IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO. 62/2011

In the matter between:

MAKHETHE CLEANING SERVICES (PTY) LTD — APPELLANT

and

NATIONAL UNIVERSITY OF LESOTHO — RESPONDENT

CORAM: RAMODIBEDI, P
HOWIE, J A
FARLAM, J A

Heard : 16 April 2012
Delivered: 27 April 2012

SUMMARY

Practice – Application – dispute of fact – case referred for trial.

JUDGMENT

FARLAM, J A

[1] The appellant in this case, Makhethe Cleaning Services (Pty) Ltd, brought an application in the High Court in January 2009 seeking an order:

> 'a) Declaring that it has the exclusive right to render cleaning services for all buildings on all the campuses of the first respondent, the National University of Lesotho;
>
> (b) Interdicting the first respondent from signing any new contracts with other companies for the cleaning of its buildings on all its campuses;
>
> (c) Interdicting the first respondent from renewing the contracts signed with three other cleaning companies, the second, third and fourth respondents, for the cleaning of the first respondent's buildings once the current contracts expire; and
>
> (d) Directing the first respondent [and the other respondents if they opposed the relief sought by the appellant] to pay the costs.'

[2] In the founding affidavit 'Mapontśo Matobo, who is a director of the appellant, said that in 2002 the first respondent agreed to grant to the appellant the exclusive right referred to in paragraph (a) of its notice

of motion. She said that in 2002 the first respondent decided to terminate the services of 36 of its employees who worked as cleaners and were employed by it as casual labourers with no permanent contracts of employment although they had worked for it for years. The first respondent, she said, promised these employees that if they formed a company it would offer the company the exclusive right to which I have referred. The first respondent, she continued, also offered the affected employees basic training in the conduct of business through its Institute of Extra Mural Studies and helped them to incorporate the company and provided it with its starting capital that was used to buy cleaning equipment and materials.

[3] She appended a list of the former employees of the first respondent who subscribed to the memorandum of

association of the company formed to give effect to the undertaking made by the first respondent. She said further that after the appellant was incorporated it ratified the agreement.

[4] In support of these allegations she annexed affidavits deposed to by Dr. Tefetso Mothibe, who was the Vice Chancellor of the university at the time, and Dr. Nqosa Mahao, who was the university's Pro-Vice Chancellor at the time. They both confirmed what she had said about the undertaking given by the university and the circumstances in which it was given.

[5] In his affidavit Dr. Mahao said:

> 'We gave only one condition for the company to enjoy the monopoly of being the sole provider of cleaning services to the university. That condition was that the privileged monopoly protection would be reviewed if the company delivered service of a lower quality than that provided by the members

> thereof when they were in the employ of the university.'

[6] In the founding affidavit Mrs. Matobo said that the agreed remuneration paid to the appellant by the university was M5.13 per square metre but that later the university had, as she put it, 'unilaterally reduced' the rate to M2.93 per square metre. She also said that it had been agreed that the appellant would not have to tender for the work but that the first respondent had now made what she called 'an about turn on the previous undertaking' by not only reducing the payment rate per square metre, as previously stated, but also by insisting that the appellant had to tender together with other cleaning companies for cleaning work to be done for the university. Furthermore, contrary to the initial undertaking given to the appellant, the second and third respondents had been

given contracts to do cleaning work that was supposed to have been done exclusively by the appellant.

[7] The first respondent opposed the application. Its answering affidavit was deposed to by Mrs. 'Mamoliko Pule, a domestic bursar. She denied that the undertaking deposed to by Mrs. Matobo and confirmed by the Vice-Chancellor of the university at the relevant time was given. She said that at the relevant time the first respondent decided to outsource all the cleaning services and that it advised its cleaners, who were 'casual labourers', to form a cleaning company which would be able to tender for cleaning work for the university. She stated that decisions of the first respondent are made by its council and that to the best of her knowledge the council did not decide 'to guarantee perpetual employment to [the appellant] or its shareholders as alleged by [the appellant]. I would

have been notified of such a decision as I would have been the one to implement it in my capacity as First Respondent's Domestic Bursar responsible, inter alia, for overseeing cleaning services of First Respondent's premises.'

