REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: A5014/16

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

31 OCTOBER 2017 FHD VAN OOSTEN

In the matter between

SS&G PROJECT & FINANCE SOLUTIONS (PTY) LTD APPELLANT

and

GIBB (PTY) LTD	**FIRST RESPONDENT**
RAND WATER BOARD	**SECOND RESPONDENT**
EMFULENI LOCAL MUNICIPALITY	**THIRD RESPONDENT**
THE MINISTER OF WATER AND SANITATION	**FOURTH RESPONDENT**
THE MINISTER OF FINANCE	**FIFTH RESPONDENT**
THE MINISTER OF ECONOMIC DEVELOPMENT	**SIXTH RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] The issue in the long line of litigation between the parties to this appeal (excluding the fifth respondent) concerns the conclusion of a Consultancy Service Agreement on 26 February 2015 (the February 2015 agreement) between a consortium, under the name of Gibb-SS&G Consortium, comprising the appellant (SS&G) and the first respondent (Gibb) (the consortium), and the second respondent (Rand Water), for the provision of transaction advisory services on behalf of the third respondent (Emfuleni), in respect of a multi-million mega sanitation project, known as the Sedibeng Regional Sanitation Scheme (the Sedibeng project).

[2] The litigation commenced on 16 March 2015 when SS&G launched an urgent application against the respondents in this court, in essence seeking interdictory and declaratory relief, aimed at nullifying the February 2015 agreement and procuring a new Consultancy Service agreement. The urgent application was heard by Victor J in the urgent court who dismissed it with costs, due to lack of urgency. The application was opposed by all the respondents and proceeded in the ordinary course. Lengthy affidavits with annexures thereto were filed mushrooming into a record consisting of 27 volumes packed with 2627 pages.

[3] The application came up for hearing before Sikhakhane AJ, who, on 12 November 2015, dismissed the application with costs, including the costs of two counsel. The appeal before us is with leave of the court a quo.

Background facts

[4] In March 2010, Gibb performed a feasibility study and submitted a report. In June 2012, Emfuleni invited tenders from experienced service providers for performing transaction advisory services in regard to the Sedibeng project, for an initial period of 3 years. On 28 June 2012 SS&G and Gibb formed the consortium with the sole purpose of submitting a joint proposal in response to Emfuleni's invitation. By way of a letter dated 25 September 2012, Emfuleni informed the consortium of the award of their tender resulting in the conclusion of a service agreement (the ELM agreement).

[5] Shortly after conclusion of the ELM agreement, the management of the Sedibeng project was taken over on national level and the consortium's activities under the ELM agreement were put on hold. In May 2013 a Sedibeng Regional Scheme Implementation Protocol was entered into to regulate the handover, cession and

transfer of the contracts that had been concluded by Emfuleni, to Rand Water. The consortium was not a party to the protocol.

[6] In October 2013, Rand Water issued a new invitation to tender in respect of substantially the same services the consortium was contractually required to perform under the ELM agreement. On 10 October 2013 the consortium launched an urgent application against Rand Water in this court, seeking interdictory relief aimed at preserving its contractual rights against interference by Rand Water by continuing with its tender process. An interdict was granted but the matter was subsequently settled on the basis that the consortium would proceed with delivering services as provided for in its original appointment, as set out in a letter of offer to the consortium which was attached to the settlement agreement, albeit revised in certain respects. The settlement agreement further recorded that Rand Water had been assigned the role of Emfuleni in respect of the Sedibeng project.

[7] A new consultancy service agreement between the consortium and Rand Water was required and negotiated. This resulted in the conclusion of the February 2015 agreement.

[8] It is SS&G's case that the February 2015 agreement was signed without its knowledge and in its absence, by Richard Vries (Vries), a director and chief executive officer of Gibb, on behalf of the consortium, well knowing that SS&G had neither agreed to, nor authorised Gibb, and therefore Vries, to sign on its behalf. Finally, SS&G contends that the February 2015 agreement does not comply with the settlement agreement. Attempts to settle the impasse that had arisen came to naught and SS&G launched the urgent application which ultimately culminated in this appeal.

The relief sought

[9] In the notice of motion SS&G seeks the following relief:

> '1. …
>
> 2. Interdicting and prohibiting the first and second respondents from proceeding with the implementation of the written "Consultancy Services 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 the 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 comprised of the appellant 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 Services agreement with the aforesaid consortium, on the basis:

6.1 as contained and described in the Settlement Agreement concluded under case number 37997/2013 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 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 Guidelines.

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

[Prayers 8 & 9: relief sought against the eighth respondent which was abandoned]

10. Directing that the first respondent is, in good faith, to enter into negotiations and conclude with applicant a written Consortium Agreement for purposes of implementing and executing the new Consultancy 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 the application on a scale as between attorney and client, jointly and severally.

12. …'

[10] Numerous material disputes of fact arose as the matter progressed. I do not consider it necessary to traverse any of those disputes. Suffice to say that the existence of the factual disputes is common cause between the parties. Counsel for SS&G sought to overcome the *Room Hire*-hurdle in seeking at the hearing in the court a quo, to divide the final relief sought into two parts (termed rounds 1 and 2). Round 1 is based on prayers 2 to 5, for relief based on facts he submitted were 'mostly common cause'. Round 2 is based on the remaining prayers in respect of which factual disputes incapable of resolution admittedly existed in respect of which a referral for the hearing of oral evidence or for trial, was sought.

[11] The court a quo held that the proposed division was artificial, that it would not serve any purpose, that irresolvable disputes of facts existed which were foreseeable and consequently dismissed the application in its entirety. In my view there are no grounds for disturbing the finding. The relief sought in both 'rounds' are intrinsically linked, based on the same facts and the fate of the relief sought therefore is dependent on an assessment of the facts as a whole.

