**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 1253/2019

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

29/1/19

**Date:** **WHG VAN DER LINDE**

In the matter between

LL Security CC — 1st Applicant

Mposha Security Services CC — 2nd Applicant

and

Eskom Holdings SOC Ltd — Respondent

---

Judgment

---

Van der Linde, J:

[1] This is an urgent application to interdict and restrain the respondent from implementing a purported cancellation on 11 and 14 January 2019 respectively of two written security services contracts concluded last year between each of the applicants and the respondent.

[2] The urgency was in dispute on mainly two bases: that the applicants have not shown an inability to be afforded substantial redress at a hearing in due course, because they can always sue for damages; and that the urgency was self-created.

[3] As to the first point: rule 6(12) provides (my emphasis):

> *"(12) (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet.*
> *(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."*

[4] The reference to *"substantial redress"* does not, in my view, refer to some other remedy, but to the remedy that the applicant brings before the court for determination in its urgent application. In my view the matter is urgent and I grant the customary condonation. I thus do not believe that it is an answer to say that the applicants are always free to pursue some other form of relief in due course.[1]

[5] As to self-created urgency, this argument derives from nearly half a century's antiquity. In Schweizer Reneke Vleismaatskappy (Edms) Bpk v Die Minister van Landbou en andere[2] Trengove, J (as he then was) said the following:

> *"Volgens die gegewens voor die hof wil dit vir my voorkom dat die applikant alreeds vir meer as 'n maand weet van die toedrag van sake waarteen nou beswaar gemaak word. Die geleentheid het slegs dringend geword omdat die applikant getalm het ... maar dit was*

[1] See also generally Notshe, AJ in East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011).
[2] 1971 1 SA (PH F11) (T).

*geensins nodig vir doeleindes van hierdie aansoek ... om so lank te wag om die hof te nader nie.*
*Al hierdie omstandighede in ag genome, is ek nie tevrede dat die applikant voldoende gronde aangevoer het waarom die hof op hierdie stadium as 'n saak van dringendheid moet ingryp nie. Ek is dus, in die omstandigheid, nie bereid nie om af te sien van die gewone voorskrifte van reël 6."*

[6] Freely translated, these dicta go thus:

*"According to the evidence before the court it appears to me that the applicant has known for more than a month of the state of affairs now complained about. The matter only became urgent because the applicant prevaricated ... but it was not necessary at all to have waited that long before bringing this application. In all these circumstances I am not satisfied that the applicant has advanced sufficient grounds upon which the court should now become involved. I am thus not prepared to condone non-compliance with the provisions of rule 6."*

[7] I do think this matter is very different. Although the issues between the parties started brewing last year on 23 August, it was, after all, only this year on 11 and 14 January 2019 when the respondent purported to cancel the agreements. The notice of motion is dated 16 January 2019. I am therefore prepared to condone non-compliance with the provisions of rule 6 in this case, and I rule that the matter is urgent.

[8] That brings me to the substance of the application. The two contracts, identical for present purposes, incepted on 9 July 2018 and will time-expire on 8 July 2019. They are standard form contracts, based on the NEC3 Term Service format. They each contain, by way of incorporation by reference, arbitration clauses. The arbitration clauses were not placed before me and I have no conception as to their terms and, importantly, whether they make provision for urgent proceedings.

[9] I was asked nonetheless to dispose of the matter before me on the basis that the dispute between the parties falls within the arbitration clauses, but for the rest nothing was said, and no information was put before me.

[10] What is sought is, is – at least in form – an interim interdict restraining the respondent as indicated, pending the final resolution of the dispute between the parties by way of arbitration proceedings to be initiated in terms of the unseen arbitration clauses.

[11]The dispute between the parties may be summarised thus. The respondent purported to cancel the contracts on the basis that the applicants failed to render two specific types of services. The applicants dispute the validity of the purported cancellation on the basis that they were not contractually obliged to render the two specific types of services the failure of which founded the respondent's cancellation.

[12]The services concerned were, respectively, the provision of chromodek mobile guard huts and not timber mobile guard huts; and the provision to the security personnel of panic buttons connected to an armed response facility.

