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 No.: **4375/2021**

In the matter between:

NALA LOCAL MUNICIPALITY Applicant

and

DANIE VAN HEERDEN First Respondent

QUILL ASSOCIATES (PTY) LTD Second Respondent

JUDGMENT BY: I VAN RHYN, AJ

HEARD ON: 4 NOVEMBER 2021

DELIVERED ON: 1 DECEMBER 2021

INTRODUCTION.

[1] The applicant, Nala Local Municipality as envisaged in the Local Government Municipal Structures Act 117 of 1998, approached this court on an urgent basis on Thursday 23 September 2021. A rule *nisi* was issued calling upon the second respondent to show cause on or before the 28th of October 2021 why the following orders should not be made final:

1.1 Respondent is ordered to re- open and install the full working and full functions of the BIQ system/financial system with immediate effect from granting of the order herein until the tender process is finalized and a service provider is appointed;

1.2 The appointment of the respondent as a service provider for the BIQ system referred to in paragraph 2.1 to continue on a month-to-month basis until the event of finalization of the tender process and appointment of a service provider as referred to in 1.1;

1.3 The respondent, as present service provider, be stopped from closing the BIQ System of the applicant until the tender process, referred to in 1.1 is finalized and a service provider is appointed;

1.4 The respondent to pay the costs of the application

[2] The orders granted in paragraph 1.1, 1.2 and 1.3 served as an interim interdict with immediate effect until a final order is granted. It was ordered that the rule *nisi* had to be served upon the respondent.

[3] On Sunday, 26 September 2021 the applicant issued an urgent application for contempt of court against the first respondent which was set down for hearing on Monday, 27 September 2021 at 10h00. Counsel appeared on behalf of the respondents at the hearing of the urgent contempt of court application. The contempt of court application was postponed to 14 October 2021. The respondent was to file an answering affidavit on 5 October 2021, with a replying affidavit, if any, on or before 12 October 2021. The respondents undertook to comply with the order granted on 23 September 2021 before 15h00 on 27 September 2021 as an interim measure. Costs stood over for later determination.

[4] Before court there are two applications namely, the application for contempt of court as well as the second respondents counter application for the reconsideration of the order granted on 23 September 2021 in terms of the provisions of rule 6(12)(c) of the Uniform Rules of Court, alternatively for rescission of the order granted on 23 September 2021 in terms of the

provisions of rule 42(1)(a), further alternatively, in terms of the provisions of rule 31(2)(b).

BACKGROUND.

[5] The facts pertaining to the dispute which lies at the heart of these applications concern the BIQ Computer Software Program ("BIQ system") provided by Quill Associates (Pty) Ltd, the second respondent, a company with registered address situated at 741 Petrus Street, Waterkloof, Pretoria, Gauteng Province to the applicant. The first respondent, Mr. Danie van Heerden is the sole director of the second respondent and is residing at the same address as the abovementioned registered address of the second respondent.

[6] On 1 March 2012, at Bothaville the applicant, whom is responsible for the municipal areas of Bothaville and Wesselsbron, Free State Province, and the second respondent, duly represented by the first respondent entered into a written licence agreement or a service level agreement ("the agreement") in terms whereof the second respondent granted to the applicant a non-transferable licence for a period of 36 months calculated from 1 March 2012. The licence entitles the applicant to use the BIQ system for purposes of managing the business of the applicant and includes additional services such as implementation assistance, guidance and professional services required by the applicant to ensure the successful operation of the BIQ System.

[7] In terms of the agreement the applicant undertakes to pay all invoices received from the second respondent within 30 days of delivery thereof. If payment of any invoice(s) does not reach the second respondent within the 30-day period, the second respondent will issue a final notice for payment containing a specified period granted for such payment. The second respondent may disable the BIQ System if payment is not made on or before the date specified in the final notice. In the event of failure by the applicant to settle invoices, the use of BIQ system will be ceased.

[8] The agreement shall terminate in the event of the applicant failing to effect payment of any invoice(s) received from the second respondent for either services rendered or the monthly instalment despite demand. There after the applicant is obliged to remove all programs relating to the BIQ System from its

servers and computers. The agreement constitutes the entire agreement between the applicant and second respondent and no variation or substitution of any clause of the agreement will be effective unless reduced to writing and signed by both parties.

