THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 8206/16P

In the matter between:

VUSA-ISIZWE SECURITY (PTY) Ltd	APPLICANT
and	
HOD: KZN PROVINCIAL GOVERNMENT: DEPARTMENT OF HEALTH	FIRST REPONDENT
MOZ GOLD CC	SECOND REPONDENT
ATHOPASI SECURITY	THIRD RESPONDENT

JUDGMENT

Delivered on 29/11/2016

POYO DLWATI J:

[1] This application is about whether the applicant's contract with the first respondent was lawfully and properly terminated.

[2] The applicant was awarded three tenders by the first respondent on 20 March 2012. The tenders were for the provision of security services in Northdale and Edendale hospitals in Pietermaritzburg. The third tender was for the provision of security services at Kwa-Zulu Natal Nursing College, also in Pietermaritzburg. The contract period was for three years commencing on 1 April 2012 and ending on 31 March 2015. The respective bid numbers were ZNB 4460/2010-H, ZNB 4215/2010-H and ZNB 4136/2010-H.

[3] A new tender was advertised during March 2015 for the provision of security services at Northdale and Edendale hospitals under bid number ZNB 4000/2015H. The applicant submitted its tender on 25 May 2015. It is not in dispute that these bids were not finalised by 30 March 2015. As a result, the first respondent, in a letter dated 30 March 2015, annexed to the applicant's founding affidavit as 'FA6', extended the applicant's contract to 31 October 2015.

[4] It appears that the bids were again not finalised by the end of October 2015. According to the applicant it was advised by a representative of the first respondent, Mr Naidoo, that its contract would be extended until the finalisation of the bids. It is at this stage that the applicant requested, and it was agreed, that it would be given a reasonable period, at least 90 days from the date of the award, to terminate its services in the event that it was not successful. This it requested in order to allow an orderly handover of the sites to the new service provider and for the applicant to have sufficient time to consult with its employees and where possible to facilitate their redeployment in terms of Sections 197 (1) (a) and 197 (2) (a) and (b) read with Section 198 of the Labour Relations Act 66 of 1995.

[5] This is where the dispute emanates and there is a material dispute of facts in this regard. According to the first respondent, when the new bids were not finalised by 30 October 2015, it sent a letter, annexed to its answering affidavit as MN1, to the applicant and extended its contract to 31 January 2016. Again the bids were not finalised by 31 January 2016. The first respondent caused a letter to be sent on 5 February 2016 extending the applicant's contract on a month to month basis until the finalization of new bids. It avers that when the awards were made in June 2016 by the MEC for Finance, it then sent the applicant the letter dated 1 July 2016, annexure FA7 to the applicant's founding affidavit, and terminated its services.

[6] On the other hand, the applicant disputes that any other communication was made regarding the termination of the contract other than the agreement reached in October 2015. It averred that it was surprised to receive the first respondent's letter dated 1 July 2016 purporting to cancel its contract by 1 August 2016. According to the applicant, when this letter was received, it contacted Ms Sthandiwe Mbotho of the first respondent and enquired about the cancelation. It also enquired why it was not given the 90 day notice period as agreed in October 2015.

[7] The applicant alleged that it was advised by Mbotho to ignore the letter as it was incorrect. Mbotho promised that a new letter with the proper notice period would be issued. However, no letter was forthcoming and attempts to contact Mbotho were futile. The applicant made enquiries on 22 July 2016 about the status of the 2015 bids and from there it learnt that there had been various objections and appeals pertaining to the bids. However, it ascertained that the Bid Appeals Tribunal had made certain recommendations which were accepted by the MEC for Finance on 29 June 2016.

[8] The applicant further alleged that after these awards by the MEC for Finance, various irregularities occurred which included the second and the third respondents entering into various agreements with the first respondent about the allocation and swapping of sites where the security services would be rendered contrary to what had been recommended to and agreed by the MEC for Finance. It also appeared that there was some collusion by the second respondent and other bidders, as the member of the second respondent is a son of the member of KSA Security Services. These issues, according to the applicant, are part of the grounds of review application launched by the applicant.

[9] It was as a result of the first respondent's failure to adhere to the agreement of giving the applicant 90 days' notice before terminating the contract and the irregularities referred to in paragraph 8 *supra* that the applicant launched an urgent application seeking to interdict the first respondent from terminating its 2012 contract pending the outcome of the review application to be launched by the applicant. The applicant also sought that the first respondent be ordered to comply with all of its obligations in terms of the 2012 contract. A rule nisi was issued by Mthembu AJ on 29 July 2016. It, however, became apparent during the beginning of August 2016 that the rule nisi did not have a provision for interim relief.

