

SOUTH AFRICA / JUDGMENT

SSG Security Solutions (Pty) Limited v Vaal University of Technology and Another

(67027/17) [2018] ZAGPPHC 775 (28 March 2018)

[2018] ZAGPPHC 775

COURT

North Gauteng High Court, Pretoria

BEFORE

Tuchten

CASE / FILE NUMBER

67027/17

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IN THE HIGH COURT OF SOUTH

AFRICA GAUTENG

DIVISION, PRETORIA

(1)

NOT

REPORTABLE

(2)

NOT OF

INTEREST TO OTHER JUDGES

CASE

NO: 67027/17

28/3/2018

In

the matter between:

SSG
SECURITY SOLUTIONS (PTY)
LIMITED
Applicant
and
VAAL
UNIVERSITY OF
TECHNOLOGY
First
RespondentMADUNA
PROTECTION SERVICES (PTY) LIMITED
Second
Respondent

JUDGMENT

Tuchten J:

1 SSG Security Solutions (Pty) Limited (SSG) and the second respondent (Maduna), together with a number of persons whom I need not identify by name, responded to a tender invitation put out by the first respondent (VUT) on 20 February 2017 to supply security services to VUT.

2 The tender process involved, broadly and for present purposes, two organs of VUT and three phases. In the first two phases, its Bid Evaluation Committee (SEC) evaluated the bids submitted. In the first phase those who responded to the tender were evaluated for compliance with formal requirements. Those tenderers who were adjudged by the BEC not to have complied with these requirements were eliminated from further consideration. This class of bidder was referred to in argument as non-responsive bidders and I shall similarly refer to this class as such.

3 The only responsive tenderers remaining, SSG and Maduna, were then adjudicated by the BEG for functionality. Functionality evaluation

broadly involves determining as objectively as possible what the prospects were that the tenderer would deliver on its tender promises. SSG was awarded 95% and Maduna 93% for functionality

4 The BEC then evaluated these two tenders for price. SSG's case is that its tendered price was about R9 million lower than that of Maduna over the three year period of the tender.

5 Tenders are further weighted at this stage for compliance with empowerment criteria developed and made known by VUT, designed to give an advantage to persons considered victims of previous racial and economic discrimination.

6 The process then contemplated that the competing bids, as evaluated would be considered by VUT's Bid Adjudication Committee and the tender awarded pursuant to that adjudication. SSG's case is that after some delay, VUT decided not to award the tender but to cancel it and commence with a fresh tender process for the same tender.

7 Aggrieved by this development, SSG decided to apply urgently for relief to set aside the decision to cancel the tender, to review and set aside the minutes of a meeting of VUT held on 10 August 2017, to review and set aside the decision of VUT to publish a new invitation to tender, for a declaratory order the VUT had awarded the tender to SSG and for an order directing VUT to implement the tender so allegedly awarded.

8 SSG implemented its decision to bring legal proceedings in a notice of motion dated 29 September 2017, supported by a founding affidavit

sworn on the same day and date stamped by the Registrar under the present case number on the same day. The founding affidavit was

deposed to by Gen Mashigo, a director and the chairman of the applicant.

9 The founding affidavit in fact reflected SSG as the applicant and VUT and Maduna as first and second applicants respectively. The allegations in the founding affidavit manifestly demonstrated SSG's intention that it, and not some other company or other person, should feature as the applicant in the contemplated legal proceedings.

10 Gen Mashigo testified that SSG was the applicant and that it had responded to the tender invitation. He concluded his affidavit with the customary request for an order as set out in the notice of motion.

11 VUT and Maduna opposed the application and delivered answering affidavits. Their answering affidavits made it clear that they admitted that SSG was the applicant and that SSG had been one of the tenderers. Neither of them suggested that any other company or person

associated with SSG had been a tenderer. VUT took the point that SSG should have joined the non-responsive tenderers to its application

because (thus the argument) they were necessary parties. But otherwise, VUT and Maduna opposed the application on its merits.

12 SSG decided to amend its notice of motion. It did so in a notice dated 2 November 2017 (the substantive amendment). In the amended notice of motion, SSG asked that the decision of VUT to cancel the tender be reviewed and set aside, that the decision of VUT not to award the tender to SSG, alternatively VUT's failure to take the decision to award the tender to SSG, be reviewed and set aside, that VUT's decision to publish a new invitation to tender be reviewed and set aside and that

... the tender is awarded to the applicant by means of the granting of substitution relief, alternatively that the matter is referred back to [VUT] to re-evaluate the tenders of the applicant and (Maduna) inclusive of the compliance of the respective bids with the mandatory requirements of the tender.

