

SOUTH AFRICA / JUDGMENT

Bosch Munitech (Pty) Ltd v Govan Mbeki Municipality (88360/2014) [2015] ZAGPPHC 1096; [2015] 4 All SA 674 (GP) (17 September 2015) [2015] ZAGPPHC 1096

COURT

North Gauteng High Court, Pretoria

BEFORE

Murphy

CASE / FILE NUMBER

88360/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

DATE:17/09/2015

CASE

N0:88360/2014

In

the matter between:

BOSCH
MUNITECH (PTY)
LTD
Applicant
and
GOVAN
MBEKI
MUNICIPALITY
Respondent

JUDGMENT

MURPHY J

1. The applicant seeks payment in the amount of R16 996 144,69 together with interest. It alleges that the money is owing to it in terms of a written contract it concluded with the respondent on 21 November 2013, whereby it undertook to carry out the refurbishment of the eMbalenhle waterworks situated in the area of the respondent's jurisdiction. The respondent is a municipality situated in the province of Mpumalanga.
2. The respondent's defence is that it did not enter into a written contract with the applicant in November 2013 which permits the

applicant to payment of the amount claimed. According to the respondent, the applicant relies on the terms and conditions of an

agreement not concluded with the requisite animus contrahendi or in accordance with its stipulated formalities. It is common cause that the applicant tendered to do the works but the issue is whether a contract was settled at the time on the terms alleged by the applicant.

3. At the beginning of April 2013, the respondent invited tenders for the refurbishment of the waterworks. The invitation to tender [1] specified the closing date for receipt of tenders as 26 April 2013. The tender contract documentation[2] includes section T1.2, the tender data, which has precedence

in the interpretation of any ambiguity or inconsistency between it and the Standard Conditions of Tender. Clause 2.15 of the Standard

Conditions of Tender governs the closing time for receipt of tenders. The tender offer must be received by the employer not later than the closing time stated in the tender data. Clause 2.15.2 provides that if the employer extends the closing time stated in the tender data for any reason, the requirements of the conditions of tender apply equally to the extended data. The employer therefore may extend the closing time beyond the date specified in the invitation to tender.

4. Clause 2.16.1 of the Standard Conditions of Tender requires the tenderer to "hold the tender offer(s) valid for acceptance by the employer at any time during the validity period stated in the tender data after the closing time stated in the tender data".

Clause F.2.16 of the tender data defines the tender offer validity period to be 120 days. Clause 2.16.2 provides that if requested by the employer, the tenderer shall consider extending the validity period stated in the tender data for an agreed additional period.

5. Clause F.1.4 of the tender data appointed the respondent's engineer, Worley Parsons RSA (Pty) Ltd, as the respondent's agent in the tender process ("the engineer"). On 24 April 2013, Mr Jaco Rossouw, an employee of the engineer, addressed an email to interested parties, informing them that the closing time had been extended to 12h00 on Friday 3 May 2013.[3]

6. The applicant submitted its tender to the respondent on 3 May 2013. It tendered for the total works in an amount of R67 861 297,95.
7. The extension of the tender closing date to 3 May 2013 meant that the 120 days validity period for which the tenderer was obliged to keep open the offer was extended to and expired on 31 August 2013.
8. The tender documents submitted to the respondent on 3 May 2011 include a completed part C1.1 being the section of the tender documentation detailing the form and requisites of a valid offer and acceptance.[4] The document is blank in different spaces which are required to be completed by the tenderer and the employer in concluding the contract. It comprises three distinct parts dealing respectively with the offer, the acceptance and a schedule of deviations. The part of the document dealing with the offer was signed by the managing director of the applicant, Mr Stephen McCarley , on 26 April 2013 and witnessed by two witnesses.
9. The C1.1 Form of Offer and Acceptance ("the C1.1 form") has assumed significance in this application, hence it will be salutary at this point to set out its relevant terms.
10. The C 1.1 form notes that the employer (the respondent) has solicited offers to enter into a contract for the procurement of the refurbishment works, consisting of civil, mechanical and electrical engineering works, and records that the tenderer (the applicant), "identified in the offer signature block", has examined the documents listed in the tender data and addenda, and by submitting the offer has accepted the conditions of tender. It provides further that by signing this part of the form the tenderer offered to perform all of the obligations and liabilities of the contractor under the contract for an amount to be determined in accordance with the conditions of contract identified in the contract data. The C1.1 form includes a space for the tenderer to state the offer price, which in this case was completed in manuscript, presumably by Mr McCarley . This part of the C1.1 form concludes with the following clause:

"This offer may be accepted by the employer by signing the acceptance part of this form of offer and acceptance and returning one copy of this document to the tenderer before the end of the period of validity stated in the tender data, whereupon the tenderer becomes the party named as the contractor in terms of the conditions of contract identified in the contract data."

11. The second part of the C1.1 form is headed "Acceptance". It stipulates that "by signing this part of this form of offer and acceptance, the employer identified below accepts the tenderer's offer". It continues:

"Acceptance of the tenderer's offer shall form an agreement between the employer and the tenderer upon the terms and conditions contained in this agreement and in the contract that is the subject of this agreement."

12. The terms of the contract are stated to be contained in Part T1 and T2, dealing with tendering procedures and returnable documents, and Part C1 - C4, containing: agreements and contract data; pricing data; scope of work; and site information. The clause dealing with any deviations from these terms reads:

"Deviations from and amendments to the documents listed in the tender data and any addenda thereto ... as well as any changes to the terms of the offer agreed by the tenderer and the employer during this process of offer and acceptance, are contained in the schedule of deviations attached to and forming part of this agreement No amendments to or deviations from said documents are valid unless contained in this schedule."

13. Part C1.1 then deals with the obligations of the tenderer to deliver bonds, guarantees and insurance, and records that the failure to fulfil any of the obligations shall constitute a repudiation of the contract. The final clause of this part of the contract reads:

"Notwithstanding anything contained herein, this agreement comes into effect on the date when the tenderer receives one fully completed original copy of this document, including the schedule of deviations (if any). Unless the tenderer (now contractor), within five (5) working days of the date of such receipt, notifies the employer in writing of any reason why he cannot accept the contents of this agreement, this agreement shall constitute a binding contract between the parties."

14. Clause 3.13 of the Standard Conditions of Tender imposes obligations on the employer in relation to its acceptance of any tender. The employer must:

"3.13.1 Accept the tender offer only if the tenderer complies with the legal requirements, if any, stated in the tender data.

3.13.2 Notify the successful tenderer of the employer's acceptance of his tender offer by completing and returning one copy of the form of offer and acceptance before the expiry of the validity period stated in the tender data, or agreed additional period. Provided that the form of offer and acceptance does not contain any qualifying statements, it will constitute the formation of a contract between the employer and the successful tenderer as described in the form of offer and acceptance."

15. Clause 3.16 of the Standard Terms and Conditions is also relevant. It requires the employer to:

"prepare and issue the final draft of the contract documents to the successful tenderer for acceptance as soon as possible after the date of the employer's signing of the form of offer and acceptance (including the schedule of deviations, if any). Only those documents that the conditions of tender requires the tenderer to submit, after acceptance by the employer, shall be included."

