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In the High Court of South Africa
KwaZulu-Natal Local Division, Durban

Case No: 4172/2015

In the matter between:

Dr Leon Yaseen Perumal — Applicant

And

Ahmed Al-Kadi Private Hospital Ltd — First Respondent
Dr Jackpersad — Second Respondent

Judgment

Lopes J

[1] The first respondent in this application, the Ahmed Al-Kadi Private Hospital Ltd, has embarked upon the building of a private hospital in the Mayville area. It is anticipated that construction will be completed, and the hospital will be functional by February or March of 2016.

[2] In anticipation of the hospital containing a fully functional radiology department, interested candidates were invited to tender for the position of the radiology unit service provider.

[3] The applicant, Dr Leon Yaseen Perumal, responded to this invitation, and was requested to attend an interview on the 10th March 2014. At the interview Dr Perumal provided a power-point demonstration, which was given to various members of the Board of the hospital. The hospital's record of the presentation indicates that it was very well received by the members of the Board.

[4] On the 10th June 2014 the hospital sent Dr Perumal a letter. The relevant content is as follows:

'Your tender presentation to the Board members on the 10 March 2014, and proposal dated 14 March 2014, as the radiology service provider at the Ahmed Al-Kadi Private Hospital refers.

As you aware, this tender was opened and numerous candidates tendered.

It gives me great pleasure to advise you that you are awarded the tender after adjudication by the Board of Directors at a meeting held on 10th June 2014.

This appointment is based on the following conditions:

1. The size of the unit is 385 sqm
2. The unit needs to include all services, incl. MRI and CT Scan
3. A 10 year lease with the option of renewal
4. A market related rental of R285.00 per sqm effective from date of operation, with an 8% increase in rental annually
5. Beneficial Occupation from date of completion of the building, allowing you sufficient time to set up. You shall be advised of the date in due cause. (sic)

6. Your commitment to providing complementary or a reduced rate radiology service to the Islamic Medical Association Baytul Nur Trust qualifying patients. The details hereof to be negotiated and finalised in the documentation, agreements and contracts to follow.
7. We accept you investment offer of R10 000 000 (ten million rands) towards the purchase of ordinary shares in the Ahmed Al-Kadi Private Hospital Limited.

The above constitute the material terms of the agreement and our offices will be in contact once the documentation, contracts and agreements have been drawn up by the legal team and a meeting will be scheduled for the signing thereof.

All our rights remain strictly reserved.

We kindly request that you treat this appointment confidentially until such time as the non-successful candidates have been informed.

Welcome to the Ahmed Al-Kadi Private Hospital family.'

I shall hereinafter refer to this letter as 'the letter of appointment'.

[5] Having received the letter of appointment, Dr Perumal believed that a binding contract had been concluded between him and the hospital. However, some considerable time later, and as the building progressed, the hospital began to express the view that his appointment had only been a provisional one. Various demands were made by the hospital, and disputes arose between the hospital and Dr Perumal which may be summarised as follows:

(a) The 'shell' dispute. The hospital maintained that all it was obliged to provide was a 'shell' – i.e. 385m^2 of the building in accordance with the letter of

appointment, without any improvements. Disputed items which emerged, were:

(i) The air conditioner. The rest of the building was air-conditioned. The hospital maintained that because the radiology unit required special air-conditioning, this had to be provided by Dr Perumal. It was not part of the letter of appointment.

(ii) The generator. Although the rest of the building was to have its own generator, the power requirements of the radiology unit were such that a separate and independent generator would be needed. Dr Perumal agreed that he would be responsible for the cost of the generator.

(iii) The fire-fighting equipment. The radiology equipment required specialist fire-fighting equipment, using gas. The hospital's view was that the additional cost of this item was for the account of Dr Perumal.

(iv) Plugs and power points. This item included interior electrical fittings and lighting. The hospital alleged these were for Dr Perumal's account.

