IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. 6737/2017

In the matter between:

UMHLATUZE GENERAL SALES AND SERVICE (PTY) LIMITED

Trading as KZN SALES AND SERVICES APPLICANT

And

TRANSNET SOC LIMITED RESPONDENT

JUDGMENT

Delivered on: _____

GOVENDER AJ:

Background and facts that are common cause

[1] In terms of a contract[1] entered into between the Applicant and the Respondent on the 22nd of July 2014, the former was appointed to upgrade the Port Control Tower Building (PCTB) at Richards Bay harbour. A contract performance bond required by the contract was furnished a few days after the commencement of

[1] Contract number: CNPA505

the contract. The Applicant commenced and continued work on the project until a stop work directive was issued by the project manager, Mr Hope Lekoa on the 6th of October 2015. The directive to stop work was necessitated by the discovery of a flaw in the original design for the upgrade. At the time this directive was issued, the Applicant had completed approximately half the work on the project. It appears that as of the 6th of October 2015 no further work has been done on the project. A dispute concerning the quantum of claims for 'compensation events' arising during the 'stop work' period was finalised on the 31st of October 2016 with the adjudicator ordering the Respondent to pay the amounts of R4 549 435 plus interest and R710 203 plus interest to the Applicant.

[2] A new consultant, BVI, delivered new drawings and a new Bill of Quantities on the 7th of September 2016. The original performance bond submitted by the Applicant lapsed in September 2015. In November 2016, the Respondent required the Applicant to re-instate the performance bond as required in the contract. During the period 24th of November 2016 and March 2017, the Applicant requested certain information from the Respondent which it claimed it needed in order to secure the performance bond. The Respondent in a letter dated 31st January 2017 provided some assistance but, in the main, took the view that it was the responsibility of the Applicant to provide the necessary information to secure the performance bond. Despite the paucity of information provided by the Respondent, the Applicant was able on the 8th of March 2017 to submit a draft performance bond and on the 19th of April 2017, it submitted an updated quotation. The draft performance bond was for an amount that was less than 10 per cent of the original contract price. On the 12th of May 2017,[2] the Respondent issued a notice terminating the contract and provided the following reasons for the termination:

1. that the Applicant had failed to provide a performance bond within the period prescribed;
2. that the Applicant had replaced key personnel without its prior approval; and;
3. that the Applicant had not performed in the spirit of mutual trust and co-operation.

[2] Page 61 of the record.

Main submissions by the parties

[3] The Applicant contended that the refusal by the Respondent to provide the requested information in circumstances where it was able to do so caused the delay in the submission of the draft performance bond. It also submitted that had the Respondent drawn its attention to the fact that the performance bond ought to have been for an amount that was not less than 10% of the original contract price, it could have rectified the situation almost immediately. The Applicant's contention was that the Respondent had failed to act in the spirit of mutual trust and co-operation. It contended that the Respondent, by refusing to co-operate, intentionally frustrated its endeavours in obtaining and submitting a valid performance bond.

[4] The Applicant sought an order interdicting the Respondent from appointing a new contractor to complete the project in respect of which the Applicant was originally appointed pending the final determination of the dispute by the adjudicator appointed in terms of the contract concluded between the parties. The adjudicator appointed is Mr Poorter.

[5] Mr WN Shapiro appeared on behalf of the Applicant and Mr I Pillay on behalf of the Respondent and I am grateful to both of them for their useful submissions. The Respondent resisted this application on the basis that it validly cancelled the agreement as the Applicant failed to maintain a performance bond/ guarantee equivalent to 10 per cent of the value of the contract. It further contended that the Applicant rendered a draft bond that was 10 per cent of the value of the works as at the date of the bond which was in violation of the original contract. The Respondent also submitted that this dispute had not been timeously referred to adjudication and that as a consequence the Applicant lost its right, in terms of the contact, to refer the matter to adjudication. As far as the interdict is concerned, the Respondent disputed urgency, contended that the Applicant has an alternative remedy in that it can sue for damages and submitted that the balance of convenience favours it in this matter.

Legal requirements that have to be met for the granting of an interdict

[6] The Constitutional Court in *National Treasury and others v Opposition to Urban Tolling Alliance and others* [3] ('*OUTA*') restated the requirements for the grant of an interdict as follows:

> 'The high court relied on the well-known requirements for the grant of an interim interdict set out in *Setlogelo* [*Setlogelo v Setlogelo* 1914 AD 221] and refined, 34 years later, in *Webster* [*Webster v Mitchell* 1948 (1) SA 1186 (W)]. The test requires that an Applicant that claims an interim interdict must establish (a) a prima facie right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the Applicant must have no other remedy'.

