

SOUTH AFRICA / JUDGMENT

Bertobrite (Pty) Ltd v Kgetlengrivier Local Municipality (3200/2019) [2023] ZANWHC 48 (17 April 2023) [2023] ZANWHC 48

COURT

North West High Court, Mafikeng

BEFORE

J T Djaje

CASE / FILE NUMBER

3200/2019

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

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy

IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

Case

Number: 3200/2019

Reportable:

NO

Circulate

to Judges: NO

Circulate

to Magistrates: NO

Circulate to Regional

Magistrates: NO

In

the matter between: BERTOBRITE
(PTY) LTD
Plaintiff
(Registration
number: 2[...])
And
KGETLENGRIVIER
LOCAL MUNICIPALITY
Defendant

Heard: 10 MARCH 2023

Delivered: This judgment is handed down electronically by circulation to the
parties through their
legal representatives' email addresses.
The date for the hand-down is deemed to be on 17 APRIL 2023
ORDER
I

make the following order: 1.
Judgment is granted against the Defendant

in favour of the Plaintiff 1.1
for: Payment of the sum of R12 466 266.20
(Twelve Million Four Hundred and Sixty-Six Thousand Two Hundred and
Sixty-Six Rand and Twelve
Cents).
1.2
Interest on the capital sum of R12 466
266.20 calculated at the rate of 7.25% (Seven-point two five
percent), calculated from the
date of service of Summons (3
December 2019) to date of payment.
2.
It is noted that the Defendant withdrew its
counterclaim at the trial on 13 February
2023.
3.
The Defendant is ordered to pay the
Plaintiff's party and party costs of the action, both in
respect of the claim and the
counterclaim, such costs to include the
cost of senior counsel.

JUDGMENT

DJAJE DJP

- [1] The plaintiff claims for payment in the amount of R12 466 266.22 from the defendant for the provision of vehicles on a full maintenance lease. The plaintiff's claim in terms of the particulars of claim is that on 29 June 2018 it received an appointment letter from the defendant to provide full maintenance lease vehicles to the defendant commencing 1 July 2018. After the plaintiff accepted the appointment letter, a Service Level Agreement was concluded on 2 July 2018 and thereafter the plaintiff complied and supplied 31 full maintenance lease vehicles to the defendant. The defendant has failed to make payment and is indebted to the plaintiff in the amount of R12 466 266.22.
- [2] The defendant's case is that the appointment of the plaintiff, the conclusion of the Service Level Agreement and any acknowledgment of debt signed by the defendant are at variance with the Constitution and as such the defendant is not indebted to the plaintiff.
- [3] The only witness who testified was the plaintiff's General/Operations Manager, Mr Shanton Lutchman. No witnesses were called by the defendant. The plaintiff's evidence is that it performed its obligations contractually under the Service Level Agreement. As at November 2019 the defendant was indebted to it in the amount of R12 466 266.22 and despite invoices being sent to the defendant, no payment was received. On 20 January 2020 the plaintiff obtained a Court order for the repossession of the vehicles due to non-payment by the defendant. The application was not opposed by the defendant.
- [4] The plea raised by the defendant was that the Service Level Agreement was invalid as there was no competitive bidding process allowed by the defendant. This was also the counterclaim raised by the defendant to have the agreement declared unconstitutional and invalid. However, the defendant withdrew its counterclaim.
- [5] The plaintiff submitted that it relies on the appointment letter dated 28 June 2018 which provides as follows:

"Bertobrite (Pty) Ltd

2[...] [...] Corner T[...] & E[...] Street

Pretoria

Montana

0[...]