(b) The financial documentation dispute. As time passed, and the building progressed, the hospital began to demand financial documents from Dr Perumal, in order to satisfy the Board members that he was able to afford to pay for the necessary radiology equipment, and the additional costs of setting up the radiology centre.

(c) The progress of the building dispute. Disputes arose as the building project evolved, arising from the need of the hospital to have floor-plans for the radiology unit finalised, in order that the construction could be continued as planned.

(d) The shares in the hospital. Dr Perumal had undertaken to contribute an investment of R10m towards the purchase of shares in the hospital. It is clear from the correspondence that those shares were initially issued at R10 per share, but that after the end of July 2014 they increased in price. Dr Perumal is of the view that he agreed to pay R10m for the shares as at the 10th June 2014, and has until the 31st July 2015 to pay that amount or secure it. The hospital could not unilaterally increase the price of the shares, which he maintains they sought to do.

(e) The radiology rates. At the time the letter of appointment was issued, there was no final agreement as to whether radiology services to be provided to qualifying patients of the Trust would be complimentary, or at a reduced rate, and the extent of any such reduction.

[6] The above disputes resulted in the applicant's attorneys addressing a letter on the 23rd April 2015 to Dr Perumal, stating that:

(a) the letter of appointment was 'conditional';

(b) certain conditions of the agreement had not been met;

(c) on the 10th April 2015 the hospital had demanded certain financial documentation by the 30th April 2015. In the absence of Dr Perumal being able to provide the documents requested, the hospital would assume that Dr Perumal had misled the Board members;

(d) the financial documentation was required to enable the hospital to confirm the provisional appointment of Dr Perumal;

(e) no conclusive and binding agreement would come into effect until the written contracts prepared on behalf of the hospital had been signed by both parties. This included the lease agreement and the agreement to provide radiology services to qualifying patients of the Trust.

[7] Although the contents of this letter were refuted by Dr Perumal's attorney, it precipitated a letter from the hospital's attorneys dated the 4th May 2015 stating that because Dr Perumal had not timeously provided the documentation and information required by the hospital, 'we hereby notify you of the revocation of your conditional appointment as radiology service provider dated 10 June 2014.'

[8] Dr Perumal then brought an urgent application seeking an order that:

(a) the hospital's revocation of his appointment as radiology service provider be declared invalid, and set aside; and

(b) the hospital be interdicted from appointing any other party in Dr Perumal's stead.

[9] When the application first came before this court, the point was taken by the hospital that a certain Dr Jackpersad had received a provisional appointment as the radiology unit service provider. The hospital submitted that the application was accordingly defective for want of the joinder of Dr Jackpersad, and the interdict requested was incompetent.

[10] On the 21st May 2015, by consent, an order was granted by this Court, inter alia, joining Dr Jackpersad as the second respondent, and recording that Dr Jackpersad would abide the decision of this court. The hospital undertook not to do anything to alter the status quo pending the outcome of this application.

[11] The letter to Dr Jackpersad, which was received by him on the 8th May 2015, was very different in content to the letter of appointment sent to Dr Perumal. Dr Jackpersad's letter records that his appointment was provisional, and included as conditions of his appointment that financial documentation and purchase orders for the radiology department be provided by him to the hospital, together with a detailed business plan. The hospital reserved the right to request further information and documentation, if necessary. The letter also records that Dr Jackpersad is aware of the dispute between the hospital and Dr Perumal, and that the hospital will not be liable for any damages which may be incurred by Dr Jackpersad pursuant to any order that this court may make in this application.

[12] Mr *Choudree*, who appeared for Dr Perumal, submitted that the letter of appointment constituted the conclusion of a contract between Dr Perumal and the hospital. He referred to the language of the letter of appointment which, he submitted, unequivocally indicated that the hospital intended to accept Dr Perumal's tender. The letter of appointment contained all the essential elements necessary to constitute an agreement between the parties.