[7] The requirements as stated in *Setlogelo* were modified somewhat in instances where the Applicant seeks to interdict a minister from exercising statutory powers vested in him or her. In *OUTA*, the Constitutional Court referred to the judgment in *Gool v Minister of Justice and Another*[4] and held that the courts grant 'temporary restraining orders against the exercise of statutory powers only in exceptional cases and when a strong case for the relief has been made out.'[5] This, according to the court was particular apposite in the constitutional era as the separation of powers is an important tenet of our constitutional democracy. The crisp issue before me is whether the Applicant has made out a strong case justifying the relief sought.

[8] According to the Applicant, the adjudication process is designed to be expeditious and it estimated that the dispute between the parties would be finalised within a period of eight to twelve weeks. Thus the interdict, if granted, according to

[3] *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC) para 41.
[4] *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 689.
[5] *OUTA* (note 3 above) at 44.

the Applicant, would prevent the Respondent appointing a new contractor or sub-contractor for a period of some twelve weeks. As no work has been done since the Applicant was directed to stop working on the project, a further delay of a few months would, according to the Applicant, not materially prejudice the Respondent but would be materially prejudicial to the Applicant as the Respondent had demanded an amount of R21 million from it as payment on termination of the contract.

Did the Applicant establish urgency?

[9] At the hearing before me on the 10th of August 2017, the Respondent persisted with its contention that the Applicant had not demonstrated urgency. The Applicant contended that after it had removed the scaffolding, it discovered that new scaffolding formwork had been erected at the site and from this it concluded that the Respondent is taking steps to replace the Applicant and appoint a new contractor. The Respondent explained that scaffolding was erected at the temporary structure which houses the Vehicle Tracking System (VTS) while the PCTB is being renovated. The scaffolding was erected to enable the Respondent to have access to the VTS for maintenance. The Respondent argued that had the Applicant made enquiries about the scaffolding, this explanation would have been provided. It was thus submitted that there was no basis to conclude from the existence of the scaffolding around the temporary structure that the appointment of a new contractor was imminent. The Applicant accepted that this may have been the case but contended that the sequence of events reasonably led it to believe that the appointment of a new contractor was imminent.

[10] In 2017, the Applicant was instructed to remove the scaffolding which it did. Thereafter its contract was terminated by the Respondent. The Applicant then discovered that the scaffolding was reinstalled in precisely the same location from where it had been directed to remove it and it was serving the same purpose as it had previously done. A letter from the Applicant requesting an undertaking that no

other contractor would be allowed access to the site pending the resolution of the adjudication went unanswered. It was open for the Respondent to have stated that it was not in the process of appointing another contractor but it chose not to do so. It also appears to me that this project has been delayed considerably and that it is imperative that the work be completed as soon as possible. The project was meant to have been completed in September 2015 and almost two years later, the project has not been completed. As the Applicant's contract had been terminated, another contractor would have to be secured to complete the project. I am of the view that in the circumstances described above, it was not unreasonable for the Applicant to conclude that the appointment of another contactor was imminent and therefore it was not unreasonable for them to approach the court on an urgent basis.

The contention that the Applicant is time barred from referring the dispute to adjudication

[11] In essence the Applicant seeks this interdict pending the adjudication of its dispute with the Respondent. An important component of its case is that as the adjudication process is expeditious, the interdict, if granted, would be of limited duration.

[12] The Respondent however contended that the Applicant has lost its right to adjudication as it was time barred. The dispute resolution provisions[6] require a referral to the adjudicator 'between two and four weeks after the Contractor's notification of the dispute to the Employer and the Project Manager, the notification itself being made not more than four weeks after the Contractor becomes aware of the action.' Mr *Shapiro* in his oral argument, accepted that there was a time period in terms of which the dispute had to be referred to adjudication and he also conceded that the referral had to be to the adjudicator, Mr Poorter. His main contention in this regard was that the letter dated 7th June 2016[7] was the referral to

[6] Pages 137 to 138 of the record.
[7] Page 75 of the record

adjudication and he accepted that if this letter was not a proper referral then the Applicant may well be time barred in making the referral. This concession is based on the fact that the notification of the dispute occurred in a letter sent by the Applicant to the Respondent on the 17th of May 2017. It is apparent from the context and the contents of the letter dated 7th of June 2016 that reference to 2016 was an error and that the correct date of the letter was the 7th of June 2017.