16. Annexure SM16 to the replying affidavit is the C1.1 form signed by the applicant on 26 April 2013 and submitted on 3 May 2013. As mentioned, the offer signature block was completed in manuscript and signed by the applicant's managing director and two witnesses. The signature block in the acceptance part is not completed or signed by the respondent and the schedule of deviations does not reflect any agreed deviations. Each page of the document incorporating the offer, the acceptance and schedule of deviations is initialled by the applicant and the two witnesses. There is no signature or initialling of this document by any representative of the respondent.
17. However, the applicant does not rely on Annexure SM16, signed by it on 26 April 2013, as the basis of the alleged contract. In paragraph 4 of the founding affidavit it proclaimed that "in November 2013 the applicant and the respondent entered into a written contract... in terms of which the applicant undertook to carry out the refurbishment of the eMbalenhle Waste Water Treatment Works". In support of its claim it annexed Annexure SM1 to its founding affidavit, which includes another C1.1 form, signed by Mr McCarley on 21 November 2013, incorporating an offer of R40 246 107,47; being about R27,5 million less than the amount it tendered on 3 May
2013. The C1.1 form in Annexure SM1 is also not signed by the respondent in the acceptance signature block. The signature of the respondent's technical director, Mr Mtshali, however, appears on the same page as the acceptance signature block, but in the space reserved for the signature of witnesses. The signature of the municipal manager, Mr Mahlangu, is found a few pages later in the place reserved for signature of the schedule of deviations. As in Annexure SM16, the schedule of deviations in Annexure SM1 identifies no agreed deviations. Both the signatures of Mr Mtshali and Mr Mahlangu in Annexure SM1 are dated 7 November 2013, meaning that they signed the document two weeks before Mr McCarley signed the offer signature block on 21 November
2103. What appears to have happened here is that both Mr Mahlangu and Mr Mtshali signed a new C1.1 form (not the one submitted by the applicant on 3 May 2013) purportedly accepting an offer, which at the time they signed had not been recorded in the document. The offer part of the C1.1 form was then completed and signed by the applicant two weeks later on 21 November 2013. The applicant's case is that such constituted the written contract incorporating the same terms and conditions in the tender documentation and data submitted by it on 3 May 2013; except for a different price, and, as will become apparent presently, for a different scope of works.
18. To understand how Annexure SM1 came into existence it is necessary to review the events that occurred after the applicant submitted its tender on 3 May 2013. The respondent evidently applied its mind to the various tenders it received in relation to the project during the four month validity period. On 31 August 2013, the respondent's municipal manager, Mr Mahlangu, addressed a letter to the engineer regarding the tender, informing it that the Bid Adjudication Committee of the respondent, at its meeting of 30 August 2013, had resolved to appoint the applicant as the contractor for civil works at a price of R40 246 107,47; that is

R27,5 million less than the applicant had tendered for the total works. The committee had also resolved to appoint another company for the electrical and mechanical works at the price of about R22,3 million. The municipal manager then requested the engineer to proceed as follows:

"We request you to issue the letter of award to the successful bidders on our behalf. We further request you to facilitate the site handover of the site to both contractors upon acceptance of our offer of award and submission of all the necessary documentation in accordance to the conditions of contribution for building and engineering works designed by the employer published by FIDIC FIRST EDITION 1999 of the Construction (Red Book)."

19. Three weeks later, the engineer addressed the following letter to the applicant dated 20 September 2013:

"CONTRACT NO. 8/3/1-66/2012: REFURBISHMENT OF EMBALENHLE WASTE WATER TREATMENT WORKS

You are hereby informed that our client the Govan Mbeki Local Municipality has appointed Bosch Munitech (Pty) Ltd for the civil works on Contract no.8/3/1-66/2012 for the Refurbishment of Embalenhle Waste Water Treatment Works and for the amount of R40 246 107.47 including 10% contingencies, 5% escalation and VAT. The amount is made up as follows:

Civil Construction

R30 565 890.08

Plus 5% Escalation

R 1 528 294. 50

Sub Total

R32 094 184.58

Plus 10% Contingencies

R 3 209 418.46

Sub Total

R35 303 603.04

Plus 14% VAT

R 4 942 504.42

TOTAL

R40 246 107.47

Due to the reason that Piel Bok Konstruksie BK was appointed for the Electrical and Mechanical works Bosch Munitech will have to work closely with the last mentioned contractor to ensure the successful completion of the project.