[9] The initial period of 36 months expired during 2015, where after the agreement continued on a month-to-month basis. It is common cause that the applicant failed to fully pay all the invoices issued by the second respondent for services rendered in terms of the agreement. Applicant concedes that it is indebted to the second respondent in an amount of "more or less R9 000 000.00". On 13 September 2021 the amount due was R 8 558 142.65.

[10] On 3 October 2019 the second respondent delivered a final notice as envisaged in the agreement for payment of the unsettled balance by way of monthly instalments in the amount of R1 million in addition to other monthly fees. In terms of clause 6.1.3 of the agreement, the agreement shall terminate immediately upon any attempt by the applicant to assign, sublicence or otherwise transfer the agreement or any of its rights in terms of the agreement.

[11] On 30 July, 2021 the applicant resolved to issue a tender in respect of the services provided by the second respondent. With reference to the tender process for an alternative financial system the second respondent, on 7 September 2021 enquired as to the existence and continuance of a subsequent agreement allegedly concluded between a representative of the applicant and the first respondent during November 2019. The subsequent agreement had been reduced to writing and signed on behalf of the second respondent, however, notwithstanding several promises by the previous municipal manager of the applicant to see to the signing of the agreement, the applicant failed to commit to the undertaking to sign the agreement. This application is to be adjudicated upon the terms of the original agreement concluded between the parties. The second respondent requested a response relating to the termination of the agreement due to the tender process being issued, before close of business on Friday 10th of September 2021.

[12] On 14 September 2021 the acting municipal manager replied on behalf of the applicant and confirmed that a tender process has been embarked upon since the agreement concluded between the applicant and second respondent had come to an end. Due to the process to be followed for the appointment of an alternative service provider, the applicant, in writing, requested that the agreement be continued on a month-to- month basis until completion of the tender process. An offer to continue paying for the outstanding fees due to the second respondent is included in the letter.

[13] In response, the second respondent indicated in a letter dated 17 September, 2021 that it is evident that the applicant considers the agreement to have terminated. All amounts due to the second respondent is therefore payable and after settlement of the amount due, further negotiations regarding the continued use of the BIQ System may be entered into.

THE APPLICANT'S URGENT APPLICATIONS OF 22 SEPTEMBER 2021 AND 23 SEPTEMBER 2021.

[14] The BIQ system enables the applicant to operate all its financial and human resources requirements and activities with the result that the applicant is not able to function properly without the BIQ system. On 14 September 2021, at 20h00 second respondent deactivated the BIQ System. On 22 September 2021 the applicant issued an urgent application (the "first urgent application") for interdictory relief against the second respondent. The founding affidavit was commissioned on the 21st of September 2021 and the application was heard as a matter of urgency by Loubser J on 22 to September 2021 at 14h00. Notice of the application was served per electronic mail ("e-mail") upon the second respondent.

[15] The first urgent application resulted in an order in terms of the notice of motion set out above and compelling the second respondent to re-open and install full function of the BIQ system with immediate effect. On 23 September 2021, the applicant filed a notice of abandonment of the order granted the previous day, evidently due to the fact that the application was served per e-mail at an incorrect e-mail address. The first application was re- issued, with

a supplementary affidavit deposed to by N. E. Radebe, the acting municipal manager of the applicant, explaining the mistake made regarding the incorrect e-mail address. The second urgent application was set down for hearing at 16h30 on 23 September 2021. Approximately an hour prior to the matter being heard, at 15h32:59, the application was served per e-mail upon the respondents at danie@biq.co.za and biq@biq.co.za .

[16] The application was unopposed and an order in accordance with the notice of motion was granted in chambers by Loubser J. The notice of abandonment as well as the first order granted on 22 September 2021 was sent by e-mail to second respondent on 23 September 2021. The first respondent received the said e-mail. The second urgent application was delivered per e-mail upon the respondents' attorney on 23 September 2021 at 16h37. Subsequent to obtaining the second order, same was served per e-mail upon the first respondent and the respondent's attorney at 17h48 on 23 September 2021.

