

SOUTH AFRICA / JUDGMENT

BT Monareng Construction CC and Another v Emalahleni Local Municipality (21010/2011) [2015] ZAGPPHC 724 (18 September 2015) [2015] ZAGPPHC 724

COURT

North Gauteng High Court, Pretoria

BEFORE

Van der Westhuizen

CASE / FILE NUMBER

21010/2011

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE
NO.: 21010/2011

DATE: 18/9/2015

In

the matter between:

BT
MONARENG CONSTRUCTION
CC
First applicant
MOKGOLOKWANE
CIVILS
CC
Second applicant
and
EMALAHLENI
LOCAL
MUNICIPALITY
Respondent

JUDGMENT

VAN DER WESTHUIZEN, A J

1. The applicants applied on notice of motion that the award by the arbitrator, appointed by the parties to arbitrate their dispute that arose in respect of a tender awarded by the respondent to the applicants, be made an order of court.
2. The respondent opposed the application and brought a counter application *inter alia* for a declarator that the tender award and contract that were allocated to the applicants were void *ab initio*, alternatively voidable due to a number of misrepresentations, that were material, on the part of the applicants made in their bid for the tender. Should the relief as aforesaid be granted, the balance of the relief sought in the counter application would follow.
3. As a result a multitude of disputes arose that could not be resolved on the papers and the parties agreed to have the disputes referred to the hearing of oral evidence thereon. In that regard the disputes were identified and collated in the order granted by this court on 5 November 2012 in terms whereof the disputes were referred to the hearing of oral evidence.
4. The parties made discovery and held a pre-trial meeting to further limit the disputes. The matter was subsequently enrolled on the trial roll.
5. In terms of the referral order, the parties agreed that the deponents to affidavits filed in the application may be called to testify *viva voce*, but the parties were not limited to calling those deponents and certain directions were made should the parties intend calling other witnesses to testify *viva voce*. However, the parties each called only two witnesses who had deposed to affidavits in the application. I shall deal with these witnesses in more detail later in the judgment.
6. Before the matter came before me, the number of disputes referred to the hearing of oral evidence dwindled and were limited to those referred to below.
7. The issues that remain to be decided are:
 - (a) Whether the applicants made any material misrepresentation to the respondent at the time of submitting the tender and/or entering into the contract;
 - (b) Whether the said tender and/or contract is voidable, consequent upon such misrepresentation made by the applicants to the respondent, and whether the respondent has cancelled same;
 - (c) Whether the arbitration proceedings was validly conducted, considering the arbitration clause(s) in the tender and contract, as referred to but only limited in respect of the issue relating to the prescribed period of four months;

(d) Whether the awarding of the tender and contract by the respondent to the applicants was flawed, in consequence of a flawed administrative tender process, and whether the respondent is entitled to cancel same consequent upon the aforesaid;

(e) Whether the respondent through partaking in the arbitration process

and after signing an arbitration agreement waived its rights, alternatively elected not to raise the issue of invalidity of the

tender and contract;

(f) Whether the respondent should have brought an application for a review and setting aside of the decision to award the contract and to have the contract set aside.

8. The aforementioned issues all originate from the counter application of the respondent.

9. It may be prudent to set the background to the referral of the dispute to mediation and thereafter to arbitration.

10. The respondent called for bids in respect of a tender for the rehabilitation of the Kalkspruit. The applicants as a joint venture

submitted a successful bid and the contract was awarded to the joint venture.

11. No sooner had the applicants commenced with the project, than objections were raised by the local community relating to employment of local workers. The applicants were effectively prevented from proceeding with the project and that culminated in the cancellation of the contract by agreement between the parties.

12. After cancellation of the contract the respondent made payment of some amounts, however a dispute arose in respect of payment of other amounts, which were claimed by the applicants in terms of the contract. The parties first attempted to mediate the dispute without success. The parties thereafter agreed to arbitrate the dispute. It is the award made in this arbitration that is the subject of these proceedings.

13. After the arbitration commenced, a number of postponements ensued at the request of the respondent and relating to amendment of its statement of defence. Evidence on behalf of both parties was heard and on 31 January 2011 the arbitrator notified the parties that he would publish his award on 4 February 2011. The award went against the respondent.

