IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 70271/2019

Date:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

22/7/2020 .....
DATE SIGNATURE

In the matter between:

INTENDA (PTY) LTD	**APPLICANT**
AND	
STATE INFORMATION TECHNOLOGY AGENCY	**1ST RESPONDENT**
LUVUYO KEYISE	**2ND RESPONDENT**
VINCENT TENDANI MPHAPHULA	**3RD RESPONDENT**

JUDGMENT

TOLMAY, J:

[1] The applicant (Intenda) brought an urgent application asking that the respondents be found in contempt of an order issued by Neukircher J on 11 November 2019 (the *interim* order) and be committed to imprisonment for a period of 10 days, but suspended subject to the first respondent (SITA) paying Intenda R18 400 000-00 within three days of this Court's order and R4.6 million monthly until the main application is determined, alternatively that SITA is directed to pay the outstanding amount of R18 400 000-00 [outstanding at the time of issuing] within three days of the Court order. Intenda also sought a punitive costs order against SITA, and cost *de bonis properiis* against the second and third respondents.

[2] The background of this urgent application is that the main application, which was launched in September 2019, was due to be heard on 11 November 2019. The main application concerns a software licence agreement concluded between Intenda and SITA during March 2017. This agreement (the 2017 Agreement) related to electronic procurement software developed by Intenda. It would seem, on a perusal of the main agreement that despite SITA not complaining about Intenda's software not being fit for purpose, or that Intenda had

failed to comply with the 2017 Agreement, for about two and a half years, SITA during May and June 2019, stopped paying Intenda in terms of the Agreement. SITA, according to Intenda, owed it close to R100 million under the 2017 Agreement. As a result of this failure Intenda launched the main urgent application in September 2019. It was common cause that if SITA failed to pay, Intenda would be insolvent by December 2019. The main application was due to be heard by Neukircher J on 11 November 2019, SITA however on 8 November 2019 launched an application for the judicial review of the 2017 Agreement.

[3] Intenda agreed to the postponement on the basis of an agreed *interim* order, which reads as follows:

> "*1. The application under case number 2019/70271 is postponed sine die and will be heard before Neukircher J at the same time as the review application under case number 2019/84691;*
>
> *2. the State Information Technology Agency ("SITA") is directed to pay Intenda (Pty) Ltd ("Intenda")*
>
> *2.1 A once-off payment of R50 000 000-00 (fifty million rand) within seven days of the date of this order; and;*
>
> *2.2 Pending the final determination of the review application under case number 2019/ 84691, a*

monthly amount of R4 600 000-00 (four million six hundred thousand rand) for monthly services."

[4] Neukircher J requested the parties to engage each other and arrange a date for the hearing before her. Intenda corresponded with SITA's legal representatives but got no response. During this hearing I instructed the legal representatives to engage with Neukircher J to arrange a date and the date of 14 September 2020 was confirmed by Neukircher J for the hearing of the application.

[5] SITA initially paid the amounts due under the *interim* court order, but had subsequently refused to do so. It was argued that the refusal to make payments under 2.2 of the *interim* court order had put Intenda back in the same precarious financial position that the interim court order was meant to address and that as a result Intenda will suffer irreparable harm and will be insolvent by August 2020, unless the Court grants the relief sought.

[6] It is clear that the matter is urgent, as Intenda will in all likelihood be insolvent before the main application is heard and the judgment is handed down. It is indeed by now trite, as argued by Mr Budlender (Sc), that commercial interests may justify the use of the urgent court, no less than any other interests.[1] Also, if Intenda is not granted relief

[1] Twentieth Century Fox Film Corp v Anthony Black Films (Pty) Ltd 1982(3) SA 582 (W) at 586 H-G, Bandle Inv (Pty) Ltd v Registrar of Deeds and Others 2001(2) SA 203 (SE) at 213 E-F

on an urgent basis and becomes insolvent, it will not be able to achieve meaningful relief in due course.[2]

[7] Paragraph 1 of the *interim* order states clearly that both the main and review applications will be heard at the same time by the same judge. Paragraph 2.1 provides that SITA must pay R50 million rand, due under the 2017 Agreement. It is common cause that SITA paid this amount. Paragraph 2.2, whose interpretation is the bone of contention between the parties states that pending the final determination of the review application SITA must pay R4.6 million rand for monthly services.

[8] On 27 November 2019 SITA withdrew and abandoned its review application, which it conceded was ill advised. SITA then continued to pay the R4.6 million per month for two months. However, after this SITA refused to pay the monthly payments and gave two reasons for not doing so. The first was that Intenda was required to provide proof of the services rendered each month in order to claim payment and did not do so. The second reasons offered for the non-payment was that the *interim* court order lapsed, as the review application is no longer pending.

[2] East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others 1977(4) SA 298 A at 304 D (Grenticuro) see also Eke v Parsons 2016(3) SA 37 at par 29

[9] In **Natal Joint Municipal Pension Fund v Endumeni Municipality,**[3] the SCA set out the general principles relating to interpretation as follows:

> *"The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to*

[3] 2012(4) SA 593 (SCA) par 18 (Endumeni)

make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[10] The principles governing interpretation of court orders were set out in **Firestone South Africa (Pty) Ltd v Genticuro**[4] as follows:

"The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."

[11] From the above it is clear that the Court must consider the context and language of the order and neither should predominate.[5] The second aspect that needs consideration is the context, which will include the background circumstances which gave rise to the order. The context will also, of necessity, include the purpose of the *interim* order and the need for that order to provide effective relief.