[17] Due to the first respondent's failure to adhere to the order granted on 23 September 2021 the applicant issued an urgent application for contempt of court on 26 September 2021. The contempt of court application was served per e-mail upon the first and second respondents on Sunday, 26 September 2021 and heard on Monday, 27 September 2021 at 10h00. The non-compliance with the provisions of the prescribed times and process including the manner of service was condoned and a rule *nisi* was issued calling upon the first respondent to show cause on or before the 11th November 2021 why he, as the managing director of the second respondent, should not be found guilty of contempt of court and four months imprisonment be imposed, suspended for two years on condition that the first and/or second respondents fully comply with the order granted on 23 September 2021 within 6 hours of granting of the order.

APPLICANT'S ARGUMENTS.

[18] Mr. Burger SC, counsel on behalf of the applicant argued that the provision of services in terms of the agreement to the applicant by the second respondent continued on a month-to-month basis subsequent to the termination of the agreement. The first respondent, despite the continuation of the agreement,

de-activated the BIQ System on 14 September 2021. This caused unsurmountable problems to the applicant which *inter alia*, included the inability to provide municipal services to the ratepayers and residents within the Bothaville and Wesselsbron area. Without access to the BIQ System, the applicant is unable to pay salaries to its employees or make payments to its creditors with the consequential inability to perform any functions of a financial nature resulting in devastating consequences.

[19] The municipal council of the applicant, on 30 July 2021, resolved at a meeting to issue a tender process as it is obliged to do, due to the termination of the agreement between the applicant and the second respondent. It was envisaged that a recommendation for the appointment would be made by 30 September 2021, followed by an appointment of the new service provider to commence with effect from 15 October 2021.

[20] Applicant contends that the first respondent, on his own version, became aware of the order granted on 23 September 2021 at 17h28 when he read the e-mails received from the applicant's attorney. Notwithstanding notice to the first respondent of the mandatory interdict granted on 23 September 2021 ordering the re- activation of the BIQ System, the BIQ system was not re-activated and therefore the first respondent's failure constitutes contempt of court.

[21] At the hearing of this matter an affidavit in terms of the provisions of rule 6(5)(e), deposed to by N K Radebe, was handed in to explain the service of the first application per e-mail on 22 September 2021. The deponent confirms receipt of the said e-mail at approximately 22h17. It is furthermore explained that due to the Apple Mail Default Application no so called "read report" is available. The applicant contends that, on the basis that N K Radebe received the first application as one of the designated recipients, it can be assumed that the first respondent, to whom it was sent as a further recipient, must have received the same e-mail. The e-mail address of the second respondent, yet a further recipient, was however incorrect. The applicant's attorney furthermore sent a text message on 23 September 2021 at17h48 confirming that a copy of the second order was sent to the respondents'

attorney as well as to the respondents. The text message included a request to comply with the court order.

THE COUNTER APPLICATION.

[22] The respondents not only oppose the application by the applicant but, in terms of an urgent counter application the court is requested to reconsider and set aside the second order granted on 23 September 2021 on the following grounds:

22.1 the order was granted without adequate or any notice of the application to the second respondent;

22.2 the jurisdiction of the court was not established by means of the founding papers and the court had no jurisdiction to grant the order of 23 September 2021;

22.3 the relief granted is academic and perpetual;

22.4 none of the jurisdictional requirements to succeed with the relief sought by the applicant were satisfied;

22.5 there cannot be contempt of an order of court which was wrongly sought and granted.

[23] I intend to firstly deal with the counter application for the reconsideration of the order granted on 23 September 2021 in terms of the provisions of rule 6(12)(c) for the order to be set aside, alternatively struck from the roll, further alternatively be dismissed. In the alternative the rescission of the order in terms of rule 42(1)(a) or rule 31(2)(b) or in terms of the common law. Applicant prays for an order dismissing the counter application with costs on an attorney and client scale inclusive of the costs incumbent upon employment of senior counsel and for an order in terms of its application for contempt of court.

JURISDICTION.

[24] In terms of the provisions of rule 6(12)(c) the person against whom an order was granted in such person's absence in an urgent application, may by

notice, set down the matter for reconsideration of the order. The general rule that a court has no power to set aside or alter its own final order, as opposed to an interim or interlocutory order, was a reaffirmed in **Freedom Stationary (PTY) Ltd and Others v Hassam and Others**.[1] The exception to this general rule is when the order was made in default of appearance of the party that seeks to have the order rescinded. Rule 6(12)(c) provides that 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. The approach by the court is a comprehensive revisit of the circumstances as they present at the time of the reconsideration[2].

