*JM//*

**REPUBLIC OF SOUTH AFRICA**

**NORTH GAUTENG HIGH COURT, PRETORIA**

12/9/12

**CASE NO: 71074/10**

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

14-9-2012
DATE

SIGNATURE

In the matter between:

| | |
|---|---|
| GAZA SECURITY SERVICES CC | Applicant |
| and | |
| MINISTER OF DEPARTMENT OF HEALTH | First Respondent |
| DIRECTOR GENERAL: DEPARTMENT DEPARTMENT OF HEALTH | Second Respondent |

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**JUDGMENT**

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**MSIMEKI, J**

[1] The Applicant, a service provider, brought this application seeking an order:

"1. *That the failure to act/omission of the Respondents to grant the Applicant a written formal contract since 2005, which pays for the Applicant security services at a rate as promulgated in the Government Gazette, at the Hillbrow branch of the Respondent be reviewed.*

2. *That the Respondents are ordered to reimburse the Applicant in the amount being the difference between the remuneration paid to the Applicant since 2005 and the remuneration as set out in the Government Gazette since 2005, for such security services by the Applicant.*

3. *The First and/or Second Respondent is/are ordered to take all steps to conclude a formal written agreement with the Applicant for security services rendered by the Applicant at the Hillbrow branch.*

4. *In alternatively (sic) to paragraph 1 above:*

4.1. *The matter is referred back to the First and/or Second Respondent for reconsideration, who is ordered within thirty calendar days from the date of this order to:*

*4.1.1. Conduct the investigations into the matter and take into account the guidelines that may be imposed by this Honourable Court;*

*4.1.2. Inform the Instructing Attorneys of thee Applicant of the decision taken after the investigation mentioned in paragraph 4.1.1 above, in writing and within forty eight hours of the time such decision is taken;*

*4.1.3. In the event of an adverse finding by the First and Second Respondents, to provide written reasons for such finding to the instructing attorneys of the Applicant within fifteen calendar days of the date of such finding.*

*5. Any of the Respondents, who oppose (sic) the relief sought herein, are (sic) ordered to pay the costs of this Application on attorney and client scale.*

*6. Further or alternative relief."*

[2] **BRIEF FACTS**

The Applicant, in 2005, concluded a written agreement annexure "TN2" appearing on paginated page 18 of the papers with the Respondents. The conclusion of the agreement came about when the service provider Gijima, at the time, gave short notice of the termination of security services at Hillbrow clinic. The Applicant would then perform security services at the clinic from 1 July 2005 on a month to month basis for a period not exceeding six (6) months. This was an emergency agreement. The Applicant contended that it wanted the work and *"its foot in the door."* The further contention is that the Applicant agreed to work for much less than the Government Gazette normally promulgate for salaries of employees in the security sector and for much lesser amount than they are paid for security services at the other sights of the Respondent. The Applicant contended that the Respondents advised it that the tender process would be implemented and that the contract would be advertised for the security services on a permanent basis at the Hillbrow clinic and that interested parties would tender for the work. This, according to the Applicant, meant that it would have an added advantage as *"its foot would already be in the door."* It then agreed to render the services at a reduced rate of R90.288.00 and for 6 months. The Applicant

contended that it normally would be working for R131.971.16 per month if the scale was not reduced. The difference between the two scales therefore amounts to R 41.000.00 per month. The Applicant's further contention is that the Respondents were entirely happy with the Applicant's work which it also did at Tladi clinic and TM1 Metro clinic where the Applicant, according to it, was properly paid for the work. The Applicant compared the Government Gazette price scale to the Government prices used for domestic workers, mine workers and other employees in other sectors in South Africa. According to the Applicant, the Government price scale for security services regulates the salaries of employees of the security firms in the industry. The Respondents contended that the price scales do not apply to them as the employer-employee relationship is missing. This contention seems to have merit. The Applicant contended that it had to explain to its employees that they would be paid at a reduced rate for 6 months only. The Applicant specifically confirms that the Respondents had difficulties with the tender process, advisement thereof and the funding for the tendering. More guards in terms of another agreement were employed at the Hillbrow clinic and these guards, according to the Applicant, were properly paid. This, according to the Applicant, created two categories of

employees those that were not properly paid (i.e. at the reduced rate) and those that were properly paid. The Applicant found the arrangement unacceptable.

What the Applicant seems to be loosing sight of is that one here has to do with two different agreements. This resulted in the Applicant bringing this application alleging that the Respondents had since 2005 omitted and neglected to bring the two agreements on par with the other agreements which the Applicant concluded with the Respondents. Again sight is lost of the fact that the agreements are independent of each other. The Respondents contend that the Applicant seeks orders for specific performance which the court, in this case, cannot do as that would interfere with the agreement that the parties concluded.