In terms of the General Conditions of Contract, the contractor must:

- Supply a guarantee of R4 024 610.74 (10% of the contract amount) within 14 days.
- Supply a programme of works to the Engineer indicating the critical path, resources and possession of various sections of the site for approval within 14 days the commencement date.
- Make arrangements for the required insurance for the period from site hand over to completion of the works, including proof that the instalments are paid, must be supplied to the engineer. The required insurance must consist of:
 - Insurance of works at the contract value
 - Special Risk insurance for the period ending on the issuance of the completion certificate to the amount of R5 000 000,00.
 - The limit of the indemnity for the liability insurance required is R10 000 000 and for the period ending on the issuance of the completion certificate.
- 2. In terms of the General Conditions of Contract the contractor must note that the defects liability period is twelve (12) calendar months.
- 3. It is also recommended by the Govan Mbeki Local Municipality:
 - That Bosch Munitech (PTY) Ltd must subcontract 15% of civil works to local contractors.
 - That the company contributes 1% towards municipal social responsible programmes.
- 4. The contract document should be signed by the Contractor at the Site Handover meeting and will be signed by the Municipality once the guarantee and contractual documentation has been received and accepted.
- 5. The site handover will serve as the first site meeting of this contract and will be conducted on Thursday 03 October 2013 at the Govan Mbeki Municipal Offices at 10:00 after receipt of the letter of acceptance from Bosch Munitech (PTY) Ltd.
- 6. Please indicate in writing your acceptance of this offer although the validity of the tender has already expired.

Also attached hereto:

- a. The letter from the Govan Mbeki Local Municipality confirming the appointment of Bosch Munitech dated 30 August 2013 as received on 06 September 2013."

20. Paragraph 6 of the letter is important in that it recognised that the tender offer made by the applicant on 3 May 2013 had lapsed because it had not been accepted in the form mandated by the C1.1 form and had not been signed, accepted and delivered to the applicant within the validity period as required by the standard terms and tender data of the tender. The engineer's letter to the applicant explicitly comprised a new offer by the municipality to the applicant. It is not immediately clear whether an arrangement of that kind is permissible or in accordance with the legal requirements governing tenders by local authorities. There are no averments in any of the affidavits in that regard. Normally, the procurement of services by local authorities involves the service provider making an offer by submitting a completed tender, which the local authority accepts in accordance with the standard modalities and formalities prescribed in the tender documentation and data. That did not happen here. The offer made by the applicant lapsed and the respondent made a new offer to the applicant (on different terms and for a lesser contract price) three weeks after the expiry of the validity period. Mr du Toit of the applicant addressed a letter to the engineer on 1 October 2013 accepting the new offer as follows:

"Your letter of appointment dated 20 September 2013 refers.

As per Point 6 of your letter I hereby confirm acceptance of the offer as per your updated letter despite expiration of the tender validity.

21. The applicant in its founding papers did not allege that a contract was concluded between it and the respondent on 1 October

2013, despite the fact that it might have been. In paragraph 4-6 of the founding affidavit, as outlined above, it averred rather that the applicant and the respondent entered into a written contract in November 2013 and annexed Annexure SM 1 as proof thereof. As we have seen, in this document i) the offer signature block was signed and completed by Mr McCarley, beneath the lesser price of R40 246 107, 47 written in manuscript, on 21 November 2013; ii) the signature block for the acceptor was left blank, but witnessed by Mr Mtshali on 7 November 2013; and iii) the schedule of deviations, although including no agreed deviations, was signed by the municipal manager, Mr Mahlangu and also dated 7 November 2013.

22. In the answering affidavit, Mr Mahlangu denied that the respondent entered into a contract with the applicant in November 2013 or thereafter. It averred that the respondent did not accept the applicant's tender or offer made on 3 May 2013 and that no valid or enforceable contract was concluded at that time. That much would seem to be common cause. As regards Annexure SM1, the respondent denied that there was any animus contrahendi to conclude a contract which entitled the applicant to the payment it seeks. But perhaps more importantly, it alleged that the manner in which that document was signed in November 2013, with the acceptance (if that) effected prior to the offer being made, was not in compliance with the formalities and modalities prescribed in the standard terms and conditions, and hence no vinculum iuris was established.

