duration provides as follows:

> **"10 DURATION OF AGREEMENT**
>
> **10.1 This Agreement shall commence on date of signature by all Members and shall terminate either:**
>
> **10.1.1. on the Project being awarded by the Client to another party; or**
>
> **10.1.2. by consensus of all Members;**
>
> **10.1.3 upon expiry of the proposal validity period as stated in the Proposal enquiry document or such extension of the Proposal validity period as agreed by the Members;**
>
> **10.1.4. on the Project having been awarded to the Consortium and an agreement for the provisions of services having been concluded."**

[28] I am constrained to hazard a view on the correct interpretation of the Consortium Agreement, or make a conclusive finding as to who between the members of the consortium had the authority to sign on behalf of the consortium beyond the awarding of the project to the consortium. This is so because the affidavits and correspondence reveal a number of disputed facts, all of which may not be capable of resolution on the papers as they stand. The issues of dispute that appear in the affidavits are based on correspondence and interaction between

the applicant and the first and second respondent, which occurred before the applicant launched its application.

[29] A careful perusal of the applicant's founding and replying affidavits reveals that, from the outset, the applicant's main complaint was directed against the substance of the Consultancy Service Agreement, which in its view re-affirmed a deviation from a PPP based project. It appears from the correspondence referred to n the affidavits that the issue of Mr. Vries's authority arises largely because there were differences as between the consortium members about the substance of the Consultancy Service Agreement. In its founding affidavit the applicant raised the issue of authority to sign in paragraph 57 as follows:

> **"57. The following day I addressed a letter to Gibb, a copy of which is attached marked "G17" highlighting that the purported new SLA which he advised was signed was in fact the draft Consultancy Service Agreement to which SS&G had objected. Further I stated that neither Gibb nor Vries could have signed the agreement on behalf of the consortium since they were not authorized to sign any agreement (at least on behalf of SS&G and/or the consortium) and accordingly SS&G would not be bound by that agreement."**

[30] It appears that the authority issue is linked, in the main, to the contents of the Consultancy Service Agreement rather than the narrow point about authority to sign *per se*. Paragraphs 59 and 60 of the applicant's founding affidavit contain the following submissions:

"59. I emphasise that the new SLA did not in any manner, reflect an agreement that had sought to incorporate or even reflect a consideration of any of the objections from SS&G.

60. In the meantime, on 3 March 2015, I also addressed a letter to Rand Water, a copy of which is attached marked "G18". I placed on record that SS&G had not received proper notice of the meeting of the signing ceremony, the reason being that the email address to which the invitation had supposedly been forwarded was spelt incorrectly. I queried why no attempts were made to determine whether I, on behalf of SS&G had received proper notice once it was apparent that I was not present at the meeting. I again reiterated that SS&G is not prepared to agree to the terms of the draft Consultancy Service Agreement and challenged the authority of Gibb and/or Vries in signing the new SLA. I then requested Rand Water to provide me with a copy of the new SLA as signed by Vries. Finally, I requested a written undertaking by no later than 15h00 on Thursday 5 March 2014 (sic) from Rand Water that it will not take any steps to try and implement the purported Service Level Agreement until our objections had been addressed adequately and meaningfully and pending the outcome of the proposed meeting with the other government departments.

61. On 4 March 2015, I then received from Gibb, a response to the letter dated 27 February 2014. I attach a copy of the letter as annexure "G19". In that letter Vries stated that he was not precluded from signing the new SLA and on the contrary he believed that he had a duty to act responsibly and suggested that my approach to the new SLA was irresponsible. He invited me to exit the consortium since I had taken a position that SS&G could not be bound by his action of signing the new SLA. He accused me of frustrating the consortium's position and advancing a personal agenda because I had raised "reservations and concerns" that the scope of works of SS&G being reduced in the current SLA..." emphasis added

[31] The contention is captured more clearly in the applicant's replying affidavit, paragraph 60 of which reads as follows:

> **"60 Vries certainly had no authority to sign the Consultancy Service Agreement with Rand Water whilst all the parties were aware and knew that SS&G was objecting to the provisions of the consultancy agreement that sought to exclude the commercial stream (and in particular SS&G) from participating in Stage 2 of the work. I attach hereto, as "R4", a copy of an email accompanied by a letter from SS&G to all the officials of Rand Water, in which letter I expressly record that Vries has no authority to purport to act on behalf of the consortium. Both Vries and the relevant Rand Water officials were thus well aware of this fact, and it is of great concern, under the circumstances, that they purported to nevertheless conclude the impugned Consultancy Service Agreement in the face thereof and now seek to defend and justify its conclusion."**

[32] I refer to these passages to make two points only. First, the disagreement about which member of the consortium had authority to sign existed long before the applicant launched its application. Second, the issue of authority to sign is intertwined with the applicant's displeasure the content of the Consultancy Service Agreement. In my view, it is less about whether or not such authority is permitted by the Consortium Agreement.

