REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

CASE NO: 9982/2015

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

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DATE SIGNATURE

In the matter between

SS&G PROJECT FINANCE SOLUTIONS [Pty] Ltd **APPLICANT**

And

GIBB (Pty) Ltd **1ST RESPONDENT**

RAND WATER BOARD **2ND RESPONDENT**

EMFULENI LOCAL MUNICIPALITY **3rd RESPONDENT**

MINISTER OF WATER AND SANITATION **4TH RESPONDENT**

MINISTER OF FINANCE **5TH RESPONDENT**

MINISTER OF ECONOMIC DEVELOPMENT **6TH RESPONDENT**

J U D G M E N T

VICTOR J:

Issues

[1] The applicant seeks extensive relief by way of urgency. The applicant seeks to interdict the first and second respondents, the first respondent being its "co-venture partner" Gibb and second respondent, Rand Water Board, from proceeding with the implementation of a written consultancy services agreement which they concluded on 26 February 2015, hereinafter referred to as the impugned consultancy services agreement. The applicant and Gibb had been awarded a tender which was amended thereby virtually cutting the applicant out of the project.

[2] The applicant also seeks an order to interdict and prohibit Gibb and Rand Water from proceeding to implement any form of the execution plan that may emanate from the impugned consultancy agreement. Further declaring that Gibb had no authority to enter into and sign the impugned consultancy services agreement on behalf of the consortium and an order declaring that the impugned consultancy services agreement is null and void and unenforceable.

[3] The next tranche of relief sought, also on an urgent basis, is that Rand Water be ordered to enter into a new consultancy services agreement on the basis contained in a settlement agreement which must be read together with the letter of the second respondent dated 10 February 2014. In order to avoid any doubt the new consultancy agreement must also deal specifically with stage 2 of the relevant scope of services.

[4] The next tranche of relief is that the fourth respondent, the Minister of Water and Sanitation, be directed to instruct Rand Water as the implementing agent to immediately conclude the new consultancy services agreement based on the relief sought in prayer 6. The next tranche is against the fifth respondent, the Minister of Finance, who must prevent all funds to be

expended on the basis and under the auspices of the intended impugned consultancy agreement, and an order directing the sixth respondent, who is the Minister of Economic Development to manage all the requisite supervision and control over the scheme so that there is timeous and proper implementation and execution of the scheme and to facilitate such execution and implementation in terms of the intended consultancy service agreement envisaged in prayer 6 of the Notice of Motion.

[5] An order was also sought directing the parties to enter into negotiations to conclude a written consortium agreement for the purposes of implementing and executing the new consultancy agreement.

Urgency

[6] The relief sought by way of urgency is extensive. The application is in excess of 1 000 pages and approximately 10 counsel appeared. Each one of the respondents raised the question of urgency but before I deal with that I need to set out what the applicant itself deemed the grounds of urgency to be.

[7] In paragraph 103 of the application the urgency is based on the following: that the delivery of the project is long overdue, that Rand Water and Gibb, have made it clear that they intend proceeding with the project in terms of the new service level agreement to the exclusion of the legally contracted party to the agreement that is SS&G, the applicant in this matter. Rand Water has stated that it is not prepared to meet with SS&G to discuss their objections to the new Service Level Agreement (SLA) citing that those objections relate to an internal dispute between the joint venture parties and they do not wish to become involved in that internal dispute.

[8] The applicant does not know what further steps are being taken by Rand Water and Gibb to implement the new SLA and it is quite clear that certainly Rand Water and Gibb intend proceeding with the SLA which was concluded on 26 March 2008. In other words, the applicant feels that the

basis of urgency is really to protect its own interests and that urgency is justified having regard to the history of this matter.

[9] The applicant has set out a very helpful timeline in this matter which shows that the joint venture tendered for a project which was initially envisaged to be run by the Emfuleni Local Municipality. They tendered and were successful. The closing date for the bid was 29 June 2012 and the tender was awarded to the joint venture group being the applicant and Gibb. It became clear at some stage that the project was then inter-governmentally re-directed and that Rand Water was to run the project. Rand Water set out a new set of tenders which precipitated an urgent application brought by consensus between the joint venture parties to interdict the proceedings in that the tender had already been awarded. That application was launched on 10 October 2013 and the person who deposed to that affidavit was a Mr De Vries.

[10] On 29 October 2013 the Rand Water tender was interdicted and then the parties met over a period in order to settle the litigation. On 30 January 2014 the first letter of offer was made by Rand Water. On 1 February 2014 there was a meeting. On 4 February 2014 there was another letter of offer from Rand Water and in that letter various deletions were made and in particular the representative of Gibb deletes the words “as per original appointment”. Various correspondence was exchanged between the parties and it would appear that the matter eventually became settled on 9 February 2014.

[11] In terms of the settlement agreement it was envisaged that there would be a new contract concluded and the scope of the services were adjusted and the impugned contract was concluded. This dispute has its genesis in what was envisaged in that settlement agreement. In fact, in terms of clause 2.8 of the settlement agreement it was envisaged that the settlement agreement would not come into effect until the contract was concluded between the parties and this is the SLA contract.

[12] On 10 February 2014 Rand Water made a letter of offer and the offer in paragraph 2 reads as follows: that Rand Water further hereby confirms your appointment to carry out a portion of the work in respect of the above bid the initial tender awarded by the Emfuleni Local Municipality. In this letter of offer it is recorded that Rand Water would assume the role of Emfuleni Municipality. In paragraph 4 of the letter of offer the point of departure between the parties is the interpretation of the words that the new infrastructure will be as per the original appointment set out in table 4.1 of the Gibb March 2010 draft.