[13]The dispute is complicated for the applicants because the written contracts suggest, at least *prima facie*, that the applicants were indeed obliged to render those services. But the applicants assert that the contracts are to be rectified so as correctly to reflect the common continuing intention of the parties, which was that those services were not to be rendered. It is not necessary here to unfold the niceties of the respective arguments concerning the probabilities either way of the suggested rectification succeeding, because of the conclusion to which I have come on the next point.

[14]For the respondent Mr Uys submitted that the relief claimed is in fact final in nature, because by the time the anticipated arbitration proceedings will have determined the dispute between the parties, the remaining five months of the contracts will have run out, and the applicants will have had their contracts finally honoured.

[15]He submitted that any claim that the respondent might then have against the applicants would be in the nature of an enrichment *condictio indebiti*, in respect of which non-enrichment would be a defence. And if no security breach will have occurred during that period as a function of the non-provision of the contentious services, then the respondent is likely not to be able to recover any compensation, because the applicants will likely succeed in a defence of non-enrichment.

[16]This will be the case despite the fact that the respondent will not have been rendered the prestation by the applicants for which it will have been held to have been entitled.

[17]Mr Redman, SC, who appeared with Mr Cohen for the applicants, responded to this submission by contending that it was not for this court to speculate how long the anticipated arbitration will take.

[18]In my view Mr Uys is correct. The principle is sound: if in fact the relief claimed in an application for an interim interdict is final in effect, then an applicant must make out a case for a final interdict or fail:

> *"In support of this proposition, Mr Labe referred to Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd 1968 (2) SA 528 (C), at 529G:*
>
> *'On the other hand Mr Friedman, who appeared on behalf of the respondent, argued that the approach laid down in regard to temporary or interim interdicts was not appropriate in this particular case because in effect the Court was being asked to grant a final interdict. He submitted therefore that the proper approach should be that indicated in a Full Bench decision of this Court in the case of the Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235, where it was indicated that, where there was a dispute as to the facts, a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such order.'*
>
> *In my view, this approach is correct. The Court should look at the substance rather than at the form. The substance is that an interdict is being sought which will run for the full unexpired time of the restraint. In substance therefore final relief is being sought although the form of the order is interim relief. In my view therefore the correct approach to this matter is that set out in the Stellenbosch Farmers' Winery case to which reference is made in the Cape Tex case."*[3]

[19]At a parochial level, it seems to me therefore that the applicants were duty bound to have made out a case that their relief was truly interim, and then to have established a case for such relief; or instead to have established a case for final relief.

[20]In the course of clearing the hurdle that they set out to scale, the applicants will have been confronted with the practical reality of the duration of litigation, even in the form of arbitration proceedings. Everyone involved in litigation knows that it takes

---

[3] BHT Water Treatment (Pty) Ltd v Leslie, 1993 (1) SA 47 (W), per Marais, J at p55.

time; that the wheels of justice turn slowly is notorious. Arbitration proceedings are no exception; that too is notorious.

[21]It seems to me that the applicants were then burdened, had they wished to avoid the pre-eminent inference that an arbitration will chew up the remaining five months, to place the arbitration clause before the court, and to put up a persuasive case that this particular arbitration could be disposed of in an exceptionally short space of time. They did not.

[22]Mr Redman conceded that given the factual disputes relating to the asserted rectification, he could not argue on these papers that the applicants have established a clear right, the very first requirement for a final interdict.[4] That concession was, if I may say so, fairly and responsibly made.

[23]In these circumstances the following order issues:

The application is dismissed with costs.

WHG van der Linde

Judge, High Court

Johannesburg

Date heard: 25 January 2019

Date judgment: 29 January 2019

Counsel for the Applicants
Adv N.P.G. Redman, SC
With him
Adv S.S. Cohen
Instructed by

Buthelezi Vilakazi Incorporated
1st Floor Block B
Edenburg Terraces
Rivonia Boulevard
Sandton
Johannesburg

---

[4] Van der Linden, Koopmans Handboek, 3 1 4 7, followed in Setlogelo v Setlogelo, 1914 AD 221 at 227.

Tel: 011 234 1777
Email:s.buthelezi@buthelezivilakazi.co.za
Ref: LLS1/0008

Counsel for the Respondent

Adv P.L Uys
Instructed by
Gildenhuys Malatji Incorporated
Katherine&West Building
114 West Street
Sandton
Johannesburg
Tell: 011 428 8600
Email:rventer@gminc.co.za
Ref: R Venter 01863150