[13] However Mr *Pillay* pointed out that the referral to adjudication letter of June 2017 was not sent to the adjudicator, Mr Poorter and therefore was not a proper referral. It is clear that the letter was not copied to Mr Poorter and the text indicates that the 'notification to Mr Poorter, the nominated adjudicator, will follow in due course.' I pressed Mr *Shapiro* on whether there was any documentary proof that the dispute was in fact referred to Mr Poorter. The best explanation he could provide was based on an e-mail from Mr Morne Gay from Burger Gay Inc[8] which indicated that efforts were made to contact Mr Poorter but that he had not responded either to the e-mail correspondence or to the telephone messages left for him. The suggestion was that the referral of the dispute may have been sent to him when efforts were being made to contact him. But there are no documents in the indexed papers indicating that the referral of the dispute to Mr Poorter had taken place. In the circumstances and on the papers before me, it appears that the Respondent has a credible argument that the Applicant is time barred from referring the dispute to adjudication. At best the Applicant's ability and right to refer the dispute to adjudication is open to serious doubt. This therefore undermines one of the important premises of the Applicant's argument that the duration of the interdict would be a limited one as the adjudication would deliver a speedy outcome.

<u>Did the Respondent unlawfully terminate the contract</u>?

[14] One of the material terms of the contract, based on NEC3, concluded between the Applicant and the Respondent was that the Applicant had to furnish a

[8] Page 140 of the record.

contract performance bond which was to endure for the period of the contract. The contractor, in terms of this clause, had an ongoing obligation to hold a performance bond equivalent to 10 per cent of the value of the contract.

[15] The main argument made by the Respondent was that the Applicant failed to maintain a valid performance bond for the duration of the contract as it was obliged to do. It was not disputed, that the performance bond could only lapse on the earlier of one of the two following circumstances-

1. if the surety received[9] 'notice from the Project Manager stating that a completion certificate for the whole of the works has been issued, that all amounts due from the Contractor as certified in terms of the contract have been received by the employer and that the Contractor has fulfilled all his obligations under the Contract'; or

2. the[10] 'date that the Surety issues a replacement Performance Bond for such lesser or higher amount as may be required by the Project Manager.'

[16] It was common cause that neither of these circumstances existed justifying the Applicant to allow the performance bond to lapse.

[17] Sometime after September 2015 after the 'stop work order' was issued, the Applicant allowed the performance bond to lapse. It was agreed by the parties that, in terms of the contract between the Applicant and the Respondent, this should not have happened. The Applicant therefore acted contrary to the contract by allowing the performance bond to lapse. The Respondent alleged that the Applicant, despite allowing the performance bond to lapse, continued to claim as part of its 'compensation event expenditure' the monthly premiums to hold the bond in place. However, the Applicant is correct that this did not form one the grounds for the

[9] Page 167 of the record
[10] Page 167 of the record

termination of the contract. The Applicant contended further, in this context, that it did not act fraudulently.

[18] It is also clear that the Respondent did not terminate the contract when it first became aware that the Applicant had allowed the performance bond to lapse. On the 22nd of November 2016,[11] the Respondent notified the Applicant that it had come to its attention that the performance bond had lapsed and requested that a valid performance bond be provided. This request was repeated in a letter dated the 17th of January 2017.[12] A draft performance bond for an amount less than 10 per cent of the original contract price was submitted to the Respondent on the 8th of March 2017. The Respondent then terminated the contract on the 12th of May 2017 without engaging further with the Applicant on the issue. The Applicant asserted that Credit Guarantee Insurance Corporation (CGIC) required certain information before a fresh performance guarantee could be issued. The Applicant attempted to get this information from the project manager and received what it characterised as an obstructive and unhelpful response.

[19] In early 2017, the Applicant continued to interact with the Respondent on this issue before submitting the draft performance guarantee on the 8th of March 2017. The Applicant's contention in this regard was that it repeatedly sought the Respondent's assistance to provide information that was required by CGIC. Notwithstanding being able to do so, the Respondent chose not to provide this information nor did it respond to the draft performance bond before terminating the contract. The Applicant submitted that it tried in good faith to obtain a new performance guarantee but was thwarted by the Respondent's refusal to co-operate and provide the assistance required. It further submitted that had the Respondent notified it that the guarantee price was lower than that required, this could have been rectified without delay. It accordingly concluded that the Respondent intentionally took steps to frustrate it being able to provide the performance bond and thereby created a ground for the termination of the contact.

[11] Page 174 of the record
[12] Page 175 of the record

[20] In summary, the Applicant unjustifiably allowed the performance bond to expire and was requested by the Respondent to re-instate it. When requested for information, the Respondent informed the Applicant that 'you (sic) guarantee should be based on your current contract value. You know how much you have claimed and you know how much is left.'[13] As far as contract period and dates, the Respondent stated:[14]

> 'It is entirely up to you how you determine the period in which (sic) you want to keep the performance bond for. The contract requires that valid performance bond to be months or yearly it's up to you'.

