REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 024313/23

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

3/3/25
DATE

[redacted]
SIGNATURE

In the matter between:

FOURSIGHT IT BUSINESS SOLUTIONS (PTY) LTD Applicant

and

DEPARTMENT OF HOME AFFAIRS First Respondent

DIRECTOR-GENERAL: DEPARTMENT OF

HOME AFFAIRS Second Respondent

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 3 March 2025.*

Summary: A party faced with an exercise of public power has as an option a PAJA or Legality review. Where a simple declaratory relief is sought, a Court bound by the pleaded case cannot order a review relief where one was not

sought. The remedies for breach of a contract are well known. The trite principle is that a party is bound by its pleaded case, it being the case the other party is called upon to meet. A suggestion that fraud as defined in law is absent, is a suggestion that the Department had exercised statutory power in the absence of the necessary jurisdictional requirements. Where the evidence demonstrates the known elements of fraud, namely; (a) misrepresentation; (b) intention to defraud; (c) the action was against the law; and (d) there was prejudice or potential prejudice, then fraud exists by whatever name it may be labelled or not labelled. Held: (1) The application is dismissed with no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] In the present application, which was midway dubbed a PAJA review, it is common cause that the applicant before me, Foursight IT Business Solutions (Pty) Ltd (Foursight) was awarded a contract by the Department of Home Affairs to render certain IT-related services over a period of five years. It also, was common cause that midway the tenure of the agreement, the Department prematurely cancelled the agreement for reasons outlined in the Treasury Regulations. The said termination gave birth to the present application. In opposing the application, the Department launched what it termed a conditional application seeking, for different reasons, to review and set aside the awarded contract.

[2] It must be mentioned that on the allocated day of the hearing, the arguments commenced after 10h00 for reasons that on CaseLines there was a notice indicating that the application was removed from the roll. As the allocated judge, I did not read the papers owing to the purported removal from the roll. It was only on the morning of the hearing day that I was alerted to the fact that the application had not been removed and was proceeding. Under those constrained

circumstances, I availed myself to the parties, in order to hear arguments, disadvantaged as I was.

The relief sought

[3] It is significant to, at this embryonic stage, set out what the applicant sought as reliefs in its notice of motion. This will be the reliefs that will navigate this Court in this judgment. It must be indicated that, initially, the applicant wished to obtain the reliefs sought now on an urgent basis. Therefore, for the purposes of this judgment, the relief to have the matter heard as one of urgency in terms of rule 6(12)(a) and (b) of the Uniform Rules shall be omitted from the reliefs sought by the applicant before me.

[4] The reliefs sought are:

1. **Declaring** the decision of the respondents to terminate the Master Service Agreement with the applicant **unlawful and invalid**.

2. It be ordered that the Master Service Agreement is **restored with immediate** effect.

3. Alternative to prayer 2 above, that it be ordered that the respondent subject **itself to the dispute to mediation process as required by the Master Service Agreement.**

4. Costs of suit;

5. Further and or alternative relief.

[5] This Court must immediately remark that other than seeking a declarator that the termination is unlawful and invalid, no relief is sought that the decision to be so declared, must be judicially reviewed. The restoration of the Master Service Agreement must mean a contractual remedy of specific performance, a discretionary remedy, this Court must mention. Also, the alternative relief is contractual in nature and in a form of specific performance.

[6] During argument, it was pointed out to counsel for the applicant, Mr *Amm SC*, that regard being had to the fact that in cancelling the contract, the Department

clearly exercised statutory power and or public power, the competent and available remedy for the applicant is a judicial review. In retort, and with sufficient confidence, this Court must state, he submitted that the present application is a PAJA review, even though, not a single section of PAJA was referenced anywhere in the papers. Of course, at that time, this Court was on its back foot, having not read the papers in advance, for reasons outlined above, had to accept a submission from a senior officer of the Court.

[7] This Court must state that regard being had to the notice of motion referenced above, it turns out that the submission by counsel that this is a PAJA review is, with respect, not correct. It is unclear to this Court whether, the submission was made with an honest error, in a genuine believe that it is a correct one or was intended to mislead this Court. This Court will leave it at that. That notwithstanding, this Court takes a firm view that this is not a PAJA review. Even if this Court were to consider the mere verbiage of further and or alternative relief, the allegations made in the founding affidavit, do not justify a judicial review remedy.

[8] For the sake of completeness, however, section 6(1) of PAJA provides that any person may institute proceedings in a Court or a tribunal for the judicial review of an administrative action. An administrative action is defined in section 1 of PAJA. Nowhere in the founding affidavit does the deponent of the applicant state that the cancellation of the contract decision by the Department amounts to an administrative action. Undoubtedly, nowhere in the notice of motion does the applicant seek a judicial review relief.

