IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED:
DATE:	21 JUNE 2021
SIGNATURE: CG LAMONT	

Case Number: 14206/2021

In the matter between:

NATIONAL ARTS FESTIVAL GRAHAMSTOWN NPC	**APPLICANT**
AND	
THE NATIONAL ARTS COUNCIL	**FIRST RESPONDENT**
MINISTER OF SPORTS ARTS AND CULTURE	**SECOND RESPONDENT**

JUDGMENT

Lamont J

1. The applicant brought an application as a matter of urgency against the first and second respondents seeking to enforce the terms of a Grant Agreement concluded on 28 January 2021. The urgent application was settled and a portion of the monies which the applicant sought were paid. It was left open to the applicant to proceed with the application to seek the balance of the monies claimed. In due course the applicant exercised this right. The applicant filed a supplementary affidavit dealing with additional matters relevant to the application including the decision of the second respondent dismissing an appeal which had been lodged by the applicant. In due course the supplementary affidavits were all filed and the matter was ripe for hearing.

2. The Grant Agreement was concluded in accordance with the Presidential Employment Stimulus Program (the program). The program was provided by the presidency with a view to creating special employment stimulus in the sector and to disburse monies which had been made available. The program was geared towards employment creation and retention initiatives for various persons including support for projects of appropriate innovation, content, creation, dissemination and development of e-commerce systems. The program identified certain types of projects which could be funded and certain categories which would not be funded. The idea was to provide a stimulus for various workers and projects through funding. The program provided detailed instructions as to how applications were to be submitted, how applications would be considered and how the results would be made known to applicants. The project provided for aggrieved persons to lodge an appeal with the second respondent.

3. The applicant applied for funding. That application was considered by the first respondent and approved. On 28 January 2021 the first respondent sent the applicant a copy of the relevant contract together with instructions as to what further steps it should take to finalise the matter. The steps were taken and the contract was concluded.

4. The contract between the first respondent and the applicant provided:

   4.1. Clause 2.1 The NAC had adjudicated the Beneficiary's application

   4.2. Clause 2.2 The NAC awarded, and the Beneficiary hereby accepted the grant subject to the terms and conditions of this Contract.

   4.3. Clause 3.2 The Beneficiary would apply the grant strictly in accordance with the Beneficiary employee details report.

   4.4. Clause 3.3 The grant awarded to the beneficiary was the amount of R8 million.

   4.5. Clause 3.4 The NAC would pay the grant in two instalments. Payment one within 3 weeks of receipt of the countersigned contract. Payment two upon receipt of documentation from the beneficiary.

   4.6. Clause 11.1 The NAC undertook to, at all times during the existence of the Contract, observe, perform and comply with the terms and conditions of the Contract and to act in a professional and competent manner in the execution of its obligations under the Contract.

   4.7. Clause 14.1 The NAC shall have the right to terminate the Contract by written notice [if the beneficiary performed certain acts not relevant to this matter].

5. It is apparent from the terms of the contract that the applicant and the first respondent concluded a binding contract in terms of which the first respondent was to pay certain amounts to the applicant and could only cancel the contract in certain circumstances. The contract contains reciprocal obligations. The applicant was unable to perform the obligations imposed upon it without the funding which was to be provided by the first respondent.

6. Subsequent to the conclusion of the contract, the applicant commenced preparations to meet its obligations. It entered into a series of contracts and undertook to make payments for various projects on the basis that the funding

would be forthcoming. If the funding as agreed in the contract was not forthcoming the applicant would find itself in a position where it was unable to pay the debts it had incurred. The first payment date came and went and the funding was not paid to the applicant.

7. On 8th of March 2021 the first respondent advised the applicant that it had decided to withdraw its Grant Notification Letter and that it would issue a new letter revising the amount it had undertaken to pay (R8 million) and in terms of which it would only pay an amount of R3,486,400. The first respondent advised that a decision had been taken to review all amounts which had been awarded to all approved applicants and that this was the reason for the lower funding amount.

