IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 6677/2020

In the matter between:

THE MEC FOR THE DEPARTMENT OF TRANSPORT, KWAZULU-NATAL — **APPELLANT**

and

RAUBEX KZN (PTY) LTD. — **FIRST RESPONDENT**

RODERICK STEWART N.O. — **SECOND RESPONDENT**

ORDER

Coram Mossop AJ:

The application is dismissed with costs on the party-party scale.

JUDGMENT

Mossop AJ:

Introduction

[1] The applicant and the first respondent concluded a contract known as 'the General Conditions of Contract for Construction Works, third edition (2015)' (the contract). The contract is a standard form contract compiled and administered by the South African Institute of Civil Engineers.

[2] The contract was concluded as a consequence of the first respondent being the successful bidder in a tender put out by the applicant in respect of routine maintenance that it required to be undertaken on certain roads administered by the Department of Transport.

Representation

[3] When the matter was argued, I had the pleasure of hearing argument from each of Mr Choudree SC, leading Mr Crampton, who appear for the applicant, with Mr Choudree commencing the argument and Mr. Crampton delivering the reply, and from Mr. Pillay SC, who appears for the first respondent. All three counsel are sincerely thanked for their most helpful submissions. The second respondent, against whom no relief is sought by the applicant, has not participated in this matter and is not represented.

The dispute

[4] In preparing its tender bid, the first respondent was required to state, at item B13.06 of the project specification, the amount that it intended to charge the applicant as a management fee for subcontracted work. Item B.13.06 stated as follows:

'The tendered rate for item B13.06 is the percentage which can be claimed by the established contractor for work completed successfully by the emerging contractors.'

[5] After awarding the tender to the first respondent, the applicant noted that the first respondent had not included a rate at B13.06 and took the view that no management fee was to be charged by it for this portion of the contract. The first respondent disputed this. It contended that the overall purpose of the contract was for routine road maintenance activities to be performed by emerging subcontractors under its management. The first respondent's activities in this regard were limited to the performance by it of a mere 20% of the total construction work to be performed. Its

primary function was to manage the work of the emerging contractors. As the bulk of the work to be performed was to be subcontracted, the first respondent contended that the position taken by the applicant that the management of that subcontracted work was not to be charged for by it was irrational. To compensate the successful party for supervising the work of the subcontractors, the contract provided for a management fee. The first respondent had tendered in its bid document at a rate of 20% for the work successfully completed by the appointed sub-contractors. It did not specify what the Rand value of that 20% charge would be. By virtue of the fact that its tender had subsequently been accepted, the first respondent reasoned that the rate at which it sought to be compensated for its supervisory functions had also been accepted.

[6] The applicant did not agree with this proposition and a dispute ensued. Ultimately, the first respondent invoked the mechanisms of the contract to formally declare a dispute. The matter was then referred to the second respondent for determination, sitting in his representative capacity as the only member of the adjudication board contemplated by the contract. Written representations were submitted to the second respondent and in due course he published his decision (the decision). In the decision, the second respondent found for the first respondent.

The applicant's dissatisfaction with the decision

[7] The applicant's view is that the decision of the second respondent is clearly wrong. It permits the first respondent, so it says, to claim payment of an amount in excess of the agreed tender amount. It wishes to further challenge the decision. However, clause 10.6 of the contract contains a sub-clause that requires a dissatisfied party to give notice of its intention to dispute either the whole, or a part of, a decision of the adjudication board within defined time periods. Should such notice not be timeously given, the dissatisfied party may no longer refer the decision complained of to arbitration or a court.

The time limitation clause

[8] Sub-clause 10.6.1.2 of the contract reads as follows:

'A party shall not dispute the validity or correctness of the whole or a specified part of the decision before 28 days or after 56 days from the receipt of the decision.

Unless either party shall on or after the said 28 days, or on or before the said 56 days from receipt of the decision, give written notice to the other party, referring to this Clause, disputing the validity, or correctness of the whole, or a specified part of the decision, he shall have no further right to refer such a dispute to arbitration or court proceedings, whichever is applicable in terms of the Contract.'

[9] The reference to a 'decision' in the extract above is a reference to a decision of an adjudication board. I shall refer to this clause as '*the time-limitation clause*.'

