

SOUTH AFRICA / JUDGMENT

Bha-Phalaborwa Municipality v Makwande Chartered Accountants and Business Advisors (3042/2019) [2020] ZALMPPHC 28 (27 May 2020) [2020] ZALMPPHC 28

COURT

Limpopo High Court, Polokwane

BEFORE

GC Muller

CASE / FILE NUMBER

3042/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION,

POLOKWANE)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

Case

no: 3042/2019

27/5/2020

In

the matter between:

BA-PHALABORWA

MUNICIPALITY

APPLICANT

And

MAKWANDE

CHARTERED ACCOUNTANTS

AND

BUSINESS

ADVISORS

RESPONDENT

JUDGMENT

MULLER J:

INTRODUCTION

- [1] This is an application for a collateral review by the Ba-Phalaborwa Municipality to set aside its own decision to award a tender for professional services to Makwanda Charter Accountants and Business Advisors which is a company that renders professional services as chartered accountants. In addition, the applicant also seek a declaratory order in terms whereof the service delivery contract entered into between the parties is declared void ab initio.

BACKGROUND**FACTS**

- [2] The applicant invited tenders for professional services on GRAP[1] conversion and preparation of the 2008/09 ANNUAL FINANCIAL STATEMENTS in the SOWETAN newspaper of 23 June 2009.[2] The closing date for tenders was 30 June 2009 at 10h00. The advertisement clearly stated that the Ba-Phalaborwa Municipality Supply Chain Management Policy and The Preferential Procurement Framework Act applied to the evaluation of the bid for award.
- [3] At 10h00 on the appointed day the officials opened the bids that were deposited before the cut-off time and completed the bidders register which contained the names of the bidders whose bids were received. The register showed that five bids were opened.[3] The bids were opened in full view of the bidders that were present and their names were announced. The respondent was not one of the bidders that deposited a bid.
- [4] On 7 July 2009, the municipal manager (KP Ntshavheni) addressed a letter to:
‘Unit 411 66 Pritchard Street Johannesburg’
- [5] The letter proceeded to state that the respondent was appointed for the tender 19/2009 at the tender price of R584 000.00 excluding VAT. In the letter the respondent is invited to negotiate the final terms of their contract and if terms are agreed, to sign a service level agreement. A meeting to negotiate was scheduled for the next day at Phalaborwa at 11h00 at the office of the municipal manager.
- [6] On 12 April 2011 the respondent addressed a letter of demand to the municipal manager saying that:

...

‘Our instructions are that our client entered into a written agreement with the Ba-Phalaborwa Municipality on the 7th July 2009 to perform a GRAP convention and to prepare the Municipality’s GRAP compliment annual financial statement as prescribed by Section 122 of the Municipal Financial Management (“MFMA”) Act 56 of 2003 and in accordance with the applicable Notices and pronouncements of National Treasury and the Accounting Standards Board pursuant to our client’s proposal dated the 30th of June 2009 which was submitted in response to Tender 19/2009 (“Tender”) issued by the Municipality in terms of Notice

33/2009.

Our Client rendered professional services to the Municipality, the total cost of the project was R2, 295, 426.80 all inclusive cost and all the invoices presented only R268 681.40 was paid and an amount of R1, 803, 441.45 is outstanding.

...’[4]

[7] The respondent instituted action against the applicant in the North Gauteng High Court for the recovery of R2 348 105 .15 on 5 July 2012. In an amended particular of claim the respondent claimed that:

‘5

During the year 2009 Defendant issued a tender under Tender Number 19/2009 of a Proposal to do Grap Conversion and prepare Financial Statements for the 2008/2009 financial year and to provide support for the Auditors of the Municipality.

6.

