IN THE HIGH COURT OF SOUTH AFRICA

NATAL PROVINCIAL DIVISION

CASE NO: 8155/07

In the matter between:

KINGDOM CATERERS (KZN) (PTY) LTD **Applicant**

and

THE BID APPEALS TRIBUNAL **First Respondent**

THE CHAIRPERSON OF THE BID ADJUDICATION COMMITTEE c/o THE KWAZULU NATAL DEPARTMENT OF HEALTH **Second Respondent**

THE M.E.C. KWAZULU-NATAL DEPARTMENT OF HEALTH **Third Respondent**

THE M.E.C. KWAZULU-NATAL DEPARTMENT OF FINANCE **Fourth Respondent**

CAPITOL CATERERS (PTY) LTD **Fifth Respondent**

SODHEXOSOUTHERN AFRICA **Sixth Respondent**

COMPASS GROUP t/a KAGISO KHULANI SUPERVISION SERVICES **Seventh Respondent**

ROYAL SECHABA FOOD SERVICES (PTY) LIMITED **Eighth Respondent**

FEDICS (PTY) LTD	**Ninth Respondent**
UNIQUE CATERERS	**Tenth Respondent**
COMPASS MANAGEMENT SERVICES	**Eleventh Respondent**
INDUNA CATERING	**Twelfth Respondent**

JUDGMENT

MSIMANG, J:

The applicant in this matter is an incorporated company with limited liability, the main business of which is the provision of catering services to a number of Government Departments. One of its clients is the Province of KwaZulu-Natal Department of Health (the Department) and the applicant has, over the years and in terms of a service agreement with the Department, been rendering catering services at the Phoenix Mahatma Gandhi Memorial Hospital since 1 March 1998. The initial duration of the said service agreement was three years. However, upon the expiry of that period, the Department despatched a letter to the applicant the relevant portion of which reads as follows :-

> "2. The company is requested to continue to provide a catering service at Mahatma Gandhi Memorial Hospital on a month to month contract until a formal tender is formalised by the KwaZulu-Natal Tender Board."

On 31 October 2006 the Department issued an invitation to interested parties to submit expressions of interest to tender for the provision of catering services to 47 of its hospitals in

the province of KwaZulu-Natal. A number allocated by the Department to the said invitation was ZNB8001/2006-H and the provision of the catering services at Mahatma Gandhi Memorial Hospital was incorporated therein. The closing date for the submission of bid application documents was 30 November 2006.

The national sales director of the applicant, who deposed to the founding affidavit, intimates that on the said date she attended at the address specified in the invitation bid at 200 Mayors Walk, Pietermaritzburg for the purpose of submitting applicant's tender documents but that, upon her arrival thereat promptly at 10h45, she noticed that the gates to the entrance of the building where the bid application documents were due to be submitted, were locked and manned by the security guards. A crowd of people were waiting to be allowed to gain entry into the building. Two officials of the Department were then contacted who advised the applicant's national sales director that they were aware of what was happening outside the gate of the premises. One official allegedly informed the national sales director that the Department would have a meeting about the matter during the following Saturday and that the applicant would be advised of the outcome thereof. Another official assured those representing the applicant that all bid applications would be accepted. Subsequently thereafter, albeit after the scheduled closing time for the submission of bid applications, those interested parties who were still waiting outside the gate were allowed entry into the building and submitted their applications which, including that of the applicant, were accepted by the Department. For purposes of adjudicating on the issue presently before Court it is not necessary to traverse in any detail a number of interactions which subsequently occurred between the applicant and the officials of the Department on the issue, save perhaps to state that that the applicant had been informed that a meeting regarding the late applications

would be held by the Department is now denied on behalf of the Department. Likewise, it is denied that an undertaking was ever given that all late applications would be accepted. However, of relevance to the issue before Court is that, as early as March 2007, the applicant became aware that its bid documents had not been received by the Department's Bid Adjudication Committee, that, on 19 July 2007, the applicant had been advised by the Department official that its appeal on the issue would have been an exercise in futility, that on 29 August 2007, the applicant had been informed in writing by the Department that it had been excluded from the list of applicants for the bid and that, on 3 September 2007, the applicant received a letter from the Department advising of its notice to terminate the catering service agreement between the applicant and the Department in respect of the Mahatma Gandhi Memorial Hospital. Because of the importance of the contents of this notice in the determination of the issues before Court, it is important to quote in full the following two paragraphs of the letter :-

> "Kindly be advised that the Department hereby provides you with a month's notice period in respect of the termination of the above mentioned service which you are rendering at the above mentioned institution.
>
> The Department has awarded a tender to a company who will begin rendering services on the 1 October 2007."