Non-compliance with the time-limitation clause

[10] It is common cause that the relevant dates are the following:

(a) 24 March 2020, being the date upon which the decision was received by the deponent to the applicant's founding affidavit, Ms Patience Phililе Sithole (Ms Sithole);

(b) 25 March 2020 to 22 April 2020, being the first 28-day period during which no party could take any action regarding the decision; and

(c) 23 April 2020 to 22 May 2020, being the second 28-day period, during which any party dissatisfied by the decision was required to give notice of its dissatisfaction.

[11] It is also common cause that the applicant did not give notice of its intention to dispute the decision within the period prescribed by the time-limitation clause and only gave such notice on 12 August 2020. Why this happened is considered later.

[12] Given the wording of sub-clause 10.6.1.2 of the contract, the applicant is now barred from further disputing the correctness of the decision. To overcome this obstacle, the applicant seeks in this application an order that enforcement of the time-limitation clause be declared *contra bonos mores*.

The relief sought

[13] The applicant seeks the following relief in its notice of motion:

'1. It is declared that the time-barring provisions, contained in clause 10.6.1 of the General Conditions of Contract for Construction works (Third edition (2015)) ("the GCC's"), which clause was incorporated into a contract (contract number ZNT4009/16T) concluded between Applicant and First Respondent, are unenforceable insofar as such provisions prevent

Applicant from challenging or disputing Second Respondent's decision ("the Adjudication Board Decision") dated and received on 23 March 2020.

2. The order granted in terms of paragraph 1 does not affect the general enforceability of the said clause 10.6.1 of the GGC's but is granted on facts peculiar to this case.

3. There is no order as to costs, provided that if either Respondent opposes this application, it will be requested that such Respondent(s) be ordered to pay, jointly and severally where applicable, the costs of application.'

[14] The applicant does not seek an order that the enforcement of the time-limitation clause be struck down in all cases where the General Conditions of Contract for Construction Works contract is employed. The applicant's case is nuanced: it contends that it is only in this case that the enforcement of the time-limitation clause should be struck down. It is for this reason that paragraph two has been included in the notice of motion. That paragraph specifically seeks to only prohibit the enforcement of the time-limitation clause because of the specific facts of this case.

Contra bonos mores

[15] The ordinary meaning ascribed to this maxim is 'against good morals'.[1] Whilst the applicant's notice of motion references this maxim and the founding affidavit makes extensive use of it, in the applicant's heads of argument more emphasis is placed on the maxim 'against public policy'. Counsel for the applicant submitted that the two phrases, essentially, mean the same thing. There appears to be merit in this submission. While the law generally seems to classify illegal or unenforceable contracts (apart from those contrary to statute) into contracts that are either *contra bonos mores* or those that are contrary to public policy, this classification is, indeed, interchangeable, as:

'in a sense ... all illegalities may be said to be immoral and all immorality and illegality contrary to public policy'.[2]

I shall accordingly treat them as if they were the same.

---

[1] *Black's Law Dictionary*, 4ed (1968).

[2] Aquilius "Immorality and illegality in contract" (1941) 58 *SALJ* 337 at 344.

[16] In considering what amounts to 'good morals', Thirion J in *Edouard v Administrator, Natal*, stated that:

'From the examples which the writers give of conduct or contracts which is branded as being contrary to public policy it is reasonable to infer that when they refer to good morals they have in mind those deep seated convictions held generally by the community in the interest of the welfare of the community. Although it is often the case that contracts which are contrary to public policy are infested with some turpitude, it is not necessary that, in order to be contrary to public policy, they should contain some disgraceful provision or have as their aim the commission of some moral impropriety.' [3]

[17] It is so that circumstances may arise in a contract in which a stipulation is felt to offend the moral susceptibilities of the citizens of this country although it cannot be said to violate any known provision of the law. The law will refuse to enforce such an agreement which is then identified as an immoral contract. What is immoral is a factual not a legal issue.[4]

[18] With the advent of a constitutional democracy in this country it is now accepted that a contractual term that is contrary to public policy is unenforceable. Public policy is derived from the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism. The validity of all law, including contractual law, depends on the consistency of that law with the provisions of the Constitution and the values that underlie the Constitution. The consequence is that the application of the principle of *pacta sunt servanda* is also subject to constitutional control.