[10] When the applicant tried to have the order amended so as to include interim relief, same was not agreed to by the first respondent. It became necessary that an application to vary the order be made by the applicant and same was opposed by the first respondent. I will not go into detail with this save to say that I granted the order varying the order made by Mthembu AJ as to provide for an interim relief on 14 October 2016.

[11] Perhaps it is significant to mention at this stage that there were then further applications to be adjudicated upon before a return date could be determined. It was then agreed between the parties that on 28 October 2016, I would hear the opposed joinder applications of the second and third respondents. There were also opposed rule 35(12) and (14) applications brought by the applicant against the second and third respondents which were ripe for hearing. Attempts were also made before 28 October 2016 for parties to try and reach settlement in respect of these applications but none were successful. Various undertakings were also made between the parties in an attempt to curtail various interlocutory applications between the parties.

[12] On 28 October 2016 I granted an order for joinder of the second and third respondents. I dismissed the rule 35(12) and (14) applications against the second and third respondents. Applicant's counsel sought leave to file a further supplementary founding affidavit in light of the joinder of the second and the third respondents. However, I did not make such an order. It was agreed between the parties, and I ordered as such, that the return date would be 18 November 2016. It was expected and had been emphasised that all parties would co-operate in filing various affidavits so that the matter could be heard on 18 November 2016.

[13] However, to my surprise and by sheer coincidence, the matter was set down on the unopposed roll on 10 November 2016. There were no papers in the court file indicating what application was before court. It only transpired when counsel addressed the court that there was an application in terms of rule 35(12) and (14) against the first respondent which had been opposed. As there were no papers in the court file pertaining to this application, I adjourned that matter *sine die* and directed the parties to engage in discussions about how the matter was

to proceed further. It was however reiterated that the return date remained the 18 November 2016.

[14] On 18 November 2016, Mr *Solomon* SC, on behalf of the applicant sought an adjournment of the matter on the basis that there was an outstanding rule 35(12) and (14) application against the first respondent. As a result the applicant had not been able to file its replying affidavit as certain information it needed to prepare its affidavit had not been provided. There was also a contempt of court application brought by the applicant as the first respondent had failed to make payments relating to the provision of services from 1 July to 30 October 2016. The applicant sought that the first respondent not be heard on the 18th until the contempt had been purged.

[15] The application for the adjournment was opposed by the first, second and third respondents. It was argued on behalf of these respondents that the applicant's application for an adjournment was a delaying tactic by the applicant and further all of the documents required by the applicant had either been furnished to the applicant or that they were not relevant to the current application. It was further submitted that the applicant ought to have filed its replying affidavit by 25 August 2016 and it was out of time for filing same. I refused the application for adjournment on the basis that after I had considered the rule 35(12) and (14) application, the documents required by the applicant from the respondent were not relevant for the determination of this application. Whatever documents were relevant to the current application had been attached to the first respondent's answering affidavit and to the applicant's founding affidavit.

[16] Furthermore, it had been agreed between the parties that the return date was 18 November 2016 and no party had advised me that there was still a

further application to be adjudicated upon before the return date. The applicant did not advise me at that stage that it was unable to prepare its replying affidavit due to the outstanding documents. It was by sheer coincidence that I became aware of that application on 10 November 2016 and it was, technically speaking, not before court as there were no papers in the court file relating to it. It is my view that the insistence on an outstanding rule 35(12) and (14) application was just a delaying tactic by the applicant to avoid the hearing and finalization of the application. In any event, after I refused the adjournment, Mr *Solomon* SC was able to argue the main application.

[17] The issues to be determined are whether the applicant is entitled to the relief sought. Furthermore, whether there is any justification in extending the interim relief pending the review application launched by the applicant in September 2016. It is trite that in order to be granted a final interdict the applicant must show:

(a) a *prima facie* right;
(b) unlawful interference with that right, actually committed or reasonably apprehended; and
(c) the absence of any other satisfactory remedy.

See *Setlogelo v Setlogelo* 1914 AD 221 at 227 and *Van Deventer v Ivory Sun Trading 77(Pty) Ltd* 2015 (3) SA 532 SCA para 26.

[18] The applicant claimed that it had a *prima facie* right to be given 90 days before its contract could be terminated. This, it was contended, arose through an oral agreement between the applicant and the representatives of the first respondent. This has been disputed outright by the representative of the first respondent, Mr Naidoo, who reiterated that no agreement was reached with the

applicant. There is therefore a dispute of fact in this regard and the applicant has not asked that the matter be referred for oral evidence.

[19] It is trite that in proceedings on notice of motion, where disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. See *Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635C. Applying the above principle in the circumstances of this case, I am not persuaded that granting the order sought by the applicant would be justified.

