

SOUTH AFRICA / JUDGMENT

Special Investigating Unit and Another v Maczola Tours CC and Others (NW01/2020) [2022] ZAST 24 (19 October 2022)

[2022] ZAST 24**COURT**
Special Tribunal**BEFORE**
L.T. Modiba**CASE / FILE NUMBER**
NW01/2020

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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 1996
(REPUBLIC
OF SOUTH AFRICA)
CASE
NUMBER: NW01/2020

In

a matter between:

SPECIAL
INVESTIGATING
UNIT
1st Applicant
MEC
FOR DEPARTMENT OF COMMUNITY
SAFETY
& TRANSPORT MANAGEMENT
2nd Applicant
and
MACZOLA
TOURS
CC
1st Respondent
TLHOTLHOMISANG
MEKWANE MACK
2nd Respondent

TLHOTLHOMISANG
GOITSEMODIMO ARNOLD
3rd Respondent
TLHOTLHOMISANG
LESEGO MILDRED
4th Respondent
TLHOTLHOMISANG
POIFO ELLEN
5th Respondent

JUDGMENT

Application for monetary judgment – whether the respondents submitted excessive claims to the second applicant in respect of the learner scholar transport contract – whether the applicants have made out a case for monetary relief sought against the respondents.

MODIBA J:

- [1] The applicants seek an order holding the first to fifth respondents (the respondents) liable to the second applicant for an amount of R 180 793.20 (One Hundred and Eighty Thousand Seven Hundred and Ninety-Three Rands and Twenty Cents). The applicants' claim arises from a tender the North West Department of Public Works Roads and Transport (the Department) issued to first respondent in 2010 for the provision of learner transportation services.
- [2] The respondents filed an appearance to oppose as well as an answering affidavit. However, they failed to file heads of argument as directed by the Tribunal. Their attorney sporadically participated in judicial case management meetings. He was not in attendance when the date of hearing was agreed with the applicants. Notwithstanding that the applicants' attorney served a notice of set down on the respondents' attorney of record and that the Tribunal Registrar sent him the link for the virtual hearing, he did not attend the Tribunal when the matter was heard, neither did he brief counsel to appear on behalf of the respondents. However, the matter remains opposed. The Tribunal had due regard to the respondents' opposing papers when adjudicating this matter.
- [3] This judgment follows the following scheme. I first set out the background facts. Then, I outline the issues for determination. Then, I determine the respondents' point in limine followed by the merits of the application. An order concludes the judgment.

BACKGROUND

FACTS

- [4] Public school learners in rural areas often have to travel a long-distance round trip from home to school on each school day. This adversely impacts their ability to learn, thus implicating their constitutional right of access to basic education. To address this problem, the North West government sought to provide a scholar transport service.
- [5] As a result, in 2010, the Department issued a tender invitation under tender number PWRT029/2010 for the provision of scholar transport services to public school learners in the rural area of Delareyville in the North West Province for a period of five years (the tender). The first respondent successfully applied for the tender. Consequently, the Department and the first respondent concluded a contract styled Contract Number PWRT 029/10 Provision of Scholar Transport (the Contract). Although in terms of the contract, the first respondent started providing the service on 4 October 2010, the Department's representative signed the contract on 20 November 2010 while the first respondent's representative signed it on 18 November 2010.
- [6] When the contract expired in 2015, the first respondent continued to provide the contracted service on a month to month basis and on the same contractual terms until June 2017.
- [7] In terms of the contract:
- 7.1 the first respondent would charge for services rendered based on the following formula: the number of total kilometres operated X the rate per kilometre X the number of school days = Total Amount;
- 7.2 the agreed rate per kilometre was R24.00;
- 7.3 the first respondent would claim for payment by submitting a payment certificate in the prescribed form (Form E), which is a schedule to the contract. The Department required the first respondent to furnish it with a detailed account of services rendered in a particular month by indicating the number of learners transported, the number of kilometres travelled, the number of trips travelled, the rate per kilometre and the number of school days in respect of which the service was rendered. A departmental official would approve the payment certificate and the Department would make payment to the first respondent for services rendered and payment claimed as per payment certificate.
- 7.4 the Department retained the authority to approve travel times and distances to avoid the inflation of claims by service providers.
- 7.5 the first respondent would only transport learners from home to school. Transportation for the purpose of other school related services such as school excursions, sports, work experience, Saturday school and after school were excluded from the service.

7.6 the first respondent would not separately charge for travel time.