23. Faced with the respondent's denial in its answering affidavit of a valid contract, the applicant pleaded its case more fully in the replying affidavit and accused the respondent of being "economical with the facts". It explained that it was caught somewhat unawares by the response of the respondent, who had not previously denied the existence of the contract. As a consequence, it needed to raise new matter in its replying affidavit and invited the respondent to file a supplementary affidavit to deal with the averments raised for the first time in reply. The respondent declined the invitation and did not file a supplementary affidavit.
24. The applicant's version about the completion of Annexure SM1 is as follows. Despite no C1.1 form having been completed, the applicant commenced with the execution of the contract in October 2013, after it accepted the offer made by the engineer in late September 2013. The site handover and establishment took place in early October 2013 and was attended by luminaries and functionaries of the respondent and representatives of the applicant. Correspondence from the technical director of the engineer to the respondent on 1 October 2013^[5] confirmed that both contractors had accepted the appointments and that the first meeting would be conducted on Friday 4 October 2013.^[6] The applicant around this time also furnished performance guarantees and the contractors' all risk insurance cover.
25. A site meeting was held on 21 November 2013 attended by the representatives of all the parties. At the meeting, the engineer produced the contract document, part of which is annexed as Annexure SM1 to the founding affidavit. That document, as discussed above, included a C1.1 form. The offer part of it was completed by specifying the amount mentioned in the respondent's offer of 20 September 2013, R40 246 107,47, as the price for the civil works. The managing director and the two witnesses signed the offer in the required spaces and dated it 21 November 2013. The signature block in the acceptance part of the form, it will be re-called, was blank, while the signatures of Mr Mtshali and Mr Mahlangu were appended at other parts of the document and dated 7 November 2013.
2013. The signature block for acceptance document was never signed and the schedule of deviations not completed appropriately.
26. Shortly afterwards, at a date not revealed in the papers, and by means unknown, the execution of the contract was suspended when the respondent advised the applicant that it had temporarily run out of funds to finance the contract. The respondent baldly denied that it asked the applicant to commence with construction work. Its denials are unconvincing and untenable in light of the preceding discussion. Nonetheless, it is clear that the respondent soon ran out of money to finance the project.
27. The FIDIC Conditions of Contract for Construction, mentioned in the respondent's letter of 30 August 2013, are normally incorporated

into the contract by Part C 1.2 of the tender documentation and the introductory clauses itemising the contract documents, which

expressly state that the FIDIC Red Book forms part of the tender and contract. The FIDIC contract provides for payment by the respondent

to the applicant of preliminary and general costs as billed, as well as standing time costs at billed rates during the period of any suspension of the contract. Clause 14 governs the contract price and payment. Clause 14.3 provides that the contractor shall submit statements to the engineer after the end of each month showing in detail the amounts to which the contractor considers himself to be entitled. In terms of clause 14.6, the engineer shall, within 28 days after receiving a statement, issue to the employer an interim payment certificate which shall state the amount which the engineer fairly determines to be due. Clause 14.7 provides that the amount certified in each interim payment certificate must be paid within 56 days after the engineer receives the statement.

28. The respondent has paid the applicant undisclosed amounts in respect of five interim payments issued between October 2013 and April 2014. It has refused to pay amounts claimed in eight certificates issued between April 2014 and October 2014. Following upon the respondent's refusal to pay these amounts, the applicant elected to terminate the alleged contract and gave notice to that effect in a letter dated 14 October 2014. It maintains that it is entitled to all the amounts payable under the outstanding interim payment certificates, as well as the release of retention held under the contract, the total amount being R16 996 144,69.