8. The applicant was dissatisfied with what the first respondent had done and launched an appeal to the second respondent in terms of the provisions of section 12 of the National Arts Council Act 56 of 1997. The right to appeal as set out above was also incorporated within the parameters under which the application for funding was made.

9. On 19 March 2021 the first respondent issued to the applicant an addendum to the contract deleting all references to the award of R 8 million and substituting lesser amounts totalling the lesser amount it had said it would pay. In addition, the number of job opportunities which the applicant was obliged to create was increased to three hundred and twenty from two hundred and eighty four.

10. It is immediately apparent that there was a significant reduction both in the funding and in the increase in the work to be done by the applicant. These changes were unilaterally made by the first respondent.

11. The first respondent sought to justify its conduct. It stated that there were material difficulties with the payment of grant monies in the amounts which had

been specified in the contract. It stated that this fact had been communicated regularly to all applicants for funding. The first respondent did not deny that the applicant had been promised a specific amount of money. It claimed that there were issues regarding the legality and constitutionality of the contract concluded and that the contract was invalid under the Public Finance Management Act 1 of 1999.(the PFMA).

12. The invalidity so it said was constituted by the way in which the council of the first respondent as then comprised had distributed the funds. It had failed to take account of the fact that the method of funding it was following would result in funds not being distributed to all approved applicants. There were many applicants, the availability of funds was limited and were insufficient to pay all of them using that method of distribution.

13. It came to pass that many approved applicants did not receive funding. The way the first respondent had distributed the funds in fact resulted in there being no funds available at all to fund seven hundred and sixty-one approved applicants who had not received funding.

14. The members who comprised the Council of the first respondent at the time the contracts were concluded providing for payment were replaced at a point in time by new members. It was the council as freshly constituted which investigated and decided that the approval and granting of funds the first respondent had received for payment to applicants had not been properly quantified, recorded and kept within the financial limits of the amount provided. It was the view of the freshly constituted Council of the first respondent that the failure to award all applicants funding was a breach of the first respondent's constitutional and statutory obligation to provide a just fair and equitable distribution of funds to all the approved beneficiaries. The premise on which the view was based was that all approved applicants were entitled to be awarded funding.

15. The first respondent adopted the view that as it was a Schedule 3 public entity under the PFMA and that the payment of public funds would be unlawful and irregular if made pursuant to unlawful contracts. Hence so it said, it was entitled to ignore the contract it had concluded with the applicant (and others) and redistribute the monies available as it deemed proper. This founded its conduct in reducing the amount to be paid to the applicant. It did not explain how or why the scope of the work to be done and the terms concerning the number of job opportunities to be provided were changed.

16. The applicant which was dissatisfied with the first respondent's actions appealed to the second respondent for relief. On 21 April 2021 the second respondent dismissed the appeal lodged by the applicant. The reasoning of the second respondent is contained within a letter written by the second respondent which sets out that according to section 3 (2) (b) of Promotion of Administrative Justice Act 3 of 2000 (PAJA) there was adequate notice of the nature and purpose of the proposed administrative action; according to section 3 (1) (2) of PAJA the administrative action was fair in that the first respondent was entitled to change the funding due to the downward adjustment being necessary to ensure a just and equitable distribution of funding to all applicants.

17. The issue for determination is whether or not the first respondent was entitled to unilaterally terminate the contract it had concluded with the applicant and re-allocate the funds it had received under the program.

18. The first respondent accepts that on the face of it, it concluded a valid enforceable contract with the applicant. It submits that the contract falls foul of the Constitution of the Republic of South Africa, 1996 (Constitution); in particular section 33(1) providing for just administrative action; section195(1) providing that public administration is to be governed by the democratic principles enshrined in the Constitution; and section 217 of the Constitution providing that contracts for

goods and services must be concluded in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

19. The facts underlying the submission concern the manner in which the first respondent's council as originally constituted had allocated funding which resulted in seven hundred and sixty-one of the approved beneficiaries receiving no funding while the balance of the beneficiaries (six hundred and thirteen) received funding the total amount which consumed all the available funds for distribution.

