

SOUTH AFRICA / JUDGMENT

Mlonzi and Another v Municipal Manager, Engcobo Local Municipality and Another (2213/2015) [2015] ZAECGHC 101 (10 September 2015) [2015] ZAECGHC 101

COURT

Eastern Cape High Court, Grahamstown

BEFORE

C Plasket

CASE / FILE NUMBER

2213/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOW

CASE

NO: 2213/2015

DATE

HEARD: 3/9/2015

DATE

DELIVERED: 10/9/2015

NOT

REPORTABLE

In

the matter between:

MCEBISI
RUDOLPH MLONZI
1ST
APPLICANT
KWANE
CAPITAL (PTY) LTD
2ND
APPLICANT
and
MUNICIPAL
MANAGER, ENGCOCO LOCAL
MUNICIPALITY
1ST
RESPONDENT
ENGCOBO
LOCAL MUNICIPALITY
2ND RESPONDENT

JUDGMENT

PLASKET J

[1] This is the return day of a rule nisi granted by Lowe J on 19 March 2015 in the following terms:

‘1. THAT a Rule Nisi do hereby issue calling upon the Respondents to show cause, if any, at 10h00 on Thursday 25th June 2015 why an order should not issue in the following terms:

1.1 Interdicting and / or restraining the Respondents from adjudicating and appointing service providers for the supply and delivery of heavy duty machinery pursuant to a bid notice published in the Daily Dispatch issue of 24th March 2015;

1.2 Declaring that Second Applicant is the appointed service provider for the supply and delivery of heavy duty machinery pursuant to a written contract with the Respondents dated 21st November 2014;

1.3 Declaring that the termination of the contract for the supply and delivery of tipper trucks by letter dated 25th February 2015 is unlawful, invalid and of no force or effect;

1.4 Directing the Respondents to pay the costs of this application.

2. THAT paragraph 1.1 above, operate as an interim interdict with immediate effect.

3. THAT the costs of this application be reserved for decision.

4. THAT this Order be served on First and Second Respondents.’

The

background

- [2] It is common cause that on 19 August 2014, the second respondent, the Engcobo Local Municipality, (the municipality) invited tenders for the 'supply and delivery of heavy duty machinery and motor vehicles', including five 'brand new tipper trucks'. On 5 September 2014, the second applicant, Kwane Capital (Pty) Ltd, (Kwane Capital) submitted its bid.
- [3] The bids were adjudicated on 20 November 2014 and Kwane Capital was chosen as the successful bidder for the supply of the tipper trucks. It was informed of this by letter dated 21 November 2014. The letter stated:

'We wish to inform you that Bid No ELM/15/14/08/2014 for the Supply & Delivery of Five (5) Brand New Tipper Trucks was awarded to you by Bid Adjudication Committee on the 20th November 2014 for the amount of R5 248 535.50 (including Vat).

This tender will only be valid subject to meet (sic) the following conditions:

1. Signing of an acceptance letter which should be submitted to the SCM Manager by the 26th November 2014.
2. The expected delivery period is a maximum of 3 weeks from the date of acceptance letter.
3. Submission of a clearance certificate certifying that the bidder has no undisputed outstanding amounts for municipal services with the Engcobo Local Municipality and / or the local municipality where the bidder's business operations are located (if it's not Engcobo Local Municipality), for which payments is overdue for more than 30 days.
4. Proof of payment for trucks.
5. Registration papers for Man trucks at supply before payment is effected.

Failure to comply with the above mentioned conditions will result in the cancellation of your appointment.

We wish to congratulate you for the appointment and looking forward with working with you for the benefit of the Engcobo Local Municipality.'

- [4] Kwane Capital accepted by letter dated 3 December 2014 and entered into a detailed written contract which contained both special and general conditions.
- [5] On 23 January 2015, Mr MR Mlonzi, the sole director of Kwane Capital, (Mlonzi) and a representative of Man Trucks arrived at the municipality to deliver the trucks. For reasons that are in dispute, and will be dealt with later, delivery did not take place and, on 25 February 2015, the municipality cancelled the contract between it and Kwane Capital.
- [6] When the municipality invited tenders once again, Kwane Capital and Mlonzi launched urgent proceedings in which the rule nisi referred to in paragraph 1 was granted and extended on 25 June 2015.

