NORTH WEST HIGH COURT, MAFIKENG

CASE NO: M370/14

In the matter between:

IZANDRA TRADING 9 (PTY) LTD	**APPLICANT**
And	
THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, NORTH WEST PROVINCE	**FIRST RESPONDENT**
THE HEAD OF DEPARTMENT: DEPARTMENT OF HEALTH, NORTH WEST PROVINCE	**SECOND RESPONDENT**

J U D G M E N T

GURA J:

Introduction

[1] The applicant launched an urgent application seeking an order in the following terms:

> "1.1 Directing that the application be heard as one of urgency and condoning the failure of the applicant to comply with the Uniform Rules of Court;

1.2 That the first and second respondents are ordered to mediate with the applicant about the disputes to the Service Level Agreement ("SLA") within 7 days of this Court order, before a Mediator agreed upon, alternatively appointed by the Court, in respect of tender number 396/2012, for the supply of coal to the Bojanala and Ngaka Modiri Molema District ("the contracts");

1.3 That if the first and second respondents refuse to mediate with the applicant, alternatively should no agreement be reached before the Mediator, the applicant is ordered to institute action for appropriate relief and a declaratory order in respect of the disputes to the SLA within 14 days after the refusal and/or the failure to reach an agreement before the Mediator;

1.4 That pending paragraphs 1.2 and 1.3 above, the first and second respondents are ordered to:

1.4.1 Immediately uplift the suspension of the contracts between the applicant and the second respondent;

1.4.2 Immediately continue to perform their obligations under the contracts in respect of the applicant;

1.4.3 Immediately pay the applicant monies due;

1.5 That pending paragraphs 1.2 and 1.3 above, the first and second respondents are interdicted to:

1.5.1 Suspend the contracts with the applicant for any of the reasons currently the subject matter of the dispute to the contracts and the SLA;

1.5.2 Prevent the applicant to fulfil its obligations in terms of the contract;

1.5.3 Appoint or make use of the services of any third party, to render any of the obligations held by the applicant, to the second respondent;

1.6 That the first and second respondents pay the costs of this application on a scale between attorney and client;

1.7 Further and/or alternative relief"

Factual Background

[2] The applicant was awarded two contracts by the Respondents to supply coal to Job Shimankane hospital: Rustenburg; Bojanala District, and the following three hospitals which are in Ngaka Modiri Molema District:
(i) Mafikeng/Bophelong hospital, (ii) Gelekspan hospital and (iii) Zeerust hospital. The first contract (for Bojanala) was for a period of three years commencing on 1 August 2013 and ending on 31 July 2016. The second one was also for a period of three years effective from 1 April 2014 until March 2017.

[3] In order to provide such health services, medical facilities require boiled hot water and steam for use and consumption and they rely on either electricity or coal powered boilers to achieve this. The importance of hot water and steam is for steam pot in cooking, laundry services which provides clean and bacteria free linen, as well as operating theatre and theatre equipment cleaning. Steam pots are necessary to ensure that there is regular and reliable provision of food to hospital patients. Clean laundry which is bacteria free, is used for both patients and medical personnel, to ensure that diseases and bacteria, are not transmitted. Theatre equipment and the theatre room must be kept sterile to avoid transfer of service bacteria into the human body and constant hot water is needed so that theatre personnel wash their hands before an operation.

[4] In terms of Tender No. 396/2012 the General Conditions of Contract

(GCOC) formed part of all bid documents, including the two contracts.

[5] Clause 3.16 and 3.14 of the first and the second tender documents respectively are almost similarly worded:

> "No price increase other than a general increase by Coal Industry shall be entertained for the duration of the contract."

The only slight difference between the two clauses (3.16 and 3.14) is that in the former reference is made to "Coal Industry Board" whereas in the latter this institution is referred to as "Coal Industry"

[6] During 2013 the suppliers of coal increased their prices and the applicant and other service providers communicated this to the second respondent. Around October 2013 the first and second respondent called upon all service providers informing them that the department was considering the price increase in conformity with clause 3.16. The respondents requested all service providers in the letter aforesaid, to submit proof of the price increases of the various mines from which the applicant and other service providers purchase coal.