13 The main application was set down for hearing during the week of 24 October 2017. There was no opposition to the substantive amendment. For reasons not made known to me, the case was then further postponed.

14 The matter served before me in the urgent court during the week of 1 February 2017. When the matter was called, counsel for SSG applied orally (if my memory serves me) for an amendment to the heading to the notice of motion (the heading amendment). The heading to the notice of motion dated 29 September 2017 as originally submitted and the notice to amend dated 2 November 2017 had not reflected SSG as the applicant. Instead it reflected SSG Security Solutions (Pty) Limited (Security Solutions) as the applicant. The reference to Security Solutions included a reference to a company registration number. There had existed a company called Security Solutions. But the registration number given was that of a different company. And Security Solutions had been deregistered some time before the institution of the present proceedings.

15 The heading amendment was opposed by Maduna but not at that

stage by VUT. Maduna's counsel had picked up the reference to Security Solutions while preparing for the hearing before me and had taken the points in heads of argument dated 15 December 2017 that Gen Mashigo was not authorised to represent Security Solutions and that relief was being sought by Security Solutions and not SSG. But SSG's attorney had only read Maduna's counsel's heads of argument about a week before the hearings during week of 1 February 2017 and SSG's lawyers considered an oral request

for the heading amendment would be adequate. In the face of opposition, however, SSG's lawyers reconsidered and submitted a substantive application for the heading amendment. This remained opposed by Maduna and the matter was accordingly postponed by special arrangement with the DJP to be heard on 26 March 2018 before me.

16 At the resumed hearing, the heading amendment was opposed by both VUT and Maduna. At the request of all counsel, I heard argument on the heading amendment and the non-joinder point taken by VUT. After argument I reserved judgment on both issues. This meant, regrettably, that an adjudication on the merits of the dispute had once again to be delayed. I gave counsel permission once again to approach the DJP for a special date for the resumed hearing.

17 I shall deal first with the heading amendment. It will be recalled that the heading to the founding affidavit contained what SSG contends is the correct heading. This proposition is supported by the facts that the founding affidavit itself identifies the applicant which the deponent, as well as SSG, intended to feature as the applicant in the case. This could hardly have been otherwise: SSG responded to the tender invitation and Security Solutions did not. Nor did the other associated company which bears the registration number in the headings to the notice of motion and the notice of substantive amendment.

18 I would have regarded this evidence, in the absence of countervailing facts, to be decisive. But pursuant to the challenge presented by Maduna, SSG presented additional facts, attested to by its attorney, Mr Breed.

19 Mr Breed briefed both junior and senior counsel to draft the application. Junior counsel prepared a draft notice of motion and founding affidavit in which the parties identified in the headings to both the notice of motion and the founding affidavit reflected SSG, with its correct registration number, as the applicant. The draft founding affidavit prepared by junior counsel of course identified SSG by name as the applicant. Junior counsel put his drafts up to his leader. Senior counsel then settled the drafts. By this I mean that senior counsel considered and changed language in the notice of motion and the founding affidavit drafted by junior counsel.

20 But in the chambers of senior counsel, the name of the applicant reflected in the notice of motion was altered to that of Security

Services and the registration number of a third company was attributed to Security Services. Senior counsel did not alter the reference to and the description of SSG in the founding affidavit as the applicant. How this alteration happened, neither senior counsel or SSG's attorney were unable to say.

21 When the notice of application for the substantive amendment was prepared, the heading to the original notice of motion was simply perpetuated.

22 SSG and its attorney Mr Breed had always wanted to institute proceedings in the name of SSG. This was because SSG was the tenderer. An application to remedy the supposed deficiencies in the tender process by Security Services or the other company would simply never have got off the ground. Mr Breed justly characterises the reference to Security Services in the heading to the notice of motion as a mistake. So it manifestly was. To conclude that senior counsel seriously and deliberately chose to have Security Services cited as the applicant would have meant that senior counsel had decided to sabotage his own client's case but then sabotaged his own attempts at sabotage by leaving the heading to and the wording of the founding affidavit as it had been drafted by junior counsel.