Thereafter there was a vain attempt by the applicant to appeal against the decision to exclude it from the bid and, when that proved to be fruitless and as an apparent last ditch effort, the applicant dispatched a letter to the Department, copying the same to the second and fifth respondents, threatening court action and advising that it would continue to render services at Mahatma Ghandi Memorial Hospital until a Court advised otherwise. The fifth respondent responded on 25 September 2007, inter alia, advising the applicant that it would commence providing catering services at the hospital in terms of the contract it had with the Department

and that it would do as of 1 October 2007.

It is therefore against the backdrop of the abovementioned facts that, on 27 September 2007, the applicant launched the present application on an urgent basis seeking a *rule nisi* calling upon a number of respondents to show cause why certain relief (a substantial part of which is of a review nature) should not be granted to it and, pending the final determination of the application, why certain interim relief should not be granted. The matter was set down for hearing on 1 October 2007 upon which date counsel for the third respondent handed in an answering affidavit from the bar. Counsel who appeared for the other respondents expressed desires to file answering affidavits on behalf of their respective clients and requested to be given an opportunity to do so. I accordingly ordered that the matter stand down to enable counsel to discuss among themselves the manner of the future conduct of the proceedings in the matter. When counsel returned to me they had indeed agreed on the issue of the future conduct of the proceedings. However, it became clear during the discussions with counsel that the issue of interim relief, particularly the one pertaining to the provision of catering services at Mahatma Gandhi Memorial Hospital, was important for the applicant and, as the granting of such relief was being opposed by the third and fifth respondents, I gave permission for the matter to be set down as an opposed matter on 5 October 2007, notwithstanding the fact that the date was outside of term. The relevant parties were then put on terms to file their respective affidavits in time for the matter to be argued on the said date.

One of the grounds upon which the applicant relies for resisting eviction as a caterer at the Mahatma Gandhi Memorial Hospital was that the notice of termination of agreement which

had been given by the Department was short and thereby rendering the same null and void. When the matter was called on 5 October 2007 I referred to this ground and suggested to Mr. **Dickson,** who appeared for the applicant, that, as the ground is capable of disposing the issue before me on its own without any need to refer to other grounds (which, in any event, were replete with disputes of fact), perhaps, that ground should be argued separately. As I understood Mr. **Dickson** to agree with my suggestion and as I did not understand other counsel to disagree with the same, I permitted the proceedings to follow that course. In his replying argument Mr. **Dickson** also suggested that the issue as based on this ground be treated as a final relief, notwithstanding the fact that in the Notice of Motion it is couched in the form of a *rule nisi.* Mr. **Olsen,** who appeared for the third respondent and Mr. **de Wet,** who appeared for the fifth respondent, agreed with this suggestion. In this judgment the matter will accordingly be dealt with in terms of these suggestions.

As already shown in this judgment, the service agreement between the applicant and the Department (the third respondent in these proceedings) for the provision of the catering services at the Mahatma Gandhi Memorial Hospital was, after the expiry of the initial three year period, on a month to month basis. What was then contemplated by the parties was that the contract would remain in force until duly terminated. [1] In **Fulton v Nunn,** [2] Innes CJ, dealing with a lease agreement couched in similar terms, had the following to say :-

> "It was clearly a tenancy terminable on reasonable notice, but running from month to month, and not for broken periods. I should have thought there was no authority required for the proposition that when a house is taken from month to month it is taken by the month, and not for any broken portion of the month. Mr. *Dickson* says the point is *res nova,* but that is probably because nobody has thought it worth while before to raise the contention now set up. The question is simple. The notice must run concurrently with some term of the lease, and must expire at the end of that term……." [3]

After referring to certain customs which existed in Holland and in England in olden times, regarding dates upon which alone, as a general rule, houses were leased and after having taken note that those customs did not exist in South Africa, the Honourable Chief Justice refers to *Voet's* writings and states that, according to the author, where a lessor is entitled to put an end to a lease, he should give a reasonable notice to quit at the end of a current term of the tenancy. The learned Chief Justice then concludes as follows :-

> "….. I think the same principle should be adopted in the case of notice by a lessee. Reasonable notice in the case of a monthly lease should be given so given as to expire at the end of a month unless there is custom or agreement to the contrary. It seems to me that no custom is required to support this principle; but proof of a contrary custom would be necessary to overrule it". [4]

