

IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU NATAL LOCAL DIVISION, DURBAN

Case No. D1546/2019

In the matter between:

Thekwini Marine Steel and Trade (Pty) Limited

Applicant

and

Transnet (SOC) Limited t/a Transnet Port Terminals

Respondent

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Judgment

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Lopes J:

[1] On the 26<sup>th</sup> February 2019 the applicant, Thekwini Marine Steel and Trade (Pty) Limited ('Thekwini') brought an urgent application seeking the following relief:

- (a) Condonation of Thekwini's failure to comply with the provisions of s 3 (2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002.
- (b) Directing the respondent, Transnet (SOC) Limited t/a Transnet Port Terminals ('Transnet') to pay Thekwini the sum of R 20 million.
- (c) Directing Transnet to pay the costs of the application on the attorney and client scale.

[2] On that day, an order was made giving directions for the delivery of answering and replying affidavits. The parties were given leave to approach the senior civil judge on the matter of urgency, and subsequently the opposed application came before me on the 31<sup>st</sup> May 2019.

[3] Transnet delivered a conditional counter-application in the event that this Court finds that an agreement with contractual force was concluded between the parties for the payment of the R20 million. The conditional counter-application is that if this court finds that an agreement was concluded, it is declared to be invalid, unenforceable and set aside. In addition, Transnet delivered a notice in terms of rule 16 A of the Uniform Rules of this Court relating to whether the agreement was contrary to the provisions of s 51 (1)(B)(ii) of the Public Finance Management Act, 1999.

[4] It is necessary to set out the history of the relationship between the parties:

- (a) On the 22<sup>nd</sup> October 2014, and at Durban, Thekwini and Transnet concluded a written agreement ('the Master Agreement'). The Master Agreement provided that Thekwini, would provide facilities for certain activities to be carried out at the port of the Durban Roro Port Terminal, for a period of two years'.
- (b) The Master Agreement was to endure from the 1<sup>st</sup> November 2014 to the 31<sup>st</sup> October 2016.
- (c) Clause 19.6 thereof dealt with the term of the contract and its possible termination:

'Notwithstanding anything to the contrary contained in this Agreement, and in addition to all its other rights, TPT (Transnet) shall also be entitled to cancel this Agreement, in whole or in part, (as it in its sole discretion may determine) upon thirty (30) days' written notice given to the service provider (Thekwini) without assigning any reason for such action. Such termination by TPT shall not form the subject of any arbitration or review and shall be binding upon the service provider, who shall have no claim of any nature or howsoever arising against TPT out of such termination, save for payment of all amounts which may be lawfully due and payable to the service provider by TPT for services

rendered pursuant to the provisions of this Agreement up to the expiry of the said period of thirty (30) days.’

- (d) On the 1<sup>st</sup> of October 2015, and purporting to act in terms of clause 19.6, Transnet gave Thekwini notice of its intention to cancel the Master Agreement with effect from the 31<sup>st</sup> October 2015.
- (e) Thekwini resisted the notice of termination, and refused to vacate the harbour premises it occupied pursuant to the Master Agreement. Transnet then brought an urgent application before this Court for an order declaring that the termination of the contract was valid and lawful. Transnet also sought interdictory relief against Thekwini to have its operations removed from the harbour area.
- (f) The matter was heard on an urgent basis on the 30<sup>th</sup> October 2015. An order was granted declaring the agreement between Thekwini and Transnet to be validly terminated with effect from the 31<sup>st</sup> October 2015, and further interdicted Thekwini from remaining in any area in the Durban Roro Port Terminal.
- (g) Leave was sought to appeal against that decision, but was it refused.
- (h) Thekwini thereafter delivered an application to the Supreme Court of Appeal for leave to appeal against the decision of the 30<sup>th</sup> October 2015. This was finally disposed of on the 21<sup>st</sup> January 2016, when the Supreme Court of Appeal dismissed the application for leave to appeal.
- (i) Thekwini then delivered a claim for unpaid invoices as well as a damages claim based on the allegation that there had been an unlawful cancellation of the contract. This was never resolved.
- (j) Thekwini sought to refer the matter to arbitration over a claim for R3 138 004.77, for arrear amounts outstanding for services rendered prior to the cancellation of the Master Agreement, and damages for the costs and loss of income sustained by Thekwini as a result of the cancellation of the Master Agreement. The claim for damages was in the sum of R33 569 914.16. Pursuant to a calculation performed by

Robertson's Accounting services for Thekwini, the damages figure was then increased to R57 433 069.90.

