
SOUTH AFRICA / JUDGMENT

SKG Africa (Pty) Ltd v Eastern Cape Rural and Others (EL1153/2019) [2021] ZAECHGHC 9 (12 January 2021) [2021] ZAECHGHC 9

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Maswazi

CASE / FILE NUMBER

EL1153/2019

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION; GRAHAMSTOWN]

CASE NO: EL1153/2019

In the matter between

SKG AFRICA (PTY) LTD

Applicant

And

EASTERN CAPE RURAL

DEVELOPMENT AGENCY

First Respondent

SOFFIT PROPERTIES Second Respondent

THE MINISTER OF FINANCE Third Respondent

JUDGEMENT

Maswazi AJ

Introduction

- [1] What served before me in the opposed motion court of the 13th of November 2020[1] was an interlocutory application filed by the applicant in a pending review application, for the leave to amend its notice of motion and notice in terms of rule 16A.
- [2] The application for leave to amend is opposed by the third respondent only, first and second respondents have only contented themselves with filing notices to abide. The parties having filed all the requisite papers including their respective practice notes, I proceeded to hear the merits of the amendment application. I shall deal later with basis of the opposition to the application for amendment.
- [3] A few weeks before the hearing of this application, the Supreme Court of Appeal handed down judgement in the matter of Afribusiness NPC v The Minister of Finance under SCA case number 1050/2019. On the 11th of November 2020, applicant's attorneys filed through the office of the Registrar, a copy of the SCA judgment in the Afribusiness case. On the 12th of November 2020, the attorneys for the third respondent filed a new practice note dealing with the implications of the SCA decision in the Afribusiness case. The upshot of the third respondent's new practice note is what appears at the very end thereof, namely, that "the Minister persists with his opposition". I shall deal later with the import or lack thereof of the Afribusiness case to this application.

Background

- [4] On the 15th of October 2020 the applicant, a company duly incorporated as such in terms of the Company laws of the Republic and having its principal place of business in East London, filed an application to review the decision of the first respondent to award a tender to the second respondent. This is pursuant to the first respondent advertising a tender for office space on the 17th of May 2020.
- [5] The applicant and the second respondents were the only two bidders in respect of the tender. The first respondent awarded the tender to the second respondent, this ignited an application for review of the award of the tender to the second respondent. Prior to the hearing of the application for review, applicant proposed to amend its notice of motion by way of the requisite notice. The third respondent took an offence and objected to the proposed amendment on the basis that same would be prejudicial to the third respondent.
- [6] It is necessary that I reproduce the notice of motion as it is currently, and later juxtapose it to the proposed notice of motion sought to be changed through the proposal to amend, it reads;

"1 That the decision of the first respondent to include in its tender document under bid number: SCMU 02-2019 the pre-qualification criteria that only bidders having B-BBEE status level one contributor may respond to the bid notice be reviewed and set aside and that all subsequent administrative actions which resulted in the award of the tender to second respondent be reviewed and set aside.

2. The administrative actions which resulted in the award of the tender to the second respondent, be reviewed and set aside.

That the decision of the first respondent to disqualify the applicant's bids be reviewed and set aside.

That the decision of the first respondent to award the tender to the second, and all administrative actions which resulted in the award of the tender to the second respondent, be reviewed and set aside.

Upon setting aside the prequalification criteria that only bidders having BBBEE status level one contributor may respond to the bid notice under bid number SCMU:02-2019-20, the award of the tender and all administrative action which resulted in the award of the tender to the second respondent :

4.1 that the tender be remitted for consideration by the first respondent with appropriate directions by this honourable Court;

alternatively

4.2 that the award be substituted with an award of the tender to the applicant;

further alternatively

4.3. directing the first respondent or any other party to the proceedings

to pay compensation to the applicant.