[21] Notwithstanding this limited response, the Applicant was able to secure a draft performance bond. The Respondent contended that it was the responsibility of the Applicant to have maintained a valid performance bond for the duration of the contract. It argued that it offered the Applicant an opportunity to provide a valid performance bond when the latter allowed the performance bond to lapse and that it was not under an obligation to provide more information than it provided.

[22] The Applicant would have to persuade the adjudicator, if it can establish that the referral is not time barred, that the Respondent should have provided the information required and its failure to do so frustrated its efforts in submitting a valid performance bond. If it fails to do so, it will not succeed before the adjudicator.

[23] The Respondent further justified the termination of the contract by contending that the Applicant had replaced key staff without its prior consent. On the papers it seems that the Applicant indicated an intention to change personnel but that this was not actually done.

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[13] Page 50 of the record.
[14] Page 50 to 51 of the record.

The balance of convenience

[24] Given the argument that the referral to the adjudicator may be time barred and the highly contested claim by the Applicant that the termination of the contract by the Respondent was prima facie wrongful, it cannot unequivocally be concluded that the Applicant has strong prospects of success. In the light of this, the balance of convenience comes into sharp focus.

[25] In *Olympic Passenger Service (Pty) Ltd v Ramlagan* the court held:[15]

> 'Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less need for such balance to favour the Applicant: the weaker the prospect of success, the greater the need for the balance of convenience to favour him'.

[26] Also relevant in context are the comments made by the Constitution Court in *OUTA*[16] where the court held:

> 'The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define 'clearest of cases'. However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case'.

[15] *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383E
[16] *OUTA* (Note 3) para 47

[27] Also relevant in this context is that the interdict would prevent the Respondent, an organ of state, from exercising its statutory powers. Given what was referred to as the 'separation of powers harm' in *OUTA* when statutory bodies are interdicted from exercising their statutory powers, an interdict should in these circumstances only be granted in the clearest of circumstances.

[28] The Applicant has the option of having the dispute over the termination of the contract considered by the adjudicator in a process which it describes as 'designed to be expeditious.' If it is successful it will be entitled to be compensated by the Respondent. It was accepted by the parties that it would not be legitimate for the Applicant to seek an interdict for the purpose of pressuring the Respondent to continue engaging it (the Applicant) as the contractor to complete the project.

[29] The Applicant in arguing that the balance of convenience favours it, submitted that any delay incumbent upon the granting of the interdict would be insignificant compared to the lengthy delays that the project has experienced thus far. It submitted further that if a new contractor is to be appointed a fresh public procurement process would have to be initiated and this is likely to further delay the completion of the project. It estimated that the appointment of a new contractor would cost the fiscus approximately R3 million more that the costs of allowing the Applicant to complete the project.

[30] In determining whether the balance of convenience favours the granting of the interim interdict, regard must be had to the harm to be endured by the Applicant if the relief is not granted and this must be weighed against the harm that the Respondent will have to bear if the interdict is granted.[17] It is apparent that the delay in completing this project is inhibiting the Respondent in carrying out all its statutory responsibilities relating to the upgrading and maintenance of the Richards Bay Port. It would not have invited tenders for the upgrade of the PCTB had this not been required for it to better and more optimally deliver on its statutory duties. It

[17] Outa (note 2) above.at 33

cannot be ideal that the Vehicle Tracking System, which is vital to the proper functioning of the port, be housed on a temporary structure. The fact that the project has already been delayed does not justify further delays. The grant of this interdict would prevent the Respondent from proceeding with and completing the project until after the adjudication process has been finalised. I am not convinced that the dispute would be finalised in the period suggested by the Applicant.

[31] The period during which the Respondent would not be able optimally to discharge its statutory duties would be extended even though the Applicant has the alternative remedy of proceeding to adjudication and, if successful, to be compensated. Given the arguments that the Applicant is time barred from referring the dispute to adjudication and its highly disputed claim that the Respondent unlawfully terminated the contract, I am of view that this is not an instance of the Applicant having the 'clearest of cases' justifying the granting of an order which restraints an organ of state from discharging its statutory duties. I am satisfied that the balance of convenience favours the Respondent. Not granting the order will enable it to continue with the upgrading of the PCTB and thus improve its effectiveness and efficiency while the Applicant will still be able to ventilate its dispute with the Respondent using the adjudication process and if successful to obtain compensation. I am therefore of the view that the interim interdict should not be granted.

[32] In the circumstances the following order is made:

Order:

1. The application for an interim interdict is dismissed.

2. The Applicant is directed to pay the costs of the application.

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GOVENDER AJ