

SOUTH AFRICA / JUDGMENT

Bushbuckridge Local Municipality v Mylocel (Pty) Ltd (1537/2019) [2021] ZAMPMHC 23 (27 August 2021) [2021] ZAMPMHC 23

COURT

Middelburg High Court, Mpumalanga

BEFORE

Mtimunye

CASE / FILE NUMBER

1537/2019

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REPUBLIC

OF SOUTH AFRICA

THE

HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MIDDELBURG (LOCAL SEAT)

CASE

NO: 1537/2019

REPORTABLE: NO

OF INTEREST TO OTHER

JUDGES: NO

27

August 2021

In

the matter between:

BUSHBUCKRIDGE LOCAL
MUNICIPALITY
APPLICANT
AND
MYLOCEL (PTY)
LTD
RESPONDENT

JUDGMENT

MTIMUNYE AJ:

INTRODUCTION:

- [1] The applicant filed an application to this court for a self- review of its agreement with the respondent in terms of the principles of legality and not in terms of the promotion of Administrative Justice Act 3 of 2000 (PAJA). The applicant brought the application under two grounds. Firstly, the applicant seeks an order from this court to declare the agreement to be constitutionally invalid under Section 172(1) (a) of the Constitution and thereafter craft a just and equitable remedy in terms of Section 172(1) (b) of the Constitution. Secondly, that the agreement did not comply with the requirements of unsolicited bidding in that it failed to meet the requirements for such. The respondent opposed the application, contending that there was an inordinate delay of fifteen
- (15) months by the applicant before bringing the application and therefore condonation should not be granted. The respondent further

argued that the municipal manager deviated from the prescripts and he was entitled to do so.

THE FACTS:

- [2] The parties entered into a service level agreement on about the 28th of June 2018 until 30 June 2021 for the supply, installation and maintenance of digital screens at 20 of the applicant sites. The

agreement was preceded by a pitch and proposal by the respondent to the applicant. The respondent offered the applicant four free

advertising content on the advertising screens. The applicant was required to pay for extra advertising.

- [3] The respondent issued summons that were served on the applicant on or about April 2019, demanding an amount of R 1 814 400 (One Million Eight Hundred and Fourteen Thousand Four Hundred Rands) for alleged repudiation of the agreement. This amount was for the total period of the agreement if it was not repudiated. The applicant defended the action and raised an exception to the respondent's particulars of claim. The exception was argued and dismissed. The action proceedings have reached a trial stage. The applicant only launched their review application in March 2020 and served on the respondents' in August 2020. The respondent opposed the application and raised a point in limine on the founding affidavit. The applicant withdrew that founding affidavit without giving an explanation and substituted it with another affidavit. The review application was argued by the parties' legal representatives virtually on the 10th of July 2021. This court reserved judgment.

- [4] It was common cause that the erstwhile Acting Municipal Manager, Mr. Emmanuel Mashava, represented the applicant and signed the agreement. It was further common cause that Mr. Mashava did not follow the supply chain management policy[1] when entering into the agreement as required for procuring goods and services. There was no competitive bidding process followed.

THE LAW AND ANALYSIS:

- [5] The application for review before this court was brought in terms of the principles of legality. The point of departure is to look at the legislative framework that allows for self-review applications under the principle of legality. It is indeed trite law that the procurement of goods and services by an organ of the state (such as the applicant) must comply with Section 217 of the Constitution. The Section reads:
1. when an organ of state in the national, provincial or local sphere of government , or any other institution identified in the national legislation , contracts for goods and services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.
 2. subsection (1) does not prevent the organs of the state or institutions referred to in that subsection from implementing a procurement policy providing for-
 - a. categories of preference in the allocation of contracts; and
 - b. the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- [6] The Constitutional Court in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) , made it clear if an award does not conform to the legal prescripts , it may be reviewed and possibly set aside. That is the legal principle. It was clear in casu that there was no tendering or competitive process which was followed before the respondent was awarded the agreement. The respondent conceded that the agreement was awarded on an unsolicited bid. I agree with the applicant that the agreement between the parties was contrary to Section 217 of the Constitution. However, the matter does not end there. Municipal managers are allowed to deviate from procurement processes.
- [7] The second ground of review is that the agreement failed to meet the requirements of an unsolicited bidding process. To decide this issue it is indeed correct that the court must look at the provisions Section 113 Municipal Financial Management Act 56 of 2003 as well as regulations 36 and 37 respectively. Section 113 provides as follows:
1. A municipal or municipal entity is not obliged to consider an unsolicited bid received outside its normal bidding process.
 - 2, if a municipality or municipal entity decided to consider an unsolicited bid received outside a normal bidding process, it may do so only in accordance with a with a prescribed framework.