29. The respondent has raised various defences to the applicant's claim. The applicant's tender offer dated 26 April 2013 and submitted on 3 May 2014 was not accepted within the 120 day tender validity period that expired on 31 August 2013 and thus no valid or enforceable

agreement was concluded between the parties as a consequence of that offer. The respondent did not in its papers address the possibility

that a different contract might have been concluded on 1 October 2013, when Mr du Toit accepted the offer made by the engineer on 20 September 2013, primarily because the applicant did not make that claim in either its founding or replying affidavits. The respondent, on account of it not filing a supplementary affidavit, has also not dealt directly with the applicant's version in the replying affidavit, but its stance appears from its at times cryptic averments in the answering affidavit. The respondent's case, simply stated, is that the contract purportedly finalised in November 2013 was i) concluded almost two months after the expiry of the validity period; ii) not signed in the acceptance signature block by any official of the respondent; iii) not accepted in accordance with the modalities and formalities prescribed by the C1.1 form. And hence, it submitted, no *vinculum iuris* was established. In the absence of an enforceable contract, it maintained, the applicant was not entitled to any interim payments and the amounts paid to the applicant before April 2014 were paid *sine causa*, in error, presumably on the assumption that there was a valid contract.

30. The ultimate question is whether the formalities for the acceptance of the offer were complied with in a manner resulting in the conclusion of a contract in accordance with the provisions of the tender process and documents. Part C.1.1, it will be recalled,

provides that the offer will be accepted by the employer signing the acceptance part of the form and returning one copy of the document to the tenderer before the end of the period of validity stated in the tender data, "whereupon the tenderer becomes the party named as the contractor in terms of the conditions of contract identified in the contract data". The acceptance of the tenderer's offer made in the C1.1 form "shall form an agreement between the employer and tenderer upon the terms and conditions contained in this agreement and in the contract that is the subject of this agreement". I accept the applicant's submission that the closing time for the receipt of tenders was lawfully extended to 3 May 2013 with the result that the validity period only expired on 31 August 2013. The respondent, however, did not sign the acceptance part of the form and return a copy to the applicant before the end of the period of validity, either in Annexure SM16 or in Annexure SM1. At best for the applicant, the respondent signed Annexure SM1 in the wrong place and did so on 7 November 2014, whereupon the applicant signed it two weeks later, both signing after the expiration of the validity period and without including the deviations in the schedule, a stipulated requirement for their validity. The legality of the respondent's signature on Annexure SM1 is in any event doubtful. Besides being signed before the offer was made by the applicant, the signature is not located in the place provided for acceptance of the contract and without further evidence cannot be construed as effective acceptance.

31. The provisions of Part C1.1 of the tender are clear and unambiguous: a tender has to be made in accordance with its formalities, and must be accepted within the validity period. Any deviations have to be recorded in the schedule of deviations, failing which they will not be valid. There is nothing recorded in the schedule of deviations in Annexure SM1 reflecting that the period of validity had been extended beyond 31 August 2013 or that the scope of the tender had been restricted to the civil works, and the price accordingly adjusted. The requirements for the making of the offer, the mode of acceptance and the treatment of changes to the terms of the offer agreed during the process, have been wholly ignored. Moreover, the tender documentation expressly provides that the contract will only come into effect "on the date when the tenderer receives one fully completed original copy of this document, including the schedule of deviations". The applicant has not produced a fully completed document.
32. Where the mode of acceptance in a proposed contract is stipulated, it is that mode that must be followed before a contract is concluded.[7] Non-compliance with formalities imposed by one of the parties results in the nullity of the contract.[8] Where a contract is not concluded between the parties because of non-compliance with the prescribed mode of acceptance, no contractual *viriculum juris* exists and the parties may not assert the contractual remedies available under the flawed agreement, as the applicant seeks to do in the present case. Performance rendered in terms of a formally defective agreement is regarded as having

been made without legal ground (*sine causa*), and such performance is recoverable by means of an enrichment action and not by contractual remedies. In short, when the acceptance of an offer is conditioned to be made within a time or in a manner prescribed by one of the parties, then the prescribed time limit and manner should be adhered to.[9]