[19] The first respondent relies heavily on the fact that the applicant agreed to the terms of the contract, to which effect must now be given. It is settled law that, in general, public policy requires contracting parties to honour obligations that have been freely and voluntarily undertaken by them. In *Beadica 231 CC and others v Trustees of the Oregon Trust,*[5] the court held that it was crucial to economic development that

[3] *Edouard v Administrator, Natal* 1989 (2) SA 368 (D) at 377H et seq.
[4] *Edouard v Administrator, Natal* 1989 (2) SA 368 (D) at 378.
[5] *Beadica 231 CC and others v Trustees of the Oregon Trust* 2020 (5) SA 247 (CC) para 83.

individuals should be able to trust that all contracting parties would be bound by obligations willingly assumed by them when contracting. Certainty of contractual relations advance constitutional rights and is essential to the achievement of the constitutional vision for this country. However, the court held further that there was no basis for privileging *pacta sunt servanda* over other constitutional rights and values: the requirements of public policy are informed by a wide range of constitutional values. Where a number of constitutional rights and values are implicated, a careful balancing exercise is required to determine whether enforcement of the contractual terms would be contrary to public policy in the circumstances. While it is necessary to recognise the doctrine of *pacta sunt servanda*, courts could decline the enforcement of a time-limitation clause if implementation would result in unfairness or would be unreasonable for being contrary to public policy.

[20] A word of caution was sounded in *Sasfin (Pty) Ltd v Beukes*.[6] The court stated: 'One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL) at 12 ([1937] 3 All ER 402 at 407B - C),

> "the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds"

(see also *Olsen v Standaloft* 1983 (2) SA 668 (ZS) at 673G). Williston on *Contracts* 3rd ed para 1630 expresses the position thus:

> "Although the power of courts to invalidate bargains of parties on grounds of public policy is unquestioned and is clearly necessary, the impropriety of the transaction should be convincingly established in order to justify the exercise of the power.
>
> In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom."'[7]

[21] The applicant contends that to enforce the time-limitation clause would be unfair to it.

---

[6] *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).
[7] *Sasfin (Pty) Ltd v Beukes* at 9.

The applicable test for fairness

[22] Counsel for the applicant submitted that the test to be applied when considering the issue of fairness is that set out in *Barkhuizen v Napier*,[8] namely:

(a) Is the clause to which objection is taken unreasonable? If it is not unreasonable, then:

(b) Should it be enforced in the view of the circumstances that prevented compliance with its provisions?

[23] I am in agreement with this submission. Once it is accepted that the wording of the contract or clause in question does not itself violate public policy and that non-compliance with it is thereafter established, the claimant is required to show that, in the circumstances of the case, there was a good reason why it failed to comply with the clause.[9] The onus is on the party seeking to avoid the enforcement of the clause to demonstrate why its enforcement would be unfair and unreasonable in the given circumstances.[10]

The validity of time-limitation clauses

[24] Time-limitation clauses are relatively common features of commercial contracts. They have enjoyed the attention of the Constitutional Court in *Barkhuizen*, where the court held that as a matter of public policy, and subject to considerations of reasonableness and fairness, such clauses in contracts are permissible.[11] The Constitutional Court found that such a clause does not deny a party the right to seek judicial redress: it simply requires the party to seek judicial redress within a prescribed period.

[25] Part of the reasoning that led to the conclusion in *Barkhuizen* is to be found in the earlier Constitutional Court decision of *Mohlomi v Minister of Defence*,[12] where Didcott J said that:

---

[8] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 56.
[9] *Barkhuizen v Napier*, para 58.
[10] *Barkhuizen v Napier* para 58.
[11] *Barkhuizen v Napier* para 48.
[12] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC).

'Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.'[13]

The meaning of the time-limitation clause

[26] The meaning of the time-limitation clause appears to be relatively uncontroversial. On the face of it, if an adjudicating board renders a decision in a matter referred to it and either of the parties to that referral are dissatisfied with that decision, no action need, or can, be taken until a period of 28 days has elapsed from the date of receipt of the decision. This was referred to in the papers as constituting a '*cooling down*' period, allowing the parties to fully consider and reflect upon a decision handed down. After the lapse of the initial 28-day period, any party still wishing to dispute the decision has a second period of 28-days within which to deliver a notice to the other party. The notice to be delivered is required to mention sub-clause 10.6.1.2 of the contract and shall indicate whether the validity or correctness of the whole, or a specified part, of the decision is disputed. Failure to deliver such a notice within the prescribed time period precludes the dissatisfied party from referring that specific dispute to arbitration or to court proceedings, whichever applies to the particular contract in question.