20. The decision of the first respondent must be assessed to consider whether it is constitutional. This requires a consideration of whether or not the premise of the first respondent is correct namely that all approved beneficiaries were entitled to receive funding.

21. The constitutionality, rationality and fairness of the decision is to be considered within the matrix set by the program which sets out the procedure and substantive requirements by creating rules which the decision maker is to follow. The sole attack upon the rationality of the decision maker's decision is that the approved beneficiaries had been treated differently. This was unconstitutional and unfair so it was submitted. This unfairness resulted in the term in the contract obliging the first respondent to pay the applicant R8 million being against public policy. Hence the contract was unenforceable at the instance of the applicant.

22. The program provided a procedure for applications to be made, substantively what the funds were to be used for and that the first respondent would control the procedure and make various decisions.

23. Pursuant to the program the first respondent during 2020 called for applications to enable it to disburse monies made available for distribution. Those monies contained within the program were geared towards employment creation and

retention initiatives for various persons and included support to innovation in digitalization efforts content creation and the dissemination and development of the E-commerce systems. The program provided for dispersing funding through two streams.

24. The first stream was directed towards job retention for entities which found themselves in positions where they were struggling to retain their staff complement via a wage subsidy. The anticipated average wage subsidy had already been calculated at R16,600 over 3 months concluding 31 March 2021.

25. The second stream was directed towards projects which could create income opportunities and was aimed at organizations institutions SMME's and individuals. It was directed towards obtaining proposals which demonstrated opportunities to create work in order to get the sector moving and income flowing. The program would act as a catalytic injection of income into the economy enabling ambitious proposals that created multiple opportunities for employment and collaboration. The funding for each employment opportunity within the project had been calculated at an anticipated R25,000.

26. The program set out that the first respondent had undertaken direction from the presidency and DSAC to enable it to assess the proposals and funding requests. The figures were guiding cost figures that applicants should consider when applying. Applicants were permitted to make multiple applications.

27. The first respondent reserved the right to allocate funds according to its priorities no applicant would automatically be entitled to funding. All funding was to be at the discretion of the first respondent. Details were given as to the way in which the application should be made and the relevant information and documentation which was required to enable the first respondent to make a decision.

28. The program set out a detailed procedure for application and award; a detailed list of objectives and use of monies; the role the first respondent would play and that the fact of approval of an applicant's application did not create an entitlement to funding. The process was open fair and clear as was the right to funding.

29. Pursuant to the request to make applications a large number of persons duly made applications. The first respondent considered the applications from time to time, approved those which were compliant, allocated funds and concluded contracts. The first respondent followed a uniform course in its approach to how funds were to be allocated. It dealt with the applications in the order they had been approved.

30. The program had as its primary objective the injection of funding into the economy. The mechanism by which that was to be achieved was through funding approved applicants which would use the monies to provide a wage subsidy to retain existing employees and approved applicants which were pursuing acceptable projects which would provide employment. The approved applicants were conduits to pass on monies to the persons who were being targeted namely employees whose income and jobs were at risk as also the employees who would be used in the projects.

31. There was no requirement stipulated in the program that the various applications be considered in such a way as to ensure that all applicants whose applications and been approved would receive funding or the amount of the funding. Indeed, single applicants were invited to submit multiple applications. This contemplates that single applicants could receive multiple awards of funding. So far from everyone being treated equally the program contemplated that applicants could be treated differently. There was no requirement that the first respondent balance the applications to abate the various amounts approved so as to ensure each approved applicant receive the same amount of funding. There is no indication of how that balancing would take place. What other of the numerous

possibilities of balancing were to be considered was never set out or suggested by the first respondent.

32. The fundamental premise upon which the first respondent based its conduct is that all approved applicants were entitled to receive monies from the program hence constitutional fairness dictated that the Council of the first respondent when it considered the applications was obliged to embark upon a balancing process to achieve the objective of funding everyone.

