

SOUTH AFRICA / JUDGMENT

Mahikeng Local Municipality v Famate Infocast (Pty) Limited (CIV APP FB 11/2019) [2020] ZANWHC 24 (26 March 2020)

[2020] ZANWHC 24

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks, P L Nobanda, B R Nonyane

CASE / FILE NUMBER

CIV APP FB 11/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE NO: CIV APP FB

11/2019

In

the matter between:

MAHIKENG
LOCAL MUNICIPALITY
Appellant
and
FAMATE
INFOCAST (PTY) LIMITED
Respondent

CORUM:

HENDRICKS DJP et NOBANDA AJ et NONYANE AJ
DATE
OF HEARING
:
21 FEBRUARY 2020
DATE
OF JUDGMENT
:
26 MARCH 2020
FOR
THE APPLICANT
:
ADV. MANENTSA

FOR
THE RESPONDENTS

:

ADV. MKHATSHWA
ORDER

(i)

The appeal is
upheld.

(ii)

The order of the
court a quo
is set aside and is substituted with the following order:-

“The

plaintiff’s (Famate Infocast (Pty) Limited) claim is dismissed
with costs.”

(iii)

The respondent
is ordered to pay the costs of the appeal.

JUDGMENT

HENDRICKS DJP

Introduction

- [1] This is an appeal against the judgment and order granted on 19 October 2017, by the court a quo in favour of the respondent. Leave to appeal was refused by the trial court. The Supreme Court of Appeal (SCA) was petitioned for leave to appeal, which was granted on 12 September 2018, to the Full Court of this Division; hence, this appeal.

Background

Facts

- [2] During April 2007 the appellant, Mahikeng Local Municipality (Municipality), invited interested parties to submit written proposals for a Payment Incentive Scheme. On 25 May 2007, the

respondent Famate Infocast (Pty) Limited (Famate) submitted its proposal to the Municipality to the total costs of R1 725 000.00. On 30 April 2008, the

Municipality issued a letter addressed to Famate, in which it accepted Famate’s proposal. The contents of the letter

reads thus:

“This served to confirm that a proposal to implement an Incentive Scheme has been awarded to you as per your proposal dated 25th May 2007. You will be appointed on a 12 months contracts (01 June 2008 to 31 May 2009) and at a later stage we will have to enter into a service level agreement.

We could also request your kind selves to come and present fully your proposal, in order for us to clarify what’s not understood by us fully.

Should you require further information please contact the Acting Head: Income, Mr. Maphologela at 018 389 0452.”

[3] Mr Mametja, the Managing Director of Famate, contacted and held meetings with Ms Modibela and Mr Maphologela of the Finance Department of the Municipality, regarding further information that was needed and the way forward. Mr Mametja prepared a Service Level Agreement (SLA) and submitted it to Mr Rantao, the Chief Financial Officer (CFO) of the Municipality, as well as to Ms Modibela. On 5 May 2009, Famate received a faxed letter from the Head: Legal Services of the Municipality raising certain issues that needed to be corrected in the SLA. The following is inter alia stated in the letter:

“...Our recommendation regarding the service level agreement between Mafikeng Local Municipality and Famate is as follows:

1. Item 3 (Duration)

The Service Level Agreement must reflect the date of commencement as well as the last date of the contract. Let us as far as possible

discourage an open ended contract.

2. Item 9 (Fees)

Let us have an exact amount on the final service level agreement for the whole period of the agreement.

3. Item 22.1 (General)

The paragraph should read: “This agreement between Mahikeng Local Municipality and annexed hereto from time to time will constitute the entire agreement between the parties pertaining to the subject matter hereof.”

4. Item 24 (Domicilia and Notices)

Rectification of the word “Any notice”

The entire service level agreement is fine.

...”

- [4] According to Mr Mametja these corrections were effected and the SLA was returned to the Municipality. No other query about the SLA was received from the Municipality. Despite follow ups been

made, the SLA was never signed and entered into by the parties. Despite the SLA not been signed and entered into between the parties, Famate was provided with data on the residents' payment profile. It started to implement its program. On 23 February 2009, Famate was also supplied with a list of the Municipality's debtors.

- [5] Realizing that the SLA was not signed and entered into between the parties, Mr Mametja sought the intervention of the Mayor, but to no avail. The Municipal Manager was also contacted, but the desired result was not achieved. During March 2009, Famate sent an invoice to the Municipality in the amount of R983 250.00 for work allegedly done. This invoice was never paid by the Municipality.
- [6] Having not received payment of the invoice, Famate resorted to institute legal action against the Municipality, alleging that there was a breach of contract by the Municipality and that Famate accepted the repudiation of the contract. Summons were issued against the Municipality for payment of the contractual amount of R1 725 000.00.
- [7] In the amended particulars of claim attached to the summons, it is alleged that on or about the 29th day of May 2008, Famate duly represented by Mr Mametja and the Municipality duly represented by Ms Modibela and Mr Maphologela,

entered into a twelve (12) month oral agreement, the terms and conditions of which were reduced to writing but not signed. The

alleged oral terms of the agreement are outlined in the amended particulars of claim. Inter alia, it is contended that it was agreed that the Municipality would pay Famate an initial amount of R862 500.00, excluding Value Added Tax (VAT) on the commencement of the contract. The balance of the agreed price was payable on the sixth (6) month of the contract. The amount of R1 725 000.00 claimed comprise of R743 986.00 as out of pocket expenses and R981 014.00 as profit.