[13] With regard to the 'shell' issue, Mr *Choudree* submitted that General Electric, the company providing the radiology equipment, had stated that ordinary air-conditioning, and the use of sprinklers as fire-fighting equipment, would be ineffective in such a unit. What was required was for gas to be used for fire-fighting. He submitted that the hospital, as landlord, was required to provide the basic infrastructure for the radiology unit, (ie. the same facilities provided to other tenants of the building), and that Dr Perumal was prepared to pay the difference between the facilities provided by the hospital and any additional facilities required because the radiology unit was unique.

[14] Mr *Choudree* submitted that Dr Perumal was entitled to a declaration that the letter of revocation was invalid, and that the hospital was not entitled to import conditions such as only providing a shell, etc. He submitted that everything reverted back to the letter of appointment, which stood on its own as a contract.

[15] With regard to the transcripts of the recordings of meetings which had been put up by the hospital in further answering affidavits, Mr *Choudree* stated that those transcripts are not accepted by Dr Perumal. Where any disputes emerge from those transcripts with regard to the terms of the contract, they should be referred for the hearing of oral evidence.

[16] Mr *Choudree* referred to *CGee Alsthom Equipment Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A). That case involved the construction of a nuclear power station for Eskom. CGee Alsthom was responsible for the supply and installation of electrical equipment for the power station. GKN, as a sub-contractor, quoted to provide a cable support system. CGee Alsthom addressed a telex to GKN notifying them that they had been awarded the contract. When GKN placed orders for the steel and advised CGee Alsthom that it had done so, numerous aspects of their agreement had not been finalised. These aspects related to the quality assurance and quality control, finishing and packaging specifications, the general administrative conditions relating to the operation of the contract, and the specifications for certain components of the support system.

[17] Negotiations on these issues broke down, and CGee Alsthom informed GKN that it had awarded the contract for the fabrication and supply of the cable support system to another company. GKN then sued CGee Alsthom for damages for repudiation of contract. It claimed that its tender had been an offer which had been accepted by CGee Alsthom, and a binding contract had been concluded by the parties. GKN referred to conduct of the parties after the acceptance of its offer.

[18] GKN was awarded damages by the local division and the matter went on appeal to the Appellate Division. The Appeal Court held that the letter of acceptance from CGee Alsthom could only be construed as meaning that the tender of GKN had been accepted. Whilst outstanding matters which had not yet been agreed upon, might well prevent an agreement from having contractual force, the intention of the

parties was what was important. This intention was to be gathered from the parties' conduct, the terms of the agreement and the surrounding circumstances. The Appeal Court held that as a matter of probability, the telex of acceptance constituted an unqualified acceptance of the respondent's tender, and despite the existence of outstanding matters, that telex had been intended to constitute a binding contract. Accordingly, the repudiation by CGee Alsthom entitled GKN to damages.

[19] It is important to note that negotiations conducted between CGee Alsthom and GKN after the acceptance of GKN's tender, were for the purpose of settling the terms of a formal contract to be signed by the parties.

[20] Mr *Choudree* submitted that, as in *CGee Alsthom,* the fact that there were a number of outstanding matters which were not included in the contract between the hospital and Dr Perumal, does not preclude this court from finding that a binding agreement was concluded. Outstanding matters could be left to future negotiations with a view to comprehensive contractual documents being drafted. When the parties finalised the outstanding matters, the final contract would incorporate and supersede the original contract. If the parties failed to reach final agreement, the original agreement would stand. The contractual force of the original agreement is to be gathered from the conduct of the parties, the terms of the agreement and the surrounding circumstances.

[21] Mr *Choudree* also submitted that the balance of convenience favoured that I grant an order interdicting the hospital from appointing Dr Jackpersad, both because of the letter of provisional appointment made to Dr Jackpersad, and for the avoidance of any doubt.