[13] Now for the purpose of urgency it is not necessary for me to resolve that debate between the parties. What is of importance is on the same day, 10 February, both Mr De Vries of Gibb and Mr Gooley of the applicant signed a letter of acceptance. Both parties signed. However, it soon must have become evident to Mr Gooley that what he had signed could have created some ambiguity and it certainly did have some dissonance in terms of what had been agreed to.

[14] In the email of 10 February 2014 sent at 9:15 pm to all the parties Mr Gooley makes the point that he is challenged by the manner in which phase 2 of the project is to be carried out. He states that there are the ECSA guidelines for consulting engineers and their clients. The guidelines do not apply to commercial contracts comprised of finance, legal, project management, PR and communications. I think it was agreed between the parties that the ECSA is really for the engineering works. The parties were awarded the contract on the basis of the PPP contract. He contended that this would prejudice the applicant in the following way: it would prejudice its income stream and it would also have a reputational effect.

[15] There was continuous contact between the applicant, Gibb and Rand Water. Quite clearly the battle lines were drawn on the evening of 10 February 2014. All the respondents attack the basis of urgency and state that

the applicant should have brought its application much earlier since it knew that the dispute was extensive and certainly by May 2014 it was clear that there would be no consensus. The applicant is criticised for not doing anything further in terms of bringing finality to the SLA agreement and the applicant criticises Gibb and Rand Water for doing nothing for a year and then suddenly in March, 2014 there was a signing event where the SLA was signed and to which the applicant claims it was not party to and did not agree and would never have agreed since it was only prepared to proceed along the PPP basis.

[16] By May of 2014 the then attorneys for the consortium terminated their mandate because of the internal differences in the consortium and a new attorney came on record. By 6 March 2015 it was quite clear that the applicant contended that the settlement agreement which was signed was not in accordance with their understanding of the settlement agreement and that the change from the PPP to ECSA contract was not in accordance with the settlement agreement.

[17] All those difficulties had been recorded over the period of the year but in particular by the beginning of March 2015 there was an incremental effort by the applicant to have the matter resolved and by 26 March Rand Water and Gibb signed the new SLA, which certainly made it clear that the ECSA guidelines would be applied to any further contract. This meant prejudice to the applicant in that the fee that they would earn would be much reduced.

[18] The grounds of urgency by the first, second, fourth and fifth respondents are really an attack on the time lapse between 10 February 2014 up to and until 26 March 2015. Neither of the respondents seems to attack the second stage, which I shall call the second stage of the urgency argument. However, it seems to me that the attack on the urgency between 10 February 2014 and 26 February 2015 requires greater analysis.

[19] The point is made by the respondents that there had even been a suggestion of mediation and I think that was by June 2014 in order to try and resolve the difficulties between the parties in the joint venture and this did not yield any resolution. There was even talk of an exit agreement by the applicant but nothing came of that.

[20] In my view, the issues raised by the applicant are extensive. There is not a part A or part B to the relief which it sought. The applicant pressed the Court to take into account that the signing of the SLA on 26 March was signed under suspicious circumstances. The applicant had been involved in the matter right up until then. The email sent to Mr Gooley to attend did not reach him because it was sent to the incorrect email address.

[21] The submission by the applicant is that if the Court were to condone that aspect, the Court would really be condoning suspicious behaviour.

[22] It was put to Mr Malindi SC, counsel on behalf of the second respondent, that the signing of the agreement seemed to be suspect. In fact, if the email did not reach Mr Gooley of the applicant Mr De Vries of the first respondent, could have phoned Mr Gooley to tell him to come down to Vereeniging to be part of the signing ceremony.

[22] Now that may be an unsatisfactory feature but there is not sufficient evidence before me to make a finding on that. I have to look at the application as a whole. It is clear that the relief sought from the various ministerial departments, for example the fourth and fifth respondent that is relief which cannot be granted on an urgent basis. It clearly is a direction in the form of a *mandamus* to direct that the Minister of Water and Sanitation give instructions to the second respondent. Similarly, the relief sought against the fifth respondent is also of a mandatory nature and so too with the sixth respondent.

[23] Upon a proper analysis of the relief sought it is far reaching, it is not something which government departments can resolve at such short notice. As I understood the argument on behalf of the applicant there was greater emphasis on the relief sought in prayers 2, 3, 4 and 5. The import of granting relief in terms of prayers 2, 3, 4 and 5 in really forcing the parties to negotiate and conclude a different consultancy services agreement and each one of the respondents had difficulty and to do so under urgency would also make it a far more complex exercise. Clearly the fourth and fifth respondents cannot carry out what the applicant wishes on an urgent basis.

[24] I, therefore, do have to assess whether prayers 2, 3, 4 and 5 can be carried out on an urgent basis and whether this Court can prevent the implementation of a consultancy services agreement based on the disputes of fact which have arisen. The applicant urged upon the Court the principle that the disputes of fact are not that extensive. It seems to me, however, that the applicant can well in due course obtain its relief by way of a claim for damages that it may have against the first respondent.

[25] Having regard to the entire matrix of facts before me, the relief sought in prayers 2, 3, 4, 5 and 6 cannot be justified on an urgent basis. The applicant, therefore, fails on the basis of urgency, and that was the only aspect that was argued before me. As regards costs at this stage the appearance by two counsel only on the question of urgency was not justified.

The order I would make is

1. The application is struck from the roll for lack of urgency.
2. The applicant is ordered to pay the wasted costs of one set of counsel and that is the senior counsel for each party.

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M. Victor

Judge of the High Court

Gauteng Local Division