3. the framework must strictly regulate and limit the power of the municipalities and municipal entities to approve unsolicited bids received outside their normal tendering or other bidding processes. (own underlying). It is clear from the above section that an unsolicited bid must follow strict prescripts.
- [8] Regulation 36 (1) (a) and (b) of the Municipal Financial Management Act 56 of 2003 provides:
- “(1) The Municipal Manager may:*
- (a) Dispense with the official procurement processes established by this policy and to procure any required goods/ and or services through any convenient process, which may include direct negotiations, but only:
 - (i) In an emergency;
 - (ii) If such goods / services are produced or available from a single provider only;
 - (iii) For the acquisition of special works of art or historical objects where the specifications are difficult to compile;
 - (iv) For the acquisition of animals for zoos and nature reserves;
 - (vi) In any other exceptional case where it is impractical or impossible to follow the official procurement processes;
 - (b) Ratify any minor breaches of the procurement processes by an official or committee acting in terms of delegated powers or duties which are purely of a technical nature.
- (2) The Municipal Manager must record reasons for any deviations in terms of sub-paragraph (1) (a) and (1) (b) above and report to them in the next meeting of the Council and must include a note to the annual financial statements. This sub- paragraph does not apply to procurement of goods or services contemplated in paragraph 3 (3) of this policy.,,,,,,” (Paragraph 3 deals with procurement relating to an emergency which is not applicable here).
- [9] It is indeed true that a municipal manager may deviate from the procurement processes as provided for by Regulation
36. This is also allowed in terms of subsection 2 of Section 113 of the Municipal Financial Management Act quoted above. However, it should be noted that the deviation is not of a general nature but ONLY as indicated above. In casu deviation can only be legally acceptable if there is compliance with Regulation 36 (1) (b) (ii). There must also be compliance with Regulation 37 which is closely connected with Regulation 36 and Section 113 (2).
- [10] Regulation 37 (2) provides:
- “(2) if a municipality or municipal entity decides in terms of Section 113(2) of the Act to consider an unsolicited bid, it may do so only if-*

- (a) the product /service offered in terms of the bid is a demonstrably or proven unique innovative concept;
- (b) the product or service will be exceptionally beneficial to or have exceptional cost advantage for, the municipality or municipal entity;
- (c) the person who has made the bid is the sole provider of the service or product; and
- (d) the reasons for not going through the normal bidding processes are found to be sound by the accounting officer.

[11] It is indeed correct that all there requirements must be complied with, read with the requirements in Regulation 36. The respondent will only succeed if he can prove not only that he was the sole provider of such goods but also that his product is unique and has exceptional benefit/ advantage to the municipality. There must also be proof that the municipal manager recorded the reasons

for the deviation from the normal processes and his action was tabled at the following council meeting. There is nowhere in the

respondents' answering affidavit where it is alleged that there was no other provider at that time that could provide the same service. All the respondents refer to is the advantages of using a duracast. The respondent also argues that the municipal manager used a convenient method. That is not the only requirements in terms of Regulation 36 and 37. The respondent also argues that their service was beneficial to the municipality. Regulation 36 and 37 require that the deviation must be done only in case of emergency, where the service provider is the sole provider and there are reasons for not going through the normal bidding processes that are found to be sound by the accounting. Those requirements were not met by the respondent.

[12] To support the above contention the applicant did investigations through it CFO and no reasons were recorded for the deviation. The argument by the respondent that the erstwhile municipal manager will be called during the trial and he will explain the processes he followed does not cure the defects. The prescripts require that the deviation be recorded. If this was done the CFO should have found those reasons. I agree with the applicant that there were no compliances with the requirements of the regulations.

[13] The final issue for determination is the delay in prosecuting the review. It is common cause that the applicant waited for fifteen month after summons was issued before lodging the application for review. The respondent argues that delay is unreasonable and the court should not overlook it but refuse the application for the matter to proceed. The respondent referred the court to the judgment of JP Legodi, Frank fisher and The Mbombela local municipality and 5 Others, case no 1054/2016. The applicant argued that the said case was concerned with PAJA. Although that matter was indeed concerned with review under PAJA, the JP also touched on the principles of legality and the Buffalo case in paragraphs 7, 8 and 17 of the judgment.