[12] Before this court counsel for SS&G persisted with the proposed division and asked this court to grant the interdictory relief sought, with reference to prayers 2 to 5 of the notice of motion, and to refer to trial the balance of the relief sought as contained in prayers 6, 7 and 10. In the appellant's heads of argument it is indicated that the appellant still seeks an order declaring the impugned agreement null and void and unenforceable, but that 'this will not arise in this appeal'.

Discussion

[13] The appeal, in my view, at the outset, flounders when consideration is given to the nature and importance of the Sedibeng project, juxtaposed to the interest SS&G seeks to protect.

[14] The Sedibeng project, in a nutshell, addresses the need to upgrade the old sanitation infrastructure within the Sedibeng District Municipality as well as the under capacity of all the water waste treatment works; to eradicate multiple challenges including the spillage of raw sewage and the discharge of non-compliant effluent into the Vaal River; the negative impact thereof on health and safety of residents and enables substantial economic and social development, including the provision of housing. The portion of the Sedibeng project that is directly relevant to this matter relates to the Sedibeng project's new infrastructure, the contractual value of which is, at 2010 prices, estimated at R1.9bn.

[15] The probable consequences, effect of and prejudice that may result from an interdict are undoubtedly immense, if not irreparable (Cf *Molteno Brothers and Others v South African Railways and Harbours and Others* 1936 AD 321 at 332). The Sedibeng project is long overdue and evidently requires uninterrupted implementation and prompt finalisation, as the project is of national importance and significance. SS&G readily acknowledges that the greater project is of 'immense

national importance'; that 'the health and safety of the very many residents, many of whom live in impoverished communities, is at stake', and that there have already been 'lengthy, unacceptable and regrettable delays'. The planning of the project dates back to 2010 and the order appealed against, was granted almost 2 years ago. In the meanwhile it must be accepted that the work and implementation of services have progressed towards finalisation in respect of which nothing has been revealed to this court. In the absence of any information having been divulged to this court as to the progress or absence thereof, this court, in any event, is unable to exercise a discretion as to whether it would be just and equitable in the circumstances to grant interdictory relief.

[16] The consortium, in terms of the February 2015 agreement, is to earn R35m for phase 1 of the Sedibeng project and a fee of 10% of the construction value of R1.9bn in respect of phase 2. In this litigation SS&G pursues an alleged contractual right against Gibb which has a commercial value only. SS&G's claim, in essence, is for a split of the revenue share between the members of the consortium. It has no bearing on the Sedibeng project, in particular the need and urgency for its finalisation.

[17] As correctly pointed out by counsel for Rand Water, SS&G now seeks to derail the continued implementation and timeous finalisation of the Sedibeng project merely in an attempt to obtain a financial benefit from its co-member in the consortium. The consortium tendered, accepted the appointment and signed the February 2015 agreement. The issue raised by SS&G concerns the authority of Gibb to sign the February 2015 agreement on the consortium's behalf and Rand Water being aware thereof.

[18] An alternative and, in my view, more appropriate remedy was available to SS&G which was to pursue its perceived claim against Gibb, but that it has seemingly failed to do (Cf *Johannesburg Consolidated Investment Co Ltd v Mitchmor Investments (Pty) Ltd and Another* 1971 (2) SA 397 (W) 404E-F). Of significance is that SS&G, in the passage of time that has elapsed since the order was made, has taken no further steps to enforce its alleged claim. Counsel for the appellant, when engaged on this aspect during argument, sought refuge in the perceived difficulty the appellant may experience in computing and proving 'reputational' damages. There is no merit in the

argument: nothing prevented the appellant from instituting action after judgment by the court a quo was delivered: as much was conceded by counsel for the appellant. To the contrary, the appellant proceeded with the appeal, in the face of admitted factual disputes, in the hope of obtaining some procedural advantage.

[19] SS&G further raises interpretational issues in regard to the February 2015 agreement and the letter of offer in the face of admitted factual disputes concerning the circumstances surrounding the negotiations and the conclusion of the letter of offer. The approach is fundamentally flawed and cannot be sustained (see *Commercial Union Assurance Co of South Africa Ltd v KwaZulu Finance and Investment Corporation and Another* 1995 (3) SA 751 (A) 759C-E; *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) para [27] & [28]; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para [12]).

[20] Counsel for the appellant submitted that in the event of this Court not being prepared to grant an interdict, a declarator ought to be granted in accordance with prayers 4 and 5 of the notice of motion. I do not think it would be proper for this court to accede to the request, for the reasons that I am not satisfied that the issue of authority can properly be decided on the papers as they stand and, in any event, that it constitutes an issue which should be considered and decided upon by the trial court on the evidence adduced on all the other issues.

Conclusion

[21] In conclusion, the realities of the situation to which I have referred, are dispositive for this court to exercise its discretion in favour of granting interdictory relief (*Roberts v Chairman Local Road Transportation Board, Cape Town and Another* 1979 (4) SA 604 (C) 608A-D).

[22] Having considered all the circumstances of this case there is no reason for interfering on appeal with the discretion exercised by the court a quo in dismissing the application (see *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A) 430G-H; *Transnet Ltd v Erf 152927 Cape Town (Pty) Ltd and Others* (798/2010) [2011] ZASCA148 (26 September 2011)).

[23] It follows that the appeal must fail.

Order

[24] In the result the following order is made:

1. The appeal is dismissed.
2. The appellant shall pay the costs of the appeal such costs to include the costs consequent upon the employment of two counsel by the first, second and fourth respondents.

_____
FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

_____
SE WEINER
JUDGE OF THE HIGH COURT

I agree.

_____
CJ VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

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DATE OF HEARING	***27 OCTOBER 2017***
DATE OF JUDGMENT	***31 OCTOBER 2017***