- (k) Transnet objected to the validity of the arbitration proceedings and the parties then attempted to settle their differences.
- (l) On the 27<sup>th</sup> November 2018 Transnet delivered a letter to Thekwini stating, inter alia:

Re Offer of Settlement of damages claim

Transnet has considered your claim of consequential damages amounting to R57 433 069.90 as per attached last calculations by Robertson's Accounting services.

'Transnet would like to make a 'full and final', 'without prejudice' settlement offer which in no way admits or cedes any rights of Transnet SOC. The terms of the offer are explained below:

Thekwini Marine out of pocket expenses, including severance packages to staff, tools of trade, vehicle investment, Anglo American loan	12, 663,552.00
Legal costs, both Transnet's and TMSTs	2,588,737.73
Consequential and loss of income settlement offer	4,747,710.27
	20,000,000.00

The settlement offer is subject to the following conditions:

- Every expense payment must be accompanied by valid and auditable proof of disbursement. Hence, evidence is required for the following expenses:
  - Evidence of disbursement will be furnished for the R12,663,552 restoration expenses;
  - Evidence of legal fees incurred by TMST amounting to R1,450,000 will be furnished to Transnet;
- Approval of the appropriate Transnet Delegation of Authority, should TMST accept the terms;
- The settlement terms will remain confidential between the parties concerned
- This offer is a "without prejudice" offer;

- This is “full and final” and there will be no further claims for damages for the termination of this contract, ...’
- (m) On the 11<sup>th</sup> December 2018 Thekwini (which had by now changed its name to Wharf Side Port Services (Pty) Ltd), addressed a letter to one Alvin Brijlal recording that it had no other choice but to accept the R20 million in full and final settlement. Mr Brijlal was a director of a non-governmental organisation referred to as ‘Voice’. It purports to assist aggrieved parties in their interactions with other contracting parties. Mr Brijlala had been requested by Thekwini to intervene on their behalf. On the 22<sup>nd</sup> February 2019 Mr Brijlal sent an email to Transnet asking them to accept the letter from Thekwini for the full and final settlement of R20 million. He ended by asking Transnet to arrange payment urgently.

[5] Mr *Choudree*, who appeared for Thekwini, conceded that there was no single agreement recording the signature of both parties. He submitted that there can be no doubt that Thekwini accepted the offer of the 27<sup>th</sup> November 2018. The only matter left to consider is whether the conditions recorded in the offer were satisfied. Those conditions were the production of valid and auditable proof of the disbursements, including legal fees, and approval of the appropriate Transnet delegation of authority. Mr *Choudree* conceded that in order to prove a concluded settlement agreement, Thekwini would have to establish approval by the appropriate Transnet delegation of authority. Mr *Choudree* submitted that Transnet attempted to impose further conditions which were not part of the original offer and acceptance, and Transnet was not entitled to do so.

[6] Mr *Choudree* also conceded that efficacy would demand that the agreement between the parties would be reduced to writing and signed by the parties. He submitted, however, that where an offer has been made and accepted, one party could not change the conditions, and both parties were bound by the original offer and acceptance.

[7] Mr *Choudree* also conceded that it was clear that the figures set out under the heading 'Settlement Offer' were adjusted to come to the round figure of R20 million. This was evidently because persons involved in the negotiations could only sanction a settlement agreement of up to R20 million. With regard to proof of the items of the expenditure, Mr *Choudree* referred me to an internal memorandum dated the 7<sup>th</sup> December 2018, addressed to Dr Popo Molefe the Chairman of the Transnet Board by Mr Tau Morwe to the Acting Group Chief Executive of Transnet. This letter was written at an early stage in the negotiations and records that the offer of R20 million was rejected by Thekwini. It further records that Transnet is unable to improve on the settlement offer without the intervention of an independent objective party. This activity was clearly prompted by the intervention of the Department of Public Enterprises, which had been approached about the dispute. The Minister had recommended that the dispute resolved expeditiously. It was made clear that this was an operational matter and it was for Transnet to decide the issue.

