



**HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**CASE NO: 29193/2021**

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

DATE: 18 JUNE 2021

SIGNATURE

In the matter between:

**BASADI BAITSOA CONSULTANTS AND PROJECTS CC** Applicant

and

**SOUTH AFRICAN FORESTRY COMPANY SOC LTD** Respondent

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**J U D G M E N T**

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*This matter has been heard in open court and otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.*

**DAVIS, J**

[1] Introduction

In this urgent application, an erstwhile service provider of the South African Forestry Company Soc Ltd (SAFCOL), seeks to interdict SAFCOL from proceeding with the appointment of new service providers pending the resolution of disputes between the applicant and SAFCOL by way of arbitration.

[2] Relevant Chronology

The relevant chronology of the parties' engagement with each other will contextualize the current disputes:

- 2.1 On 1 July 2019 the applicant was appointed as a service provider to SAFCOL, pursuant to which, on 5 September 2019 the parties concluded a written agreement with each other. In terms of the agreement the applicant would render certain silviculture services for SAFCOL for a period of three years. These services would include annual burning of firebreaks, chemical weeding, mechanical weeding, pruning, pitting, fertilizing, planting of seedlings and ancillary services, using labour sourced from local communities.
- 2.2 The written agreement provided that the applicant may not cede or assign its rights or obligations in terms of the agreement without the written consent of SAFCOL, which consent will not unreasonably be withheld. All disputes in terms of the agreement would be referred to the Arbitration Foundation of South Africa (AFSA) to be resolved by way of arbitration in terms of the AFSA rules.
- 2.3 During the existence of the contract, numerous issues arose from time to time concerning the applicant's workforce. The allegations that these

resulted in protests at different intervals at different sites as a result of non-payment of salaries and wages, stand uncontested. These, so SAFCOL says, has already resulted in losses of some R700 000. All these issues constituted breaches of the agreement.

- 2.4 In the beginning of April 2021, the workforce issues escalated to the extent that the industrial strike action reached a point beyond the applicant's control. Employees of SAFCOL were held hostage and other service providers were barred from entering SAFCOL sites.
- 2.5 At that time, invoices of the applicant for March 2021, April 2021 and May 2021 were not yet payable by SAFCOL, but, in order to assist the applicant and to defuse the situation, SAFCOL, after informing the applicant and relying on the applicant's historical data, reconciled the outstanding invoices and paid the applicant's workers their salaries and wages directly on 24 April 2021 when it became clear that the applicant was otherwise unable to do so.
- 2.6 This followed on a written demand to the applicant on 19 April 2021 to remedy all breaches to the agreement between the parties, particularly pertaining to labour issues and labour disputes within 7 days.
- 2.7 The seven calendar days (calculated in terms of the contract) expired on 26 April 2021).
- 2.8 The applicant's erstwhile member, Ms Madalane alleges in the founding affidavit, that the applicant had resolved all its financial difficulties by ceding and assigning all its rights and obligations in terms of the agreement to another close corporation, Hankhesa Consulting CC on 3 May 2021. The cession agreement is, despite an allegations to that effect, not annexed



to the founding affidavit. It is contended that it was sent to SAFCOL. As no response or consent had been received, counsel for the applicant submitted that it had “fallen by the wayside”, but that the envisaged financial support still remained.

- 2.9 I interpose to state that there are no supporting affidavits from the current members of the applicant nor any on behalf of Hankhesa Consulting CC confirming or corroborating any of the above aspects.
- 2.10 Be that as it may, on 12 May 2021, SAFCOL cancelled the agreement due to non-fulfillment of its prior demand.
- 2.11 On the same day, the applicant, represented by an acting CEO who states that he had taken over from Ms Madalane “as she is taking indefinite leave”, again reported that, according to the applicant, all labour issues had been resolved. The acting CEO pleaded that a meeting be arranged to discuss matters amicably rather than resorting to litigation. The letter, however, also records the position to be as follows: *“Although I am fully aware that our relationships with Safcol is a legal one, governed by a contract, I am of the view though that the best and cost-effective solutions are achieved by frank discussions before considering legal options”*.
- 2.12 When no further meetings resulted, the applicant resorted to its attorneys who, on 24 May 2021, wrote to SAFCOL. In the letter, the attorneys place the applicant’s breach in dispute and labels SAFCOL’s cancellation of 12 May 2021 a repudiation of the agreement, which was not accepted by the applicant. The letter also served as a demand to SAFCOL to refrain from obtaining quotations from other service providers whilst the dispute between the parties remained unresolved, failing which, an application for an interdict would follow.

2.13 In view of its history with the applicant, SAFCOL concluded that the time had arrived to resort to alternative service providers and consequently issued a request for quotations on 1 June 2021 in terms of the procurement provisions of the Public Finance Management Act, 1 of 1999 (the PFMA) and the Preferential Procurement Regulations, 2017. The validity period for bids is 60 days and the bid evaluation process has commenced and is underway.