14. It is to be noted that the agreement relating to the arbitration provides that the arbitrator's award is to be published within four months from the date of notice, i.e. four months from 17 June 2010.

15. The respondent, on failing to adhere to the award, compelled the applicants to approach this court to have the award made an order of court, thus setting these proceedings in motion.

16. At the commencement of his argument Mr Monene, counsel for the respondent, conceded that should the aforesaid issues be decided

against the respondent, the arbitrator's award is to be made an order of court.

17. It was agreed between the parties that the respondent bears the onus in respect of the issues to be decided and that the respondent has the duty to begin.

18. The respondent chose to lead the evidence of Mr Shongwe, who deposed to the respondent's main affidavit, and Ms Kama, who deposed to a confirmatory affidavit on behalf of the respondent.

19. On behalf of the applicants the evidence of Mr Hibbert, the attorney of the applicants and who deposed to the founding affidavit on behalf of the applicants, and that of Mr Madisha, who deposed to the replying affidavit on behalf of the applicants, were led.

20. It is common cause between the parties that the applicants participated in the bid for the tender, in respect of the rehabilitation of the Kalkspruit bridge under bid no 34/2009, as a joint venture.

21. In argument Mr Monene limited his argument to three alleged misrepresentations. These relate to:

- (a) an alleged misrepresentation of the address of the applicants in

respect of the locality of their offices;

- (b) an alleged misrepresentation of previous experience/references in

respect of the applicants; and

- (c) an alleged misrepresentation of the turnover of the applicants for the previous and current year at the time when the tender was called for.

22. Mr Shongwe, at the time the Acting Director: Administration and Resources Management of the respondent, testified in general on the granting of the tender and contract awarded to the applicants. He testified in respect of the alleged misrepresentation

relating to the address and locality of the joint venture as indicated in the bid documents. He testified that it was not true and hence tarnished the bid of the joint venture. This conduct he testified placed a question mark over the credibility of the

applicants and hence rendered the contract void. He testified that when the issue of the address came to the fore, he visited the

address and was told by the then occupant that the applicants were never at the premises and in fact where unknown to the occupant. No evidence by that person was led in that regard.

23. He further testified that the Bid Evaluation Committee (BEC), of which he was the chairperson at the time, considered the bids for the tender and in this regard was handed a report by the consultant appointed by the respondent who assisted in evaluating the various bids and who was obliged to make a recommendation to the respondent in that respect. On that recommendation the BEC made a further recommendation to the appropriate department that was tasked to award the contract to the successful bidder. He conceded that none of those reports or recommendations was before court.
24. In respect of the alleged misrepresentation relating to the turnover of the applicants, Mr Shongwe testified that information supplied by the applicants was not correct and that the applicants had failed to supply supporting documentation in that regard. No explanation was proffered as to why the information was not correct and what role it played in awarding the tender to the applicants.
25. Mr Shongwe further testified that in respect of the references supplied by the applicants relating to their previous experience,

some were fictitious and others non-existent when Ms Kama investigated the references.
26. He testified that at the time the respondent agreed to mediation and thereafter arbitration, it was not perpetrated by the applicants in respondent only became aware arbitration. He concluded aware of the "fraud" that was obtaining the contract and the thereof when preparing for the that the magnitude of the

misrepresentations by the applicants could only have been due to possible oversight on the part of the respondent or collusion with the applicants by employees of the respondent. He did not and could not explain his conclusion. No evidence was led in respect of who committed the oversight or what led thereto. Mr Shongwe neither testified nor explained that an investigation undertaken by the respondent had pointed to any collusion. No such investigation was undertaken.
27. Mr Shongwe conceded that the BEC's decision to recommend the applicants to be allocated the contract was premised upon the consultant's report. He also conceded that the respondent was aware of the alleged misrepresentation relating to the issue of locality

prior to the cancellation of the contract by agreement between the parties.
28. Ms Kama, the Head of the Department of Roads and Stormwater of the respondent was the second witness to testify on behalf of the respondent. She had deposed to a confirmatory affidavit in the application.
29. She testified that she was a member of the BEC that considered the consultant's report on the various bids received in respect of the tender. She referred in her oral evidence to a document forming part of the respondent's discovery that is headed "Extract form the 29th Agenda of the Bid Evaluation Committee of the Emalahleni Local Municipality Held on 5 May 2009". She testified that she was the author of that document.