[8] A further letter by Dr Molefe to the Minister of Public Enterprises records that any amount over R20 million would breach the fiduciary duty of Transnet in complying with the Public Finance Management Act, 1999, because there was no evidence or audit trail to support the payments requested. The view was taken that Thekwini would have difficulty in proving any consequential damages or loss of profits. Mr *Choudree* submitted that the internal memorandum of the 7<sup>th</sup> December 2018 indicated that the documents had been made available by Thekwini, and that the tender by Transnet had been made with full knowledge of those documents. That is not, however, what the internal memorandum purports to state. No reference is made to the fact that Thekwini had provided documents to substantiate the expenditure contained in the offer. The letter of the 27<sup>th</sup> November 2018 addressed by Dr Molefe to the Minister of Public Enterprises records that there is no evidence or audit trail to support the proposed payment.

[9] Mr *Choudree* further submitted that in terms of the Transnet delegation of authority network, any litigation or dispute resolution process had to be authorised by the Chief Operating Officer together with the concurrence of the Chief Legal Counsel, for amounts up to but not exceeding R35 million. The concurrence of the Group Chief Executive was only required where a settlement agreement exceeded R100 million. Thekwini was entitled to rely on the operation of the Turquand rule in

assuming that all the internal delegations and authorities had been complied with by Transnet. Mr *Choudree* submitted that the unsigned draft settlement agreement contained in the papers could not have been drafted without the necessary authorities knowing of its existence. He submitted that in these circumstances the necessary authorised personnel in Transnet, who could have concluded the agreement, must have been prepared to do so and that is why the draft agreement was prepared.

[10] Mr *Choudree* submitted that in terms of s 195 (g) of the Constitution, when dealing with Public Administration, the necessity for transparency is emphasized. It was therefore incumbent upon Transnet to have provided timely and accessible information to Thekwini.

[11] Mr *Choudree* submitted that in the circumstances an offer and acceptance had taken place and the suspensive conditions had been fulfilled. Accordingly Thekwini was entitled to an order that Transnet pay to it the sum of R20 million.

[12] Mr *Gajoo* SC who appeared for Transnet, submitted that there was a very narrow dispute between the parties. An offer had been made by Transnet to Thekwini on the 27<sup>th</sup> November 2018. That offer was, however, subject to express conditions comprising the submission of valid proof of incurring the expenditure by Thekwini, and the approval of the relevant Transnet authorities. The fact that Thekwini may have accepted the offer on the 11<sup>th</sup> December 2018 did not mean that the suspensive conditions had been satisfied.

[13] Mr *Gajoo* submitted that Thekwini bore the onus of proving the fulfilment of the suspensive conditions. In this regard he referred to *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at 644H, and *Trinity Asset Management (Pty) Ltd v Grindstone Investment 1 132 (Pty) Ltd* 2018 (1) SA 94 (CC), paras 69 and 157. Mr *Gajoo* also referred to *Red Dunes of Africa CC v Masingita Property Investment Holdings* (159/2014)[2015] ZASCA 99 (1 June 2015) at paras 10 and 11 regarding the fulfilment of suspensive conditions.

[14] Mr *Gajoo* pointed out that in Thekwini's founding affidavit it clearly records that it relies on the offer of settlement dated the 27<sup>th</sup> November 2018, and further records the conditions to which the settlement offer was subject. The affidavit goes

on to allege that the contents of that offer, and the letter by a director of Thekwini to Mr Brijlal, constitute a valid and binding agreement. Mr *Gajoo* pointed out that this does not mean that the suspensive conditions do not have to be fulfilled, and no allegations that it had done so, have been made by Thekwini.

[15] He submitted that the suggestion that the proof of expenses referred to in the offer had been provided to Transnet before that document was concluded, does not entitle Thekwini to rely on that fact. It was required to set out compliance with the suspensive condition, and had not done so. Mr *Gajoo* further drew my attention to the internal memorandum relied upon by Thekwini. The memorandum is from the Group Chief Operating Officer of Transnet to the Acting Group Chief Executive, is dated the 26<sup>th</sup> November 2018, and records at clause 6.1 that the offer made by Transnet was subject to the conditions listed in that paragraph. The memorandum then refers at clause 8.1 to the fact that Transnet required an auditable trail for all expenses and claims. This was in addition to approval of the delegation of authority. In setting out the history of the matter in that memorandum, there is no reference to Thekwini having submitted proof of its claims to Transnet.