[3] **THE ISSUES**

These are:

3.1. whether the review procedure is warranted and justified

3.2. whether there is an administrative action that requires to be reviewed or whether only a purely contractual relationship which has nothing to do with an administrative action has come into being.

[4] **PRINCIPLES**

4.1. An agreement once concluded has to be respected hence the maxim *"pacta sunt servanda"*

4.2. courts often interfere with agreements which are illegal or against public policy.

4.3. if an agreement is not contrary to public policy or its enforcement such agreement is binding and enforceable.

4.4. courts are allowed to decline to enforce terms in agreements that are in conflict with the constitutional values even though the parties may have consented to them. **(See Bredenkamp and Others V Standard Bank of SA Ltd 2010 (4) SA 468 (SCA) at 479 A)**

4.5. A party is bound by a term of a contract even if the term is unfair **(See Bredenkamp case (supra) at para [34])**

[5] **In Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) at 9B-C** Smalberger JA said:

*"The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness."*

**In Bedenkamp v Standard Bank of South Africa Ltd 2010 (4) SA 468 at para [50]** the court said:

> *"with all due respect, I do not believe that the judgment held or purported to hold that the enforcement of a valid contractual term must be fair and reasonable, even if no public policy consideration found in the Constitution or elsewhere is implicated".*

**In Barkhuizen v Napier *(supra) 2007 (5) 323 (CC)* at 341 para [57]** Ncgobo J said:

> *"Self- autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the*

*values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress."*

[6] Ms Nobanda for the Respondents submitted that the principles of just administrative action found application only in instances where *"administrative action"* was involved. The submission is, indeed, correct.

Just administrative action has been defined as:

*" that part of public law which regulates the exercise of public power and the performance of public functions by organs of State, which fall within the constitutional rights to just administrative action laid down in Section 33 of the Constitution."*

**(See LAWSA (2ed) (vol 1) at para 70)**

**Section 1 of the Promotion of Administrative Justice Act no.3 of 2000 (PAJA)** defines administrative action as *"any decision taken, or any failure to take a decision by*

(a) *organ of State, when –*

*(i) exercising a power in terms of the Constitution or a provincial constitution; or*

*(ii) exercising a public power or performing a public function in terms of any legislation; or*

*(b) a natural or justice person, other than an organ of state, when exercising a public power or performing*

*a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect."*

Grounds for judicial review of administrative actions are set out in Section 6 of PAJA.

[7] Ms Nobanda submitted that before an act can be regarded as an administrative action and accordingly reviewable certain jurisdictional facts must first exist. The submission is correct. These are that:

7.1. the exercise of public powers or

7.2. the performance of public functions

7.3. by organs of state; or

7.4. a natural or juristic person must be:

(a) in terms of an empowering provision; or

(b) in terms of the Constitution or a provincial constitution: or

(c) in terms of any legislation.

[8] Ms Nobanda submitted, correctly in my view, that:

8.1. none of the jurisdictional facts have been alleged or appear from the papers

8.2. instead, the parties concluded a private agreement in terms of which the Applicant was to render services for the Respondents in return for payment.

8.3. the Respondents exercised private and not public powers or performance of public functions as envisaged in the definition of an administrative action.

8.4. the Applicant did not show that the agreement was not concluded voluntarily or that it was not aware of the terms of the agreement which were agreed upon by them giving rise to the agreement.

8.5. the Respondents took no decision which could have resulted in the administrative action. Just and lawful administrative action, according to her, finds no application in this matter.

8.6. Neither the agreement nor any of its terms is contrary to public policy

8.7. nothing vitiates the validity of the agreement.

8.8. the agreement does not offend the provisions of the Constitution

8.9. the facts of the current matter do not accommodate any legitimate expectation on the side of the Applicant. In the light of the principles I have referred to above, I am bound to agree with Ms Nobanda's submissions.

[9] Ms Strauss, for the Applicant, submitted that the Respondents created legitimate expectation on the part of the Applicant which understood the agreement to mean that:

9.1. it would exist for 6 months only

9.2. they had their "proverbial foot in the door" which meant that they would be at an advantage when the tender would be advertised and considered.

9.3. This agreement would be considered by the Respondents who would bring the contract price in line with the other agreements that the parties were involved in.

9.4. the Respondents had since 2005 omitted and neglected to bring the agreement in line with the other agreements between the parties. Once brought in line with the other agreements, the agreement would then be reasonable and acceptable.