[8] To illustrate her point that first respondent never promised the appellant the exclusive right to do cleaning work on all its campuses she said that the first respondent issued a tender notice for the cleaning of its Maseru IEMS campus at the beginning of 2003 and that the appellant tendered with other companies, including the second respondent, which was the successful candidate.

[9] Mrs. Pule also said that after operating from 2002 to 2005 without a written contract with the first

respondent, what she described as a 'written and formal contract' was concluded on 15 March 2005 to operate (retrospectively) from 1 March 2005 to the end of June.

[10] It was headed 'Appointment Contract in the Roma and IEMS Campuses' and read as follows:

> 'I am authorized to offer you a short term contract for three months with retrospective effect from 1st March 2005 to end of June 2005, at the rate of M3.04 inclusive of VAT per square meter.
>
> This letter is sent to you in triplicate and if you wish to accept the offer please return to me two copies duly signed by you and witnessed by another person in the space provided for the purpose.
>
> Yours Sincerely,
>
> A.M. MPHUTHING
> ACTING UNIVERSITY REGISTRAR'.

It was extended on 27 June 2005 until 31 December 2005.

[11] A document headed 'Memorandum of Understanding (CONTRACT)' was signed by the Registrar on behalf of the university and Mrs. Matobo on behalf of the appellant on 16 December 2005. It contained a clause, headed 'Nature of Contract' in which it was stated that 'the purpose of the contract' was for the appellant to provide cleaning services at the Roma campus of the university, while other places would be cleaned 'on negotiations between the Company and the University'. Another clause, headed 'Undertakings by Company' contained an undertaking by the appellant to be responsible for daily cleaning of stated buildings and their immediate surroundings at the Roma and Maseru campuses.

[12] Another clause provided that the contract would come into effect 'on the day mentioned in the letter of offer'

and that it would 'remain in force for a period of twelve (12) months at the end of which it [would] expire.' A further clause provided that either party might terminate the agreement by giving three calendar months' written notice of its intention to terminate.

[13] Mrs. Pule annexed a further letter dated 9 January 2006, which extended what was described as the cleaning contract between the appellant and the university for a year, from 1 January 2006 to 31 December 2006 and stated that 'the terms and conditions of the existing contract remain unchanged.' Internal university correspondence was also annexed to Mrs. Pule's affidavit, indicating a further renewal for a year until the end of 2007, although no correspondence between the university and the

appellant or a contractual document, extending the agreement, was annexed.

[14] Mrs. Pule also stated that in September 2007 the first respondent invited tenders for cleaning services. The successful tenderers, to whom contracts, which ran from 1 January 2008 to 31 December 2008, were awarded were the appellant and the second, third and fourth respondents. As the university failed to invite tenders three months before these contracts expired the contracts were extended to 30 June 2009.

[15] As regards Mrs. Matobo's allegation that the university unilaterally reduced the rate payable Mrs. Pule admitted that the appellant was initially remunerated at a rate of M5.13 per square metre. She said that the scale changed when the appointment contract of 15

March 2005, which has been quoted above, was concluded and the appellant was offered the new rate of M3.04 inclusive of VAT per square metre, which was accepted by the appellant. Later, as from the beginning of January 2008, the rate was reduced to M2.93 per square metre in terms of the contract for 2008 which followed the acceptance of the tenders to which I referred above.

[16] A further affidavit filed on behalf of the first respondent was deposed to by Miss Anne Masefinela Mphuthing, registrar of the first respondent, who was the registrar in 2002. She said that as the secretary of the university's council she is in possession of all its minutes and records and that no decision or resolution exists giving the appellant the undertaking

or promise to which Mrs. Matobo deposed. She continued:

> 'I accordingly deny, on behalf of First Respondent, that First Respondent "promised" or that it legally awarded [the appellant] or its members a contract to clean First Respondent's premises solely in perpetuity as alleged by [the appellant].'

[17] She denied that the university had provided the appellant with its starting capital with which it purchased cleaning equipment and materials. She said that the university made a loan in this regard to the appellant, which has not yet been repaid. She also denied that the contents of the affidavits deposed to by Dr. Mothibe and Dr. Mahao were correct.