- [8] In its plea to the amended particulars of claim, the Municipality denies the existence of the alleged oral agreement entered into between the parties. It pleaded that Famate's appointment was subject to the making of representations which it failed to do as well as the signing of a SLA, which never happened. It was denied that the Municipality is indebted to Famate in the amount claimed or for any amount. The Municipality prayed for the dismissal of the claim with costs.

The Proceedings before the Trial Court.

- [9] Oral evidence was presented by Mr Mametja for and on behalf of Famate. He was the Managing Director of Famate. The invitation for proposals for a Payment Incentive Scheme placed by the Municipality caused Famate to submit its proposal on 25 May 2007. The Municipality sent a letter of acceptance of the proposal to Famate dated 30 April 2008.

Meetings were held between Mr Mametja and two officials of the Municipality. He prepared a SLA and sent it to the Municipality, who returned it with some queries. The queries were attended to and it was sent again to the Municipality. No further queries were received. However, the SLA was not signed by the representative of the Municipality. As

far as Mr Mametja is concerned, an oral agreement was concluded between him and the representatives of the Municipality, Ms. Modibela

and Mr. Mphologela because, although the agreement was reduced to writing, it was never signed.

[10] Mr Smit was the Municipal Manager of the Municipality at the point in time. As such, he was the accounting officer of the Municipality, clothed with the necessary authority to enter into contracts for and on behalf of the Municipality. He did not sign the SLA.

[11] The trial court found that there is correspondence that proves that the SLA was sent to the Municipality and that enquiries were made about the signing thereof. Famate attended to the queries raised by the Municipality. This was an indication from Famate that there was every intention to have the SLA signed. Furthermore, the proposal made by Famate contained all the details of the project and the costs thereof. The appointment of Famate must have taken all that into consideration. Mr Mametja also testified that a presentation was made to Ms Modibela and Mr Mphologela. There were no other outstanding matters to agree on for the contract to be binding. Over and above, Famate performed certain tasks as requested by the Municipality and submitted an invoice. The invoice was never queried or rejected by the Municipality and it wasn't paid either.

[12] In paragraph 19 of the judgment, the following is stated:

"[19] The evidence tendered does not show that the parties in this matter contemplated that consensus would have to be reached on the outstanding service level agreement before a binding contract could come into existence. In its argument the Plaintiff relies on fictional fulfilment in that the Defendant frustrated the signing of the service level agreement and can therefore not benefit from the failure to meet its obligation, I am in agreement with this submission as discussed in paragraph 17 above that the Plaintiff effected the corrections on the service level agreement but there was still no response from the Defendant about the signing thereof. It is therefore my view that there were no suspensive conditions to be fulfilled before the contract between the parties based on the appointment letter could be binding. The Defendant's conduct of denying the contract based on the unfulfilled conditions constituted repudiation and cannot succeed. There was a contractual arrangement between the Plaintiff and the Defendant when the Plaintiff received the letter of appointment dated 30 April 2008 and the Defendant is liable to the Plaintiff In the amount of R1 725 000-00 as indicated in the accepted proposal."

The appeal

[13] Counsel on behalf of the Municipality submitted that the two issues which are central to this appeal are:

(i) The appointment letter and whether or not it constitute a contract and have suspensive conditions attached to it;

(ii) The issue of fictional fulfilment.

[14] With regard to the letter of appointment, the words in the letter should be interpreted in order to determine their proper meaning in the context of the letter. The principles with regards to interpretation has crystalized over a number of years in our case law. It is important that every word must be given meaning to and no word should be ignored or treated as tautologous or superfluous. Context is everything.

See: KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA).

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA).

Aschcor Secunda (Pty) Ltd v Sasol Synthetic Fuels (Pty) Ltd (624/10) [2011] ZASCA 158 (28 September 2011).

Absa Technology Finance Solutions (Pty) Ltd v Michael's Bid a House CC and Another 2013

(3) SA 426 (SCA).

Belet Industries CC t/a Belet Cellular v MTN Service Provider (Pty) Ltd (936/2013) [2014] ZASCA 181 (24 November 2014).

[15] The letter of appointment states that Famate is to implement an incentive scheme on a twelve

(12) month contract from 1 June 2008 to 31 May 2009. The parties will have to enter into a SLA at a later stage. Famate should make a presentation to present the proposal fully in order for the Municipality to clarify any issue that wasn't understood by them.

[16] This letter of acceptance clearly advise Famate that its proposal was accepted by the Municipality. This letter in itself is not a contract. It furthermore advises Famate that it will be appointed on a twelve (12) month contract, in the future. It contains a rider, namely that the parties (Famate and the

Municipality) will have to enter into a SLA. Giving the ordinary meaning to these words, it is quite obvious that the twelve (12) month contract will be entered into in the future, as the parties will have to enter into a SLA. It is quite apparent that the Municipality contemplated that a contract was going to be concluded somewhere in the future and that it will be for a twelve (12) month period.