Attention: Mr Sidwell Phutheho

RE: LETTER OF APPOINTMENT FOR PROVISION OF FULL MAINTENANCE LEASE FOR THE
DELIVERY OF MUNICIPAL POOL VEHICLE FOR A PERIOD OF 36 MONTHS ONLY

As the Accounting Officer, duly delegated by Council, I have pleasure informing you that you have been appointed for the above-mentioned

project on behalf of the municipality (Client), subject to the following terms and conditions:-

1. The contract shall encompass the following at no additional costs;
 - a. The provision of Full Maintenance Lease Pool Vehicles as per pricing schedule.
 - b. You are further requested to indicate in writing your acceptance of this appointment within 48 hours of receipt of this letter.
2. The contract is approved as per the consent of Bela-Bela Local Municipality and yourself on the section 32 of Chapter 1 of the Municipal Financial Management Regulations.
3. The commencement date of the rental contract is 01 July 2018 ending after 36 months from the of variety pool of vehicles in the municipality. Please note that a service level agreement (SLA) will be signed between yourself and the municipality with full details of scope of work, termination dates and full details of pricing.
4. The municipality will not be liable for any cost incurred by yourselves through whatsoever cause, except where the client has specifically instructed you in writing to incur the same.
5. Invoices in relation to the Services are to be addressed to the Kgetlengrivier Local Municipality:

The Chief Financial Officer

Kgetlengrivier Local Municipality

P.O Box 6[...]

Koster

6. Instruction from the Municipality or any of its employees will not release you in any way from your professional responsibility and

obligations

7. Kindly sign the second copy of this Letter of Appointment as acceptance of the conditions contained herein.

You shall be liable to Kgetlengrivier Local Municipality for the performance of all your functions in a proper and professional manner.

Yours faithfully

ADVOCATE R J MOGALE

MUNICIPAL MANAGER”

- [6] This letter was not disputed by the defendant. The plaintiff argued that as per the appointment letter, the vehicles were procured under Regulation 32 of the Municipal Financial Management Regulations which does not require a competitive bidding process. Further that the defendant failed to provide a version before court disputing whether the appointment was indeed under regulation 32 or not.
- [7] The defendant argued that as a state organ, it is bound by the provisions of section 217 of the Constitution of South Africa to procure goods in accordance with a system that is fair, transparent and cost-effective. It is the defendant's case that the plaintiff has failed to prove that its appointment was lawful and in compliance with section
217. In relation to the applicability of Regulation 32 the defendant argued that the plaintiff cannot use it to subvert the dictates of section 217 especially that it was not pleaded and canvassed. In addition, the defendant submitted that the plaintiff failed to produce the original contract with the first Municipality of Bela Bela, its consent and the Municipalities' consent.
- [8] The procurement of goods and service by state organs is regulated by section 217 of the Constitution of the Republic of South Africa Act 103 of 1996 which provides that:
- "When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective."*
- [9] The Constitutional Court in *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC) at par 33 recognised that section 217 of the Constitution, which enjoins all spheres of government and organs of state to contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective, is the source of the powers and functions of a government tender board. This in essence requires of all organs of state to comply with the prescripts of section 217 in the procurement of goods and services.
- [10] The Municipalities are organs of state at local level and are bound by the dictates of section
217. There is on the other hand the Municipal Finance Management Act 5 of 2003 ("MFMA") which regulates municipalities and section 110(2) (c) of the MFMA allows a municipality to deviate from its Supply Chain Management processes. The section provides that:
- "110. (1)...*
- (2) This Part, except where specifically provided otherwise, does not apply if a municipality or municipal entity contracts with another organ of state for-
- (c) the procurement of goods and services under a contract secured by that other organ of state, provided that the relevant supplier has agreed to such procurement."

[11] In turn Regulation 32 of the Municipal Supply Chain Management Regulations provides as follows:

“32. Procurement of goods and services under contracts secured by other organs of state