[25] The second respondent, in whose absence the order of 23 September 2021 was granted, gave notice of the set down of the matter for reconsideration on 14 October 2021, which was the date for the hearing of the applicant's contempt of court application. Both the contempt of court application and the second urgent application was postponed to 4 November 2021.

[26] Mr Heyns SC, counsel on behalf of the respondents contends that the court did not possess the necessary jurisdiction to grant the urgent mandatory and prohibitory relief. It is trite law that the applicant bears the onus of establishing the court's jurisdiction and to set out sufficient facts to justify a conclusion of jurisdiction.[3] Section 19(1) of the Supreme Court Act 59 of 1959 (now replaced however the provisions are still applicable) endows a provincial or local division of the High Court with jurisdiction in civil matters "… over all persons residing or being in and in relation to all causes arising …. within its area of jurisdiction…". It is not in dispute that the first respondent is residing in Pretoria and the registered address and place of business of the second respondent is also Pretoria. The respondents are therefore *peregrini* of this court. The respondents are neither "residing" nor "being in" the area of this court, and the issue remaining is whether it can be said, on the facts of this case, that "all causes arising" within the area of jurisdiction of this court are present. First, it

[1] 2019 (4) SA 459.
[2] ISDN Solutions (Pty) Ltd v CSN Solutions CC & Others 1996 (4) SA 484 (W) at 486H-J.
[3] Titty's Bar and Bottle Store (PTY) Ltd v ABC Garage (PTY) Ltd and Others 1974 SA 362 (T) at 368 H.

must be established what is meant by "all causes arising" within the meaning of s.19(1).

[27] In **Cordiant Trading CC v Daimler Chrysler Financial Services PTY Ltd**[4] Jafta JA succinctly put it at as follows:

"Plainly, what is meant in the above interpretation is that 'causes arising' *does not refer to causes of action but to all factors giving rise to jurisdiction under the common law."*[5]

[28] The jurisdiction of a court to grant an interdict is explained in the work of Forsyth on Private International Law[6] to be as follows:

"The law on jurisdiction in regard to interdicts may thus be summed up as follows: First, if the respondent is an *incola,* the court may assume jurisdiction to grant an interdict (whether mandatory of prohibitory) no matter if the act in question is to be performed or restrained outside the court's area. Secondly, if the respondent is a *peregrine*, it is essential for reasons of effectiveness, that the act to be performed or restrained be within the court's area."

[29] In **Metlika Trading Ltd and Others v Commissioner, South African Revenue Service**[7] the Supreme Court of Appeal confirmed Forsyth's view that, for purposes of an interdict, whether mandatory or prohibitory, relating to acts to be performed outside of the court's jurisdiction, the court could grant an interdict if the respondent is an *incola* of the court.

[30] Counsel on behalf of the applicant placed reliance on the work of **Prest: The Law and Practice of Interdicts**[8] and argued that the court will have jurisdiction if the cause arose or the contract in respect of which the proceedings are being brought was entered into within such area. The issue, therefore is whether the legal proceedings in this application can be said to have arisen within the area of jurisdiction of this court. The legal proceedings are based on facts relied upon by the applicant from which legal inferences may be drawn. In **Estate Agents Board v Lek**[9] Trollip JA, held as follows:

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[4] 2005 (6) SA 205 (SCA).
[5] At [11].
[6] 5th Edition p 249.
[7] 2005 (3) SA 1 (SCA).
[8] At 269.
[9] 1979 (3) SA 1048.

"I therefore turn to consider whether the court a quo had jurisdiction in these proceedings according to the general principles of our law. That depends on (a) the nature of the proceedings, (b) the nature of the relief claimed therein, or (c) in some cases, both (a) and (b)."[10]

[31] The second defendant's uncontested evidence is that the de-activation of the BIQ system as well as the re-activation occurred at Pretoria. There is no evidence in the founding affidavit to suggest why the court has jurisdiction to grant either a mandatory or a prohibitory interdict, or both against the second respondent, a peregrinus of this court. In **Kibe v Mphoko and Another**[11] it was held that where the respondent is a *peregrinus*, the court has jurisdiction "... in the case of a mandatory interdict, the act is to be carried out within such area, or in the case of a prohibitory interdict, if the act against which an interdict is claimed is about to be done in such area"[12]

[32] In the circumstances, where the uncontested evidence is that the act to de-activate and re-activate the BIQ system was performed in Pretoria, I am not convinced that the court was clothed with the necessary jurisdiction to grant the interim order in the form of a mandatory and/or prohibitory interdict.