33. The underlying facts do not support this premise. There could be no balancing unless all applications were simultaneously considered in the process which did not require this type of consideration. The program contains funding amounts which were a guide and which while not binding indicate what was perceived to be the approximate quantification. If the first respondent was unilaterally abating amounts there was more than an insignificant risk that it might abate amounts to such an extent that the funding was valueless – something not considered by the process. The process established a unit which was deemed useful and capable of achieving the objectives of the program, any reduction in that unit would have an impact on its effectiveness.

34. The program provided expressly that in all cases the right to receive funding was subject to the discretion of the first respondent; there was no right automatically granted to an applicant to receive funding.

35. The procedure allowed multiple applications from one applicant. The program contemplates that applicants will be treated differently.

36. Fairness in the distribution of funding dictates not that everyone receives the same funding or any funding at all, it dictates rather that everyone to whom the decision making body allocates something to gets the allocation. The very reason a decision making body is appointed is to enable it to make decisions

substantively and procedurally fairly. The decision in my view was both procedurally and substantively fairly made.

37. The claimed unfairness is unrelated to the rights and duties of the parties to the contract which was concluded. It is an issue which arises prior to the conclusion of the contract and concerns persons not parties to the contract. The unfairness had no place in the contract between the applicant and first respondent. The unfairness claimed is a feature of how the first respondent came to contract rather than a feature of it contracting. It concerns the issue of the internal process by which the first respondent came to agree to contract with the applicant. The applicant played no role in that internal process, it did not influence it in any way. When it was notified the first respondent would contract it took steps to do so.

38. In consequence the applicant and first respondent concluded a contract in terms of which the first respondent was to pay R8 million to the applicant. At the time that contract was concluded the procedural requirements to entitle the applicant to payment had been completed and established. There is no suggestion of any impropriety or dishonesty on the part of any of the role players. There is at best for the first respondent a complaint that there was not a proper record keeping and balancing. At the time the contract was concluded the internal workings of the first respondent had in terms of the first respondent's structures occurred or at the very least could be taken by the applicant to have occurred. The applicant was entitled to assume when the first respondent deliberately contracted with it that the internal requirements of the first respondent had been met.

39. From a contractual perspective the parties to the contract intended to conclude it and intended that each would be entitled to rely upon the terms contained in the contract in the course of their future conduct. The applicant relying upon the contract incurred debt which it cannot pay unless the first respondent is held to the contract.

40. I have held that the facts do not demonstrate unequal or unfair treatment. The next issue is whether the applicant's claim for payment of money is a claim for specific performance which I should not permit.

41. The starting point is that the Court has a discretion not to enforce claims for specific performance. This discretion will be sparingly exercised. The *locus classicus* is the judgment of Innes J in *Farmers Co-Op Society (Reg) v Barry* 1912 AD 343 at 350. Specific performance of a contract will not be ordered where public policy dictates that 'the general sense of justice of the community, the *boni mores*, manifested in public opinion' which 'imports the notions of fairness, justice and reasonableness', and 'takes into account the necessity to do simple justice between individuals' dictates that the contract is contra *boni mores*. This is simply because the contract in those circumstances is void.

42. A term in a contract will not be enforced if the term is being implemented in a manner which is offensive to public policy. The determination of the issue involves a two-stage test. The first is an objective enquiry: is the provision in question so manifestly unreasonable on its face that it offends public policy? If so, it is void and the question of enforcement does not arise. The second enquiry is more subjective: in all the circumstances of the particular case, including the relative position of the parties, and the reason for non-compliance with the clause, would it be contrary to public policy to enforce the clause?[1] The ambit of the interrogation was conveniently set out In *AB v Pridwin Preparatory School* 2019 (1) SA 327 (SCA) which considered:

    (i) Public policy demands that contracts freely and consciously entered into must be honoured;

[1] See for example *Beadica 231 CC v Trustees, Oregon Trust* 2020 (5) SA 247 (CC); *Napier v Barkhuizen* 2007 (5) SA 323 (CC).

(ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;

(iii) where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;

(iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;

(v) a court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;

(vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.