Relevant background facts

[9] As indicated above, it is common cause that Foursight was awarded a contract to perform certain services. This was a culmination of the bid adjudication process that unfolded. It is unnecessary for the purpose of this judgment to recount the bid adjudication process. It suffices though to mention that a bid adjudication process was undertaken.

[10] Of particular relevance, it is common cause that Foursight appointed a subcontractor, aptly named Aim-Right. In the course of the delivery of the

services, it turned out that Aim-Right had failed to meet the required deliverables. Aim-Right used the employees of the Department to perform the subcontracted work. This happened on the instruction of one Mr Khuzwayo, an official of the Department who was intimately involved in the bid adjudication process. The director of Foursight, considered what was happening with Aim-Right and the employees of the Department, through Mr Khuzwayo, to be extremely offensive, and she instructed her attorneys of record to report the incident and to terminate Aim-Right as a subcontractor. In the letter seeking to terminate Aim-Right, it was mentioned that Foursight was aware that Aim-Right used the personnel of the Department at certain places and misusing taxpayers' money.

[11] Ultimately, on 13 August 2021, the director of Foursight reported the observed irregularities attached to the execution of the contract. Such prompted the Department to conduct an investigation into the alleged irregularities. The investigations revealed various irregularities in the bid adjudication process. For the sake of brevity, the investigations were conducted by a company known as BDO Advisory Services (Pty) Ltd (BDO). On or about 6 September 2022, BDO produced a report of the investigations and furnished it to the Department for consideration. The report is about 110 pages long. The contents of the report were not, in these proceedings, challenged by Foursight.

[12] The BDO report revealed amongst others that an invoice of R45 000.00 was raised by Foursight, which invoice represented that at Bloemfontein SITA certain services were performed. However, it turned out that payment of that invoice was made before the installation of the device. The author of the report considered the payment to constitute an irregular expenditure since Foursight did not render the alleged services. A number of other invoices raised by Foursight were questioned for validity. BDO recommended that the Department should consider referring the matter, they investigated, to the SAPS for an investigation into contravention of Prevention and Combatting of Corrupt Activities Act (PRECCA). This recommendation simply suggested to the Department that corruption was involved in the tender process that the BDO was tasked to investigate.

[13] Having studied the report, the Department on 09 March 2023 wrote a letter of cancellation directed to Foursight and referenced the provisions of the Treasury Regulation 16A.9.1. In parts, the letter read:

> "The accounting officer or accounting authority **must** –
>
> (f) **Cancel a contract awarded** to a supplier of goods or services –
>
> (ii) If **any official** or **other role players** committed **any corrupt or fraudulent act** during **the bidding process** or the **execution** of **that contract that benefitted that supplier.**
>
> 6 Consequent to the above, and in carrying out the **DHA's duties and obligations in terms of the Treasury Regulations referred to above, the DHA** has no other option but to cancel the Master Services Agreement with immediate effect.

[14] This cancellation gave rise to the urgent application which was launched on or about 15 March 2023. By agreement, the urgent application was removed from the roll on 4 April 2023. Ultimately, the application emerged before me as a special motion allocation.

Evaluation

[15] This Court has already found that, despite desperate pleas from counsel for the applicant, this is not a PAJA review. The relief sought by the applicant is not one competent under PAJA. There is no legal basis upon which this Court can declare that the cancellation is unlawful and or invalid on the strength of the present papers. With respect, the submission that these papers presents a PAJA review, lame as it is, appears to be an afterthought, in order to address a fundamental problem highlighted by this Court during oral submissions. There is no doubt that in terms of the law, the TR 16A.9.1, the Director General was obliged to cancel the agreement in the circumstances where, any official or other role player committed a corrupt or fraudulent act at any of the two stages. Either during the bidding process or execution of the contract stages. Not seized with a review application, it is unnecessary for this Court to express a view whether the fraudulent or corrupt acts occurred at any of the mentioned stages. It may be true

that presence of fraud or corruption at any of the stages is a jurisdictional requirement for the exercise of the cancellation power. Not seized with a review application, it is academic for this Court to answer the question whether the necessary jurisdictional requirements were present or not. Therefore, the cancellation at play here is not one that is contractual in nature, but an exercise of statutory power.