33. The formalities in this case required the signature of the C.1.1 form in the appropriate place. That did not happen during the validity period, and nor did it happen correctly in November 2013 when Annexure SM1 was signed. A contract "in terms of the conditions of contract identified in the contract data" could only have come into existence if the offer was signed in the prescribed way within the period of validity. The applicant deviated from the proper tender process and did so at its peril.[10] Once the Bid Adjudication Committee resolved to award part of the tender to the applicant a contract in terms of the tender terms and conditions could have come into existence only if i) the changes to the validity period, price and scope of the works were included in the schedule of deviations; ii) the C1.1 form was signed by a duly authorised representative in the appropriate signature block within the validity period; and iii) the applicant (tenderer) received a fully completed original copy of the document, including the schedule of deviations. None of that happened in this case. Moreover, clause 3.13.2 of the standard terms reiterates that the fully completed copy of the forms of offer and acceptance had to be finalised and returned to the applicant before the expiry of the validity period. That too did not happen. Only the completion of the document and its delivery in that way would "constitute the formation of a contract between the employer and the successful tenderer" in terms of Clause 3.13.2. The applicant accordingly has failed to prove the existence of a contract on terms that permit it to obtain the payment it seeks.
34. The applicant made no cogent attempt in its papers or in argument to argue that the letter from the respondent addressed to the engineer on 31 August 2014 (within the validity period) resulted in the conclusion of a valid and enforceable contract between the applicant and the respondent, or led to a valid waiver, estoppel or the conclusion of a contract on the basis of quasi- mutual assent.
35. The applicant, as I have mentioned, likewise did not contend that the letter of the engineer dated 20 September 2013 and its reply of 1 October 2013 constituted a waiver of the obligatory formalities and gave rise to a valid contract outside the formal tender process. When confronted during argument with the possibility that such may indeed have been the moment at which a valid contract was formed, counsel was compelled to concede that its pleadings (averments) did not rest on that cause of action. Reluctant to apply for an amendment at this late stage, counsel urged me to refer the matter to trial. I see no basis upon which such could be ordered. A real, genuine and bona fide dispute of fact can only exist, justifying a referral to trial or oral evidence, where the court is satisfied that the party who purports to raise the dispute has in his affidavit consciously and recognisably addressed the fact said to be disputed. The applicant did not plead that the correspondence gave rise to a contract. The respondent understandably therefore did not raise a contrary version, giving

rise to a dispute of fact about the effect of the correspondence. It limited its case to a plea that the applicant failed to prove that a contract was concluded on 21 November 2013.

36. The object of pleading is to define with precision the question at issue between the parties. The whole purpose of pleadings (including affidavits in motion proceedings) is to clarify the

issues

upon which reliance is to be placed in a suit. Generally speaking, a litigant cannot be allowed in pleadings to direct the attention of the other party to one issue and then, at the hearing, attempt to canvass another. [11] A court on occasion may decide a legal issue which is not pertinently raised in the applicant's papers but which arises out of the established facts, and such may form the basis of the judgment. It should only do so, however, where this will not prejudice the respondent or do it an injustice.[12] All the relevant facts must be before the court. It is not clear to me in the present case whether the respondent has a defence to a possible contractual claim by the applicant based on the correspondence of September-October 2013. It has not been afforded a proper opportunity to consider its defence or to plead appropriately because no suit has been brought against it on that specific cause of action. Consequently, I cannot adjudicate the issue because all the relevant

facts

are not before me and there has not been a full ventilation of the issues.

37. Counsel for the respondent conceded that the appropriate order in these circumstances should be one of absolution from the instance.

The respondent's plea is to the effect that the contract was not proved. The applicant failed to discharge its onus in relation to the cause of action it pleaded, and absolution is accordingly the apposite remedy.