[18] In her replying affidavit Mrs. Matobo reiterated what she had said in her founding affidavit. She said that the contracts to which Mrs. Pule referred were never explained by the first respondent nor understood by

the appellant as an abandonment of the original undertaking. They were understood to be necessary for accounting purposes on the part of the first respondent and no more. She admitted that tenders were invited in September 2007 and said that this was indicative of the lack of bona fides on the part of the first respondent. She stated that the appellant 'only tendered out of fears of losing out on the work and not because it was accepting the first respondent's repudiation of the parties' original agreement.'

[19] As far as the reduction of the rate was concerned she said that this was imposed by the first respondent 'which exploited the fact that the [appellant's] bargaining power was virtually nil and took whatever was paid to it even if that was in breach of existing agreements.' She drew attention to the fact that

neither Mrs. Pule nor Miss Mphuthing was testifying from her own knowledge that the first respondent had not given the appellant the undertaking relied on. She mentioned two persons who had knowledge of what happened and who were still available but had not been asked by the first respondent to make affidavits setting out what really happened.

[20] At the end of her affidavit she asked the court 'to refer any material disputes of fact to oral evidence so as to establish the true facts in this matter.'

[21] The application was heard by Guni J in the High Court, who dismissed it with costs. The learned judge found that the appellant had not proved the agreement on which it relied. She found further that the affidavits of the former Vice-Chancellor and Pro Vice-

Chancellor were not, as she put it, helpful. She did not refer to Mrs. Matobo's request that the matter be referred for oral evidence in order to resolve the disputes of fact.

[22] Even though the deponents of the two affidavits filed on behalf of the first respondent were unable in the main to deal from their own knowledge with what happened between the parties it is clear that a dispute of fact did arise in the matter. It was of the third kind referred to in the leading case of Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T), which has often been cited with approval in this Court : see, e.g., African Oxygen Ltd v STM Marketing and Agencies Ltd LAC (2000-2004) 174. At p 1163 Murray AJP sets out the principal ways in

which a dispute of facts arises. The third is where a respondent –

> 'may concede that he has no knowledge of the main facts stated by the applicant but may deny them, putting applicant to the proof and himself giving or proposing to give evidence to show that the applicant and his deponents are biassed and untruthful or otherwise unreliable and that certain facts upon which applicant and his deponents rely to prove the main facts are untrue.'

[23] Earlier, at p 1162, the learned judge said that '(except in interlocutory matters) it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory affidavits in disregard of the additional advantages of viva voce evidence'.

[24] It is not correct, in my view, to attempt to brush aside the affidavits made by the former Vice-Chancellor and the former Pro Vice-Chancellor as being unhelpful. In terms they confirmed what Mrs. Matobo said.

[25] Counsel for the respondent endeavoured to meet this point by submitting that the dispute concerning the existence or not of an agreement between the parties at the time of the formation of the new company became 'totally irrelevant', as he put it, in view of the terms of the memorandum of understanding dated 16 December 2005. He submitted that this contract governed the relationship between the parties as from that date and rendered irrelevant what occurred between them when the company was established.

[26] The argument presupposes that the memorandum of understanding was indeed a contract between the parties and not, as Mrs. Matobo said, one of the documents understood 'to be necessary for accounting

purposes on the part of the first respondent and no more'.

[27] The circumstances relating to the repeated extensions of the contract between the parties, and the fact that it was not at least until December 2007 preceded by any invitation to the appellant to tender lend some plausibility to the appellant's allegations.

(2) The judge did not, as she should have done, consider the request that the matter be referred for oral evidence. This Court is accordingly at large to exercise the discretion as to the future course of the proceedings which arises in motion proceedings where there is a dispute of fact on the affidavits. In my opinion the appropriate order in a case such as this is to send the parties to trial, in terms of High Court Rule 8 (14) with a direction that pleadings be filed.

[28] The following order is made:

1. The appeal is allowed with costs.

2. The order of the court a quo is set aside and the following order substituted:

> 'The application is referred to trial in terms of Rule 8 (14) and the parties are directed to file pleadings defining the issues to be decided. The applicant is to file its declaration within 20 days of this order and all subsequent pleadings are to be filed in terms of the rules.'

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I.G. FARLAM
JUSTICE OF APPEAL

I agree:

_____
M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

_____
C.T. HOWIE
JUSTICE OF APPEAL

For Appellant : Adv K.K. Mohau KC

For First Respondent : Adv P.J. Loubser