The issue

- [7] When all is said and done, the issue that has to be determined is whether the municipality was entitled to cancel the contract. If it was, then Kwane Capital had no right to an interdict or to the other relief claimed by it. Conversely, if the municipality was not entitled to cancel the contract, Kwane Capital would be entitled to the relief that it seeks.
- [8] It was argued by Mr Chithi, who appeared for the municipality (and its municipal manager, the first respondent) that the dispute of fact that exists is not resolvable on the papers, that the applicants should have foreseen that a dispute of fact would arise, and that the application should be dismissed on this account.
- [9] I do not believe that the dispute of fact is not capable of resolution on the papers. I intend to make factual findings on the

basis of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*

- [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-I. In other words, the facts that will determine whether the applicants are entitled to the relief that they claim are those put up by them that are either admitted or not denied by the respondents as well as the respondents' facts that are in dispute.

- [10] Mr Poswa, who appeared for the applicants, argued that no real, genuine or bona fide dispute of fact had been created by the

respondents. He is incorrect. As I shall presently demonstrate, in answer to the averments made by the applicants concerning the

material issues in dispute, the respondents have set out detailed averments of their own and have not sought refuge in bare denials.

See *Wightman t/a JW Construction v Headfour (Pty) Ltd & another*

- [2008] ZASCA 6; 2008 (3) SA 371 (SCA), para 13.

- [11] The factual dispute between the parties concerns the circumstances surrounding, and the way in which, the contract was cancelled. I proceed to set out the contending versions.
- [12] Mlonzi, in the founding affidavit, stated that after the contract was entered into Kwane Capital purchased the trucks from MAN Truck & Bus (SA) (Pty) Ltd (MAN Trucks). The document that is attached as proof of the purchase does not in fact confirm it. It is a letter written by Mr Brian Biyela of MAN Trucks that confirmed that Kwane Capital had placed an order for the trucks 'for expected delivery' in 'November & December 2014'.

[13] The trucks did not meet the tender specifications and had to be modified. While that was being done, Mlonzi claimed, Kwane Capital attempted to obtain 'proxy details' from the municipality so that the trucks could be registered in its name. These attempts, between 27 November 2014 and 21 January 2015, were unsuccessful. He lays the blame for this squarely at the door of the municipality which, he said, had failed to cooperate with Kwane Capital.

[14] He set out the following details. On 27 November 2014, the financial director of Kwane Capital, Mr Bamba Tabata, sent an e-mail to the municipality in which he attached the letter from MAN Trucks 'confirming the order of trucks and delivery schedule'

and asked for 'the appointment letter and the order number in order for us to fast track delivery of these goods'. On 28 November 2014 he sent another e-mail to which he attached 'proxy documents that need to be signed by the Municipal Manager and placed on municipal letterhead'. He also asked for a copy of the municipality's 'BRNC certificate' and asked that the process be expedited 'as I am needing these for registration of the vehicles'.

[15] The attached document that was to be put on a municipal letterhead and signed reads as follows:

'To whom it may concern

As the Municipal Manager of Engcobo Local Municipality I confirm that Kwane Capital (Pty) Ltd, operates independently under control of its shareholders.

Kwane Capital (Pty) Ltd entered into Full Maintenance Lease agreements ("FML Agreements") with your company ("Avis") on or about 18 June 2014.

We confirm that The Engcobo Local Municipality will be utilising the vehicles set out in annexure A to this letter, and will be effecting all payments due in terms of the FML Agreements to Kwane Capital (Pty) Ltd.

Engcobo Local Municipality hereby agrees to be bound by the terms of the FML Agreements, mutatis mutandis, in so far as same relate to its possession of the vehicles, and the rights of Avis to recover same in terms of the FML Agreements.

It is recorded and agreed that this letter of undertaking does not constitute a cession and/or assignment of the FML Agreements and does not in any way constitute a substitution of contracting parties, a novation of the FML Agreements and/or an amendment of the FML Agreements in any manner whatsoever.'

[16] On 3 December 2014, Tabata wrote to the municipality again. He attached again, it would appear, the document he had sent before and asked again for the BRNC certificate. On 11 December 2014 the municipal manager telephoned him and asked for Kwane Capital's

municipal bill. Tabata explained that Kwane Capital leased premises and that its rental covered the cost of utilities (which were paid, presumably, by the lessor). He forwarded the lease. He asked, once again, for the proxy documents.

[17] On the same day he received a letter from the municipal manager which said:

Engcobo Local Municipality hereby informs you of the following appointments of Proxy and Representative:

Proxy

: Silumko Mahlasela

[.....]

Representative

: Silumko Mahlasela

In all matters concerned registration and licensing of vehicles in the name of Engcobo Local Municipality. This will include new registrations, re-registrations, license renewals, cancellations, duplicate registration certificates and license disc's.'

[18] Despite this, Mlonzi stated that the information supplied was not sufficient for the purpose.

On 13 January 2015, however, the municipality sent Kwane Capital a letter which stated:

'We acknowledge receipt of your Acceptance letter dated 03 December 2014; in relation to the above mentioned Tender Bidding Process.