30. Ms Kama testified that according to that document, the applicants were awarded points for locality in view of the address supplied in the joint venture's bid. She conceded that the joint venture had not claimed any points in respect of locality in its bid, however emphasised that the joint venture had indicated in its bid that its address was a local one and that this had influenced the BEC to recommend the applicants as preferred bidder.
31. In cross-examination Ms Kama was adamant that the BEC decided to recommend the joint venture as preferred bidder due to it being a local entity as per the address supplied. Her response to the apparent conflict between the respondent's policy in respect of preference for local entities and the provisions of Preferential Procurement Policy Framework Act, 3 of 2000 (PPPFA) was that the respondent's policy enjoyed preference over the PPPFA.
32. In respect of the issue of alleged misrepresentation relating to the list of references supplied by the joint venture, Ms Kama testified that she only attempted to verify the first ten references on the list, those being references in respect of contracts undertaken five years prior to the submitting of the bid and that she had not investigated the more recent and apparent comparable references. She confirmed that she only directed her inquiry in respect of the first applicant and was at a loss in explaining why she had not enquired in respect of the second applicant. Ms Kama did not, as confirmed by her in her confirmatory affidavit, attempt to verify all 24 references listed. She could not explain why two references with the same telephone number and the same contact person offered different responses. She did not explain the manner, format or methodology of verification and the period within which that process had taken place. Her evidence in this regard is sketchy. Ms Kama's explanation that she only investigated those contracts that on the face of the document were relevant to the project of the tender does not hold up. The last reference on the list was current and related to bridges, yet she did not investigate it. This omission was not explained.
33. Ms Kama conceded that the CIDB rating of the applicants qualified them to bid for the tender. She further conceded that the respondent, through its employees, including her, knew of the issue of locality prior to the agreed cancellation and had not only become aware thereof during preparation for the arbitration. She also testified that she had undertaken to investigate the allegation relating to the issue of locality prior to the cancellation of the contract. She confirmed that she had notified the responsible person of the respondent prior to the agreed cancellation of the contract in respect of the allegation relating to the applicants not being a local entity.
34. Mr Hibbert, who is the attorney of the applicants, testified on a limited issue, namely that relating to the issue of the period of four months within which the arbitrator was to make his award and whether there had been an agreement in respect of an extension

thereof. He testified that the respondent was responsible for the delays that occurred due to its various requests for postponement to amend its statement of defence. Such had resulted in the four-month period not being met and consequently extended by agreement between the parties, at least by conduct due to the respondent's requests for postponement.

35. Mr Madisha, the second witness on behalf of the applicants and the member of the second applicant, testified that he had completed the tender bid on behalf of the joint venture. He testified further that he was advised at the compulsory site meeting before the submission of bids, that he should insert the address at which the applicants could be reached during the project if the contract would be awarded to them. He further testified that the address would be the temporary address of the joint venture and that it was the address of a family friend of the member of the first applicant. They were allowed to use that address for the duration of the project. He conceded that neither he nor his partner in the joint venture ever stayed at that address for the short period that the project was underway.
36. He further confirmed that no claim was made in the bid for points in respect of locality.
37. Mr Madisha testified that he had attached the applicants' respective documentation in respect of the CIDB rating to the bid and had also written the reference numbers of the CIDB rating on the bid document as it often happened that the CIDB certificates were either lost or removed from the bid.
38. He testified that soon after the applicants commenced with the project, objections were raised by the local community in respect of employment of local labourers and to the extent that the applicants were hampered in the execution of the contract. This was taken up with the appropriate persons at the respondent. Nothing came of their complaint and on the day that a letter of cancellation of the contract was handed to the responsible person in the employ of the respondent, a group from the local community led by the erstwhile councillor objected to the allocation of the contract to the applicants. This occurred at the offices of the respondent where Ms Kama was also present. Mr Madisha testified that the respondent through its employees on that day clearly indicated to the local community that the issue of locality was not relevant and that the respondent was not obliged to award the contract only to a local entity. This evidence was not seriously challenged by the respondent.
39. It is trite^[1] that a party relying on alleged misrepresentation is to prove:
 - (a) a misrepresentation of a fact by the other party with the intention that it would lead to the conclusion of the contract;
 - (b) that the party would not have entered into the agreement was it not for such misrepresentation of fact;
 - (c) that such misrepresentation was material; and if so,
 - (d) the party was entitled to restitutio in integrum and damages, if any.