Plaintiff submitted its bid for the tender dated 30 June 2009 and the quotation for the work to be done was R584 000.00 exclusive of VAT, travel expenses and accommodation. The project was expected to be presented to Defendant’s management of the 15th August 2009. Such tender document is enclosed herein as annexure “MAK 1”. Defendant accepted the proposal of Plaintiff and issued a letter of appointment on the 7th July 2009. In terms of the letter of appointment parties were to negotiate final terms of contract and to sign a service level agreement after agreeing. Letters of appointment is enclosed herein as “MAK 2”

7.

Plaintiff issued a letter of engagement dated 08 July which contained terms and scope of services. Copy of the engagement letter is enclosed herein as “MAK 3”

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Claim 2

On or about 08 July 2009 and at Phalaborwa, Limpopo Province, the plaintiff, duly represented by Ronald Nhleko, and the Defendant, duly represented by Ms Khumbudzo Ntshabeni, Mr Aubrey Mushwana and Mr TV Machete in their capacities as the Municipal Manager, Finance Manager

and Head of Procurement respectively, entered into a contract that the scope of work done by the Plaintiff in terms of the original contract could be extended, subject to the performance of a “gap analysis” and “mutual agreement” as per engagement letter already attached and marked as annexure “MAK 3”.

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The plaintiff entered into an oral contract (hereinafter referred to as “the second contract”) with the Municipal Manager in terms of which the scope of work to be done by the Plaintiff in terms of the original was extended as per addendum, revised the project plan and engagement letter already attached and marked as annexure “MAK 3”.

12

It was an implied term of the agreement that the Defendant would remunerate the Plaintiff on the same terms and conditions as contained in the engagement letter referred to in annexure “MAK 3”

[8] The action is defended by the applicant and is pending at this juncture. The present application is also premised on the allegations contained in the particulars of claim, more particularly, with reference to the allegations that the original contract had been amended orally or that another contract had been entered into in terms whereof the scope of the original contract had been extended in terms of an addendum.

[9] The application is based on the following irregularities that had been committed:

- (1) the failure of respondent to submit a bid before 30 June 2009 at 10h00.
- (2) the failure of respondent to comply with the provisions of the applicable Supply Chain Management Policy;
- (3) the oral amendment of the written service level agreement between respondent and the applicant.

[10] I interpose to refer to the Supply Chain Management Policy document of the applicant. Section 18.3.4.4, 5 and 6 provides:

‘4. Bids submitted to the municipality must be in a sealed envelope, clearly indicating the purpose of the tender as well as an allocated

tender number, and must be submitted through the Municipal Tender Box. The Head: SCM shall ensure that such tender boxes are sealed

until the date and time of their official opening, and that they are properly secured at all times.

5. For a bid to be considered it must comply with all the requirements as stipulated in the tender document.
6. No bids received after the closing time shall be considered.’

- [11] When an applicant seeks final relief in motion proceedings disputes of fact must be determined on the facts as stated by the respondent together with the admitted or undisputed facts in the founding affidavit. The founding affidavit of the applicant provides the factual basis for determination unless denials or disputes which are raised in the version of the respondent are not real or genuine or the denials are bald or unworthy of credit or the version of the respondent raises such obvious fictitious disputes of fact or is so untenable or implausible that a court is justified in rejecting that version.[5]
- [12] I now turn to consider the version put forward by the respondent. The respondent stated that the deponent to the answering affidavit personally submitted the respondent's tender documents before the deadline of 10h00. According to the respondent the tender box had been placed outside the administration building where the bid documents were to be submitted. There was no register present nor was there any form of receipt given to him as proof of submission of the bid. The applicant is to be blamed, if the name of the respondent was not recorded in any of the registers. It is the contention of the respondent that the applicant had the responsibility for the integrity and adequacy of controls in the process, once the bids have been placed in the box. The respondent asked the rhetorical question as to how it was possible for the bid of the respondent to have made its way to the tender evaluation and the adjudication committees? The respondent questioned the adequacy of the controls put in place to ensure the integrity of the tender box and also question the particularity provided in the founding affidavit.
- [13] It is common cause that the 14 day advertisement period had not being complied with, but the respondent asserts that the period may be deviated from under exceptional circumstances or urgency. The respondent is unable to say that exceptional circumstances did in fact exist, save to state that there was a deadline of 31 August 2009 for the submission of the financial statements to the Auditor General.