[22] Mr *Pillemer* who appeared for the hospital submitted that:

(a) the letter of appointment was intended only to indicate the hospital's approval of Dr Perumal as a person who would provide radiological services;

(b) the letter of appointment was only provisional because there were areas which had not been agreed upon between the parties – i.e. the 'shell question' and others;

(c) he was not suggesting that there was not an agreement, but merely one that was not binding on the parties, because they had not intended to conclude a binding agreement. What the parties had done was made an agreement to agree;

(d) the letter of appointment indicated no more than that Dr Perumal would get a shell with no air conditioning, fire-fighting equipment, etc. The lease still had to be drawn up and signed, and the letter of appointment was simply not capable of dealing with all the requirements of a properly drafted lease;

(e) whilst the letter of appointment was almost an agreement, the critical features of what Dr Perumal was going to do, and what he would pay for, were not disclosed by the letter of appointment;

(f) the financial requirements which were insisted upon by the hospital in the form of the production of financial statements, a business plan and proof of payment for equipment, was an implied term of the letter of appointment;

(g) with regard to the provision of complimentary or reduced rate radiology services to qualifying patients of the Trust, no agreement had been reached, and this was essential to any proper conclusion of an agreement between the parties;

(h) even if the letter of appointment was to be held to constitute a concluded agreement, there was no mechanism to deal with the outstanding matters which had not been agreed;

(i) if it were to be held that a contract has been concluded, this Court still had an option not to enforce it. Specific performance is a remedy which lies within the discretion of a court to award or refuse. In these circumstances a court would not be inclined to enforce it.

[23] Mr *Pillemer* submitted that there was a complete breakdown of trust between the parties and this had undermined any contractual relationship between them. They had reached an impasse with regard to the funding of additional items which the hospital maintained it should not have to bear. It was not possible to say which party should have to bear the financial obligation of providing air conditioning, the generator, ceilings and electricity and the fitting-out of the unit.

[24] Mr *Pillemer* submitted that it was open to the court to find that there was a contract but to make an election not to enforce it, and in those circumstances Dr

Perumal would have a contractual claim against the hospital for damages. He also submitted that if an agreement had been concluded, then it had been repudiated by Dr Perumal to the extent that the hospital was entitled to cancel it. Dr Perumal's repudiation was to be found in his failure to provide financial details, etc.

[25] Mr *Pillemer* submitted that this case went beyond the interpretation of the contract, and concerned whether or not the contract could be enforced, and if so, to what extent. Mr *Pillemer* referred to *Pitout v North Cape Livestock Co-operative Ltd* 1977 (4) SA 842 (A). The judge considered whether an offer made during negotiations, and the acceptance of that offer, would give rise to an enforceable contract. He held that this was something that had to be decided upon the facts of a particular case. Where negotiations were terminated, the court would be required to be satisfied that the parties intended the original promise to constitute a concluded bargain on precise terms, and that they were content to stand by that bargain, irrespective of the course of future negotiations.

[26] In my view there is no doubt that Dr Perumal and the hospital concluded a valid and binding agreement. I say this because:

(a) the hospital invited tenders setting out the factors which had to be included in a presentation to be presented by tenderers;

(b) Dr Perumal completed a demonstration to the Board of the hospital;

(c) As is evident from the letter of appointment :

(i) after adjudication of numerous tenders by the Board members they decided to award the tender to Dr Perumal;

(ii) the space to be allocated to the radiology unit is set out, that it needs to include all radiology services including MRI and CT scans, that there is to be a ten year lease with the option of a renewal, an eight per cent per annum increase on the market related rental of R285 m^2 , with beneficial occupation to be given in sufficient time to allow Dr Perumal to set up the radiology unit;

(iii) that Dr Perumal would provide complimentary or reduced rate radiology services to qualifying patients of the Trust, and that would be negotiated and agreed upon in the final contract documents;

(iv) the hospital accepted Dr Perumal's offer of R10m towards the purchase of ordinary shares;

(d) the letter of appointment records: 'The above constitutes the material terms of the agreement ...'. Thereafter, it records that documentation, contracts and agreements which will be drawn up by the hospital's legal team would be signed in due course;

(e) Dr Perumal is asked to keep his award confidential until such time as the 'non-successful candidates have been informed (sic)';

(f) the fact that there was no 'deadlock breaking' provision in the letter of appointment, cannot affect its validity as an agreement.

