

SOUTH AFRICA / JUDGMENT

Afrisake NPC and Others v The City of Tshwane Metropolitan Municipality and Others (74192/2003) [2016] ZAGPPHC 641 (22 July 2016) [2016] ZAGPPHC 641

COURT

North Gauteng High Court, Pretoria

BEFORE

BAM

CASE / FILE NUMBER

74192/2003

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 74192/2003

22/7/2016

In the matter between

AFRISAKE NPC First

Applicant

AFRIFORUM NPC Second

Applicant

CORNELIUS JANSEN VAN RENSBURG Third

Applicant

And

THE CITY OF TSHWANE METROPOLITAN

MUNICIPALITY First

Respondent

Second to Ninth Respondents are respondents linked to the First Respondent.

PEU CAPITAL PARTNERS (PTY) LTD Tenth

Respondent

TOTAL UTILITY MANAGEMENT SERVICES (PTY) LTD Eleventh

Respondent

JUDGMENT

BAM J

Appearances:

Applicants: Adv C Puckrin SC and Adv Q Pelser SC.

First to Ninth respondents: Adv W Mokhari SC, Adv K Tsatsawane and Adv P Managa. Tenth and Eleventh respondents: Adv JP Daniels SC and Adv JB Currie.

INTRODUCTION

1. On 5 July 2016 the applicants, by way of an urgent application, applied for the extension of an interdict restraining the First

Respondent, "CoT" from paying certain monies to the Eleventh Respondent, and "TUMS", pending finalization of a review application concerning the validity of a terminated agreement called Master Services Agreement, "MSA", between CoT and Tenth Respondent "PEU" which agreement had been ceded to "TUMS". The application was opposed by all the respondents.

2. When the matter came before me I deemed it expedient, and in the interests of justice and the parties, that the matter should be finalised on the same day. Fortunately I have had sufficient time and opportunity to peruse the papers beforehand, despite the more than 40 other applications also on the urgent roll. Accordingly, and after having heard counsel, I was satisfied that the interdict had to be granted as prayed for in prayers 1, 2, 3 and 4 of the Notice of Motion, but with an amended costs order. I added that the applicants should approach the Deputy Judge President for a preferential date for the hearing of the pending review application. Due to time constraints, however, I did not deliver a reasoned judgment at the time.

REASONS

3. On 6 June 2013 CoT and PEU entered into the MSA for the installation of a smart electric meter system in the city. On 30 October 2013 PEU ceded the MSA to TUMS. It was common cause that subsequently about R1 Billion had already been paid by CoT to PEU/TUMS. On 12 August 2015, after about 1200 smart meters of the more than 400 000 had been installed, the MSA was terminated by CoT. On 20 August, however, CoT entered into another agreement, the "Interim Services and Termination Agreement", "ISTA", with TUMS. In terms of the latter agreement TUMS agreed to sell the pre-paid smart meter system, awarded in terms of MSA, to CoT for the amount of R950M. CoT has agreed to pay that amount to TUMS by 15 July 2016.

Pending payment of this amount, TUMS further agreed to continue maintaining and operating the prepaid smart meter system at a service fee of 9.5 cents per Rand. CoT intends selling the system to a new service provider, who has agreed to purchase the system for the same amount.)

4. The main issue between the parties turns upon the validity of the initial contract, MSA, and, directly flowing from that agreement, according to the applicants, payment of the purchase price of R950M by CoT to TUMS for the purchasing of the system. In this regard the applicants have lodged a review application which is pending. One of the applicants' concerns, addressed in the present application is the payment of the R950M. The termination of the MSA and the agreement that TUMS should, in the meantime, proceed to operate the system, are not at stake.
5. Although the matter concerning the challenged validity of the MSA has a history, the applicants stated that it was only at the end of May 2016 that they became aware of the payment of the first amount

to the two respondents in terms of the MSA. The applicants then attempted to seek information from CoT concerning that payment. CoT, however, according to the applicants, did not respond, but, instead, on 13 June 2016, the attorneys of PEU/TUMS informed the applicants that a further amount of almost R950M was earmarked by the CoT to be paid to their clients.

6. At the time the applicants were aware that the infrastructure of the project in terms of the MSA was incomplete and that that agreement had been terminated by CoT.
7. When the applicants were informed that the payment of the R950M to TUMS was imminent, they lodged an urgent application to prevent it. This application came before Tuchten J. On 15 June 2016, upon an agreement between the parties, an interim order was made which included a temporary interdict - effective up till 5 July 2016 - stopping the payment of the amount in question. It is this interdict that the applicants sought to have extended.
8. The Applicants contended that the MSA is constitutionally invalid, and that any payment in terms of that agreement is flawed. The respondents, on the other hand, contended that the MSA was lawful and valid. It was also contended by the respondents that the proposed second payment of R950M is unrelated to the issue of the validity of the MSA.
9. Taking into consideration all relevant facts, including that the City of Tshwane Municipality bears a huge responsibility towards the residents, and that the issues are of "extreme importance to the residents of Tshwane" (as submitted by the applicants) I was convinced that the application was indeed of sufficient urgency justifying its adjudication.
10. From what follows it should appear clearly that the applicants, in my view, complied with all the formal requirements pertaining to an interim interdict.