[14]

The respondent admits that the applicant made payment of R268 681.40 to the respondent for professional work done. The respondent disputes that the contract price was the amount of R584 000.00, and pointed that:

'In amplification of the above denial, the envisaged initial bid price could be described as a function of a fixed and variable cost. Both the fixed known cost and a variable unknown, but predictable cost were specified in both the Respondent's bid documents and its contract subject to certain specifically predetermined parameters. The variable cost was contingent on certain factors and options, which turned out to be realised and the Applicant initiated the process by exercising its option to call for performance in terms of its contract with the Respondent and the latter discharged on this mandate in good faith. Comparisons of the price specification could be made to for example to a contract of an unspecified value but only giving rates.'

- [15] The variable costs are reflected in the respondent's tender documents. And the marginal variable costs comprised of disbursements, costs relating to the extensive "backlog accounting work" as well as costs related to addressing the requirements of the auditors.
- [16] As far as the oral agreement is concerned, the respondent says that the oral agreement was concluded between the parties to give effect to the written agreement, and in particular, the variable costs to which the respondent had alluded to in its tender documents with reference to the engagement letter and the bid documents. The respondent states that due to the variable costs component of the agreement the contract price in reality did not increase but the variable costs were realised and allocated.
- [17] Counsel for the respondent in argument, without conceding that the oral contract entered into is void for want of compliance with section 116(1)(a) of the Municipal Finance Management Act,[6] submitted that the court should not review and set aside the contract as being void ab initio, but declare the contract unlawful. He argued that that the respondent will retain its rights that flow from the contract if the contract is declared unlawful.
- [18] It was pointed out in the replying affidavit that the tender box with a slit wide enough to accommodate an envelope is a fixture which is mounted to the wall inside the community hall, which is impossible to move. The keys to the box were in possession of an official, Mrs Kleynhans, who has since resigned. Her whereabouts is unknown. She handed the keys to Ms Visser who together with Mr Mthombeni and Ms Modjadji opened the box shortly after 10h00. The names of the bidders were announced by Ms Visser in the presence of the bidders who were present and their names immediately recorded in the bidder's register.
- [19] The denials of the respondent are verbose and riddled with conjecture and far-fetched contentions. Very little of what is said, is factual. The explanation that the tender box was outside the administrative building is plainly untrue. The box is a fixture inside a building.
- [20] The officials that retrieved the envelopes containing the bids from the tender box did so in the normal course of their duties. It simply defies logic that this bid was not recorded in the register but nevertheless found its way with the other bids into the system.
- [21] If the respondent submitted a bid before the box was opened, its name together with the names of all bidders should have been announced and recorded in the register. The contents of the register (which was completed contemporaneously with the opening of the box and the opening of envelopes containing the respective bids) is strong prima facie proof that the bid of the respondent was not in the box with the other bidders when it was opened. The version of the respondent in my judgment is so implausible that it can safely be rejected out of hand. In my view, the respondents bid was not deposited in the box as required but found its way into the process contrary to the supply chain management policy document.
- [22] The contract price of R584 000.00 (exclusive of VAT) which was confirmed by the municipal manager in a letter on 7 July 2009 has sky-rocketed to R2 268 681.40 on 8 July 2009 in terms of an oral agreement concluded on the very day after the contract was awarded. It boggles the

mind that such an increase, without council approval, could have been negotiated and agreed upon for the same work tendered for. The explanation proffered by the respondent as the reason for the conclusion of the oral agreement is incomprehensible, indigestible, and is undeserving of acceptance.

[23] The respondent is a company which purports to be chartered accountants who professes to be experts in municipal finance and able to draft annual financial statements for the applicant. It ought to have been aware of the provisions of the MFMA, and more particularly, section 116.