[27] There is no doubt from the papers that a number of matters had not been finalised by the parties. Although the hospital suggests that Dr Perumal accepted that he was only given a 'shell' and that he would pay for air conditioning, I am not

satisfied that it has been established on the papers that he should pay for all of it.. What has, however, been established, is that he would pay for the generator required. He agreed to this at a meeting held on the 15th October 2014. It also seems clear that if the air-conditioning and fire-fighting equipment necessary for the radiology unit differed from that provided throughout the hospital, then the additional cost of that specialised equipment should be for the account of Dr Perumal.

[28] With regard to Dr Perumal's contribution of R10m for the purchase of shares in the hospital, it is clear from the papers, that as at the 10th June 2014, it was intended by the hospital that the shares would be priced at R10 per share. It is also clear from the papers that the subsequent increase in the price of the shares cannot affect the agreement which was concluded with Dr Perumal, and that he was entitled to have until the 31st July 2015 within which to raise the R10m.

[29] I disagree that the failure of Dr Perumal to provide financial documentation constituted a breach of the agreement between the parties. This was not dealt with in the letter of appointment. It was not necessary for it to have been a material term of the agreement that Dr Perumal would provide proof of his ability to purchase the radiology equipment, and the cost of setting up the unit. The demand that he provide financial information arose so long after the letter of appointment, that the probabilities are that this was an afterthought on the part of the Board. Dr Perumal was asked at short notice to provide the financial documents. His failure to do so does not affect his performance of the terms of the letter of appointment, or, indeed, his ability to perform in providing the radiology unit. If the hospital wanted the

assurance of the financial viability of Dr Perumal to perform, that was something they should have considered when they drafted the letter of appointment. It was a not a necessary or obvious term of the agreement, nor is it necessary to provide business efficacy to the agreement.

[30] In deciding whether the parties concluded an agreement on the 10th June 2014, it is also relevant to look at their conduct thereafter. Significant progress was made between the parties towards finalising the layout of the radiology unit, and the Board of the hospital offered to extend terms to Dr Perumal should he have difficulty financing the necessary equipment. It was even envisaged that this could be amortised into the rental payable by Dr Perumal. That they would have done all this in the absence of a belief by both parties that they had concluded a binding agreement, seems highly improbable.

[31] It also seems highly improbable that anyone in the position of either the hospital or Dr Perumal, would have concluded a provisional agreement, when so much else had to be done by each party in order to fulfil it. It makes no business sense for Dr Perumal to have concluded a provisional agreement and gone to the lengths to which he has clearly gone to, in trying to fulfil the agreement.

[32] I am not persuaded that;

(a) the agreement was provisional;

(b) the hospital was entitled to cancel the agreement concluded by the letter of the 10th June 2014.

The fact that the parties may have difficulty in resolving the remaining outstanding issues will have to be the subject of further negotiation between them. This was not an agreement to agree in the sense that it could be said to be unenforceable. The parties concluded a firm agreement and they are bound by its contents. The language of the letter of appointment makes this clear. Having made this finding, Dr Perumal's entitlement to an interdict follows, at least for the duration of his agreement with the hospital. I see no reason why an order for costs should not follow the result.

[33] In the circumstances I grant the following order:

1. The respondent's revocation of the applicant's appointment as a radiology provider, as contained in the respondent's letter dated the 4th May 2015, is declared to be invalid and is set aside;

2. For the duration of the parties' agreement, the respondent is interdicted and restrained from appointing any other party in the applicant's stead;

3. The respondent is directed to pay the applicant's costs of suit.

Graham Lopes

Date of hearing: 22nd June 2015.

Date of judgment: 9th July 2015.

For the Applicant: ABG Choudree (instructed by Derik Jafta Attorneys).

For the Respondent: M Pillemer SC, with Johan Ploos van Amstel (instructed by Shaukat Karim & Co).