- [8] Following widespread allegations of irregularities concerning the appointment and overpayment of service providers contracted in terms of the tender, the President of the Republic issued Proclamation R.2 of 2018 read with Proclamation R. 118 of 31 July 2001 (the Proclamation) in terms of s 2 of the Special Investigating Units and Special Tribunal Act[1] (the Act).
- [9] The Proclamation authorised the SIU to investigate irregularities and unlawfulness in the procurement process that led to the appointment of service providers in terms of the tender, lack of departmental oversight in respect of services rendered, the inflation of kilometres travelled by service providers when rendering the services and the resultant overpayment by the second applicant to service providers.
- [10] In 2019, the respondent conducted an investigation in respect of the services the first respondent rendered in terms of the contract by verifying the kilometres on the route travelled by the first respondent when rendering services in terms of the contract against those stated in the payment certificate the first respondent submitted to the Department for payment. The SIU also had interviews with the first respondents' driver, the principal of Kopanelo Primary School being the school in which the scholars who received services under route RSMDM 10 attended and the 3rd Respondent.
- [11] The investigation established that the first respondent inflated the kilometres travelled when rendering the service in terms of the contract and as a result, claimed excess payment from the Department. As a result, the applicants allege that when they provided scholar transport services to the Kopanelo Primary School on the RSMDM 10 route between October 2010 and June 2017, the respondents benefited unlawfully from the Department by an excess amount of R180 793.20.
- [12] The respondents deny that they exaggerated claims under the contract as alleged by the applicants. They contend that the kilometres they claimed for were verified and approved by the Department. They have also raised a number of points in limine which I detail below.
- [13] It follows that the following issues stand to be determined:
- 13.1 Points in limine:
- 13.1.1 lack proper service on the respondents;
- 13.1.2 prescription;
- 13.1.3 whether there is a dispute of fact between the parties, irresolvable on the papers;
- 13.2 whether the applicants make out a proper case for the relief sought.

POINTS IN LIMINE

Lack proper service on the respondents

- [14] The respondents complain that the applicants failed to effective proper service of the application on them. This complaint is not only frivolous and vexatious, as argued on behalf of the applicants, it is academic. All the cited respondents have entered an appearance to oppose. By implication, they have received the application and are aware of these proceedings. Although the answering affidavit deposed to by Tlhotlhomisang Mekwane Mack, only mentions that he is authorised by the first respondent to depose to the answering affidavit and does not expressly state that he is filing it on behalf of all the other respondents, they have deposed to confirmatory affidavits, confirming the contents of the answering affidavit in so far as they relate to them.
- [15] At worst for these respondents, having entered an appearance to oppose, they are in default of filing an answering affidavit and the application ought to proceed against them on an unopposed basis. However, I am satisfied on the basis of the papers filed, that these respondents not only have knowledge of the application, they are also opposing it.
- [16] Therefore, this point in limine stands to be dismissed.

Prescription

- [17] The applicants pre-empted the respondents' prescription defence by dealing with it in their founding affidavit. They have also prayed for an order declaring that their claim has not prescribed.
- [18] They have set out in their founding affidavit a factual basis for their contention that their claim against the respondent has not prescribed. They contend that the SIU was only authorised to investigate the affairs of the second applicant on 19 January 2018 when the President issued the Proclamation. The Proclamation interrupted the running of prescription. They further contend that in terms of the Prescription Act, prescription only starts running when the debt is due. This is when it is recoverable or enforceable. The applicants only became of the facts giving rise to their claim against the respondents after the SIU concluded its investigation.
- [19] The principles regulating prescription are trite. In terms of s 11
- (d) read with s 12 (3), the applicants had three years from the date they had knowledge of the identity of respondents and of the facts from which the debt arose within which to institute legal proceedings against the respondents. The running of prescription is delayed under certain circumstances as described in s 14(1). None of the relevant circumstances are prevalent here. Prescription is also interrupted in
- terms of s 15(1) when the creditor serves legal process on the debtor claiming payment of the debt. The issuing of a Presidential

Proclamation in terms of s 2 of the Special Investigating Unit and Special Tribunals Act[2] does not constitute legal process as envisaged in terms of s 15(1). Prescription is only interrupted in terms of this section when legal process commencing legal proceedings is served on the respondent.[3]

[20] The respondents have not presented a version regarding when prescription running.