[17] This letter gave Famate a hope (spes) that the Municipality will contract with it in the nearby future and nothing more. Perhaps it did create a legitimate expectation

for Famate about the future possibility of a contract with the Municipality. However, to reiterate, this letter in itself does not constitute a contract. More so, it also entails a request that Famate present fully its proposal in order for the Municipality to clarify what is not understood by them.

This in itself, is a further indication that there was no complete meeting of the minds. The Municipality sought clarification from Famate before it could conclude a SLA. It remains however of critical importance that a SLA had to be concluded. No contractual relationship could exist in the absence of a SLA.

[18] The trial court found that it is trite that upon acceptance of a tender, a contract comes into being and such agreement is binding in law. This conclusion lost sight of the fact that the letter of appointment in question created a pacta de contrahendo, which is an agreement to conclude a contract in the future. More so because the SLA had to be entered into in the future, after the presentation that had to be made by Famate to clarify any uncertainties that the Municipality had about the proposal. The possibility of the extension of the contract as testified to by Mr Mametja, also further illustrate the point that all the material terms of the contract had not been agreed upon. There was still further negotiations that had to take place. Therefore, the SLA was not signed.

See: *Commando Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v SA Post Office Ltd* 2013 (2) SA 133 (SCA)

CGEE Alsthom Equipments v GKN Sankey (Pty) Ltd 1987 (1) SA 81 (AD).

[19] Section 38 (1) of the Public Finance Management Act 1 of 1999 states that only the accounting officer can enter into contracts for and on behalf of the Municipality. Mr Smit, the then Municipal Manager, was the accounting officer. He testified that he did not enter into a contract with Famate. Section 116 (1) of the Municipal Finance Management Act 56 of 2003 stipulate that an agreement procured through the Supply Chain Management System of a Municipality, must be in writing and must stipulate the terms and conditions of the agreement. The section read thus:-

“116. Contracts and contract management

- (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-
 - (i) the termination of the contract or agreement in the case of non- or under-performance;
 - (ii) dispute resolution mechanisms to settle disputes between the parties;
 - (iii) 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
 - (iv) any other matters that may be prescribed.”

[20] The language of this section is clear and unambiguous. It is imperative that a contract for procurement of goods and services concluded by a municipality must be in writing and must stipulate the terms and conditions as set out in this piece of legislation. These provisions are peremptory and mandatory. An agreement which fails to comply with this provision is invalid and unlawful. This is in actual fact the crux of this case. The reliance on an

oral agreement concluded between the parties is bad in law, because it does not comply with the legislature prescripts. This put paid to the case of Famate. On this basis alone, the claim should have been dismissed. This is because the case pleaded by Famate in its amended particulars of claim is based on an oral agreement entered into between Mr Mametja on behalf of Famate and Ms Modibela and Mr Mphologela on behalf of the Municipality.

[21] This brings me to the second central issue of this appeal namely fictional fulfilment. In paragraph 19 of the judgment of the court a quo, supra, it is clear that the court relied on the principle of fictional fulfilment. The court a quo states that this was raised by Famate's legal representative during closing argument. This was never raised in the pleadings. The Municipality was not forewarned and conscientious about the principle of fictional fulfilment. Counsel for the Municipality in his heads of argument contended that this amounts to trial by ambush and is grossly unfair. I am in full agreement with this contention. Fictional fulfilment should have been pleaded by way of a replication. This was not done. It was therefore simply not open for Famate to advance it for the first time during closing arguments. It was therefore equally not open to the court to consider fictional fulfilment at such a late stage of the proceedings and to base its judgment on it.

[22] In any event, Mr Mametja testified that he did not communicate initially with Mr Smit in order to ask him to sign the SLA and that Mr Smit refused to sign it. Bearing in mind that Mr Smit, as the Municipal Manager, was the only relevant official of the Municipality that could sign the SLA. He only approached Mr Smit towards the end of the contract period, whereas he should have done so before 1 June 2008, as stipulated in the acceptance letter. Having not been approached initially before the commencement date as suggested in the acceptance letter, there is no evidence that Mr Smit intentionally avoided the signing of the SLA. No one else but Mr Smit was authorized to sign the SLA. Therefore, any

consultations and/or negotiations with other officials of the Municipality does not help Famate's case at all. These

officials could not sign the SLA and bind the Municipality to a contract. No evidence was presented that Mr Smit, who had the authority to sign the SLA and bind the Municipality contractually frustrated the signing of the SLA. In my view, the doctrine of fictional fulfilment does not find application in this matter. The appeal must therefore succeed.

[23] Insofar as costs are concerned, it should follow the result and be awarded in favour of the appellant as the successful party. The costs should include the costs of the application for leave to appeal in the court a quo as well as in the SCA, as per the court order of the SCA. Such costs should be on a party-and-party basis.

Order

[24] Resultantly, the following order is made:

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

I agree

P L NOBANDA

ACTING JUDGE OF THE HIGH COURT,

B R NONYANE

NORTH WEST DIVISION, MAHIKENG

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