11. It is trite that the applicants were obliged to show that they had a prima facie right, that they may suffer irreparable harm if the interdict was to be refused, and that the balance of convenience favoured the granting of the application. See *SOUTH AFRICAN INFORMAL TRADERS FORUM AND OTHERS vs CITY OF JOHANNESBURG AND OTHERS* 2014(4) SA 371 CC.
12. The pending review application of the MSA appears to involve several material issues. It is mainly contended by the applicants that the MSA is "constitutionally invalid in that it was concluded without a competitive bidding process", and that it did not comply with the "applicable legislation". The applicants also pointed out that PEU was appointed as consultant, which created a conflict, especially when PEU was awarded the contract despite "warnings from Treasury". Another allegation made by the applicants is that there was no "proper financial feasibility study". Although most of these allegations are contested, or explained by the respondents, this court was not called upon to determine whether the applicants will indeed succeed with the review. What had to be considered is whether the applicants have shown a prima facie right "that is likely to lead to the relief sought in the main application" and that irreparable harm will follow if the interdict would be refused.
13. The issues raised by the applicants are serious in nature, and at the time I made the order I remarked that the more I read the more I became concerned.
14. Concerning the review the applicants' case is that this application is "a sequel to a review brought by the Applicants to have the decisions and the subsequent award of the tender and the agreements which flowed therefrom, set aside. . ." which includes the issue of the payment of the R950M to TUMS. The applicants aver that the latter fell outside the scope of the recommendation and resolution adopted by the City Counsel.
15. As to be expected, the respondents contended that the proposed review is moot and that the payment of the R950M is not in any way connected or related to the questioned validity of the MSA. In this regard it was further pointed out by Mr Mokhari that in view thereof that CoT never intended to keep the system but that it was going to sell same to another contractor for the same amount of R950M, there was no prejudice to any party.

Mr Daniels supported these arguments.

16. However, I agree with Mr Puckrin's contention that the R950M, earmarked to be paid to TUMS, is interlinked with the MSA. It is clear that the relationship between CoT and PEU/TUMS originated in the MSA, and although the MSA had been terminated, TUMS and the system, for which CoT agreed to pay R950M to TUMS, are intrinsically linked to the MSA. The present relationship between CoT and TUMS, in terms of ISTA, obviously, flowed directly from the MSA. It is therefore unescapable, if the review court should find that the MSA was indeed unlawful and invalid, that such finding would have a direct bearing on the payment of the R950M to TUMS. The fact that the new contractor would be prepared to repay CoT has nothing to do with the issue whether the MSA was lawful or not. Accordingly it follows that no subsequent re-selling of the system, for whatever amount, would validate

the payment to TUMS. In any event, in view thereof that TUMS has agreed, in terms of ISTA, to continue the required services, with which the applicants have no quarrel, it seems that the balance of convenience favours the applicants.

17. It was further emphasised by Mr Mokhari that the applicants, already in February 2014, by way of an interim interdict, failed in their endeavours to stop the initial phase of the project. That application was dismissed by Fabricius J. Mr Mokhari submitted that the present proposed review application is based on the same allegations and submissions considered and ruled upon by Fabricius J, and, accordingly, that the pending review is doomed to failure. The applicants, on the other hand, submitted that it subsequently

transpired that certain vital information, including correspondence between, amongst others, the Minister of Finance and the Executive

Mayor of the CoT, that was not placed before the Council when the tenders were considered, had not been disclosed to Fabricius J. This information includes advice by National Treasury in a letter dated 15 May 2015 addressed to the municipal Manager, Mr Ngobeni, which reads as follows:

(Page 207 of the founding papers.)

"National Treasury advises you to halt the payment of any settlement amount agreed with the service provider pending the National Treasury's detailed review of the entire procurement process, implementation and the ultimate cancellation of the project."

There is no indication in writing what the CoT's response to the Minister was. Instead, it appears that CoT actually disregarded the advice. In that regard the following appears in the respondents' answering affidavit signed by Mr Ngobeni: (Page 434, par 47.1)

"The letter of the Minister of Finance was received after the Council has already approved the tender. However, the municipality was in consultation with Treasury officials throughout the whole process of tender."

(A more vague form of answering the implication that Treasury's letter was ignored, can hardly be imagined.)

18. In respect of the decision of Fabricius J, Mr Mokhari, reluctantly, conceded that since that application, the "situation" has somewhat changed. This concession, in my view, is an understatement. It is clear that the papers before my learned colleague were, to say the least, incomplete.

19. The reference to the letter of Treasury in paragraph 17 was but one aspect that will be addressed in the review application. Others include that a competitive bidding process recommended by Treasury was allegedly not considered, and that CoT was paying more than R800M for the installation of about 12000 to 13000 meters. There are several more contentious issues which I do not deem necessary to repeat. They are addressed in the applicants' founding affidavit.
20. In conclusion Mr Puckrin submitted that the applicants have made out a strong case "in seeking to protect the public's rights and interest" and that they have established that they have a prima facie case in that they sought "to prevent any further irregularity and unlawfulness."

Both Mr Mokhari and Mr Daniels vehemently submitted that the applicant's failed to show that they are entitled to the interim relieve sought.

21. For the reasons set out above, I agreed with Mr Puckrin.

AJ BAM JUDGE

22 July 2016

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2016/641.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/afrisake-npc-and-others-v-the-unknown-topic-agpphc-2016>

Prepared on 14 October 2026 · Esheria