[24] I digress for a moment to refer to the relevant provisions of section 116 which provide that:

(1) A contract or agreement procured through the supply chain management system of a municipality or municipal entity must-

(a) be in writing

(b) stipulate the terms and conditions of the contract or agreement which must include provisions providing for-

the termination of the contract or agreement in the case of non or under- performance;

(i) dispute resolution mechanisms to settle disputes between the parties;

(ii) a periodic review of the contract or agreement once every three years in the case of a contract or agreement for longer than three years; and

(iii) any other matter that may be prescribed

(2) ...

(3) A contract or agreement procured through the supply chain management system of the municipality or municipal entity may be amended by the parties, but only after-

(a) the reasons for the proposed amendment have been tabled in the council of the municipality or, in the case of a municipal entity, in the council of its parent municipality; and

(b) the local community-

(i) has been given reasonable notice of the intention to amend the contract or agreement; and

(ii) has been invited to submit representations to the municipality or municipal entity'.

[25] It matters not if the oral contract referred to by the respondent amended the original contract or if the oral contract substituted the original contract. The oral contract or agreement fell afoul of the provisions of section 116(1)(a) and section 116(3). Both the provisions are peremptory. As far as compliance with the provisions section 116(3) are concerned, it is undisputed that the proposed amendment could not have been, and was not tabled in the council because the amendment was discussed and orally agreed upon, the

very day after the respondent was notified that the contract was awarded to it. The local community in any event had not been notified of the intention to amend.

- [26] It is unnecessary, in the light of the findings the court have made in relation to the failure to deposit the bid of the respondent in the tender box and in relation to the oral amendment of the contract, to determine whether the failure to comply with clause 18.3.4.2 of the Supply Chain Management Policy, was fatal.
- [27] Section 217(1) of the Constitution lays down that when an organ of state contract for goods or services it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.
- [28] The tender process constituted 'administrative action' under the Constitution which entitles all participating tenderers to lawful and procedurally fair process and outcome[7]. The award of a tender is similarly administrative action[8].
- [29] The collateral challenge is raised by means of a review of the decision to award the tender to the respondent. It is legality based, on the rule of law, which is a foundational to the Constitution,[9] and was launched in reaction to the action instituted by the respondent against the applicant, some, 10 years after the tender was awarded and the contract concluded and competed.
- [30] The respondent instituted action for the recovery of its fee for work done in 2012. The delay for bringing the application is explained in 9 paragraphs in the founding affidavit. The applicant pointed out that it defended the action of the respondent and that prior to 2016 a collateral challenge was not available to the applicant. The attorney that acted on behalf of the applicant passed away in 2018. The action was set down for trial on 9 April 2019. After the current attorneys had been appointed, advice from senior counsel was sought and obtained. The action was postponed and an agreement was reached that the present application be launched. The respondent opposed the application and also the condonation sought for the failure to launch

the collateral attack within a reasonable period.

THE LAW

- [31] It is axiomatic that municipal functionaries are enjoined to uphold and protect the rule of law. A general duty rests on the municipality to seek redress for unlawful decisions taken by any of their departments. This duty is explained in *Khumalo v Member of the Executive Council for Education: Kwa Zulu Natal*: [10]

'Section 237 of the Constitution provides: 'All constitutional obligations must be performed diligently and without delay.'

Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent

compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality'.[11]

[32] Ordinarily, a party should launch an attack against a decision within a reasonable time. The applicant must advance cogent reasons for the court to condone a delay as extensive as the present.[12]

[33] The effect of the decision over the period of time and the prejudice suffered by the respondent due to the delay is an important consideration in the assessment, if the applicant has lost its right to a remedy.

[34] The respondent instituted the action in 2012. A plea was delivered in

2016. The applicant had ample time and adequate opportunity to obtain the information necessary for a collateral review since 2016. The applicant, with little reflection, should have been able to discover, early on, that there was malfeasance because of the oral amendment and because the amount claimed in the particulars of claim and the amount of the tender which was accepted, cannot be so markedly different. The alarm bells that were ringing should have been deafening.