[33] In its answering affidavit (paragraph 55), Rand Water contends, *inter alia*, that:

> **"It is significant that the consortium was notified through the First Respondent of the signing arrangements of the Consultancy Agreement."**

[34] Dealing precisely with the applicant's contention that it had raised objections to it, Rand Water's answering affidavit makes the following submission:

"54.1 The Second Respondent denies that there had at any stage of the negotiations and the conclusion of the consultancy agreement been any objection raised by the Applicant to any of the contents of the consultancy agreement.

54.2 Further and in addition to the above, we attach hereto, various correspondence between the Second Respondent and the consortium relating to the negotiations and conclusion of the consultancy agreement.

54.3 In the reading of most if not all the correspondence, Mr Vries states clearly that he acts on behalf of the consortium. Despite these facts, at no point does the Applicant question his authority and/or question it. The said email is attached thereto marked annexures "AB5". The Applicant is estopped from raising lack of authority under the circumstances."

[35] Responding directly to the above submissions, Mr. Gqoli, in his replying affidavit submits, rather categorically, that:

"100 Nowhere in any of the emails attached to Rand Water's answering affidavit does Vries state clearly that he acts on behalf of the consortium. In any event, Rand Water cannot rely on Vries's own representation, to suggest that SS&G gave Vries authority to act on behalf of the consortium."

[36] Nothing much turns on this for the purposes of what I must determine. However, it is clear that Mr. Gqoli's categorical assertion misses the very first line of Mr. Vries's email of 18 February 2014 in which Mr. Vries writes; **"Please accept my apologies on behalf of the consortium..."**.

[37] Mr. Berridge SC on behalf of the applicant argued strongly that Rand Water was aware that Mr. Vries had no authority. He argued this in the context of the *Estoppel* point raised on behalf of the respondents. I do not have to decide the

Estoppel point at all. Accordingly, it is not necessary that I express a view on Mr. Berridge SC's arguments resisting the *Estoppel* point. What is important for present purposes is a determination, from the papers, whether or not the disputes of fact in respect of both Round 1 and Round 2 were foreseeable at the time when the applicant launched its application.

[38] Gibb and/or Mr. Vries have maintained in the correspondence as well as the answering affidavits that Mr. Vries had the authority to sign the Consultancy Service Agreement on behalf of the consortium. It is common cause that in terms of the Consortium Agreement, at least before its termination, the SS&G component of the consortium was authorized to sign the Proposal (Clause 4.2).

[39] In its answering affidavit Gibb deals with both the issue of authority and the duration of the Consortium Agreement. Paragraph 58.2 of the answering affidavit contains the following submissions:

> **"58.2. Clause 10.1.4 expressly provides that the Consortium Agreement as reflected in "G3" would terminate on the project having been awarded to the Consortium and agreement for the provision of the services having been concluded. The project was awarded to the Consortium on 25 September 2912 ("G4" to the founding affidavit at index page 70) and an agreement for the provision of the services having been concluded between the Consortium and the Municipality on 26 October 2012 *("G6" at index pages 74 and 75*)**

[40] There was no argument made to suggest that the Consortium Agreement had not terminated. Accordingly, I will take that particular issue no further. What is

worthy of some consideration, though, is the applicant's contentions in its replying affidavit. Paragraphs 61 to 62 of the replying affidavit to the first respondent's answering affidavit the following submissions are made:

> **"61 In fact Vries himself knew (and still knows) that none of the consortium members can ever represent the consortium without authorization by the other consortium member. For instances:**
>
> **61.4 Both Gibb and SS&G signed a consortium agreement ("G3" to my founding affidavit) authorising me *inter alia* to sign the bid proposal;**
>
> **61.5 When the consortium resolved to institute legal proceedings to interdict the Rand Water tender, both SS&G and Gibb signed a resolution authorising me to sign all documents necessary to institute such proceedings. This resolution is attached hereto marked "R5";**
>
> **61.6 As appears from the paginated page 195 of my founding affidavit, the Rand Water Letter of Offer of 10 February 2014 was signed in acceptance by Vries (on Gibb's behalf) and I (on SS&G's behalf), collectively on behalf of the consortium."**

[41] I need only made one point here. It is clear that, contrary to the contentions contained in Mr. Gqoli's letter of 15 April 2014, the basis upon which the applicant claims that Mr. Vries did not have authority is not the provisions of the Consortium Agreement. Were it so, the submissions made in the passages I have quoted above would make no sense. I only make this point to highlight the existence of a material dispute of fact in regard to the authority of any member of the consortium to sign and to enquire whether such dispute is determinable on

the papers. I do not wish to determine the issue of authority as it is apparent that the papers alone cannot resolve it. That much, in my view, was clear before the application was launched. The applicant's own correspondence bears testimony to this point.

[42] I now turn to Round 2, in respect of which the applicant concedes that there are material disputes of fact which are not capable of resolution on the papers. It is not necessary to traverse and unravel in any great detail the facts relied upon in this regard. I only traverse them to determine one remaining enquiry, and that is whether these material disputes became apparent only after the applicant had launched its application, and therefore could not have been anticipated or foreseen prior to the launching of the application.