Kindly Take Notice that your company has failed to deliver the said Trucks within the period of Three (3) weeks as required in the Appointment letter. The Appointment letter is attached hereto for ease of reference.

You are therefore required to give us reasons to as to why we cannot terminate your contract with immediate effect as you have Breached

the conditions of the same, and, further failing to notify the Municipality of your delay.

We humbly request your goodselves to respond to us within 2 hours from receipt of this email, failing which we shall Terminate your contract without any further notice thereof.

Your quick response will be highly appreciated in this regard.'

[19] Kwane Capital responded by saying that '[w]e as Kwane Capital would like to sincerely apologise for the delays in Delivery'

and attached a letter from MAN Trucks that said that the trucks would be delivered on 23 January 2015. Mlonzi continued to state that no response was received from the municipality and on 23 January 2015 the trucks were delivered. The municipal manager refused to take delivery of them on the basis of Kwane Capital's non-compliance with the contractual term relating to registration.

[20] On 25 February 2015, the municipality sent a letter to Kwane Capital in which it stated:

'We acknowledge the receipt of your Acceptance letter dated 01 December 2014; in relation to the above mentioned Tender Bidding Process.

Kindly Take Notice that your company has failed to meet the requirements as detailed in the Appointment letter dated 21st November 2014.

Take Further Notice that such a failure gives the Municipality powers to cancel the same without any Further Notice Thereof. Therefore your contract with Engcobo Local Municipality is hereby lawfully terminated, should you wish to get any clarities feel free to contact the Municipality.'

- [21] The municipality's version of events differs in substantial respect from Kwane Capital's. Its answering affidavit was deposed to by Mr Silumko Mahlasela, its municipal manager.
- [22] He made the point that when Tabata sent the confirmation that the trucks had been ordered Kwane Capital had still not accepted the tender. Despite that, Tabata also sent the so-called proxy document on 28 November 2014. At this point, the municipality's legal advisor, Mr Zolile Matiwane, telephoned Tabata and drew his attention to the fact that Kwane Capital had yet to sign and submit the acceptance letter. Tabata undertook to attend to this. This was done on 3 December 2014.
- [23] On the same day, however, Tabata sent an e-mail to the municipality in which he purported to set out the registration process and requested, once again, that the proxy document be signed. Mahlasela stated that both he and Matiwane 'refused to sign the proxy in the format proposed' by Tabata and they did so during telephone conversations with him. He continued to say that they told Tabata that 'the trucks should be registered on a temporary permit in the name of Kwane Capital and when they have been delivered they will be transferred in the traffic department at Engcobo into the name of the [municipality]'. As Tabata had suggested in his e-mail that this way of registering the trucks would result in an audit query, he was told that the municipality had registered its vehicles in this way before and had never had an audit query as a result. Later in his affidavit, Mahlasela stated that the municipality used the same method in the past to 'facilitate the registration of vehicles by third parties into its name'. Mahlasela prepared a proxy document which he put on the municipality's letterhead, signed it and sent it to Kwane Capital. That was the letter of 11 December 2014 which identified him as both the proxy and the representative of the municipality.
- [24] Furthermore, Mahlasela stated that when he and Matiwane queried the proxy document that Tabata had sent them, Mlonzi said it had been sent in error and could be ignored. (The affidavit refers to the 'First Respondent' as saying the document could be ignored. That is a patent error as Mahlasela, the deponent to the answering affidavit, is the first respondent. Read in context, this must be a reference to Mlonzi, the first applicant.)
- [25] In any event, Mahlasela had good reason to refuse to sign the proxy document sent to him. He was asked in it to confirm that Kwane Capital operated independently under the control of its shareholders; that it had entered into full maintenance lease agreements (FML agreements) with Avis in June 2014; that the municipality would use the trucks and would be 'effecting all payments due in terms of the FML Agreements to Kwane Capital (Pty) Ltd'; and that the municipality 'agrees to be bound by the terms of the FML Agreements, mutatis mutandis, in so far as same relate to its possession of the vehicles, and the rights of Avis to

recover same in terms of the FML Agreements’.