The applicant's allegations

[27] The principal factual submissions of the applicant as to why the enforcement of the time-limitation clause should not be permitted are the following:

(a) the applicant appointed an attorney to represent it in the dispute before the second respondent. He was a Mr Mkhulise (Mr Mkhulise) of the firm Mkhulise Attorneys. On Friday, 20 March 2020, four days before the second respondent

[13] *Mohlomi v Minister of Defence* para 11.

delivered his decision, Mr. Mkhulise was tragically murdered. The applicant states that following upon this, it was unable to get any information from Mr Mkhulise's files from his office as he was a sole practitioner and his office was in 'disarray' following his death. It was also unable to receive legal advice concerning the decision. Attempts to appoint a successor to Mr Mkhulise were further hampered when the applicant approached its present attorneys and was told that they could not act until all outstanding amounts owing to Mr Mkhulise's firm had been paid. The founding affidavit states that the applicant's present attorneys were approached 'in early June' but that they were only capable of being instructed by the applicant on 17 June 2020. This application was ultimately launched on 16 September 2020; and

(b) on Monday, 23 March 2020, one day before the decision was delivered, President Ramaphosa declared a nationwide lockdown as a consequence of the outbreak of the COVID-19 pandemic in the country (the lockdown). As a consequence, the applicant experienced difficulty in appointing a new attorney and devoting the necessary attention to the matter. The applicant states that during level 5 of the lockdown, being the most restrictive stage, all citizens, apart from those involved in essential services, were confined to their homes. During this level of the lockdown, Ms Sithole and her colleagues were not permitted to work as essential services employees and could not access their workplace or the documents relevant to this matter. Level 5 of the lockdown was relaxed to level 4 on 1 May 2020, but the applicant was still faced with challenges. While it was now permitted to operate a skeleton staff, the staff were inundated with a backlog of work that had accumulated during the previous month. In addition, according to the applicant, there was uncertainty as to whether attorneys were entitled to operate as essential services and many of the attorneys' offices in Pietermaritzburg remained closed.

[28] The applicant contends that the interplay of these two principal factors caused it difficulty in complying with the provisions of the time-limitation clause.

Application of the test as laid down in *Barkhuizen*

[29] The applicant does not contend that sub-clause 10.6.1.2 is itself objectionable. So much was conceded in its replying affidavit and confirmed by its counsel when the

matter was argued. That disposes of the first leg of the inquiry set out in *Barkhuizen*. Only the second part of the inquiry need be considered.

[30] In approaching the second stage of the inquiry, the reasons advanced by the applicant for its non-compliance obviously assume some importance. It is those reasons that must be assessed to determine whether they are sound and allow the applicant to escape the strictures of the time-limitation clause. The court is also required to take into account the relative equality or inequality of the bargaining positions of the parties when concluding the contract.[14]

[31] At first blush, the two principal reasons advanced by the applicant for its non-compliance with the time-limitation clause appear to be cogent and compelling. Death is notoriously a great disruptor, and the imposition of a national lock down is unprecedented in the modern history of this country. As was said in *Barkhuizen*:

‘ … where a claimant seeks to avoid the enforcement of a time-limitation clause on the basis that non-compliance with it was caused by factors beyond his or her control, it is inconceivable that a court would hold the claimant to such a clause.’[15]

[32] The essential question to be determined thus is whether compliance with the time-limitation clause was prohibited by factors beyond the control of the applicant. The death of the attorney and the imposition of the lockdown were clearly events beyond the control of the applicant. But does the mere fact of their occurrence permit the applicant to avoid the terms of the time-limitation clause? In my view, the answer to that question must be in the negative. The conduct of the applicant’s employees must still be scrutinised notwithstanding the occurrence of the two factors relied upon by the applicant. The difficulty for the applicant is that it has provided very little information concerning its employees conduct in relation to the occurrence of the two factors relied upon by it.