[35] It is common cause that the respondent rendered professional services to the applicant during August until November 2009. The respondent was paid the amount of R268 681.40 for those services. The respondent seeks to recover R2 348 105.15 in the action instituted for the services it rendered to the applicant.

[36] It is not the purpose of this judgment to comment on the strength or weakness of the claim or the veracity of defences raised in the plea. Whatever the position might be, it is uncontroverted that the respondent rendered professional services to the applicant.

[37] Both counsel was alive to this fact. Counsel for the respondent contended that the respondent will be prejudiced in the action, if this court should condone the lapse of time and set the contract aside. The respondent will be forced to reconsider the sustainability of the present claims if that happens and will have to consider an amendment of its particulars of claim to put up a fresh claim on a different cause of action, altogether. The applicant will, no doubt, in such an event, raise prescription as a special defence, so the argument ran.

[38] Counsel for the applicant submitted in response, that the applicant is willing to give an undertaking not to raise prescription in the event of this court setting aside the decision as invalid and the contract as void. It is accepted by counsel for the applicant that the respondent, as a consequence, will be forced to change tack. Counsel, as stated earlier, acknowledged that professional services had indeed been rendered to the applicant and that the respondent should be fairly remunerated for services actually rendered. He made it clear that the concession is made without admitting that the services were adequately and professionally rendered.

- [39] This court is not disposed to deny a remedy to the applicant where it seeks to set aside egregious illegal administrative acts, even after such a long delay. A remedy denied tantamount to validating an obvious invalid administrative act.[13] The public interest demands that a remedy be granted to the applicant despite the indifference and lack of interest displayed by the applicant to promptly and timeously attack the invalid award.
- [40] The correction and reversal of invalid administrative actions is firmly grounded in section 172(1) of the Constitution which requires a court to declare any law or conduct inconsistent with the Constitution invalid to the extent of its inconsistency. Closer to home; the conclusion of the contract which flowed from the decision by the applicant to award the tender to the respondent is grounded in the Constitution. The invalidity of the award rubs off on the validity of contract which was concluded and also orally amendment. In *Merafong City Local Municipality v AngloGold Ashanti Ltd*[14] the principle is stated:
- ‘Hence the central conundrum of Oudekraal that “an unlawful act can produce legally effective consequences” is constitutionally sustainable, and indeed necessary. This is because, unless challenged by the right challenger in the right proceedings, an unlawful act is not void or non-existence, but exists as a fact and may provide the basis for lawful acts pursuant to it. This leads to a logical corollary, which this Court recognised in *Giant Concerts*, that an own-interest litigant may be denied standing “even though the result could be that an unlawful decision stands.”[15]
- [41] The public interest in procurement is an important factor to be considered when the rights and obligations of all affected parties are assessed.[16] The setting aside of the award will effectively deprive the respondent of a contractual remedy. As stated previously, counsel for the respondent, alive to this consequence, suggested that if the court is minded to grant the relief prayed, to rather declare the contract unlawful. Even if the contract is declared void, the respondent will not be non-suited thereby and will not be without an appropriate remedy. The undertaking by the applicant not to raise prescription will alleviate any prejudice that the respondent might suffer in the pending action.[17]
- [42] The public generally, and in particular those members of the community of Phalaborwa who pay rates, taxes, and other levies towards their municipality, have a real and a direct interest in the administration of the public purse which the Ba-Phalaborwa municipality and other municipalities throughout the country are privileged to administer. Fruitless and unauthorised expenditure touch their pockets and impact severely on much needed service delivery that they are entitled to, and expect.
- [43] When contracts are entered into by the public functionaries under corrupt or illegal circumstances, the public interest dictates that those responsible should be brought to book swiftly and expertly. It has been far too long that the public has been soothed with countless empty promises and threats by politicians that corrupt activities of officials will be rooted out and that they will be prosecuted. To no avail. Little, if nothing, has been done in this Province, in particular, to prosecute corrupt officials and others that benefitted from corrupt activities. It is high time that the malfunctioning state machinery grinds into gear before all

faith is lost in the criminal justice system.

