IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 890/2016

In the matter between:

BABEREKI CONSULTING ENGINEERS CC	Applicant
and	
THE MINISTER: GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA: DEPARTMENT OF WATER AND SANITATION	1st Respondent
VHARANANI PROPERTIES (PTY) LTD	2nd Respondent
THE MINISTER: GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA: DEPARTMENT OF HUMAN SETTLEMENTS	3rd Respondent
BLOEMWATER	4th Respondent
THE PREMIER: FREE STATE PROVINCIAL GOVERNMENT	5th Respondent
NKETOANA LOCAL MUNICIPALITY	6th Respondent
SETSOTO LOCAL MUNICIPALITY	7th Respondent
TOKOLOGO LOCAL MUNICIPALITY	8th Respondent

CORAM:	PHALATSI, AJ
HEARD ON:	15 APRIL 2016
JUDGMENT BY:	PHALATSI, AJ
DELIVERED ON:	19 MAY 2016

[1] The applicant, Babereki Consulting Engineering CC (BABEREKI), approached this court on an urgent basis and on 15 March 2016, CHESIWE AJ, granted the following order:

> "1. The applicant's non-adherence to this court's rules related to time periods and service is condoned, and the application is heard as an urgent application in terms of Rule 6(12).
>
> 2. Pending the final outcome of the proceedings envisaged in prayer 3 below, the first and second respondents are interdicted and restrained from in any way further implementing an agreement concluded between them in or about **October 2015**, and in terms of which the second respondent is to attend to any work related to the construction of any water borne toilet structures in the following towns and their surrounds:
>
> 2.1 The towns of Reitz, Petrus Steyn, Lindley and Arlington falling in the jurisdictional area of the sixth respondent;
>
> 2.2 The towns of Ficksburg, Clocolan and Senekal in the jurisdictional area of the seventh respondent;

2.3 The town of Hertzogville in the jurisdictional area of the eighth respondent.

3. The order contained in prayer 2 above is to serve as an interim interdict with immediate effect, pending the finalisation of an action or application to be instituted by the applicant within 15 days after the date of this order and in terms of which the applicant is to seek declaratory or such other relief as advised, as to the contractual rights of all the parties *vis a vis* each other.

4. Should the applicant fail to institute the judicial process as contemplated in prayer 3 above within the stipulated time period, the interim order shall lapse and be of no force and effect.

5. The cost of this application is to be costs in the proceeding contemplated in prayer 3. Should the applicant fail to institute the said proceeding within the time periods stipulated, the applicant is ordered to pay the costs of the this application.

6. Alternatively to prayer 5 above, the first and second respondents to pay the costs of this application."

[2] The second respondent, Vharanani Properties (Pty) Ltd (VHARANANI), in turn also approached this court on an urgent basis, in terms of the provisions of Rule 6(12) (c), for reconsideration of the application for an interim interdict.

[3] The application for reconsideration was heard on 15 April 2016, and I granted the following order:

> "1. Application for an interim interdict is dismissed with costs.
>
> 2. Costs include the costs of two cousel."

I did not give reasons for the order. I decided that the party who seeks the reasons for the order, can request the reasons in terms of Rule 49 (1) (c) of the Uniform Rules. The applicant has filed the request for reasons. I deliver this judgment in compliance with the said request.

[4] The first issue which was to be decided by the court, was whether Vharanani had complied with the provisions of Rule 6 (12) (c), in that the order of Chesiwe AJ was granted in its absence. It is common cause that when the matter was argued and the order granted by Chesiwe AJ, Vharanani was neither present in court, nor represented. The order was therefore granted against it in its absence. It is the case of Vharanani that Babereki, the applicant, did not serve the application on it and it therefore did not receive notice of the application and that it was going to be heard on the 15th of March 2016. The two documents that served before court in respect of notice to Vharanani, come from the sheriff of Sandton South. They state as follows:

> **"NON – SERVICE Notice of Motion with Founding Affidavit and Annexures**

> On the 25 February 2016 at 13:55 at 5th Fredman Towers, 13th Fredman Drive, Sandton, the Notice of Motion with Founding Affidavit and Annexures could not be SERVED as the premises at given address was found vacant and locked.
>
> **SERVICE Notice of Motion with Founding Affidavit and Annexures**
>
> On the 9 March 2016 at 10:08 at 5th Fredman Towers, 13th Fredman Drive, Sandton, being the principal place of business of the 2nd respondent Vharanani Properties (Pty) Ltd. I duly served a copy of the Notice of Motion with Founding Affidavit and Annexures by affixing copies of the abovementioned documents to the outer and principal door of the said premises. No other services possible after diligent search at the given address. Rule 4(1)(a)(v).
>
> Note: Premises is vacant & locked."

Rule 6(12) (c) of the Uniform Rules provides as follows:

> "A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order. "

It was initially contended on behalf of Babereki that the address mentioned in the sheriif's documents is the address that Vharanani chose as its *domicillium* in its contract with the Department of Water and Sanitation (VHARANANI CONTRACT) and therefore service on the address is good service even though the premises were found vacant and locked. It is common cause that Babereki is not a party to the Vharanani contract. It is trite that a *domicilium* clause in a contract is binding only as between the contracting parties. See

AMCOAL COLLIERS LTD v. TRUTER 1990 (1) SA 1 (A). In the light hereof, this argument was consequently abandoned, and it became common cause that Vharanani did not receive notice of the application and it was therefore entitled to apply for reconsideration of the order in terms of Rule 6(12)(c).