[33] In the analysis that follows, it may appear that only the evidence of Ms Sithole

---

[14] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 58, 59 and 65.
[15] *Barkhuizen v Napier* para 73.

is being singled out for close scrutiny. The fact of the matter is that insofar as the merits of the application are concerned, hers is the only evidence tendered by the applicant. There are no affidavits from other employees of the applicant or from employees of the late Mr Mkhulise's practice.

[34] Sequentially, the death of Mr Mkhulise was the first event Ms Sithole had to deal with. She acknowledged that she became aware of his murder the day after it happened, which would then mean that she had such knowledge on 21 March 2020. This was before the announcement of the lockdown by President Ramaphosa. Whilst Ms Sithole acknowledged in her affidavit that she relied heavily upon Mr Mkhulise, it is equally so that she must have realised at a very early stage, before the decision was even delivered, that he would unfortunately not be able to assist her again in the future. The need to replace him swiftly would have been obvious to her. Initially, she would have had no appreciation of the coming lockdown. When it was announced three days after Mr Mkhulise's death, she knew that she had limited time to source a replacement before the lockdown was imposed. She has provided no evidence of what she did to try and replace him.

[35] When the occurrence of the lockdown was announced, it was not imposed with immediate effect. The citizens of this country were given three days advance warning that the lockdown would be imposed. This was presumably to allow them to make preparations for its imposition. Ms Sithole makes no mention of what she did in the days leading up to the imposition of the lockdown, whether in regard to the appointment of a new attorney or with regard to delivering the notice contemplated by the contract. She does not mention even reading the decision, which she received directly from the second respondent, or discussing its terms with any other person involved in the matter on behalf of the applicant. The lead up to the imposition of the lockdown offered a period, albeit brief, within which the relevant files that required urgent attention could have been identified and removed for easy access at the relevant official's residence, alternatively copies of relevant documents could have been made for later perusal at home. Nothing is explained by Ms Sithole about what was done in preparation for the lockdown.

[36] Indeed, throughout the founding affidavit, Ms Sithole makes no disclosure of anything that she personally did from 21 March 2020, being the date upon which she acquired knowledge of the murder, to 22 May 2020, being the date upon which the second 28-day period expired. What she narrates is impersonally recited without an acknowledgement from her that she personally did any of the things that she mentions. The mere existence of the murder and the lockdown appears to be used by Ms Sithole as a cloak that is drawn down upon her activities to obscure them from view.

[37] It follows that Ms Sithole makes no mention of anything that she personally did during the first part of the lockdown, being level 5. That period is glossed over with the explanation that citizens of this country were required to remain at home and that no access to the documents relevant to this matter was possible. That may well be so. But the mere fact that the lockdown was imposed did not mean that state employees such as Ms Sithole were entitled to regard it as a paid period of absence. Whilst the lockdown was enormously disruptive, economic life had to continue even if it was conducted from one's dining room table.

[38] The silence of Ms Sithole is perhaps more damning insofar as the period after the relaxation of the lockdown from level 5 to level 4 occurred. The first day of the level 4 lockdown was 2 May 2020.[16] At that point, there were still 20 days remaining of the second 28-day period. This was the critical period when the notice of dissatisfaction with the decision had to be delivered. Nothing is said about what Ms Sithole did in relation to this matter during that period either. There is a general explanation that the applicant's skeleton staff were faced with a backlog of work that had accumulated. One would have anticipated that this matter would be at the top of the list of those matters requiring urgent attention. It appears that it was not. Why this is the case is not revealed.

[39] Ms Sithole describes herself as:

'… a Director: Legal Services in the Department of Transport, KwaZulu-Natal.'

[16] Although 1 May 2020 was a public holiday, the regulations in GG 43258, dated 29 April 2020, state that lockdown level 4 would commence on 1 May 2020 (regulation 15).