[7] During November 2013 the applicant forwarded all the necessary documents for the increase to the respondents. The applicant again wrote the following letter to the second respondent in November 2013:

> "According to the correspondence we received from you, you mention that the contract states that only coal price increases shall be entertained for the duration of the

contract. (We do not agree with this)."

[8] A compulsory briefing session was held at 10H00 on the 13th November 2012 at Mafikeng Provincial Hospital where it was discussed that Diesel increases will be entertained.

[9] On 28 November 2013 the respondents informed the applicant that its price increase had been approved.

[10] There were further price increases in 2014 and the applicant as well as other service providers communicated this to the second respondent with a view to approving a price increase to them. The price increases were approved by the second respondent on 8 April 2014 for Bojanala District and on 19 May 2014 in respect of Ngaka Modiri Molema District.

[11] A dispute subsequently developed between the parties about clause 9.5 of the Service Level Agreement (SLA). This disagreement emerged before the SLA could be signed by the applicant. From time to time the parties were engaged in some form of communication with a view to solving the purported problem. Clause 9.5 of the SLA dealt with price increases and it stipulated that a price increase would be considered only at each anniversary of the agreement. The applicant's view was that the terms and conditions of the SLA were not in conformity with the requirements, terms and conditions of the tender document. The respondents disagreed with the applicant. The applicant refused to sign the SLA as it was.

[12] On 23 July 2014 the second respondent suspended the operation of the contract because the applicant had not signed the SLA which contained the alleged offending clause 9.5.

[13] On 8 August 2014 the applicant requested urgent mediation by Advocate Johan Pistoor S C. The second respondent was advised by the applicant that it (second respondent) had acted unlawfully in suspending the "agreement" because the parties had not gone to mediation prior to that. On 8 August 2014, the second respondent answered and indicated that this matter would be brought to the attention of the acting head of department (HOD) who would be briefed the subsequent week. On 14 August 2014 the applicant sent another follow-up letter seeing that there was no response (according to the applicant) from the second respondent.

[14] The respondents summarised the events leading to the launch of this application as follows: During August 2014, Dr Motlhabani was appointed the acting head of the department and he had to be fully briefed about this matter. Numerous correspondences were exchanged between the applicant and the second respondent. The applicant was made aware that Dr Motlhabani had been appointed as acting head of the department and that he (Dr Motlhabani) was the only official who was authorised to take a decision on the matter in his capacity as the accounting officer of the department. The applicant was informed that the matter would be brought to the attention of the acting head of the department as soon as he was back in office. On 25 August 2014 before the applicant brought the present application the second respondent's official informed the applicant that the matter would be raised with the accounting officer on 27 August 2014 when he would be returning to office. Despite that information, the applicant launched this application on 26 August 2014.

[15] The brief history of this matter after it was lodged with the Registrar is that it was enrolled for 4 September 2014. Although the respondents filed a

notice to oppose, they never filed opposing papers before the date of hearing. On 4 September 2014, the parties agreed to settle the matter. This settlement proposal, which was then made a court order was in line with an undated letter from the State Attorney which was faxed to the applicant's attorney on 3 September 2014. I quote the Court order of 4 September 2014.

> "1. The application be and is hereby removed from the roll;
> 2. The applicant and the first and second respondents will give effect and implement the letter from the State Attorney dated the 3rd of September within one week of this order;
> 3. The costs of this application be and are hereby reserved."

[16] On 28 October 2014 the applicant and the second respondent with their legal representatives met the mediator, Advocate Zwiegelaar. The latter was required to mediate in the dispute between the parties about clause 9.5 of the SLA. The matter was then settled in accordance with a letter dated 1 July 2014 from the applicant's attorneys to the respondents. The only variation in the settlement was that the period of fourteen days was replaced with sixty days in clause 9.5.5 of the letter of 1 July 2014.