9.5. the Respondents would then act reasonably, justly and fairly in their dealings with the Applicant which always had such legitimate expectation.

[10] Ms Strauss submitted that the Applicant has a legitimate expectation to protect its interest. Legitimates expectation according to the decided cases that she referred the court to, according to her, included expectations which go beyond enforceable legal rights. She submitted that the Applicant has more than the legitimate expectation based on the contractual relationship that exists between the parties. She further submitted that the Applicant's whole case *"is based on contractual relationship that was not handled in a fair and reasonable manner."* It was Ms Strauss's contention that the court could compel a substantive result "by granting an order to compel the Respondents to reimburse the Applicant for the difference in the amounts paid to the Applicant and the amounts that the Applicant ought to have received from 2005 to the date of the order. The amount,

according to Ms Strauss, can be determined after delivery of statements to the Respondents and after calculation is made by the parties. Ms Strauss submitted that the Respondents could be ordered to give reasons for the decision not to pay the Applicant in accordance with the price scale and allow the Applicant an opportunity to state its case in order for the amicable solution to be reached. Ms Strauss's submission does not have merit.

The court, for instance, is not competent to make an order forcing the parties to amend their valid agreement. The court neither has the basis to interfere nor to force the parties to conclude a contract. The court cannot order that the terms of the existing agreement be amended. The agreement is valid and in place and continues to exist on a month to month basis until validly cancelled.

The Applicant, as Ms Nobanda correctly submitted, took a business decision which is regulated by the law of contract. This, according to her, has never included an administrative action . The government Gazette price scales according to her, have nothing to do with the contractual relationship between the parties as they concern the employer-employee relationship. The submissions, in my view, have substance. Ms Strauss herself gave examples of the relationships regulated by the price scales in the various industries. The Respondents cannot be forced to conclude

another agreement to substitute the valid agreement. Of course, it is up to the parties, by agreement, to vary the agreement. Absent the variation, the agreement remains in place. Ms Strauss argued that the agreement was preceded by a decision which was taken by the Respondents and that that was the decision that was reviewable. Of course, an agreement is preceded by a decision to conclude it but that does not simply make the decision to conclude the agreement an administrative action. No administrative decision was taken to warrant the re-consideration of the matter by way of a review. There is nothing to review.

[11] The Applicant seeks, *inter alia*, orders for specific performance. As Ms Nobanda correctly submitted, the different meanings of specific performance have a common thread of *"in pursuance of a contractual obligation or other obligation."*

There is an order to perform a specified act *(ad factum praestendum)* in pursuance of a contractual or any other obligation. There is an order to perform a specified act or to pay money *(a pecuniam solvendam)* in pursuance of a contractual obligation. There is also an order to perform a specified act in pursuance of a contractual obligation (**See**

**Christie, The Law of contract in South Africa (5ed) at p522.)**

The Applicant did not prove or allege that there was an agreement between the parties that the Respondents would pay the Applicant an amount more than the contract price at the end of the agreement or any time thereafter. Annexure TN2 does not disclose that. The agreement regulates whatever is being done by the parties. The Applicant conceded that it was advised that the Respondents would advertise a tender for the provision of permanent security services and that the Applicant, like any interested party, would also tender. Indeed, Ms Strauss conceded that there was no guarantee that the Applicant would get the tender. An indefinite contractual relationship can be terminated by either party on reasonable notice. ***(See Breedenkamp matter (supra)* at para [23].** The Applicant, voluntarily, decided and elected to continue with the agreement once it came to an end. That was to enable it to obtain *"the foot in the door"* which was as Ms Nobanda correctly submitted, *"for self-serving reasons and motives."*

The Applicant, she further submitted, *"made a business decision"* and should not *"seek the aid of the court to change the terms of the agreement it had agreed to"*

[12] Finally, Ms Nobanda submitted that the Applicant can still lawfully cancel the agreement which is enforceable until duly cancelled. The Applicant, according to her, has failed to make out a proper case for the relief that she seeks and the application should, accordingly, be dismissed with costs. I agree.

[13] **In the result I make the following order:**

**The application is dismissed with costs.**

**MSIMEKI J**
**JUDGE OF THE HIGH COURT**
**NORTH GAUTENG, PRETORIA**

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| Counsel for applicant: | Advocate Strauss |
| Counsel for respondent: | Advocate Nobanda |
| Attorneys for applicant: | Surita Marais Attorneys |
| Attorneys for respondent : | State Attorney |
| Date heard: | 10 September 2012 |
| Date of judgment: | |