- (1) A supply chain management policy may allow the accounting officer to procure goods or services for the municipality or municipal entity under a contract secured by another organ of state, but only if—
 - (a) the contract has been secured by that other organ of state by means of a competitive bidding process applicable to that organ of state;
 - (b) the municipality or entity has no reason to believe that such contract was not validly procured;
 - (c) there are demonstrable discounts or benefits for the municipality or entity to do so; and (d) that other organ of state and the provider have consented to such procurement in writing.
 - (2) Subregulation (1)(c) and (d) do not apply if—
 - (a) a municipal entity procures goods or services through a contract secured by its parent municipality; or
 - (b) a municipality procures goods or services through a contract secured by a municipal entity of which it is the parent municipality.”
- [12] In terms of both the section 110(2) (c) and regulation 32 a municipality can dispense with the competitive bidding process only if there is compliance with the provisions of Regulation 32. In terms of the MFMA circular 96 which elaborated on the applicability of Regulation 32, the goods or services that were procured by the other organ of state should be exactly the same in every respect including the terms and conditions as that required by the municipality or municipalities. Further that the municipality or municipal entity will rely on the open competitive bidding processes that the other organ of state undertook in appointing the service provider.
- [13] The plaintiff in this matter relies on the appointment letter issued by the defendant especially reference to paragraph 2 thereof which states “The contract is approved as per the consent of Bela-Bela Local Municipality and yourself on the section 32 Chapter 1 of the Municipal Finance Management Regulations”. This letter was annexed to the particulars of claim and the defendant was apprised of that fact from the start of the action. The defendant in its plea denied that the agreement was lawful and that there was no compliance with the prescripts of section 217 of the Constitution and the MFMA Supply Chain Management processes. There was no reference to the applicability or not of Regulation 32 raised by the defendant in its plea. During trial the defendant elected not to lead any evidence to dispute compliance with Regulation 32.

- [14] The defendant's argument that the plaintiff failed to plead Regulation 32 has no merit. It was the plaintiff's case that it relied on the appointment letter which refers to the said regulation. The defendant could not have participated in a contract secured by another municipality without conducting detailed analysis of the services rendered to the other municipality and looking at the original contract which should have been secured by means of a competitive bidding process.
- [15] The appointment letter was authored by the defendant's Municipal Manager, being its accounting officer specifically referring to the approval of the contract as per the consent of another Municipality, this on its own indicates that the Municipal Manager was aware that there was an original contract with another Municipality, Bela-Bela Municipality which is an organ of the state, hence the wording of the appointment letter. Further that the said contract complied with the prescripts of the competitive bidding processes. The defendant cannot now turn to argue that the plaintiff failed to produce the original contract and the consent. These are the requirements that the defendant in terms of the Supply Chain Management Regulations should have met before the appointment was made. Failure by the defendant to adduce any evidence in relation to how the appointment was made is fatal to their defence that the contract was unlawful. The only version before court is that of the plaintiff on its appointment relying on the letter of appointment and the conclusion of the Service Level Agreement.
- [16] In the particulars of claim the plaintiff refers to the acknowledgment of debt by the defendant wherein the defendant acknowledged its indebtedness to the plaintiff in the amount of R4 499 376.74 for fees and disbursements and VAT under the Service Level Agreement. The defendant argued that this acknowledgement of debt cannot be used as a source of liability as it is based on an appointment that was made unlawfully. The defendant failed to adduce any evidence to challenging the appointment of the plaintiff according to Regulation 32.
- [17] This is a matter where the plaintiff's case is that the appointment was done in terms of Regulation 32 which does not require competitive bidding process. The letter of appointment clearly refers to the said regulation. The defendant had ample opportunity to deal with that aspect in their plea, disclosing the relevant documents if any or in evidence but failed to do so. This was to the detriment of their defence which cannot be sustained. On a balance of probabilities, the plaintiff succeeded to prove that it is entitled to payment for services rendered as acknowledged by the defendant.

Costs

- [18] The plaintiff has succeeded in this matter and I see no reason why costs should not follow the result.

Order

- [19] Consequently, the following order is made:

1. Judgment is granted against the Defendant in favour of the Plaintiff for:
2. It is noted that the Defendant withdrew its counterclaim at the trial on 13 February 2023.

J T DJAJE

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

NORTH WEST DIVISION; MAHIKENG

APPEARANCES

DATE OF HEARING: 13 FEBRUARY 2023

JUDGMENT

RESERVED: 10 MARCH 2023 DATE OF JUDGMENT: 17 APRIL 2023 COUNSEL FOR THE PLAINTIFF: ADV WILLIAMS SC COUNSEL FOR THE DEFENDANT: ADV W LUSENGA

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/ZANWHC/2023/48.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/bertobrite-pty-ltd-v-kgetlengrivier-unknown-topic-anwhc-2023--6a3ea51e3b1caa912981483e>

Prepared on 13 October 2026 · Esheria