

SOUTH AFRICA / JUDGMENT

Mobile Telephone Network v Special Investigating Unit (LP/03/2022) [2024] ZAST 6 (24 July 2024)

[2024] ZAST 6

COURT

Special Tribunal

BEFORE

K Pillay

CASE / FILE NUMBER

LP/03/2022

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IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF THE SPECIAL INVESTIGATIONS UNIT AND

SPECIAL TRIBUNALS ACT 74 OF 1999

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: LP/03/2022

In the matter between:

MOBILE TELEPHONE NETWORKS (PTY) LTD EXCIPIENT

and

THE SPECIAL INVESTIGATING UNIT RESPONDENT

In Re:

THE SPECIAL INVESTIGATING UNIT PLAINTIFF

THOKOZANI FLORENCE MHLONGO

FIRST DEFENDANT

MOBILE TELEPHONE NETWORKS (PTY) LTD SECOND DEFENDANT

Registration Number: 1993/001411/07

VODACOM (PTY) LTD

THIRD DEFENDANT

Registration Number: 1993/003367/07

REASONS

K PILLAY J

[1] On 21 February 2024, I granted the following order:

“Having considered the submissions by the respective parties, the Court is of the view that the exception falls to be dismissed with costs. Such costs including those consequent upon the engagement of two counsel where applicable”. Reasons therefore are furnished herewith.

[2] The plaintiff is the Special Investigating Unit (“SIU”). The second defendant is Mobile Telephone Networks however, for ease of reference I will refer to them as the “plaintiff” and “excipient” respectively. The excipient filed an exception to the plaintiff’s particulars of claim (“POC”) on the basis that the lacks averments which are necessary to sustain the plaintiff’s purported cause of action.

[3] The essence of the exception is summarised as follows:

- (1) The excipient merely submitted a proposal which can be accepted or rejected.
 - (2) The plaintiff’s POC does not attribute any unlawful and/or illegal and/or unconstitutional conduct on the part of the excipient.
 - (3) The mere submission of a proposal cannot be considered as conduct that is sought to be sanctioned with reference to paragraphs 1.4 to 1.5 of the plaintiff’s POC.
 - (4) The plaintiff has not pleaded nor alleged any conduct indicating unlawful, wrongful, illegal or unconstitutional conduct on the part the excipient, which would justify the relief sought.
 - (5) The submission of an unsolicited bid is not unlawful or unconstitutional or illegal.
 - (6) The goods were delivered on the basis of an accepted proposal. There are no averments pleaded suggesting any wrongful, unlawful, illegal or unconstitutional conduct entitling the plaintiff to the relief sought.
 - (7) The expenditure in respect of the specified goods were not in vain and cannot be considered to be fruitless and wasteful expenditure as contemplated in s 21 of the Public Finance Management Act 1 of 1999 (‘the PFMA’)
- [4] Rule 28(1) of the Special Tribunal Rules provides for instances where these Rules do not address a specific situation, in this regard, the Tribunal has the discretion to adopt any appropriate procedure, including invoking the High Court Rules. Therefore, reliance will be afforded to Rule 23 of the Uniform Rules, applicable to exceptions in the High Court.