[16] Mr *Gajoo* submitted that where a settlement of R20 million is proposed, it is only the Chief Operating Officer, together with the concurrence of the Chief Legal Counsel that are needed to certify payment. This was not the province of the Group Chief Executive who dealt with matters over a R100 million. The limitation on employees of Transnet negotiating and concluding contracts without consulting the relevant legal advisers employed by Transnet, are clearly set out in clause 6.5 of the legal policy of the Transnet group. This had not been done in this matter.

[17] Mr *Gajoo* submitted that with regard to the operation of the Turquand rule, *One Stop Financial Service (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Another* 2015 (4) SA 623 (WCC) refers to the fact that s 20(7) and (8) of the Companies Act, 2008 are regarded as a codification of the Turquand rule. The effect of the original rule and the statutory changes is that an outsider concluding an agreement with a company, may assume that its officers have the powers ordinarily associated with the positions they occupy. The contracting party would then not have to investigate whether the company's act of internal management were appropriate. In terms of s 20(7) of the Companies Act 2008 a third party may



presume that the company with whom it is contracting has complied with its formal and procedural requirements, unless the third party bore knowledge or ought to have bore knowledge of the company's failure to do so. Where a party knows of the levels of authority required, and those levels are not present in the contractual arrangements, the third party cannot rely on an assumption of compliance by the company with its internal requirements.

[18] Mr *Gajoo* submitted that in the circumstances Transnet was entitled to an order dismissing the application together with an adverse order of costs, including the costs of two counsel and the costs which were reserved.

[19] In reply Mr *Choudree* submitted that Transnet indicated its fulfilment of the suspensive conditions, which was implicit in its subsequent negotiations. He referred to the draft settlement agreement which was never signed but which recorded that Transnet had reviewed Thekwini's claim and made the full and final offer of R20 million on the 27<sup>th</sup> November 2018. Mr *Choudree* also referred to the figures in the offer of settlement which he submitted were clearly odd. I understood him to mean by this that they probably did not accord with any factual position, but were rather adjusted to comply with arriving at the total figure of R20 million. He submitted that these figures were 'negotiated'. Mr *Choudree* also referred to the internal memorandum of the 7<sup>th</sup> December 2018 in which Mr Tau Morwe the Acting Group Chief Executive of Transnet recorded that had requested and received evidence for the disbursements in the sum of R12 663 552 and legal fees in the sum of R1 450 000. Mr *Choudree* also referred me to an email message sent by a Transnet employee to Mr Brijlal advising him that the settlement agreement detailing the terms of the settlement had been sent to their Group Office for signature. It was thereafter be forwarded to Thekwini for acceptance.

[20] Mr *Choudree* also reiterated Transnet's constitutional obligations to inform Thekwini about its policy requirements. This was with regard to the delegation of authority.

[21] Urgency was not dealt with by either party at the hearing before me. I shall not, in those circumstances, deal with that question, but assume that the matter was properly before me when it was argued.

[22] The following are common cause:

- (a) That an offer of settlement in writing was made by Transnet on the 27<sup>th</sup> November 2018.
- (b) Thekwini's director, acting via Mr Brijlal, indicated that she had no other choice but to accept the offer in full and final settlement of the dispute between the parties. That letter was forwarded by Mr Brijlal to Transnet on the 11<sup>th</sup> December 2018.
- (c) Accordingly, an agreement was concluded between the parties at that stage.
- (d) The agreement was, however, subject to two conditions:
  - (i) the provision of valid and auditable proof of the disbursements claimed; and
  - (ii) approval of the appropriate Transnet delegation of authority.
- (e) The conditions were suspensive conditions, and in the circumstances Thekwini bears the onus of establishing that they have been fulfilled.

[23] The circumstances of the settlement offer are unusual in the sense that consequential damages and loss of income has been quantified in the curious amount R4 747 710.27. It is overwhelmingly probable that this was a balancing figure in order that the total arrived at was R20 million. What is curious is that the previous litigation had determined that termination of the Master Agreement was lawful, and it is difficult to understand how Thekwini could have claimed damages. However, as so often happens in settlements, matters are taken into account which cannot be accurately and numerically calculated.