SERVICE OF THE SECOND APPLICATION AND THE APPLICATION FOR CONTEMP OF COURT.

[33] It is a cornerstone of our legal system that a person is entitled to be notified of legal proceedings against him or her.[13] The principle of *audi alterem partem* is therefore sacrosanct in our legal system with the result that the only times that a court shall consider a matter without a litigant's knowledge are in exceptional circumstances. Generally, process must be brought to the notice of the party against whom legal proceedings are instituted by serving a copy of the process and any annexures to it in the manner directed by the Uniform

[10] At 1063 F.
[11] 1958 (1) SA 364 (O).
[12] At 367A.
[13] Steynberg v Cosmopolitan National Bank of Chicago 1973 (3) SA 885 (RA) at 892 C.

Rules of Court and by explaining its nature and contents to the person upon whom service is effected.[14]

[34] Rule 4 provides as follows:

"(1)(a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one of the following manners:..."

Though it is not explicitly stated, rule 4 appears to contemplate that, if possible, service should be personal. In **Prism Payment Technologies (PTY) Ltd v Altech Information Technologies (PTY) Ltd and Others**[15], Lamont J confirmed the purpose of rule 4 in the following terms:

"[21] The purpose of rule 4 is to provide for a mechanism by which relative certainty can be obtained that service has been effected upon a defendant. If certain minimum standards have been complied with as set out in the rule, then the assumption is made that the service was sufficient to reach the defendant's attention and his failure to take steps is not due to the fact that he does not have knowledge of the summons. The converse is not true – namely that if service is not effected as required by the rule, the service is not effective – in that the purpose for which service is required was fulfilled, namely the defendant came to know of the summons. The rules, as was pointed out by Roux J in *United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W), set out procedural steps. They do not create substantive law. Insofar as the substantive law is concerned, the requirement is that a person who is being sued should receive notice of the fact that he is being sued by way of delivery to him of the relevant document initiating legal proceedings. If this purpose is achieved, then, albeit not in terms of the rules, there has been proper service."

[35] In this matter and due to the ineffective service of the first urgent application on 22 September 2021 the applicant abandoned the first order and e-mailed the notice of abandonment to the first respondent subsequent to a telephonic conversation with the secretary of the first respondent to confirm the correct e-mail address. The respondents received the notice of abandonment and the first order at approximately 14h00 on 23 September. The email was forwarded to the respondents' attorneys.

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[14] Botha v Botha 1965 (3) SA 128 (e) at 130F-G.
[15] 2012 (5) SA 267 (GSJ) at [21].

[36] The Heritage Day (24 September) long weekend commenced on Thursday afternoon, 23 September 2021. The attorney acting on behalf of the respondents however decided to telephonically contact the applicant's firm of attorneys and was then able to obtain the attorney's cell phone number to discuss the possibility of any further applications. On 23 September2021 at 16h17 the conversation between the applicant's attorney and the respondent's attorney took place during which the respondents' attorney requested that in the event of any further legal proceedings such should be delivered by hand to the respondent's attorney. This request was subsequently confirmed per email on 23 September 2021 at 16h29.

[37] At 16h37 (8 minutes later) on 23 September 2021 the applicant's attorney responded to the letter and appended the second urgent application that was set down for hearing on 23 September 2021 at 16h30, being 7 minutes prior to the delivery of the email to the respondents' attorney. The applicant had by then e-mailed the second urgent application to the respondents at 15h32. This e-mail with the second urgent application was allegedly not received by the first respondent. The first respondent explained that he had by then left for the long weekend and did not receive the e-mail. He was not aware of the second application.

[38] On their respective returns from the long weekend on Sunday evening, 26 September 2021 both the respondents' attorney as well as the first respondent received, via e-mail, not only the order granted on the 23rd September 2021 but also the application for contempt of court. The order obtained on 23 September 2021 was sent via e-mail to the respondents' attorney and the first respondent at 17h48 on 23 September 2021 after both the attorney and the first respondent had already departed for the long weekend.