[3] Relief claimed

3.1 In the circumstances as set out in the above chronology, the applicant launched the present urgent application on 11 June 2021 claiming that SAFCOL “*be interdicted and ordered to desist from proceeding with the appointment of other service providers to do civiculture (sic) work which was previously performed by the applicant, pending resolution of the dispute ... through arbitration*”.

3.2 Costs are also claimed.

3.3 No timeframe or other procedural prescripts pertaining to the arbitration were contained in the notice of motion and Adv Malatji, who appeared for the applicant, from the bar argued that the disputes are manifold and appear to be beyond the simple issue of cancellation of the agreement.

[4] The law pertaining to interim relief

It is trite that, in applications for interim relief, the requirements are the following:

- that the right which is the subject matter of the main proceedings (in this case, the intended arbitration proceedings) which the applicant

seeks to protect, is clear or, if not clear, is prima facie established, though open to some doubt,

- that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and it ultimately succeeds in establishing the right,
- that the balance of convenience favours the granting of the interim relief and
- that the applicant has no other remedy.

See Setlogelo v Setlogelo 1914 AD 221 at 227 and L. F. Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C) at 267A – F.

## [5] Evaluation

- 5.1 That the applicant has the right to have disputes in respect of its agreement with SAFCOL determined by way of arbitration, is beyond doubt – the agreement itself provides for this. What exactly the dispute is and whether it has any prospect of success, are less clear. There has not been any referral to arbitration yet and neither have the disputes which the applicant suggests exist been formulated, either in the papers or in terms of the AFSA rules. Insofar as the validity of the termination of the agreement is the primary of those disputes, counsel for SAFCOL referred to the decision in Malan v City of Cape Town 2014 (6) SA 315 (CC) at [25] to point out that, once the applicant had failed to comply with the demand to remedy its breach by the due date, SAFCOL had been fully entitled to cancel the agreement. There is therefore serious doubt whether the right which the applicant seeks to enforce will bear any consequential relief in its favour.



- 5.2 Regarding the issues of irreparable harm, the applicant averred that the termination of its agreement with SAFCOL, will render a number of workers and their families destitute. The facts indicate that the non-payment from time to time by the applicant, had already in the past impacted negatively on those workers. There is insufficient evidence to conclude that the applicants' financial woes are at an end. Moreover, SAFCOL's requirement in its request for quotations, is that any new service provider, must make use of local labour at the various SAFCOL sites. This would mitigate (or even remove) the fear of prejudice to the workforce. The sole remaining harm which the applicant itself may suffer, is the loss of profit, should it be successful in establishing that the agreement has been unlawfully terminated by SAFCOL. Such loss can be adequately compensated by a damages claim.
- 5.3 The above discussion also indicates where the balance of convenience lies: should an order as prayed for be granted, that would leave SACOL without anyone rendering silviculture services and tending to its forests and plantations. Such an untenable situation would, if the interim order is granted, endure for an indeterminate time. Even though Adv Malatji made reference to an expedited arbitration possibility (which has not been canvassed on the papers), no immediate time-frames can be established in circumstances where the referral to arbitration has not yet even commenced. On the other hand, should new service providers be appointed (which, in terms of the bid validity period, must take place, at the very latest, within the next 47 days) they would simply step into the shoes left by the applicant and, employ the workforce already on site and proceed with the rendering of silviculture services, preventing a re-occurrence of losses such as that which had happened in the during under the applicant's

tenure. The balance of convenience therefore does not favour the granting of the relief.

5.4 In respect of both the issues of irreparable harm and the balance of convenience, it is apposite to note that the applicant had not, neither in its notice of motion nor in its founding affidavit, made any provision for the *lacuna* which will exist pending finalization of the proposed arbitration. It has not asked for suspension of the termination of the agreement which took place on 12 May 2021 (more than a month ago) nor tendered any interim solution. Moreover, no affidavit has been delivered gainsaying any of the averments made in SAFCOL's answering affidavit.

5.5 It must follow that the applicant has failed to make out a case for the relief it seeks.

[6] Costs

Although costs customarily follows the event, having regard to the applicant's position and the pleas delivered *ad misericordiam* by Mr Malatji, I am, in the exercise of the court's discretion, inclined to have the liability for costs stand over until the determination of the validity of the cancellation and to treat this application as an interlocutory application in that process.

[7] Order

1. The application is dismissed.
2. Costs of the application shall be costs in the intended arbitration between the parties.



3. Should the arbitration not be proceeded with, either party shall be entitled to approach this court in terms of Rule 41, on notice and, by way of supplemented papers, for determination of the issue of costs.



N DAVIS  
Judge of the High Court  
Gauteng Division, Pretoria

Date of Hearing: 14 June 2021

Judgment delivered: 18 June 2021

APPEARANCES:

For the Applicant:

Attorney for Applicant:

Adv. K R Malatji

Lancaster Kungoane Attorneys, Centurion

For the Respondents:

Attorney for Respondents:

Adv. C Thompson

Richen Attorneys' Inc, Randburg

c/o Savage Jooste Adams Attorneys,

Pretoria