[21] In their founding affidavit, the applicants do not expressly allege when prescription started running. They do not specifically state when they became aware of the debt and the identity of the debtor. They only state that the SIU concluded its investigation against the respondent in 2019. By implication, they could only have knowledge of the debt and the identity of the debtor after they concluded the investigation. They served the present application on the respondents on 17 June 2020. If I accept that prescription started running during 2019, this date falls within the three-year period contemplated in s 11(d) read with s 12(3).

[22] Therefore, the respondents' prescription point in limine stands to fail.

Whether the application stands to be dismissed due to the existence of a dispute of fact

[23] The respondents contend that the application ought to be dismissed because there is a dispute of fact on the papers. However, they fail to articulate the dispute.

[24] It is trite that application proceedings are appropriate where there is no foreseeable dispute of facts between the parties which is incapable of resolution on the papers.[4] As I find below, there is no dispute of facts between the parties which is incapable of resolution on the papers.

[25] Therefore, there is no basis to dismiss the application on the basis contended by the respondents. Even if there was an irresolvable dispute of facts on the papers, if it was not foreseeable, this Tribunal has the discretion to refer the matter to trial or to oral evidence. It is not the respondents' case that the alleged dispute was foreseeable.

[26] Therefore, this point in limine also stands to fail.

THE MERITS

[27] It is trite that, in terms of the seminal Plascon Evans rule, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order unless, of course, the court is satisfied that the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is so far-fetched or so clearly untenable or so palpably implausible as to warrant its rejection merely on the papers.[5]

[28] The respondents are not denying that they exaggerated the kilometres travelled when the first respondent rendered services under the contract. They only assert that the kilometres they claimed were verified by a departmental official. This is a bald allegation on which this Tribunal is unable to rely. They have not provided proof of the verification. They are also

silent on the name of the official who conducted the verification and the process followed. Further, no government official has the authority to permit a service provider to claim excessive kilometres.

- [29] Therefore the allegation that the authorised route comprised 15 kilometres and the respondents claimed 26 kilometres is undisputed. It follows that the respondents exaggerated the kilometres claimed by 11km per trip.
- [30] The applicants seek monetary relief against the respondents in the amount of R180 793.20. However, they offer no explanation regarding how they determined this amount. Since the respondents are not participating in the hearing, they would suffer no prejudice if I afford the applicants an opportunity to file a supplementary affidavit setting out how they determined this amount.
- [31] The applicants seek to impute joint and several liabilities on the second to the fifth respondents. However, they have not pleaded the basis on which they seek to do so. The first respondent is a juristic person. Only the first respondent was party to the contract. It rendered the service in terms of the contract and submitted payment certificates to the Department. Other than pleading that the second to fifth respondents are members of the first applicant, the role they played in the submission of inflated claims is not pleaded.
- [32] I am not satisfied that the applicants have made a proper case for the relief claimed against the second to the fifth respondent.
- [33] The applicants claim against the first respondent stands to succeed with costs.
- [34] In the premises the following order is made:

ORDER

1. The application against the first respondent succeeds with costs.
2. It is declared the applicants' claim has not become prescribed.
3. The first respondent shall pay the second applicant an agreed or proved amount by which it exaggerated its claims against the first respondent in respect of contract number PWRT 029/10 - Provision of Scholar Transport.
4. By Friday 28 October 2022, the applicants shall file a supplementary affidavit explaining how they determined the amount of R180 793.20 (One Hundred and Eighty Thousand Rands, Seven Hundred and Ninety-Three Rands and Twenty Cents) in respect of which they seek monetary judgment against the respondents.
5. By 4 November 2022, the respondents shall file their supplementary answering affidavit.
6. By 7 November 2020, the applicants shall file their supplementary replying affidavit, if any.

JUDGE L.T. MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARANCES

Counsel for the 1st and 2nd applicant: Adv. T Mpshe

Attorney for the applicant: Ms S Zondi, Office of the State Attorney, Pretoria

Counsel for the 1st – 5th Respondents: No appearance

Attorney for the 1st – 5th Respondents: Mr Nakale, Isang Nakale INC

Date of hearing: 08 September 2022

Date of judgment: 19 October 2022

[1] 74 of 1996.

[2] Act 74 of 1996.

[3] CGU Insurance Ltd V Rumdel Construction (Pty) Ltd 2004

(2) SA 622 (SCA)

[4] Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949

(3) SA 1155 (T) at 1162 and 1168.

[5] Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235.
See also National Director of Public Prosecutions v Zuma 2009

(2) SA 277 (SCA) at 290D–E.

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