- [26] Mahlasela stated that the municipality knew nothing of the FML Agreements that Kwane Capital had entered into with Avis in June 2014 and Avis was not a party to the bid in which Kwane Capital was, some months later, appointed as a service provider. Furthermore, the municipality never intended leasing the trucks and it would never have agreed ‘to bind itself to an agreement in which it was not a party’. This document appears to have nothing to do with the registration of the vehicles.
- [27] Because the municipality was expecting delivery of the trucks by about 28 December 2014, it made arrangements for staff to be on stand-by during the end-of- year closure of the office. When its office re-opened on 6 January 2015, however, delivery had still not been affected.
- [28] As a result, on 13 January 2015, Mahlasela wrote to Kwane Capital to give notice of its breach – its failure to deliver the trucks in time – and called on it to ‘give us reasons as to why we cannot terminate your contract with immediate effect’. Kwane Capital was given two hours to respond, ‘failing which we shall Terminate your contract without any further notice thereof’.
- [29] Tabata responded with an apology and an undertaking that the trucks would be delivered on 23 January 2015. Mahlasela pointed out that this e-mail made no attempt to blame the municipality for failing to cooperate with Kwane Capital.
- [30] On 23 January 2015 Mlonzi and a person from MAN Trucks arrived to deliver the trucks. Mlonzi was not able to produce proof of payment for the trucks when requested to do so. They also had not been registered as Mlonzi said that the ‘weight capacities of the trucks had not yet been done’ and that he required a further two months ‘to do the weights before registering the trucks’ in the municipality’s name.
- [31] When Mlonzi was asked why he had delivered the trucks in these circumstances, he became angry and said that ‘the deal was off’ and that he was going to take the trucks to East London. He and his companion left with the trucks.
- [32] The municipality did not want to cancel the contract and, in Mahlasela’s view, had adopted a benevolent approach to Kwane Capital. It wanted the trucks. It waited, after 23 January 2015, for the trucks to be delivered but when they had not been delivered by 24 February 2015, it decided to cancel the contract.
- [33] It did so in its letter of 25 February 2015. After pointing out that Kwane Capital was in breach of the ‘requirements as detailed in the Appointment letter dated 21st November 2014’, the letter stated that the breach entitled the municipality to cancel the contract without further notice to Kwane Capital and that ‘your contract with Engcobo Local Municipality is hereby lawfully terminated’.

- [34] It is not in dispute that the contract to supply the trucks was concluded by Kwane Capital and the municipality. The terms of the contract are also not in dispute. Similarly, it is common cause that when Mlonzi delivered the trucks to the municipality, it did not accept delivery and, a month later, cancelled the contract.
- [35] The dispute of fact relates to whether Kwane Capital performed its obligations in terms of the contract and, if not, whether the municipality made it impossible for Kwane Capital to do so.
- [36] On the basis of the Plascon-Evans rule, however, it is the facts averred by the municipality in respect of these aspects that must be accepted. On those facts, no case is made out for the relief claimed by Kwane Capital. To the contrary, it must be accepted that Kwane Capital, having attempted and failed to persuade the municipality to sign a document which had nothing to do with the registration of the trucks and which was at odds with the contract between them, failed, when it delivered the trucks, to establish that it had paid for them and failed to have them registered. Kwane Capital was, accordingly, in breach of the contract.
- [37] Kwane Capital sought to prove that it had paid for the trucks by attaching certain documents to its replying affidavit. I have my doubts that those documents establish that fact, particularly when viewed in the context of the so-called proxy document that refers to the FML agreements with Avis. They take Kwane Capital's case nowhere, however, because it had to establish that it had paid for the trucks at the time of delivery and was unable to do so, resulting in it being in breach of its obligations.
- [38] When, a month after the failed attempt to deliver the trucks, Kwane Capital had still not rectified its breach and delivered the trucks, the municipality, relying on clause 23.1 of the General Conditions of Contract cancelled the contract. This clause states that in the event of a supplier failing, inter alia, to deliver the goods within the period specified or failing to perform any other contractual obligation, the municipality, 'without prejudice to any other remedy for breach of contract, by written notice of default sent to the supplier, may terminate this contract in whole or in part'. It did what it was entitled to do.

Costs and the order

- [39] It was argued by both sides that they were entitled to the costs of the postponement of the matter on 25 June 2015. I do not intend dealing with the various submissions made in this respect. In my view, the costs of that day should follow the result as there is no basis upon which to make any other order.
- [40] As the applicants have failed to establish a right to the relief that they seek, there is no need to deal with the points that Mlonzi lacked standing and that the joinder of the municipal manager was a mis-joinder, even though both points appear to have merit for the reasons argued by Mr Chithi.
- [41] All that remains is for me to make the following order.

The rule nisi issued on 19 March 2015 is discharged and the application is dismissed with costs, including the costs of 25 June 2015.

C. PLASKET

JUDGE OF THE HIGH COURT

APPEARANCES:

For the applicants: SG Poswa, instructed by Khuselo Steven Gqeba Inc and Mili Attorneys.

For the respondents: MM Chithi instructed by Makaula Zilwa & Co and JD Haydock Attorney.

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