- [44] The impact of corrupt activities is so devastating and repugnant that the courts should do all in its power to ensure that nobody should benefit from those activities, must less those in powerful positions.
- [45] It is clear that various provisions of the MFMA had been contravened by officials of the applicant in this instance. It will be surprising to learn that steps had been taken against any of those officials. It leaves the distinct impression, if no steps were taken, that officials are being protected to the detriment of the public.
- [46] Inactiveness by the council is a reflection of a lack of an understanding of its oversight role and is evidence of perfunctory performance of its constitutional mandate.

CONCLUSION

- [47] I have come to the considered conclusion that the award of the tender 19/2009 must be set aside. It follows, also, that the service level contract and any oral amendment of the contract entered into between the applicant and the respondent be declared void ab initio.
- [48] I am not inclined to grant prayers 3 or 4 on the basis that the respondent rendered a professional service to the applicant. The trial court in the action instituted by the respondent is best suited to determine if the respondent is to be remunerated for the work it has done. I am minded to record the undertaking in the order and report the matter to the Deputy Director of Public Prosecutions; Polokwane to consider institution of prosecution, if warranted by the facts, following an investigation.
- [49] The applicant did not seek costs in the notice of motion but counsel submitted that the respondent should pay the costs of the application. No submissions to the contrary were made.
- [50] I therefore, make the following order:

ORDER

1. The award of tender No 19/2009 to the respondent on 7 July 2009 is set aside.
2. The service level contract concluded between the applicant and the respondent, inclusive of any oral amendment to the contract, is declared void ab initio, and is set aside.
3. The respondent is ordered to pay the costs of the application.
4. It is recorded that the applicant has undertaken not raise prescription as a defence in the pending action between the parties instituted in the High Court Gauteng Division: Pretoria, under case no 48033/12.
5. A copy of this judgment must be forwarded to the Deputy Director Public Prosecutions: Polokwane.

GC MULLER

JUDGE OF THE HIGH COURT LIMPOPO DIVISION: POLOKWANE

APPEARANCES

1. For the Applicant

: JA Motepe SC

2. For the Respondent

: D Thumbathi

3. Date of hearing

: 21 May 2020

4. Date of Judgment delivered : 27 May 2020

[1] Generally Recognised Accounting Practice.

[2] Tender 19/2009.

[3] They were: (1) MRL Incorporated Carted Accountants (2) R Kalidass & Associates (3) Altimax Training Academy (4) KPMG Services

(5) TMDG Consulting (Pty) Ltd.

[4] Only the relevant portions of the letter of demand are quoted.

[5] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984

(3) SA 623 (A) 634H-635C; National Director of Public Prosecutions v Zuma

[2009] ZASCA 1; 2009 (2) SA 277 (SCA) par 26.

[6] Act 56 of 2003. (Hereinafter 'the MFMA').

[7] The Promotion of Administrative Justice Act, Act 3 of 2000.(Hereinafter PAJA.).Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA) par 5.

[8] Cape Metropolitan Council v Metro Inspection Services CC 2001 (3) SA 1013 (SCA par 16-18.

[9] Section 1(c) of the Constitution.

[10] 2014 (5) SA 579 (CC).

[11] Par 46.

[12] Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) 44D-E; Setsokosane Busdiens (Edms) Bpk v Voorsitter Nasionale Vervoerkommissie en 'n Ander 1986 (2) SA 57 (A) 82G-83D.

- [13] Metal & Electrical Workers Union of South Africa v National Panasonic Co (Parow Factory) 1991 (2) SA 527 (C) 533A-B.
- [14] 2017 (2) SA 211 (CC).
- [15] Par 36. Footnotes are omitted.
- [16] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others 2014 (4) SA 179 (CC) par 32-33.
- [17] Counsel agreed that mediation could be explored as an option depending on future developments in the action.
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