[17] For a proper understanding of the settlement agreement between the parties it is necessary to quote the relevant parts of the applicant's attorneys' letter referred to in paragraph 16 of this judgment.

> "1. Your email below to my client, Izandra 9 (Pty) Ltd refers.
> 2. The SLA allows for only one price adjustment per year.
> 3. This is clearly not acceptable given that our client faces price increases right through the year from both its coal and diesel suppliers.
> 4. The said increases are not always such that notice of 30

days is received by our client, as you know the price of diesel is not increased with such prior notice for instance.

5. We propose the following amendments to clause 9.5

9.5.5 An application for a price increase will be considered by the NWDOH and decided on within 14 (Fourteen) days of being submitted. Should the NWDOH reasonably require any additional documentary proof in consideration of the application for a price adjustment, the date on which the NWDOH receives the additional documentation required will be regarded as the date on which the application for a price adjustment is submitted.---"

[18] There are two issues which call for decision in this case. It is urgency and costs. I will deal with both issues simultaneously. Mr Ackerman for the applicant submitted that in deciding who should pay the costs of this application the Court has to consider the following:

18.1 Whether the application was urgent or not;

18.2 Whether the first and second respondents were entitled in law to act contrary to the provisions of clause 27.5 of the General Conditions of Contract ("GCOC"), by suspending the contracts of the applicant, to force the applicant to sign the SLA and/or to accept the terms thereof, contrary to the tender;

18.3 Whether the applicant was *bona fide* when he raised concerns to the proposed clause 9.5 of the SLA, and whether the applicant was entitled to raise these concerns/issues; and

18.4 Whether the applicant was entitled to approach Court taking into account the facts of the matter.

[19] Ms Moagi, for the second respondent, submitted that the questions to be determined herein are:

19.1 Whether the application was urgent;

19.2 Whether the Applicant acted reasonably by launching this application on 25th August 2014, and

19.3 Whether the Applicant is entitled to wasted costs.

[20] Ms Moagi further submitted that the following questions were irrelevant and immaterial for the purpose of determining who should be held liable for the costs of this application:

20.1 Whether the Department was entitled in law to act contrary to the provisions of clause 27.5 of the General Conditions of Contract concluded with the Application;

20.2 Whether the Applicant was *bona fide*, when he raised concerns to the proposed clause 9.5 of the SLA, and whether the Applicant was entitled to raise these concerns; and

20.3 Whether the Applicant was entitled to approach the court.

[21] The position of the second respondent is that on 25 August 2014 the applicant was informed that the acting head of the department would be briefed on 27 August 2014. Despite this information, the applicant submitted

the urgent application to the Registrar on 26 August 2014 something which was unnecessary under the circumstances.

[22] In August 2013 the second respondent presented to the applicant the SLA with the alleged offending clause 9.5. The applicant then responded by stating that he was against clause 9.5. The version of the applicant is that the respondent never responded until in June 2014. The respondent stated that it did respond and the cause of the delay was the applicant who was refusing to sign the SLA as it was. On 1 June 2014 the second respondent forwarded the same SLA again to the applicant. The applicant then informed the second respondent that he was handing over the matter to his legal advisers who will deal directly with the respondent.

[23] On 1 July 2014 the second respondent acknowledged receipt of the applicant's response which by now had been referred to the Departmental Bid Adjudication Committee and the Directorate Legal Services for their attention. On 23 July 2014 the applicant's contract was suspended by the second respondent because he refused to sign the SLA. So instead of referring this dispute to mediation, the second respondent suspended the services of the applicant in terms of the contract. The applicant wrote a letter on 28 July 2014 to the second respondent pointing out that the step of suspending this agreement was unlawful and that the second respondent had to comply with clause 27 of the General Conditions of Contract (GCOC).

[24] In respect of both tenders (Contracts), clause 27 of the GCOC reads:

"Settlement of Disputes

"27.1 If any dispute or difference of any kind whatsoever arises between the purchaser and the supplier in connection with or arising out of the contract, the parties shall make every effort to resolve amicably such dispute or difference by mutual consultation.