In the later decision in **Pemberton, N.O. v Kessell** [5] the Honourable Chief Justice extended the principle to contracts of service, holding that :-

> "I think it is impossible to distinguish this case from *Fulton v Nunn.* I go further. Even if the point were *res nova,* I think the same principle should be applied. When the hiring is not for menial or domestic service, and is for an indefinite period from month to month, it appears to me that, in the absence of custom to the contrary, it should only terminate at the end of one of the monthly periods, and that the reasonable notice should be so given as to run to the end of a month……. Reasonable notice, it is admitted, is a month's notice. It follows that if it is to run with a monthly period it must be given at the
>
> end of the preceding month……" [6]

Dealing with a contract of service in **Stocks and Stocks Holdings Ltd and another v Mphelo** [7] Botha J remarks as follows about the principle :-

> "The rationale for the rule in *Fulton v Nunn* and *Pemberton N.O. v Kessell* is still good in our time. Leases and service contracts are commonly entered into with effect from the beginning of a calendar month. Vacancies arise at the end of a month. In that way the practice of filling them at the beginning of a month is perpetuated." [8]

It was on the basis of the law as enunciated in the abovementioned decisions that Mr. **Dickson** submitted that the notice given by the third respondent terminating the service agreement between it and the applicant is invalid and null and void. It is, of course, true that the agreements which the said decisions had to deal with were those of contracts of service and the one of contract of lease and that *in casu* the contract is one for provision of catering services. However, in my judgment, the rationale for the invocation of the principle in those contracts equally apply to the contract for the provision of catering services which was concluded by the applicant and the third respondent in this matter. That being the position and in view of the fact that the said notice fell short of a calendar month, it must follow that the notice is invalid.

Mr. **Olsen** has, however, argued that, notwithstanding the defect in the notice, it would not be proper to find that the same has no effect at all and that effect should be given to it with the result that, in terms thereof, the calendar month would expire on 31 October 2007 and that I should order that the notice take effect as from and that the contract is terminated on that date.

I am not persuaded by the submission made by Mr. **Olsen.** A notice which, like in the present case, fell short of a calendar month in the **Stocks and Stocks** case **(supra)** was found to be invalid. [9] In the Black's Law Dictionary the word "invalid" is defined as :-

> "vain; inadequate to its purpose; not of binding force or legal efficacy; lacking in authority or obligation. " [10]

It accordingly follows that a notice the effect of which is as described in this definition cannot, at the same time, have an effect which Mr. **Olsen** has urged me to give to it. The submission based on that argument can therefore not succeed.

I have accordingly found it unnecessary to deal with the rest of the grounds advanced by Mr. **Dickson,** including the ground based on Section 217 of the Constitution which ground was, in any event, advanced for the first time in Mr. **Dickson's** supplementary heads.

Regarding the costs, there does not appear to be any reason to depart from the general rule that a party who achieves success in the proceedings should be awarded his costs. It is clear that in the present case the applicant has achieved such success and that, in the exercise of my discretion, costs should be awarded to it.

I accordingly order that :-

1. The notice of termination of the catering service agreement between the applicant and the third respondent annexed as "KK10" to the applicant's founding affidavit is declared invalid and of no force and effect;

2. The fifth respondent is interdicted and restrained from evicting the applicant as the caterer at the Mahatma Gandhi Memorial Hospital

3. The costs relating to the application for interim relief be borne by the third and fifth respondents jointly and severally, the one paying the other to be absolved.

For the applicant: Mr. A J Dickson SC (instructed by Madikizela Nyati

Attorneys)

For Ist – 4th Respondents: Mr. P J Olsen SC with Mr. J Nxusani (instructed by State Attorney KwaZulu-Natal

For 5th Respondent: Mr. A de Wet (instructed by Austen Smith)

Matter heard: 5 October 2007

Judgment delivered: 11 October 2007

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[1] Tiopaizi v Bulawayo Municipality 1923 AD 317 at 320;

[2] 1904 TS 123;

[3] Ibid at 125;

[4] Ibid at 125 – 126;

[5] 1905 TS 174;

[6] Ibid at 178;

[7] 1996(2) SA 864 (T);

[8] I bid at 869 A-B;

[9] At 869 B;

[10] Fifth Edition at 739; See also the concurring judgment of van Heerden J in Marais and another v McIntosh and another 1978(3) SA 414 (N) at 421 E-F;