[4] 1977(4) SA 295 at 306F – 308A
[5] Endumeni par 19

[12] In **G4S Cash Solutions v Zandspruit Cash and Carry (Pty) Ltd and Another**[6] it was held that a court in the interpretative process "*is one of ascertaining the intention of the parties* ..." In this process a Court must examine the circumstances surrounding the conclusion of the agreement, which should include the context and the subsequent conduct of the parties.

[13] In my view one should, when interpreting this court order, start with the background which led to the agreement between the parties to the *interim* order. The purpose of the *interim* order was to keep Intenda afloat pending the determination of the main application, but for the belated launching of the review application, the main application would have been heard on 11 November 2019, and the dispute between the parties would have been determined by the court. Intenda's financial survival pending the determination of the applications lies at the heart of the agreement that led to the *interim* order.

[14] It will be legally unsustainable to interpret any part of the *interim* order on its own. Paragraph 1 clearly states that both applications will be heard by the same judge on the same day. The only inference that can be drawn from this is that the determination of these two applications was inextricably linked. The fact that the review application was withdrawn and abandoned on 27 November 2019 did not change the

[6] 2017(32) SA 24 (SCA) par 12, see also Novartis v Maphil 2016(1) SA 518 (SCA) par 35

fact that Intenda needs to stay afloat until the determination of the main application.

[15] The present dispute between the parties revolves around the interpretation of paragraph 2.2 of the *interim* order. As already stated, this part of the order cannot be interpreted on its own, reference was already made to the background leading up to the interim order. The conduct of SITA, subsequent to the *interim* order is also of importance. It paid the R50 million and continued to pay the R4.6 million per month, for a period of two months, even after the review application was withdrawn, it was only then that SITA made an about turn and raised the two reasons earlier referred to for refusing to pay the monthly payment.

[16] The first reason provided for non-payment was that there was no proof provided by Intenda of performance in terms of the 2017 Agreement. The parties however agreed on an *interim* order, pending the final determination of their rights. These disputes about performance forms part of the main application. In its replying affidavit Intenda dealt extensively with this allegation and also referred back to the main application where this aspect was dealt with. It is of importance to note that SITA did not raise any complaint for a period of two and a half years and continued to pay SITA until approximately June 2019. Intenda stated in its replying affidavit that it kept on providing precisely the same proof for services rendered as it did since the start of the

2017 Agreement. The facts contradict the reason offered by SITA for ceasing to pay the amount set out in paragraph 2.2 of the *interim* order.

[17] The second reason given by SITA for not complying with paragraph 2.2 of the *interim* order was that the *interim* order lapsed as a result of the withdrawal of the review application, but this must be seen in the context of the fact that the parties clearly contemplated that the applications would be heard together. When the order is considered in its proper context and in accordance with the purpose that the parties sought to achieve, the order can only be understood to continue to apply pending the main application. SITA's subsequent conduct by making further payments, after the review application was withdrawn, clearly indicates that this argument has no merit at all. It is also interesting to note that this reason was never raised in any correspondence after SITA stopped paying. As a result neither of SITA's defences is sustainable.

[18] Intenda, as already stated, initially proposed two routes, one is an order of contempt, secondly a *mandamus* as set out in prayer 5. Mr Budlender (Sc) however urged the Court to rather follow the *mandamus* route, as the contempt route might cause a further delay and complexities which Intenda can ill afford if it wants to remain financially afloat. I am of the view that in the context of this case and the urgency for relief, this is indeed the most appropriate route to

follow. As a result, and due to the urgency of this judgment I do not deal with the question of contempt.

[19] Intenda sought a punitive costs order and an order that the second and third respondents should bear the costs *de bonis properiis*. I am of the view that in this case a *de bonis properiis* costs order against the second and third respondents will not be appropriate, in the light of the fact that the court did not follow the contempt route. Despite the fact that their conduct on a perusal of the papers show a truly disturbing attitude towards the rule of law and respect for court orders. If the Court decided to follow the contempt route the outcome for them regarding costs could have been quite different.

[20] Regarding the punitive costs order against SITA however, the interpretation of the court order was always quite apparent and I find SITA's attempt to avoid complying with the *interim* order to be reprehensible, it is a public entity and state organs have a duty to show due respect for the rule of law.[7] The reasons provided for not complying with the *interim* order were contrived and without any merit. I also took into account that despite Intenda's best efforts SITA did not comply with the request by Neukircher J that the parties should engage to arrange a date for the hearing. Intenda's requests for dates from SITA were not responded on. In the light of these facts a punitive costs order is appropriate.

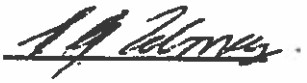
[7] Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others 2015(5) SA 1 (GP) at par 37.2

[21] I make the following order:

1. **The main application is postponed by agreement to 14 September 2020, to be heard by Neukircher J;**

2. **The first respondent is directed to pay the outstanding amount of R18 400 000-00 [outstanding at time of issuing] within three days of this court order;**

3. **The first respondent is ordered to pay the costs of this application on an attorney and client scale, which costs will include the costs of two counsel.**



R G TOLMAY

JUDGE OF THE HIGH COURT

DATE OF HEARING:	**9 JULY 2020**
DATE OF JUDGMENT:	22 July 2020
ATTORNEY FOR APPLICANT:	**SCHINDLER ATTORNEYS**
ADVOCATE FOR APPLICANT:	**ADV S BUDLENDER (SC) AND ADV S SCOTT**
ATTORNEY FOR RESPONDENTS:	**DIALE MOGASHOA ATTORNEYS**
ADVOCATE FOR RESPONDENTS:	**ADV K TSATSAWANE (SC) AND ADV K MAGANO**