She admits to having a ‘generalist experience in the law’. She was a direct recipient of the decision when it was handed down by the second respondent. At the time that she received the decision, she would have been able to access all the documents relevant to the matter, including the contract itself. She would have been able to remind herself of the further requirements of the contract. She claims not to be a construction law expert and asserts that she is ‘not intimately familiar with the contract and all its demands.’ It does not require one to be an expert to realise that the clock commenced running once the decision was received. If Ms Sithole was not comfortable in dealing with the contract, she was under a duty to her employer to ensure that she received the necessary advice from someone who was familiar with it. She, on behalf of the applicant, was responsible for the legal aspects of the contract. She does not reveal a single step that she personally took to secure that advice. She does not mention whether the applicant only appoints a single attorney to attend to its business or if it has a list of approved attorneys who may be approached. It is more probable that the latter holds true. Yet she does not mention approaching or telephoning a single attorney either prior to or after the lockdown commenced. Mr Pillay submitted that if the applicant was truly at a loss regarding what to do, it could have communicated with the South African Institute of Civil Engineers, the administrators of the General Conditions of Contract for Construction Works contract and sought advice from them. It appears that the applicant did not do so. Finally, the applicant could have contacted the first respondent’s attorneys and explained the predicament in which it found itself. Perhaps, at an early stage in the proceedings, the second respondent may have had a more accommodating attitude towards granting the applicant the indulgence that it sought. No such communication was resorted to.

[40] Ms Sithole has indicated that she relied heavily upon Mr Mkhulise. In argument, it was agreed by counsel for the applicant that the applicant, upon recognising that the second respondent had found against it on the basis that he did, immediately recognised that the decision was incorrect and flawed and wanted to take steps to reverse the decision. The importance of that concession is that Mr Mkhulise’s involvement was not required in assessing the correctness of the decision: it could not have been as the applicant arrived at the conclusion that the decision was wrong after

his demise. Mr Mkhulise's only involvement would have been on the communication of the applicant's decision to the respondents. However, according to the applicant, following Mr Mkhulise's death, there was no way of the applicant taking the next step required by sub-clause 10.6.1.2 of the contract. A consideration of that clause reveals that all that was required from the applicant was a notice that made reference to that clause number and a further statement as to whether the whole, or only a part, of the decision was challenged. There was no expertise required in constructing the notice and the notice itself involved no great complexity. Initially, all that was required was the sub-clause of the contract to be read and understood. It appears that no-one employed by the applicant took the trouble to read the sub-clause. No reason was advanced in the founding affidavit as to why Ms Sithole could not have done what was necessary in that regard.

[41] As regards the availability of other attorneys to assist the applicant, Ms Sithole makes the following statement:

'In the initial stages of the alert level 4, there was some uncertainty as to whether attorneys were entitled to operate as essential services and many of the attorneys' offices in Pietermaritzburg remained closed. It was, therefore, difficult to source attorneys to replace Mr Mkhulise.'

This statement is impermissibly vague. Who was uncertain? Ms Sithole or attorneys generally or only specific attorneys? Which attorneys' offices remained closed? How did Ms Sithole know that many of the attorneys' offices remained closed? Were any attorneys contacted by her and did they indicate that they could not do the applicant's work? These are all relevant questions that require an answer if the applicant is to be found to have discharged the onus that it bears.

[42] Finally, I can discern no inequality in bargaining strength that redounds to the benefit of the applicant. If anything, the applicant was in the stronger bargaining position of the two parties.

[43] The applicant painted its picture using broad brush strokes. What was needed was the use of a finer brush to highlight the detail that is presently missing from the picture. The affidavit of Ms Sithole is remarkable more for what it does not say than

for what it does say. In my view, insufficient reasons have been advanced in support of the allegation that the applicant could not have complied with the provisions of the time-limitation clause.

Other issues raised

[44] The parties identified other ancillary issues, including:

(a) whether the applicant was required to establish absolute impossibility of performance in order to obtain the relief that it seeks. Mr Choudree, however, made it clear that the applicant was not relying on the doctrine of supervening impossibility of performance. If that was sought to be established, the performance would have to be absolutely or objectively impossible and not merely difficult or uneconomical.[17]

(b) whether the applicant, as an organ of state, may rely on the Bill of Rights in claiming the relief that it seeks. Given the judgment *in State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd*[18] that fundamental rights are meant to protect warm-bodied human beings primarily against the state, there may be merit in the first respondent's assertion that the applicant is not entitled to rely upon the Bill of Rights. The matter is, however, capable of being resolved on the facts without reference to the issue of the Bill of Rights; and

(c) whether in conducting itself as it has, the applicant has repudiated the contract. Given the finding arrived at, there is no need to resolve this assertion by the first respondent.