APPLICALBLE LEGAL PRINCIPLES.

[39] The nature of the relief sought is not such that an *ex parte* order could have been justified. The second order was obtained without any forewarning. When an applicant contemplates any application in which it is considered necessary to truncate the times for service provided for in the Rules of Court,

attention to use all reasonable steps to mitigate such truncation must be taken. In a matter in which less than a day's notice is thought to be justifiable, all reasonable steps to ameliorate the effect thereof on a respondent is necessary.

[40] Rule 4(1)(aA) of the Uniform Rules of court provides that "Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings". In **BHP Billiton Energy Coal South Africa Ltd v Minister of Mineral Resources and Others**[16] the court held that it is clear that rule 4(1)(aA) applies to proceedings already instituted and therefore applies to ancillary and interlocutory applications. In the present matter the attorney acting on behalf of the respondents had not placed herself formally on record prior to the launching of the urgent applications and therefore the reliance on delivery of the applications per e-mail upon the respondents' attorney does not constitute proper service.

[41] Rule 4A provides as follows:

> "(1) Service of all subsequent documents and notices, not falling under rule 4(1)(a), in any proceedings on any other party to the litigation may be effected by one or more of the following manners to the address or addresses provided by that party under rules 6(5)(b), 6(5)(d)(i) ....., by
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> (a) hand at the physical address for service provided, or
> (b) registered post to the postal addres provided, or
> (c) facsimile or electronic mail to the respective addresses provided"

[42] The applicant's attorney should have informed the respondent telephonically about the decision to bring an urgent application as soon as the decision was made to launch the first urgent application. The failure of the applicant's attorney to inform the respondents' attorney about the second urgent application during their telephonic conversation is concerning, to say the least. The comprehensive procedure set out by Sutherland J in **South African**

[16] 2011 (2) SA 536 (GNP) at 542I.

Airways Soc v BDFM Publishers (Pty) Ltd[17] pertaining to service of an urgent application, is applicable to the present matter.

[43] There is consequently no evidence before this court that effective service of the second urgent application was effected. The first application (abandoned) as well as the second was brought with extreme urgency even though the applicant waited 8 days before launching the first urgent application. There is no reason why the respondents were not notified of the application in advance. The applicant's contention that the first respondent should have enquired from the applicant's attorney what the position was pertaining to service of the second application due to the fact that he was at that time already notified of the abandoned first application, is farfetched.

[44] The respondents, later on, scrutinized the e-mails received on 22 September 2021 to ascertain the reason why the emails of 22 September 2021 pertaining to the first application and the order on that date were not received. An expert was consulted to provide a report regarding the reason for such failure. According to the information technology specialist, one of the most common reasons for not receiving an email from a sender is that the service providers set their system to block e-mails exceeding certain sizes. The respondents requested a so called "read report" to be submitted by the applicant regarding the transmission of the e-mail on 22 September 2021. The applicant then explained that the laptop of the attorney who sent the e-mail is not setup to send read receipts with the result that a read report is not available.

[45] The onus of convincing the court in respect of compliance with the provisions of rule 4 rests upon the applicant. In my view, the deliberate failure of the applicant to inform the respondents about the second urgent application, together with the inadequate service do justify a dismissal of the applicant's application on those grounds alone.

CLEAR RIGHT.

[17] 2016 (2) SA 561 (GJ) at 571C – 573B and [26] in particular.

[46] The applicant in the founding affidavit merely contends that it has a *prima facie* right, supposedly based on the agreement for the delivery of the BIQ system on a month-to-month basis. The approach to be followed in establishing whether an applicant has complied with the requirements for an interdict were set out in **Spur Steak Ranches Ltd and Others v Saddles Steak Ranch, Claremont and Another**: [18]

> "In determining whether or not the applicants crossed the threshold, the right relied upon for a temporary interdict need not be shown by a balance of probabilities, it is enough if it is prima facie established though open to some doubt.
>
> The proper approach is to take the facts set out by the applicants together with any facts set out by the respondents, which the applicants cannot dispute, and to consider whether having regard to the inherent probabilities the applicants should, not could, on those facts obtain final relief at the trial.
>
> It is also necessary to repeat that although normally stated as a single requirement, the requirement for a right prima facie established, though open to some doubt, involves two stages. Once the prima facie right has been assessed, that part of the requirement which refers to the doubt involves a further enquiry in terms whereof the Court looks at the facts set up by the respondent in contradiction of the applicants' case in order to see whether serious doubt is thrown on the applicant's case and if there is a mere contradiction or unconvincing explanation, then the right will be protected. Where, however, there is serious doubt then the applicant cannot succeed."