43. The unfairness contended for by the first respondent has the feature that as the claims of approved beneficiaries which should have been granted exceeded the amount available namely the amount budgeted for by the program it was entitled to ignore the contract.

44. It has been held that an order for payment of money should be granted even if a public body has not budgeted for it. The Constitutional Court has held in *Permanent Secretary, Education and Welfare, EC v Ed-U-College (PE)* 2001 (2) SA 1 (CC) (para 21 and 23) in response to such a submission that:

> "… because the Department of Education had spent the full amount of R8,450,000.00 allocated to independent schools as estimated in the White Book and approved in the legislature's budgetary process, it would not be competent for the High Court to make an order sounding in money against the Applicants. This argument holds no water. If a court concludes that the government owes money to a litigant, the fact that the government has not budgeted for such a payment

cannot deprive the court of the power to make an appropriate order. Nor will it excuse the government from an obligation to pay."

45. The judgment of *Kwa-Zulu Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others* 2013 (4) SA 2262 (CC) deals with the issue of the right to amend a contract after due date as happened here.

> "… a public official who lawfully promises to pay specified amounts to named recipients cannot unilaterally diminish the amounts to be paid after the due date for payment has passed. This is not because of a legitimate expectation of payment. Legitimate expectation relates to expected conduct. Rather, this principle concerns an obligation that became due because the date on which it was promised had already passed when it was retracted."[2]

Unilateral retraction by the State of promised public interest funding is unacceptable:

> "It cannot be countenanced, legally or constitutionally, that the amount of the subsidy be reduced unilaterally after the date for payment has by regulation already fallen due. This is so regardless of whether the intended beneficiary might have been able to divine the possibility of a cut. The respondents' hands were tied once the date for payment stipulated in the regulation had passed. The reasons lie in reliance, accountability and rationality.".
>
> … .
>
> "It can never be acceptable in a democratic constitutional state for budget cuts to be announced to those whom undertakings have been made after payment has by regulations already fallen due." Para 64. "Revoking a promise when the time for its fulfilment has already expired does constitute rational treatment of those affected by it."[3]

[2] *Kwa-Zulu Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others* 2013 (4) SA 2262 (CC) at para 52.
[3] Id at para 62; 63 and 65.

46. The conduct of the first respondent in unilaterally reducing the contractual amount at a point at which the time for payment of the first amount of funding had passed, and a mere two weeks before the project completion date is accordingly unlawful and irrational.

47. It follows that the applicant succeeds. There is no need by reason of my finding to deal with the claim made in the alternative for a review. The matter involves matters of principle and is both complex and important to the applicant. Accordingly, the costs should include the costs of both senior and junior counsel where employed. The costs of the proceedings before Wepener J should also be paid by the first respondent.

48. I accordingly grant an order in the following terms:

48.1. Declaring that the terms of the Grant Agreement concluded on 28 January 2021 between the Applicant and the First Respondent remain in force and are binding on the First Respondent and, in particular,

48.2. Declaring that the Applicant is entitled to the full grant amount of R8,000,000.00, in accordance with clause 3.3 of the Grant Agreement; and

48.3. Directing that the First Respondent make immediate payment of the balance of R4,513,600 to the Applicant, in fulfilment of the Grant Agreement.

48.4. Costs of the application (including the costs of the proceedings before Wepener J). Costs to include the costs of senior and junior counsel where same were used.

Signed electronically

CG Lamont

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

HEARD ON: 31 May 2021

WRITTEN JUDGMENT DELIVERED ON: 21 June 2021

APPEARANCES:

COUNSEL FOR THE APPLICANT: Advocate Heidi Barnes SC with Advocate Nada Kakaza

INSTRUCTED BY: Fairbridges Wertheim Becker Attorneys

COUNSEL FOR THE FIRST RESPONDENT: Advocate Willem Bezuidenhout

INSTRUCTED BY: Van Zyl Ebrahim Cook Attorneys

COUNSEL FOR THE SECOND RESPONDENT: Advocate Musa Msomi

INSTRUCTED BY: The State Attorney