40. The document relied upon by Ms Kama, the extract from the agenda referred to above, clearly indicates that the applicants' bid was the lowest received and was rejected by the respondent's consultant due to the allegation that no CIDB certificate had been provided by the applicants. However, the respondent, through the relevant department determined and verified that the applicants had the required CIDB rating and the said certificates were attached to Ms Kama's report.
41. The first and main issue of alleged misrepresentation relates to the address and locality of the joint venture as indicated in the bid document.
42. The respondent contends that such representation was material and induced the respondent to enter into the contract with the applicants.
43. There is no merit in this contention. Firstly, the conduct of the respondent as referred to above at the meeting when the cancellation of the agreement was entertained, clearly gainsays a claim that locality was of overriding importance.
44. Secondly, the applicants did not claim any points on that score. The respondent had, on its own accord, allocated such points. Having so allocated points, the respondent then allegedly again takes it into consideration when recommending the applicants for the award of the tender. That exercise is contrary to the provisions of the PPPFA.[2]
45. Further in this regard, Mr Snyman, who appeared on behalf of the applicants, submitted that it is trite that the respondent is obliged in terms of the relevant legislation pertaining to procurement to accept the lowest bid which scores the highest points. He further submitted that should the points allocated to the applicants in respect of locality be deducted, the respondent would still have the highest points and the lowest bid. This can be clearly gleaned from the extract of agenda relied upon by Ms Kama.
46. Thirdly, the aforesaid document, the extract of the agenda, gainsays the evidence of Ms Kama. It clearly states that the applicants were recommended by the BEC to be awarded the tender in view of its CIDB rating, they being the lowest bidder. In this regard the following is contained in the said document.

"RECOMMENDATION OF THE CONSUL TANT

That Bid No. 3412009: Rehabilitation of Kalkspruit be awarded to Patrick Makgoka Construction at an amount of R2,211,403.51 (Excluding VAT but Including contingencies).

Further Comments of the Acting Director Infrastructure and Basic Services:

In the above paragraph the consultant recommended the lowest Tendered as Makgoka Construction. He eliminated B.T Monareng/Mokgolokwane J/N for not submitting the CIDB certificate. B. T Monareng/Mokgolokwane J/N submitted a CRS number for their CIDB application and when they were checked on the CIDB website it shows they have the required grade of 4CE PE. Attached as Annexure "A" (page 1 - 2) are the copies printed out from the CIDB website.

CONCLUSION

1. That Bid No. 3412009: Rehabilitation of Kalkspruit be awarded to 8.T Monareng / Mokgolokwane J/N at an amount of R2,080, 190.64 (Excluding VAT);
2. "
47. It is to be noted that the preferred bidder of the consultant, Patrick Makgoka Construction, was not a local entity. So were many of the other bidders not local entities. Ms Kama did not explain the obvious contradiction. The applicants were clearly the lowest bidder.
48. Fourthly, the fact that the joint venture was not a local entity was known to the respondent prior to the cancellation of the contract and prior to the arbitration proceedings. Ms Kama was aware of that fact prior to the cancellation of the contract. She notified the responsible person of the respondent of that fact prior to the cancellation of the contract. The respondent had clearly at that stage not regarded it as an important issue that went to the root of the tender award. Its protestations now appear to be an afterthought.
49. The alleged misrepresentation clearly had not and could not have induced the respondent into allocating the tender to the applicants.

It was not a determining factor in considering the award of the tender to any bidder, certainly not in respect of the applicants. Nor in respect of the consultant's preferred bidder. It certainly was not a material misrepresentation and on the evidence it cannot be found to have been made with an intention to induce the respondent in allocating the tender to the applicants.