[24] There is a debate on the papers whether a valid and auditable proof of disbursements was provided to Transnet. Thekwini maintains that that was done even prior to the offer of the 27<sup>th</sup> November 2018. There is certainly evidence that documents had been compiled by the staff of Transnet on the basis that such evidence had been provided. Whether that was done in anticipation of the proof and

merely as a method of accelerating the time limits in the event that the evidence was provided, is not clear. I shall, however, accept for purposes of this judgment that such evidence had been provided.

[25] What remains to be considered is either the appropriate Transnet delegation of authority was provided. The Legal Policy of the Transnet group, which was compiled on the 11<sup>th</sup> April 2016, provides that any form of negotiation or correspondence with third parties on behalf of Transnet that requires the expertise of a person trained in the practice of law falls within the definition of 'legal services'. Clause 6.5 of that policy document provides that no employee of Transnet, regardless of seniority, may negotiate and conclude a contract without consulting the relevant in-house legal advisers on terms of the contract. It is also required that the signatory to such an instrument must possess the necessary authority or delegation to conclude the agreement on behalf of Transnet.

[26] On the 26<sup>th</sup> November, 2018, the day before the offer was made by Transnet, a letter was signed by Mr Mlamuli Buthelezi, the Group Chief Operating Officer of Transnet and Mr Tau Morwe the Acting Group Chief Executive approving the offer which was made. In the Delegation of Authority Framework document approved by the board directors of Transnet on the 31<sup>st</sup> August 2016, clause 5.6.1 deals with the approval to commence and settle any litigation, arbitration or other form of alternative dispute resolution. That clause provides that an amount of up to R35 million may be concluded by the Chief Operating Officer of Transnet, but only with the concurrence of its Chief Legal Counsel.

[27] The offer after the 27<sup>th</sup> November 2018 was made by Mr Mlamuli Buthelezi the Group Chief Operating Officer of Transnet. It was approved by the Acting Group Chief Executive. That document however was an internal memorandum, and not a document which contractually bound Transnet to Thekwini. The problem with the document is that although it is signed by the Group Chief Operating Officer and the Acting Group Chief Executive, there is no indication of concurrence by the Chief Legal Counsel.

[28] If the Group Chief Executive had authority to deal with contracts exceeding R100 million, is it correct to assume than that he was entitled to conclude all

agreements falling below R100 million, and that he could do so without the concurrence of the Chief Legal Counsel?

[29] The purpose of including the Chief Legal Counsel in the delegation of authority document was clearly to ensure that the proper legal advice was obtained when legal services were included. That was clearly the case in the offer and acceptance because the agreement was designed to settle the consequences of the Master Agreement after considerable litigation had taken place between the parties.

[30] A settlement agreement of some ten pages was prepared. It was obviously intended by the persons who prepared that document that it would be signed by the representatives of both parties. The document is clearly a legal document both in its structure and content. It was, however, never signed. With regard to the application of the Turquand rule, both parties were clearly aware that the proper delegation of authority had to be followed prior to the parties being able to finally conclude their agreement.

[31] In my view it was clear that the parties always intended that a settlement agreement would be drafted and signed by them. The offer and acceptance constituted an agreement subject to suspensive conditions. It seems clear that one of those conditions, that a comprehensive agreement be drafted, and signed by properly delegated authorities, never occurred. In those circumstances there cannot be said to be an agreement between the parties. It has failed because of the failure of suspensive conditions

[32] With regard to costs, they should follow the results. In my view there is no basis for making an award of costs on a punitive scale. I accordingly make the following order:

‘The application is dismissed with costs, such costs to include those which were reserved in the application and the costs consequent upon the employment of two counsel’

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Lopes J

Date of hearing: 31<sup>st</sup> of May 2019.

Date of judgment: 3<sup>rd</sup> July 2019.

For the Applicant: Mr ABG Choudree (instructed by Mhlanga Incorporated).

For the Respondent: Mr V I Gajoo SC and Mr M Z F Suleman (instructed by Livingston Leandy Attorneys)