- [14] It is indeed correct that the leading case in this regard is the case of Buffalo City Metropolitan Municipality V Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC), paragraph 42, where the court set down four principles to be followed in decided in assessing delay:

“The issues that arise are:

- (a) Did the Municipality unreasonably delay in bringing the review application?
- (b) Has the Municipality provided a satisfactory explanation for the delay? If not, should the delay be overlooked?
- (c) If the delay is unreasonable, and should not be overlooked,
- (d) does section 172 impel this Court nonetheless to declare that the Turnkey contract is unlawful and grant a just and equitable remedy?

- [15] Firstly, it must be determined whether the delay is unreasonable or undue. This is a factual enquiry upon which a value judgment is made, having regard to the circumstances of the matter. In casu it is clear that there was a delay by the municipality in bringing the review application.

- [16] Secondly, has the municipality provided a satisfactory explanation for the delay? The applicant gave an explanation for the delay: The applicant indicated that the current municipal manager was only appointed after a month the contract was entered into. She learned of the contract when she was presented with invoices. In October 2018 the acting CFO made investigations and found that supply chain management processes were not followed in February 2019. In March 2019 the municipal manager tried to convene a meeting with the respondent to discuss the agreement but got delayed due to a busy schedule. In April 2019 the respondent served the applicant with summons which the applicant defended. There was an exception taken on the summons that was heard in March 2020. The applicant sought an opinion from a counsel. Papers for review were prepared in April 2020 and the country was placed on lockdown level 5 on April 2020. Contrary to the argument by the respondent’s legal representative, the applicant covered the entire period of the delay. This court following Buffalo City v Asla where the court said the approach to undue delay within the context of a legality challenge necessarily involves the exercise of a broader discretion than that traditionally applied to section 7 of PAJA.

- [17] Thirdly, if the delay is unreasonable, the question becomes whether the Court’s discretion should nevertheless be exercised to overlook the delay to entertain the application. In overlooking the delay the court will take into account the potential prejudice to the affected parties as well as the possible consequences of setting aside the decision. In casu, the delay was indeed unreasonable. The current municipal manager learnt of the unlawful contract in February 2019 but she says she was too busy to meet with the respondent. Surely, that was not a sufficient reason. Also, after receiving summons it was not explained why the applicant did not lodge their review application immediately but sought opinion of a counsel after the CFO already found that the contract did not follow prescripts. However, sight must not be

lost of the fact that the applicant has already paid the respondent for the work done. What the respondent now wants is the payment for the remainder of the contract after it was cancelled. The payment of the contract for the full period amounts to wasteful expenditure public funds for work not done. The respondent on the other hand has not suffered any loss as they had not performed for the money they are demanding. Thus, this court is inclined to overlook the delay and entertain the application.

- [18] The fourth principle stems directly from Gijima. Even where there is no basis for a court to overlook an unreasonable delay, the Court may nevertheless be constitutionally compelled to declare the contract unlawful. This is so because “[s]ection 172(1)(a) of the Constitution enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution”.^[2] This court is indeed bound by the decision of Gijima and therefore it will overlook the unreasonable delay. This is because state funds are involved in this contract and as indicated above the contract did not comply with the required legal prescripts.

ORDER:

- [19] In these circumstances, justice and equity dictate that the respondent should not benefit from a contract that is invalid and allowing it to benefit even after the contract was terminated. I therefore make an order declaring the Mylocel contract invalid and is set aside as from the date it was terminated by the applicant. It should be noted that such an award preserves rights which have already accrued but does not permit a party to obtain further rights under the invalid agreement.

- [20] The following order is made:

1. The Digital Broadcast Solution Service Agreement between Bushbuckridge Municipality and Mylocel (Pty) Ltd is declared invalid in terms of Section 172 (1) (a) of the Constitution.
2. In terms of section 172 (1) (b) of the Constitution, the contract is set aside only as from the date it was cancelled/terminated by the applicant.
3. The respondent to pay the costs of the application.

Mtimunye AJ

Acting Judge of the High Court

Mpumalanga Division, MIDDELBURG (Local Seat)

DATE OF HEARING:

10 AUGUST 2021

DATE OF JUDGMENT:

27 AUGUST 2021

APPEARANCES

FOR THE APPLICANT:

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[1] as contained in Section 111-119 of the Municipal Finance Management Act 56 of 2003 read with the Municipal Supply Chain Management Regulations

[2] Gijima above at para 52. See also section 172 of the Constitution which states:

“When deciding a constitutional matter within its power, a court—

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including—
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”
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