[5] The facts relied upon by Babereki in its application for an interim interdict against the respondents, are briefly, the following:

> That on the 1st of November 2013, Babereki and Bloemwater concluded a written agreement (BABEREKI CONTRACT), in terms of which Babereki was appointed as a Turnkey Contractor for supervision and implementation of engineering services as well as the physical construction of identified toilet structures. It is further alleged that Babereki was appointed to construct the toilet structures in the Nketoane, Setsoto and Tokologo Muncipal areas. On 21 July 2015, Babereki submitted an invoice in the amount of R50 196 079.50 to Bloemwater, which to date Bloemwater has failed to pay. Bloemwater, in a letter to Babereki dated 4 November 2015, stated that it would pay the said amount upon receipt of sufficient funds from the Department of Water and Sanitation. During August 2015, Babereki abandoned the site because of non payment of its invoice and referred the matter for arbitration in terms of the contract. On the 10th of February 2016, Babereki received a call from a Municipal official that the works were continuing on the construction site. On further investigation, it emerged that the Department of Water and Sanitation had concluded an agreement with

Vharanani Properties (Pty) Ltd during October 2015. In terms of the new contract, Vharanani was appointed as a turnkey contractor, under the bucket eradication programme, to attend to construction and planning (including design through an appointed engineer) for toilets in the Kopanong, Tokologo, Setsoto and Nketoane areas. Clause 2.6 of the said contract states as follows:

"2.6 The following is a list of projects to be implemented by the SERVICE PROVIDER:

PROVINCE	MUNICIPALITY	PROJECT	TOTAL UNITS
Free State	Kopanong	Fauresmith Reddersburg	33 205
	Tokologo L.M	Dealesville Boshof Malebogo/ Hertzogville	1290 300 1020
	Setsoto L.M	Ficksburg Senegal Clocolan	1469 2913 3379
	Nketoana	Petrus Styn Lindley Arlington Reitz	960 900 1192 739
TOTAL UNITS			15145

It is further contended that the said contract infringes upon the rights Babereki have in contract to the same

performance, as it relates to the provision of the same services on the same areas.

[6] **APPLICABLE LEGAL PRINCIPLES**

The applicant for an interim interdict is required to satisfy the following requirements to justify the granting of same:

1. A *prima facie* right.
2. A well grounded apprehension of irrepairable harm.
3. A balance of convenience.
4. That he has no alternative remedy.

[7] **APPLICATION OF THE LEGAL PRINCIPLES TO THE FACTS**

Prima facie right

It is the case of Babereki that the contract between the Department of Sanitation and Vharanani infringes upon the contractual rights that Babereki has against the Department and Bloemwater. The contract between the Department and Vharanani clearly stipulates the services that Vharanani has to provide as well as the areas, towns and total units in which such services have to be rendered, as set out in paragraph 2.6 of the said paragraph, which is quoted in full in paragraph 5 hereof. It was therefore incumbent upon Babereki to establish that in terms of its contract with Bloemwater, they also have to provide the same services in the same areas in respect of the same units as those provided by Vharanani.

The contract between Babereki and Bloemwater does not specify the Municipalities in which Babereki has to render the services. In the definitions of the said contract, "Municiapality" is defined as meaning municipalities as referred to in the scope of works. The scope of works referred to in the contract is not attached to the contract itself. The said document is also not attached to the founding affidavit. It is therefore not possible, *ex facie* the contract, to determine the areas or the municipalities in which Babereki was contracted to provide the services. During argument, I was referred to the proposal by Babereki to Bloemwater, which forms part of the agreement in terms of the definition of the term "agreement" in the contract. The said document however, does also not stipulate the areas, towns or municipalities in which the services are to be redendered. In dealing with the contract between Babereki and Bloemwater, the following is said in paragraph 20.2.8 of the founding affidavit: "Most relevant to this proceedings, Babereki was appointed to construct the toilet structures in the Nketoana, Setsoto and Tokologo Municipal areas. All the reference documents (the scope of the works etc.) were appended". I have already stated that the scope of works is not attached to the papers and that, other than this bear averment, no documentation was attached to show that Babereki was indeed appointed to construct toilet structures in the said municipalities. The claim of Babereki against Vharanani is based on an alleged interference with Babereki's contractual rights. It is imperative that Babereki

has to attach all documents from which its contractual rights emanate. This it has failed to do, as I have shown above.

I therefore find that Babereki has failed to establish a *prima facie* right which would entitle it to be granted an interim interdict against the respondents. In the light of this finding, I do not find it necessary to deal with the other requirements for an interim interdict. On this ground alone, the application for an interim interdict should be dismissed.

[8] The next question to be decided is the one of costs, as Vharanani asked for the costs of two counsel. In its opposing affidavit to the application for reconsideration, Babereki refers to the Vharanani contract as a Billion Rand construction contract. This clearly signifies how much was at stake for Vharanani for the matter to be properly handled. Vharanani also states that it has ongoing total monthly expenses attendant upon the servicing of its contract with the Minister in excess of R9.5 million. This project also affects large communities that have to be provided with running water toilets. On the basis of these considerations, I find that in this matter, Vharanani is entitled to the costs of two counsel.

[9] In the result, the following order is made:

1. The application for interim interdict is dismissed.
2. The Applicant, Babereki Consulting Engineers is ordered to pay the costs of the second Respondent (Vharanani Properties) which costs include the costs of two counsel.

N.W. PHALATSI, AJ

On behalf of applicant: M Khang
Instructed by:
Mphafi Khang Inc.
Bloemfontein

On behalf of 2nd respondent : Advocate GI HOFFMAN SC and
Adv. TL MAROLONG
Instructed by:
Ramabulana Attorneys
C/O Bezuidenhouts
BLOEMFONTEIN

/PC