[16] Therefore, the competent relief available to the applicant is a PAJA or legality review. There is no doubt in my mind that in cancelling the Master Service Agreement, the Director General was performing an administrative action which is certainly reviewable under PAJA. A careful and proper read of the founding papers, other than fortuitous reference to unlawfulness and invalidity, the applicant does not make a case for judicial review. Its case was one of a simple declaratory relief, which, on its own admission is a discretionary relief. The deponent of the founding affidavit had the following to say in pinning the applicant's colours to the mast:

> "51 In the premises, the grant or refusal of declaratory orders lies in the discretion of the Court which must be exercised judicially given the facts pertaining to a particular matter and the facts of this matter are (i) there is no misconduct or impropriety on the part of the applicant (and it is not alleged), (ii) the applicant has been forthcoming in respect of the improprieties and misconduct of the respondent's employees (iii) and that public policy (*pacta sunt servanda*) demands that contracts must be honoured at all levels unless the Court of law decides otherwise."

[17] Contrary to the repeated submissions by counsel for the applicant that this is a PAJA judicial review, launched in a complete disregard of the rule 53 procedure, the present application has, written all over it, a declaration of rights and a breach of contract. I reiterate, it is not a PAJA judicial review. On application of the *Oudekraal* principle, the decision to cancel the contract factually remains and is adorned with legal consequences until set aside by a Court of law by way of a judicial review. In the present constitutional order, there are only two judicial review pathways available for the exercise of public power, namely; PAJA or Legality/Rationality review. The applicant chose neither. The net effect of this is

that the cancelation remain as a valid administrative decision capable of producing legal consequences.

[18] It was not contended before me that the TR16A.9.1 was in any manner or shape unconstitutional. I suggested to counsel for the applicant that perhaps that should have been the case. On application of the principles of contract law, a party faced with a repudiation, has an election to make. Either to cancel the contract and sue for damages or to ignore the repudiation (in this instance the cancellation) and approach a competent Court for a relief of specific performance. Even if this Court were to accept that, put at its lowest ebb, the case for the applicant is one for specific performance, in the exercise of its discretion this Court would refuse to grant that relief. The contract has been cancelled, thus, the only competent contractual remedy available is that of damages claim. There is no damages claim before me.

[19] As I conclude, counsel for the applicant persistently beat the drum of absence of fraud as legally defined. In his heads of arguments, he referenced Amler's, Snyman and other sources just to demonstrate that there was no legally defined fraud involved. The *ad nauseam* beating of the fraud drum was unhelpful to the applicant's pleaded case. Counsel baldly and with sufficient perspicacity submitted that having scoured the 110 paged report of BMO, he could not find the word fraud imprinted in the report. It is indeed so that the report does not, in print form, mention the word fraud. But, what is certainly replete in the report is the evidence of presentation of invoices that were neither due nor payable. One such invoice of R45 000.00 was, as reported and not disputed in these proceedings, presented by Foursight. The elements of the offence of fraud are (a) misrepresentation; (b) intention to defraud; (c) unlawfulness; and (d) prejudice or potential prejudice.

[20] If regard is had to the R45 000.00 which was paid to Foursight and Aim-Right, when the duo issued the invoices, they were seeking to represent to the Department that the invoices were due and payable, whilst knowing fully well that the services were not performed. Intention (*mens rea*) is all about a state of mind. Knowing that the services were not performed, by invoicing, the duo intended to defraud the department (make it look like the services were performed). Their

actions are clearly unlawful and had prejudiced the Department – effecting an irregular expenditure contrary to the law. If fraudulent acts are not apparent in the report, then there is certainly something wrong with our law of identifying the elements of a particular offence. To my mind, it was not required of BMO, without legally trained mind to imprint the word fraud in their report. But, they, indeed reported what clearly constituted fraud and or corruption, regard being had to the elements of the offences. Corruption and fraud are generally joined to the heap. They are offences involving an element of dishonesty. Often times, they are inextricably intertwined.

[21] Given the conclusions this Court reached, consideration of the conditional self-review application is unnecessary. It was, *ex abudandi cautela,* argued before me. With regard to costs, although the application was jumbled up, it appears to be one that falls under the *Biowatch* principle. For that reason alone, this Court will not make a costs order against the applicant.

[22] For all the above reasons, I am constrained to make the following order:

Order

1. **The application is dismissed.**
2. **There is no order as to costs.**

GN MOSHOANA
JUDGE OF THE
HIGH COURT GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Applicant:	Mr G W Amm SC and Mr M Maphuta
Instructed by:	K Montjane Inc Attorneys, Tembisa
For the Respondents:	Mr J Hershensohn SC and Mr E van As
Instructed by:	State Attorney, Pretoria
Date of the hearing:	26 February 2025
Date of judgment:	3 March 2025