50. The respondent failed to prove the second alleged misrepresentation relating to the issue of fictitious references. The evidence by Ms Kama on this issue is unconvincing and inconclusive.
51. There is no merit in the alleged misrepresentation relating to the issue of the applicants' turnover. Firstly, the respondent led no evidence in that regard. Secondly, it is gainsaid by the respondent's own evidence relating to the applicants' CIDB ratings referred to above. It was put to Ms Kama by Mr Snyman that a CIDB rating of 4CE PE was equivalent to a turnover of R10 000 000. She did not quibble with that proposition.
52. There is no merit in the allegation of material misrepresentation that would warrant a finding that the tender award was fraudulently

obtained and thus void ab initio or voidable. The respondent failed to discharge the onus in this regard.

53. It follows that the respondent's counter application in respect of material misrepresentation cannot succeed.
54. There remains the further issue relating to the four-month period within which the arbitrator was to publish his award.
55. It is clear from the evidence that the respondent through its conduct prevented the completion of the arbitration and hence the publishing of the award within the period of four months.
56. The respondent at no stage objected to the award being published on 4 February 2011: it did not object when the arbitrator notified the parties on 31 January 2011 that he would publish his award on 4 February 2011; the respondent did not object when a demand was made in respect of compliance with the award; the respondent only raised the issue in its counter application.
57. In *Bester v Easigas (Pty) Ltd et al* 1993(1) SA 30 (C) it was held that a party seeking an extension of the four-month period is obliged to show good cause for such extension.[3]
58. *Murphy, J* in an unreported

judgment

- [4] held that postponements due to the conduct of a party now raising the issue constituted good cause for extending the time period within which the award was to be published.[5]
59. The applicants applied during argument for an amendment to the notice of motion to incorporate a prayer for extension to 4 February 2011 of the time period within which the award was to be published. The basis for the amendment was raised in the answering affidavit on behalf of the applicants to the counter application. The respondent opposed this application for amendment on the ground that it was only made at a late stage of the proceedings and hence the respondent was prejudiced. Mr Monene could not define the alleged prejudice suffered by the respondent. There is no merit in such opposition. It is trite that a party is entitled to apply for an amendment until judgment is delivered in the matter, provided that the issue to be introduced was properly canvassed in evidence. In the present matter Mr Hibbert dealt with the issue of the delays and he was cross-examined thereon by Mr Monene.
60. The applicants are entitled to the amendment and it should be granted.
61. It follows that the respondent has not discharged its onus in respect of the counter application.
62. I grant the following order:

- (a) The respondent's counter application is dismissed;
- (b) Leave is granted to the applicants to amend the notice of motion to include the prayer:
- " That the time period for the making of the award by the second respondent be extended to 4 February 2011 in terms of the provisions of the proviso to section 23(b) of the Arbitration Act, Act 42 of 1965"
- (c) The time period for the making of the award by the second respondent be and is hereby extended to 4 February 2011 in terms of the provisions of the proviso to section 23(b) of the Arbitration Act, Act 42 of 1965;
- (d) The arbitrator's award, a copy of which is annexed to the notice of motion and marked as annexure "X" is made an order of court;
- (e) The respondent is to pay interest on the amount of R548,003.12 at the rate of 15.5% from 6 July 2009 to date of payment;
- (f) The respondent is ordered to pay the costs of the application on the scale as between attorney and client.

CJ VAN DER WESTHUIZEN

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION

On behalf of Applicants: Instructed by:

M Snyman

Albert Hibbert Attorneys

On behalf of Respondents: Instructed by:

M S Monene Dolamo Attorneys

[1] See Novick et al v Comair Holdings Ltd et al 1979(2) SA 116 (W) at 1498 - 150C

[2] Grinaker v Tender Board (Mpumalanga) 2002(3) All SA 336 (T)

[3] at 32 -34

[4] Prime Fund Managers (Pty) Ltd v Rowan Angel (Pty) Ltd et al Case no. 27283.2012 delivered on 28 January 2014

[5] See also Bester, *supra*, at 32

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