- [5] In order to succeed an excipient has the duty to persuade the Court that upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defence is disclosed, failing this the exception ought not to be upheld.
- [6] The approach to exceptions was addressed in *Telematrix (Pty) Ltd v Advertising Standards Authority SA*[1] as follows:
- ‘Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility.’[2]
- [7] The action instituted against the excipient arises from an unsolicited offer by the excipient to provide 10 000 cell phones devices which the first defendant (Dr Mhlongo), acting as the accounting officer of the Limpopo Department of Health accepted on 17 April 2020.
- [8] It is common cause that the excipient delivered the devices to the Department after its unsolicited proposal was accepted. After delivery, the excipient was paid R10 million for aforesaid devices.
- [9] The devices were intended to assist the department in conducting mass COVID-19 screenings of the residents of the Limpopo Province. It is not in dispute that 9588 cell phones were not distributed to the intended users. The plaintiff in respect of the excipient contends that the first defendant in her capacity as the accounting officer failed to act in accordance with s 38 of the PFMA which requires such accounting officer, inter alia, to ensure that the department, trading entity or Constitutional institution which she oversees, has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective.
- [10] The plaintiff sets out in detail in the POC, all the prescribed regulatory procurement prescripts which it avers that the appointment of the excipient contravened.[3] For the sake of brevity I will not set out same again.
- [11] The principal thrust of the exception to the POC appears to be that the plaintiff’s POC do not attribute any unlawful, illegal or unconstitutional conduct to the excipient. This is referred to by the plaintiff as the “attribution defence”.
- [12] It is accepted by the excipient that the facts as pleaded by the plaintiff in the POC must be accepted as established for purpose of this judgment. The plaintiff on the other hand concedes that it does not attribute any unlawful conduct to the excipient but submits that it does not have to allege and prove attribution in order to justify its cause of action. All that it is required to do is to allege and prove that the contract in question is tainted by unlawfulness in order to found its case against the excipient. The breach of the prescribed regulatory prescripts are set out specifically in paragraphs 48 to 62 of the POC.
- [13] I agree with the plaintiff’s submission in this regard. All that the plaintiff is required to allege and prove is that irregularity.

[14] In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)*, [4]

‘...the Constitution, and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented.’ [5]

Additionally, the court held:

‘It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to [the party awarded the contract]. The converse, however, is also true. It has no right to benefit from an unlawful contract...any benefit that it may derive should not be beyond public scrutiny.’ [6]

[15] As pointed out by the plaintiff, the aforesaid approach was reaffirmed in the decision of *Mining Qualifications Authority v IFU Training Institute (Pty) Ltd*, [7] where it was held that:

‘...in my view it is unnecessary that a clear case of complicity is proven; it is enough that the award was tainted by irregularity. Were it otherwise the plea of an innocent tenderer would as a matter of course outweigh the public interest. The pendulum should usually swing the other way. What one has nor obtained through a fair and transparent process ought not to vest any moral claim to retain the spoil.’ [8]

[16] The “attribution defence” appears to permeate almost all of the second defendant’s grounds of exception. For the reasons aforesaid I find no merit in the argument because applying “a charitable test” [9] to the interpretation of the pleadings I am unable to find that “upon every interpretation which the Particulars of Claim” and any agreement on which they rely I can reasonably bear no cause of action is disclosed”. [10]

[17] The excipient also submits that the specified goods were received by the department and the expenditure in respect thereof was not vain. This ground clearly contemplates the “just and equitable relief” postulated in s 172(1)(b) of the Constitution. [11] I once again am in agreement with the plaintiff’s submission that this will depend on the facts of the case and cannot be determined by way of an exception.

[18] It is for these reasons that I dismissed the exception with costs including costs consequent upon the engagement of two counsel.

JUDGE K. PILLAY

MEMBER OF THE SPECIAL TRIBUNAL

APPEARENCES

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This reasons was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 14H25 on 24 July 2024.

[1] Telematrix (Pty) Ltd v Advertising Standards Authority SA

[2005] ZASCA 73; [2006] 1 All SA 6 (SCA); 2006 (1) SA 461 (SCA).

[2] Ibid para 3.

[3] See paras 27-47 of the plaintiff's POC at 17-25.

[4] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC).

[5] Ibid para 30.

[6] Ibid para 67.

[7] Mining Qualifications Authority v IFU Training Institute (Pty) Ltd

[2018] ZAGPJHC 455.

[8] Ibid para 41.

[9] Nel and Others NNO v McArthur and Others 2003(4) SA 142 (T) at 149 F-G.

[10] Ibid.

[11] The Constitution of the Republic of South Africa 1996.

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