5. An order declaring the short term lease agreement concluded by the first respondent and the second respondent on the 9th of September 2019 in respect of the property at 10 St Helena Road, Beacon Bay, East London to be unlawful and setting aside the

agreement;

6. To the extent necessary:

6.1 declaring that Regulation 4(1) of the Preferential Procurement

Regulations of 2017 published under Government Notice R.32 in Government Gazette No 40553 of 20 January 2017, is invalid as not

complying with section 217(3) of the Constitution of the Republic of South Africa, 1996 (the Constitution) alternatively incomplete and therefore Constitutionally invalid (sic); and

6.2 ordering the Minister of Finance to, within 12 months of the date of this order to publish amended regulations in terms of section 217(3) prescribing amended regulations in terms of section 217(3) prescribing further the framework in terms of which the policy in section 217(2) of the Constitution must be implemented;

7. That the first respondent, alternative, the first respondent and the second respondent and/or third respondents, jointly and severally in the event of the second and/or third respondent opposing the relief sought, be ordered to pay the costs of this application and, in the case of the first and/or second respondents, also the costs of the interdict application under case number EL1074/2019”
- [7] In the notice of amendment, the proposed notice of motion, reads;
1. Declaring that regulation 4(1)(a) of the Preferential Procurement Regulations of 2017 published under Government Notice R.32 in Government Gazette No 40553 of 20 January 2017, inconsistent with (ultra vires) the provisions of the Preferential Procurement Policy Framework Act, 5 of 2000 invalid.
 2. The provisions of regulation 4(1)(a) of the Preferential Procurement Regulations are struck out and declared of no legal effect.
 3. Declaring that regulation 4(1) of the Preferential Regulations of 2017 published under Government Notice R.32 in Government Gazette No 40553 of 20 January 2017, is invalid as not complying and not being consistent with section 9, 22, 33 and 217(3) of the Constitution of the Republic of South Africa 1996, (the Constitution) and therefore Constitutionally (sic) invalid and set aside.”
- [8] The proposed amendment goes on to insert and replicate the other provisions of the notice of motion in their original form as already set out above. The notice of amendment is dated the 14th of October 2020. In a separate notice of amendment, the applicant also sought to amend its rule 16A notice which related to the

constitutionality challenge in respect of the Preferential Procurement Regulations. The third respondent objected to both the proposal for the amendment of the notice of motion and one for the rule 16A notice. In their submissions during the hearing, the parties did not say much about the amendment sought in respect of the rule 16A notice[2]. I accordingly take their submissions regarding the proposed amendment in respect of the notice of motion to be applicable to the rule 16A notice as well.

- [9] The third respondent’s basis of objection falls into three broad strokes, first, he asserts that the amendment constitutes an introduction of a new cause of action to which he had not been able to plead since he had already filed his answering affidavit when the proposal for amendment was made. Second, it is that the introduction of the phrase *ultra vires* as reference to the regulation 4(1) renders the notice of motion incomprehensible, vague and embarrassing and the third respondents

would be prejudiced thereby. Third, it was also stated that the reference to the provisions of section 9, 22 and 33 of the Constitution in the proposed notice of motion will prejudice the third respondent as he had not dealt at all with section 33 of the Constitution as a proposed ground for the setting aside of the Procurement Regulations. About sections 9 and 22 it was said that third respondent had only dealt with these “cursorily” but not in the context of the “the relief the applicant now proposes”.

[10] In relation to the claim by the applicant for compensation, which appears both in the current notice of motion and in the proposed one, the third respondent states that the applicants has not pleaded a basis upon which it has a cause of action in which it can claim compensation from the third respondent. I must say from the onset that this ground of objection is sound only if applied directly against the merit or substance of relief sought, but as an objection to an amendment it falters at the very first hurdle. As already stated, the compensation relief is part of the current notice of motion. The essence of the objection in this regard is that the applicant has not met the requisite threshold for the relief he seeks. That must demonstrate that it is not, therefore, an amendment factor and so is the purported defence to it. I shall accordingly say no more about it.

[11] I deal now with the basis for the application for an amendment and the extent to which it meets the basis of the objection to it from the third respondent.

The basis of the application for leave to amend and the corresponding objections

[12] The applicant states that the reference to ultra vires in the proposed amendment is nothing new, since it appears in the founding affidavit, it makes reference to paragraph 56.1 of the founding affidavit in the main application where the following appears;

“Regulations are not empowered to govern or regulate beyond the provisions contained in its enabling legislation. The PPPFA does not afford any power to regulate a pre-qualification to preferential procurement. Regulation 4(1) may therefore become ultra vires if challenged.”

[13] The applicant goes on to demonstrate that the third respondent answered to the ultra vires issue in paragraph 66 of his answering affidavit where he dealt as follows with the above allegations in the applicant’s founding affidavit,

“I note contents of the correspondence referred to in the paragraph under reply, but I deny that the “concerns” raised

therein are valid or provide a valid basis for the relief (sic) sought in this application.