Summation

[45] Regard being had to the fact that whether something is immoral or not is a question of fact, sufficient facts must be advanced if a declaration that the enforcement of the time-limitation clause is *contra bonos mores* or contrary to public policy is to be made. The applicant's founding papers, in which it is required to make its case, is characterised by an absence of facts. There is simply no evidence to satisfactorily explain why the applicant could not have complied with the time-limitation clause.

---

17 *Yodaiken v Angehrn and Piel* 1914 TPD 254 at 260.

18 *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA).

[46] On the facts disclosed, such as they are, there is nothing that commends itself as being immoral or contrary to public policy. Right thinking members of the community would require organs of state such as the applicant to be diligent and vigilant in the performance of their contractual obligations. Those entrusted with the legal work of the applicant are required to conduct themselves in a professional manner and to use their best endeavours to protect the interests of their employer.

[47] In my view, in advancing the version that it has in the manner that it has, bereft of any real detail, the applicant has not discharged the onus that it bears. It may be perceived that the result is harsh. A court, however, may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh.[19] These abstract values have not been accorded autonomous, self-standing status as contractual requirements. This is, moreover, on the facts disclosed by the applicant not a clear-cut case where the court should intervene and strike down the enforcement of the time-limitation clause.

[48] The argument raised by the applicant concerning the COVID-19 pandemic is not a unique one. A similar argument was raised in the matter of *Bulldog Abrasives Southern Africa (Pty) Ltd v Davie and another.*[20] In that matter, the court was dealing with the enforcement of a restraint of trade clause. The existence of the COVID-19 pandemic was raised as a factor that should persuade the court not to enforce the restraint of trade on the grounds that to do so would offend against public policy. The court stated as follows:

'To suggest that enforcing a restraint in Covid-19 situation is contrary to public policy is to stretch the meaning of public policy beyond what it is supposed to be. As consistently held, public policy requires that parties to a contract freely entered into to be bound by such a contract..'[21]

In my view, that reasoning applies equally to the enforcement of contracts during the COVID-19 pandemic that contain time-limitation clauses that have been freely entered into.

---

[19] *Beadica 231 CC and others v Trustees, Oregon Trust and others* 2020 (5) SA 247 (CC) para 80
[20] *Bulldog Abrasives Southern Africa (Pty) Ltd v Davie and another* [2021] ZALCJHB 58.
[21] *Bulldog Abrasives Southern Africa (Pty) Ltd v Davie and another* para 19.

[49] Counsel were agreed that it was not the function of this court to adjudicate upon whether the decision was correct. It was submitted that the court was only to have regard to the decision at the level of whether the applicant had prospects of success in determining whether the relief should be granted. It would appear to me that those prospects are not strong. A business-like consideration of the first respondent's tender conforms with the finding of the second respondent. The applicant could not reasonably have believed the first respondent would perform all its supervisory services of the work not performed by it, amounting to 80% of all the work to be performed in terms of the contract, for free. The applicant specified its rate at which it would perform such services, namely 20%. The founding affidavit does not reveal the value of that work, and neither could counsel during argument. This may, perhaps, be because that value can only be calculated in relation to work 'successfully performed' by the sub-contractors. That phrase renders it possible that some work performed might not be successfully performed and therefore not capable of attracting a fee for the first respondent. But that could not have be known at the time of tendering. It seems that the only way that first respondent could disclose what it would charge is by reference to a percentage. That is what it did.

[50] On the question of costs, Mr Pillay urged for a punitive order against the applicant on the attorney client scale. After consideration, it appears to me that such an order is not called for.

Conclusion

[51] I accordingly make the following order:

The application is dismissed with costs on the party-party scale.

Mossop AJ

APPEARANCES

Counsel for the applicant	:	Advocate R Choudree SC with Advocate D. Crampton Instructed by: Govindasamy, Ndzingi and Govender 211 Burger Street Pietermaritzburg
Counsel for the respondent	:	Advocate I. Pillay SC Instructed by: Cox Yeats Ncondo Chambers Vuna Close Umhlanga Ridge Durban
Date of Hearing	:	28 May 2021
Date of Judgment	:	8 June 2021