38. This court has some sympathy with the applicant. It is clear from the evidence that both parties proceeded in good faith on the supposition that a contract had been concluded. The real problem resulting in the termination of the project was that funding was not available. The project was not properly budgeted for by the respondent. Both parties engaged in efforts to acquire funding from alternative sources. All correspondence between the engineer and the applicant was conducted on the assumption that a contract existed. At no stage prior to this application did the respondent inform the applicant that it was of the view that no valid contract existed. Sight must not be lost of the fact that the Bid Adjudication Committee approved the applicant's bid, but for a more limited scope of work, and directed that an award be made to it. Moreover, the respondent offered no explanation for the steps it took beyond the expiration of the validity period, and the payments it made before April 2014, from which the applicant legitimately inferred that the respondent considered itself bound by the contract supported by the signatures of Mr Mahlangu and Mr Mtshali on Annexure SM1. While it is still debatable whether a valid contract ever came into existence, the

respondent's silence and its conduct led the applicant bona fide to assert a cause of action which ultimately has proved to be unsustainable on the basis alleged. Had the applicant proceeded by action it might have been brought to terms by an exception or the pleaded

issues

better resolved by an amendment at trial. Instead the applicant took the risk of motion proceedings and was caught off guard by the answering affidavit, which is at best cryptic and does not address in a meaningful way the events after the expiration of the validity period. While that may not save the applicant in its present quest for relief, I am of the view that the respondent's conduct falls short of the standard of ethical dealing one might legitimately expect of an organ of government in a constitutional state. Section 152 of the Constitution [13] requires local government to run accountable government within its financial and administrative capacity. Likewise, section 195 of the Constitution provides that all public administration must be accountable, transparent, maintain high standards of professional ethics and be efficient, effective and economic in its use of resources. The respondent has not acted in accordance with those principles in this case. It awarded a tender in an irregular fashion when it lacked the financial resources to implement it. That led to the dispute which forms the subject of this application. Its conduct deserves a measure of censure. Hence, despite its success in the application, I am disinclined to award it costs.

40. In the premises, I make the following orders:

- i) The respondent is granted absolution from the instance.
- ii) There is no order as to costs.

JR MURPHY

JUDGE OF THE HIGH COURT

Heard on:10 September 2015

For the Applicant: Adv N Davis SC

Instructed by: Cox Yeats

For the Respondent: Adv FW Bates SC

Instructed by: Cronje de Waal-Skhosana Inc.

Date of Judgment:17 September 2015

- [1] Annexure SM13 to the replying affidavit
- [2] Annexure MM1 to the replying affidavit
- [3] Annexure SM 15 to the replying affidavit
- [4] Annexure MM1, page 282 of the record and Annexure SM16, page 400 of the record

- [5] Annexure SM20
- [6] A detailed agenda for that meeting is annexed as Annexure SM21
- [7] Laws v Rutherford 1924 AD 261; and Lepogo Construction (Pty) Ltd v The Govan Mbeki Municipality 623/2013)
- [2014] ZASCA 154 (29 September 2014)
- [7] Laws v Rutherford 1924 AD 261; and Lepogo Construction (Pty) Ltd v The Govan Mbeki Municipality 623/2013)
- [2014] ZASCA 154 (29 September 2014)
- [8] Wilken v Kohler 1913 AD 135, and Magwaza v Heenan 1979 (2) SA 1019 (A)
- [9] Laws v Rutherford 1924 AD 261 at 262
- [10] The deviations were changes to the terms of the offer agreed by the tenderer and the employer during the process of offer and acceptance, as contemplated in the third part of Part C.1.1 of the tender documentation.
- [11] Kali v Incorporated General Insurances Ltd 1976 (2) SA 179 (D) at 182A
- [12] Minister van Wet en Orde v Matshoba 1990 (1) 280 (A) 285E-H
- [13] Act 108 of 1996

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