27.2 If, after thirty (30) days, the parties have failed to resolve their dispute or difference by such a mutual consultation, then either the purchaser or the supplier may give notice to the other party of his intention to commence with mediation. No mediation in respect of this matter may be commenced unless such notice is given to the other party.

27.3 Should it not be possible to settle a dispute by means of mediation, it may be settled in a South African court of law.

27.4 Mediation proceedings shall be conducted in accordance with the rules of procedure specified in the SCC.

27.5 Notwithstanding any reference to mediation and/or court proceedings herein,

(a) The parties shall continue to perform their respective obligations under the contract unless they otherwise agree; and
(b) The purchaser shall pay the supplier any monies due the supplier."

[25] The applicant contacted an official, Kyereh, of the respondent telephonically and asked for a meeting. The second respondent undertook to revert but this never happened. On 8 August 2014 the applicant addressed a follow-up letter requesting mediation and the mediator was suggested being Advocate Johann Pistoor SC.

[26] On 28 August 2014 the second respondent's official promised to brief the head of the department "early next week". Thereafter, the second respondent did not inform the applicant whether or not the HOD was ever briefed. Seeing that there was no feedback from the second respondent, on Friday 22 August 2014 the applicant placed the respondent on terms:
Unless you give us a complete answer by 10H00 on Monday, 25 August 2014 we take you to court. The second respondent responded by stating that the HOD would be briefed on Wednesday, 27 August 2014. The applicant then marched to court the subsequent day, 26 August 2014.

[27] I cannot find anything improper in the behaviour of the applicant. He had done everything in his power to engage the second respondent but the latter was moving at a snail's pace. As at Monday 25 August 2014 the applicant was justified not to attach any value to this latest promise from the second respondent. He had no guarantee that they would brief the HOD on Wednesday because previously they had made almost similar excuses for which they did not even have the courtesy of explaining their default. In the circumstances, it is the conduct of the second respondent that pushed the applicant to Court, something which he (the applicant) tried at all costs to avoid.

[28] It should be borne in mind that it was by now about a period of a month (on 26 August 2014) since the applicant's services were suspended unlawfully and contrary to clause 27 of the GCOC. The applicant's creditors, including his workers were surely, at that stage, knocking at his door. Finality had to be reached as soon as possible. A further delay had the potential that institutions which supplied the applicant with coal would soon be reluctant

to do business with him in future. All these facts, in my view, justify the bringing of this application on urgency.

[29] At paragraph 20 of this judgment counsel for the second respondent persuaded the Court to disregard certain factors in resolving this dispute. I am unable to share the same view however. To hold otherwise would result in prejudice to the applicant. The attitude of the respondents is inexcusable. They disregarded clear and elaborate provisions of clause 27. When the applicant offered them an advice to the effect that they acted unlawfully, they did not reconsider their unlawful act.

[30] It would be unfair for the applicant to be out of pocket purely due to the dilatoriness of the second respondent. This is a matter which should never have come to Court if the second respondent had listened to advice from the applicant. This is a proper case where both respondents should be saddled with an order of costs on a punitive scale. The delay in resolving this matter posed a potential threat to patients in the affected hospitals which would likely be without boiled or hot water. In fact, it is the second respondent and not the applicant, who should have known this better.

[31] Consequently, the following order is made:

The respondents to pay costs on the scale as between attorney and client, such costs include reserved costs of 4 September 2014.

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SAMKELO GURA

JUDGE OF THE HIGH COURT

APPEARENCES

DATE OF HEARING	: 26 MARCH 2015
DATE OF JUDGMENT	: 16 JULY 2015
ATTORNEYS FOR THE APPLICANT	: NIENABER & WISSING
ATTORNEYS FOR THE RESPONDENT	: STATE ATTORNEY
COUNSEL FOR THE APPLICANT	: ADV ACKERMAN
COUNSEL FOR THE RESPONDENT	: ADV MOAGI