[47] The respondents deny that the applicant had any right with which the second respondent unlawfully interfered. The respondents further argue that the resolution dated 30 July 2021 terminated the month- to- month agreement with effect from 30 August 2021. The applicant disputes the allegations by the respondents that a final notice for payment was issued to the applicant, that any such notice specified any period within which time payment of any arrear amount had to be made or that, if payment was not effected within such period, the BIQ system will be deactivated. In this regard the respondents relied on the letter of demand dated 3 October 2019.

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[18] 1996(3) SA 706 (C) at 714E-G

[48] On the applicant's version a request was sent to the first respondent to continue with the contract on a month-to-month basis. Whether an applicant has a right is a matter of substantive law. The onus is upon the applicant to establish the fact and evidence which prove a clear and definite right in terms of the substantive law. The month-to-month agreement was terminated by the applicant. Therefore, there existed no agreement upon which the applicant can claim a *prima facie* right.

[49] The interim relief obtained by the applicant is pending the finalization of a tender process and the appointment of an alternative service provider at the latest on the 30th of September 2021. However, the respondent provided proof that the Acting Member of the Executive Council of the Provincial Government, Free State Province had notified the applicant, in writing on 21 September 2021, that all procurement processes dealing with service delivery is to be suspended due to financial restraints. The tender process referred to in the applicants second urgent application and in terms of which the interim order was subsequently granted, was not proceeded with at the time when the order was sought.

[50] No tender process exists in terms of which an alternative service provider will be appointed as envisaged in the order granted on 23 September 2021. I agree with the contention on behalf of the respondents that the second respondent is held hostage whilst the applicant had full knowledge of the fact that no tender will be awarded in the immediate future as envisaged in the order granted by Loubser J. This is notwithstanding the fact that on the applicant's own version the amount of approximately R9 000 000.00 is due and owing to the second respondent.

CONCLUSION.

[51] Even if the finding in respect of the court's lack of jurisdiction is wrong, I am not convinced that service of the second application was effected in terms of Rule 4. In **South African Airways Soc v BDFM Publishers (Pty) Ltd and**

Others[19], it was held that where the applicant had in effect approached the Court on an *ex parte* basis and had not disclosed all the material facts, such as the fact that the tender proceess was suspended, the application should be dismissed. The applicant has failed to make out a case for the mandatory and/or prohibitory interdictory relief sought and the interim interdict granted on 23 September 2021 should be set aside.

[52] As a result the contemp of court order should also be set aside .

COSTS.

[53] The respondents seek costs orders in respect of the contemp of court application and the second urgent application on a punitive scale. The first urgent application culminated into an abandonement of the order on the basis of a dismal failure to follow the rules pertaining to service of process. I agree with the argument on behalf of the respondents that the applicant elected, notwithstanding the admision regarding failure to serve the first application upon the respondents, to "sneak an order" on 23 September 2021 by affording the respondents (both from Pretoria) less than an hour's notice by means of e-mail. The application came to the knowledge of the first respondent after it was already heard by Loubser J.

[54] I am of the view that convincing reasons were advanced for an punitive cost order against the applicant.

ORDER:

[55] In the result the following orders are granted:

1. The interim order granted in favour of the applicant on 23 September 2021 is set aside.

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[19] 2016 (2) SA 561 (GJ).

2. The applicant is ordered to pay the costs of the counter application on a scale as between attorney and client inculsive of costs consequent upon the employment of senior counsel.
3. The contempt of court order granted on 27 September 2021 is set aside.
4. The applicant is ordered to pay the costs of the contempt of court application on a scale as as between attorney and client inculsive of costs consequent upon the employment of senior counsel.

I. VAN RHYN A J

On behalf of the Applicant:	ADV. A H BURGER SC
Instructed by:	FINGER ATTORNEYS
On behalf of the Respondents SC	ADV. G.F HEYNS
Instructed by: ATTORNEYS	MARTINS