[43] What the applicant seeks in respect of Round 2 flows directly from the facts about which there are material disputes of fact which existed at the time when it launched its application. In this regard, it seeks orders, *inter alia*, directing Rand Water to enter into a new Consultancy Service Agreement. It also seeks an order directing Gibb, in good faith, to enter into negotiations and conclude with the applicant a written Consortium Agreement for purposes of implementing and executing the new Consultancy Service Agreement.

[44] It was argued on behalf of Rand Water that the facts to which the applicant refers are inextricably linked to the very same facts upon which it bases its prayers in

relation to Round 1. Mr. Malindi SC on behalf of Rand Water argued that the effect of the applicant's prayers in respect of Round 2 is that the court is being asked to direct the parties to conclude a new agreement, amend the existing settlement agreement and the letter of offer; and amend the Consultancy Service Agreement entered into between Rand Water and the consortium.

[45] It was argued on behalf of Rand Water that these orders are incompetent and incapable of enforcement. Since the applicant has conceded the existence of material disputes of fact, I do not have to make a finding in this respect.

[46] In so far as the applicant relies on the facts relating to the changed scope of work, the papers are replete with correspondence revealing knowledge of the disputes surrounding the changed scope of work to be performed by the consortium. I see no purpose served by the artificial split of the facts relating to Round 1 and Round 2. The issue of the changed scope of work resulting from the involvement of Rand Water as the Implementing Agent is reflected in both the Settlement Agreement and the letter of offer. I do not see what purpose is served by the splitting of the applicant's case into Round 1 and Round 2. I am inclined to agree with the contentions made on behalf of the respondents in this regard. In particular, I am persuaded by the argument made by Mr. Semenya SC on behalf of Gibb that **"...the fate of the relief in either part is dependent on the fate of the relief in the other part."**

[47] It was argued strenuously on behalf of Gibb that the applicant cannot at this late stage, after setting out a wide-ranging notice of motion and allegations, seek to distinguish that part of the relief relating to disputes of fact that were or should have been foreseen from the outset. I concur with the assertion that all the disputes that have arisen in this case were foreseeable or ought to have been foreseen by the applicant when it framed its relief and launched its application.

[48] The basic principle relating to motion proceedings has been stated repeatedly, and I need only refer to a few of the authorities in this regard. I do so because the applicant is indeed alive to this basic principle, hence its application in terms of Rule 6 (5) (g). This trite principle is best captured in the case of *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)*. Therein the court held that:

> **"It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event ...the Court has a discretion as to the future course of proceedings. If it does not consider the case such that the dispute of fact can properly be determined by calling viva voce evidence under Rule 9, the parties may be sent to trial in the ordinary way, either on the affidavits as constituting the pleadings, or with a direction that the pleadings are to be filed. Or the application may even be dismissed with costs, particularly when the applicant should have realized when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action."**

[49] In the case of the *National Director of Public Prosecutions v Zuma 2009 (2) SA 277* the Supreme Court of Appeal referred to the well-established guidance of the *Plascon-Evans* case when it held that:

> **"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's ...affidavits, which have been admitted by the respondent..., together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald and uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers..." (references omitted)**

[50] More recently, in *Lombard v Droprop CC and Other 2010 (5) SA 1 SCA* the Supreme Court of Appeal has reiterated this principle when it held that:

> **"Motion proceedings are not designed or intended to resolve disputes of fact. Therefore, if a party has knowledge of a material and bona fide dispute, or should reasonably foresee its occurrence and nevertheless proceed on motion, that party will usually find the application dismissed."**

[51] It is clear that the applicant in these proceedings should have anticipated that material disputes of fact would arise. The very facts upon which the applicant relies for advancing its contentions are riddled with disputes that, in my view, were foreseeable when it launched its application. The correspondence to which

the applicant refers in contending that Mr. Vries had no authority reveals factual disputes that existed before the applicant launched its application.

[52] Courts must take a deem view of attempts by an applicant who, having anticipated that the disputes are of such a nature that they cannot be resolved on the papers, employs a tactic to create an artificial split between the facts in order to get their foot in, so to speak. I agree with counsel for Rand Water that this constitutes an abuse of process. There may be cases where it is justifiable to draw such a distinction when the disputed facts have just emerged, and our courts have determined such cases. This application, in my view, does not fall within that category of cases.

[53] Given my finding that the applicant foresaw or ought reasonably to have foreseen the material disputes of fact, I do not consider it prudent to determine the remainder of the issues, like that of authority, *estoppel* and whether the Consultancy Service Agreement constituted a departure from the Settlement Agreement. Once I am of the view that the applicant foresaw or reasonably should have foreseen the material disputes of fact, it is in my view the end of the enquiry relevant for the determination of this application. I also do not have to determine all the other issues relating to *estoppel*, alleged departure from the settlement agreement and the appropriateness or otherwise of the prayers sought in respect of Round 2.

[54] Accordingly, the following order is made:

1. The application is dismissed ;
2. The applicant is directed to pay the costs of the application, including the costs of two counsel;

M SIKHAKHANE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 11 August 2015

Date of Judgment: 12 November 2015

Counsel for the Applicant: B Berridge SC and B Manentsa; Instructed by Fluxmans Incorporated.

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