[20] That, however, is not the end of the enquiry on this point. The applicant averred that initially its contract with the first respondent was extended in March 2015 up to 30 October 2015. Thereafter the agreement about the 90 days' notice was reached. It did not receive any other correspondence from the first respondent other than the correspondence of 1 July 2016. The first respondent on the other hand, through Mr Morganathan Naidoo, a systems manager employed at Edendale Hospital, has demonstrated how the extensions were communicated to the applicant. All of these letters, on close examination, are similar to FA7 attached to the applicant's founding affidavit. I, therefore, have serious doubt that the applicant received FA7 but did not receive MN1 and MN2.

[21] The significance of MN2 is that the applicant's contract was extended on a month to month basis from 1 February 2016 until the new bids were finalised. According to Mr Naidoo, it was delivered to the applicant in the same way that FA7 was delivered. In any event any variation to the contract ought to have been in writing as per clause 17 of the 2012 Service Level Agreement between

the applicant and the first respondent. I therefore reject the applicant's contention that there had been an agreement that it would be given 90 days' notice before its contract would be terminated. I accept the first respondent's version of events that the applicant's contract would be extended on a month to month basis until the new bids were finalised.

[22] This leads me to the applicant's further argument that the finalisation of new bids also meant any reviews to be launched seeking to set aside the award of the tender. This argument is nonsensical in my view. It was not in dispute that various appeals had been launched dealing with these new bids. The MEC for Finance made an award to the second respondent on 29 June 2016 after recommendations from the Bid Appeals Tribunal. This, in my view, meant that the new bids had been finalised. At the time that the applicant was notified of the termination of the contract, all appeals had been finalised. There was no review application or action launched at that stage pertaining to those bids. The first respondent was therefore entitled to assume and conclude that the new bids had been finalised.

[23] The applicant has therefore not established any right that entitled it to provide services to the first respondent beyond 1 August 2016. Even the averment that the applicant had spoken to Mbotho who had undertaken to send a correct letter with an appropriate notice has been disputed by Mbotho. If there was no right in the first place, then it follows that there was no interference or infringement with any right and no resultant prejudice. There could therefore not have been any irreparable harm, as a result of the termination. The balance of convenience favours the first respondent as it has to comply with its obligations in terms of the award made on 29 June 2016.

[24] If the applicant persists with the contention that there are various irregularities with regard to the award of the tender, which I believe it does, it ought to have appealed the decision in terms of the Kwazulu Natal Supply Chain Management Policy Framework. It was submitted that it did not appeal because it had not been advised that the award of the tender had been made. However, clause 28.2 of special terms and conditions relating to the 2015 tender provides that 'the intentions of award of the bid will be advertised in the same media as the invitations'. The applicant ought to have been aware of this. There was therefore no duty on the first respondent to have notified the applicant of the award of the tender especially because it was not a successful tenderer. In any event the applicant would have enquired from those that liaised with it about the status of the tender. Even in the review proceedings the applicant will have to deal with this failure of exhausting the internal remedies available to it before launching the review.

[25] In any event, because of the conclusions I came to in the above paragraphs I do not believe that I ought to make any findings in respect of the prospects of success in the review application. However, I am satisfied that the applicant can pursue its review application without the interim relief or rule being confirmed. There is no justification or case made out for the continuation of the interim relief. On the applicant's own version the 90 days' notice period has come and gone and it must accept that the contract was lawfully terminated. To extend the rule would be tantamount to reviving an expired contract, something which was frowned upon by the Supreme Court of Appeal in *Tasima (Pty) Ltd v Department of Transport* (792/2015) [2015] ZASCA 200 (2 December 2015) and the Constitutional Court in *Department of Transport and Others v Tasima (Pty) Limited* (CCT5/16) [2016] ZACC 39 (9 November 2016).

Order

[26] Accordingly, I make the following order

'the rule is discharged with costs including costs of 2 counsel where employed.'

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Poyo Dlwati J

APPEARANCES

Date of Hearing	:	18 November 2016
Date of Judgment	:	29 November 2016
Counsel for Applicant	:	Adv R A Solomon SC with Adv A MacManus
Instructed by	:	Vishal Junkeeparsad & Company C/O J Leslie Smith
Counsel for First Respondent	:	Adv V M Naidoo SC with Adv S Jasat
Instructed by	:	State Attorney (KZN) C/O Cajee Setsubi Chetty Inc
Counsel for Second Respondent:		Adv A J Rall SC
Instructed by	:	A P Ngubo Attorneys
Counsel for Third Respondent	:	Adv V Moodley
Instructed by	:	Siva Chetty and Company