In particular:

I deny that the regulations are ultra vires. Section 5 of the PPPFA provides that the Minister may make regulations regarding the any matter that may be necessary or expedient to prescribe in order to achieve the objects of the PPPFA. The regulation sought to be impugned simply seeks to achieve the objects of the PPPFA”.

[14] Whether the court adjudicating the main application will find these allegations sufficient to ground a basis of review premised on the ultra vires principle is of no moment in this application, the issue for now is whether the third respondent was given a due warning in the founding affidavit worthy of being dealt with in the answering affidavit, if not forewarned, whether the amendment will prejudice

the third respondent in the sense of being unable to prosecute his defence appropriately. I shall deal with the conclusion in this

regard later on, for now it suffices to state that these are the parameters of the applicant's case in so far as the amendment

is concerned.

[15] Accordingly, the applicant takes a view that not only did the third respondent understand the relief sought to be comprising the ultra vires objection with respect to the regulations promulgated in terms of the PPPFA, the third respondent also responded to the ultra vires objection in his answering affidavit as illustrated by the quotations above. The essence of this contention is that there is no prejudice on the part of the third respondent occasioned by the amendment, certainly none that cannot be cured by the third respondent filing a consequential adjustment to his pleading, which, these being motion proceedings, includes his answering affidavit in the main application.[3]

[16] Regarding discrimination under section 9 of the Constitution as a basis of the review in the main application, the third respondent addressed himself as follows in his answering affidavit;

"I also deny that the imposition of the prequalification criteria infringed the constitutional right contained in section 9 of the

Constitution. The economic transformation of our society is a goal provided for in section 217(2) and 217(3) of the Constitution and the provisions of the PPPFA as well as the Regulations thereto constitute through which effect is given thereto"

[17] The above is a response to the applicant's founding affidavit in which the applicant stated on the subject of discrimination,

"The equality principle is echoed in section 9 of the Constitution and, as such, I have been advised that, by imposing the prequalification

criteria that only level one BBBEE contributors could participate in the tender process, the ECRDA infringed upon the constitutional right of prospective bidders enshrined in section 9 of the Constitution"

[18] Regarding section 33 of the Constitution, the applicant articulated its case as follows in its founding affidavit;

“The tender process and the subsequent award of the tender, more specifically the implementation of the Procurement Regulations and in particular the application of the prequalifying criteria, were unconstitutional, invalid and unlawful in that it inter alia infringed on the rights in section 9, 33 and 217 of the Constitution”

[19] Once again, the third respondent answered to these allegations in his answering affidavit elaborately and most importantly, did not claim not to understand them nor did he allege that the allegation thereof were factually unsubstantiated.

[20] It is clear though from both the applicant’s founding papers and the corresponding answering affidavit that the applicant did not deal at any length with section 22 of the Constitution which has since been added in the proposed amendment. The impact of this omission on the fate of this interlocutory application in is an aspect I shall deal with later.

Evaluation and application.

[21] The general and overarching principle regarding amendment is that amendment will be allowed unless such an amendment will cause injustice to the other party or is made maliciously.[4] I regard malice and injustice as referred to above to be interchangeable for I am unable to conceive of a situation or circumstance where an amendment that is perforce found to be malicious, to be, nonetheless, just. Even if the amendment will result in prejudice if it is prejudice which remains curable through an order of costs such an amendment remains good to be granted.

[22] As I understand it, the principle is simply that a party has a right to an amendment of his pleadings and documents if such an amendment will not cause an injustice incurable through the costs order in favour of the other party. The object of an amendment is to obtain a proper ventilation of issues between the parties[5].

Courts have also developed an array of amendments which per se cause injustice to the other party. They have, for instance refused an amendment in respect of an issue which has already been decided.[6] Similarly, amendments which have an effect of withdrawing an admission have understandably been accepted as not falling within the scope of the general rule.[7] An amendment which introduces a new cause of action also falls outside the “general and overarching principle” I have alluded to above.

[23] A proper scrutiny of the papers and written submissions of the parties does not reveal the amendment sought by the applicant to be falling amongst the categories that are outside the general rule. The suggestion that the proposed amendment makes the notice of motion incomprehensible and vague and embarrassing is not supported by any facts. The third respondent’s misunderstanding of the ultra vires doctrine can hardly constitute a fact sufficient for assailing the proposed amendment.

- [24] Where the third respondent accuses the proposed amendment of introducing new issues to which he has not responded, his own papers, as already demonstrated above, belie the point. It is thus difficult to find prejudice to the third respondent, let alone one that cannot be remedied by the third respondent making, as he is entitled to, further consequential adjustments to his papers.
- [25] As for objection regarding section 22 of the Constitution, which is alleged to be a new issue. Whilst I agree that section 22 as an objection to the PPFA Regulations in so far as it infringes the applicant's right to trade is a new issue altogether, I do not see any basis for prejudice to the third respondent because section 22 does not constitute a new cause of action. It has been added to lend further support to the submission that the Regulations contravene section 9 of the Constitution. The cause of action remains unconstitutionality of the PPPFA Regulations. Facts if established which demonstrate that the Regulations contravene section 9 the Constitution may equally support a conclusion that such Regulations also infringe section 22. This of course, must be balanced with the fact that the third respondent remains entitled to file a further affidavit if minded, to deal with such allegations.
- [26] I am thus satisfied that the proposed amendment is neither malicious nor unjust. The application must accordingly succeed. I then turn to deal with the implication of the SCA decision in *Afribusiness*.

Implications of the *Afribusiness* case

- [27] I have already indicated that the SCA handed down judgment in *Afribusiness* sometime before the hearing of this application. In its judgment, the SCA concluded that the Regulations made under the PPPFA are

unconstitutional since they are not empowered by section 201(7) of the Constitution.^[8] The third respondent filed a practice note seeking to distinguish the *Afribusiness* case from the issues arising in this matter.

- [28] I have no inclination to deal with the merits or lack thereof of the proposition advanced in the practice note. In my view, the *Afribusiness* case is more relevant for the review court since it now makes certain that the Regulations made by the third respondent under the PPPFA are unconstitutional. That, however, is not a matter that arises before me, I am only seized with the task of deciding whether the amendment sought by the applicant is good in law. I find that it is, for the reasons set out above. This finding is naturally irrespective of the finding in the *Afribusiness* case, which contains important warnings for the third respondent in the review application. Prudently considered, such warnings, might decide the fate of the main application much more expeditiously. That in my view is all there is to say about the *Afribusiness* case in this application.

Costs

[29] The applicant has been successful in its effort to secure the amendment of its notice of motion, amidst tentative opposition by the third respondent, there is no reason why costs ought not to follow the result. This is all the more warranted when the third respondent's objections to the proposed amendment are rather flaccid. I do not regard the matter to be appropriate for two counsel though.

[30] The following order shall accordingly issue;

1. The applicant is hereby granted leave to amend its notice of motion in accordance with its notice of intention to amend dated 11 March 2020.
2. The applicant is granted leave to amend its rule 16A notice in accordance with its notice of intention to amend dated 11 March 2020.
3. The third respondent to pay costs of this application.

B. Maswazi

Judge of the High Court (Acting)

Date of the hearing: 13 November 2020

Date handed down: 12 January 2021

For Applicant: Adv AC Botha SC

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[1] The matter was meant to have been dealt with along with other matters on the 12th of November 2020, however the density of the roll made it necessary that the matter proceeds only on Friday the 13th of November 2020.

- [2] The third respondent says in his heads of argument “In these heads of argument, any reference to the proposed amendment to SGK’s notice of motion equally apply to the rule 16A notice”
- [2] The third respondent says in his heads of argument
“In these heads of argument, any reference to the proposed amendment to SGK’s notice of motion equally apply to the rule 16A notice”
- [3] Rule 28(8) of the Uniform rules
- [4] 1923 TPD 718 at 720
- [5] Robinson v Randfontein Estates GM Co. Ltd 1925 AD 173 at 198
- [6] See Firestone South Africa Ltd v Genticuro AG 1977(4) SA 298 at 306, David Hersch Organisation v Absa Insurance Brokers 1998(4) SA 783 at 787
- [7] President-Versekerigsmatskaappy Bpk v Moodley 1964(4) SA 109 (T) at 110H-111A
- [8] Para 38 of the Afribusiness case
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