23 The whole notion is preposterous and I deplore the fact that the arguments advanced by counsel for the both VUT (which had decided at the hearing on 26 March 2018 to oppose the heading amendment) and Maduna required me to write this considered judgment.

24 The arguments of counsel for the respondents were replete with learning but as I see it rather lacking in wisdom. They accepted that amendments such as the heading amendment fall into two, and only two, categories: the applicant for amendment either wants to substitute one plaintiff or applicant for another or to correct a misdescription, ie what the cases call a misnomer. Which category is apposite cannot be determined merely by looking at the form of amendment sought. For example, an attempt to change a single word in the description of the plaintiff may in fact be an attempt to substitute one plaintiff for another.

25 The change in senior counsel's chambers of the heading to the notice of motion was a mistake. But what kind of mistake? Was there a decision by senior counsel to change the applicant in the contemplated urgent application to Security Services? Or was the reference to Security Services a simple misnomer? I shall conclude my reasoning on this aspect below.

26 There is also a line of cases^[1] which is authority for the proposition that, without exception, an attempt to substitute one litigant for another where the litigant

initially cited was non-existent, can never succeed. In *Van Heerden*, an attempt to substitute the testamentary executor for the deceased who had died before summons was issued was held to be incompetent.

27 I decline to follow *Van Heerden* and its progeny on the point. I think it posits too rigid a test, overlooks the multitude of factual situations that can give rise to such applications for amendment and does not give due weight to the principle that procedural law must operate, not as an end in itself, but to give effect to the principle articulated in s 34 of the Constitution that

courts exist to decide disputes between litigants. I prefer the reasoning in *Luxavia (Pty) Ltd v Gray Secun"fy Services (Pty) Ltd*,^[2] which held that the correction of errors giving rise to applications for such amendments should more appropriately be controlled through the limiting criteria of *ma/a fides* and prejudice.

28 To determine what the notice of motion, with its existing heading, and the founding affidavit actually mean, I find it useful to apply the *Endumeni* principle. As was so trenchantly observed in *Potgieter v Olivier and Another*,^[3] in *Natal Joint Municipal Pension Fund v Endumeni Municipality*^[4] the Supreme Court of Appeal has provided an exposition of the principles of interpretation. It is a unitary exercise that requires the consideration of text, context and purpose. Of course in the present case, one must look too at the evidence presented by the parties. Neither of the respondents contributed to the factual material. Maduna purported to do so but its evidence is mere argument.

29 The language is ambiguous; there is a reference in the text both to SSG and to Security Services. But the language favours the conclusion

that the litigants intended SSG to be the true applicant, not Security Services which had by then ceased to exist and which could

never succeed in an application to enforce SSG's rights arising from the tender. A fortiori, the third company whose registration number was wrongly attributed to Security Services. The purpose was to produce a set of papers that would best ventilate the claim and enforce the rights of SSG, not those of either of the other two companies. The context was the process in which papers were prepared for this purpose. All this points, as I have said, irresistibly to the conclusion that a mistake was made in senior counsel's chambers.

30 Counsel for Maduna submitted that there had been no explanation for the mistake. Absent an explanation, he submitted, no amendment was competent. But the submission is wrong. There was an explanation. Either senior counsel or his assistant who converted his work into the finished product^[5] made a mistake. What is not explained is how that mistake came to be made. In a proper case, the inability to explain how an alleged

mistake came to be made may be decisive against an applicant. But once, as in the present case, the fact of a mistake has been proved, the inability to explain the mechanics of how the mistake came to be made cease to be of decisive importance. The argument for the second respondent is essentially that the heading amendment application lacks *bona fides*. I reject this contention for reasons already given

31 Nor was there any prejudice to the respondents. Prejudice was said to lie in the fact that if the amendment in fact constituted a substitution, the main application would be out of time under s 7 of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). But this argument overlooks the nature of the time restriction in s 7(1). An applicant who is out of time under PAJA can apply for what is generally termed condonation under s 9. If the effect of the heading amendment is, against, my conclusions, a substitution rather than a correction of a misnomer, then the

respondents will have their remedy: they can raise the alleged lateness of the application as a bar to a decision against them on the merits unless the hypothetical substitution is "condoned".

32 In determining whether the applicant for amendment wants to substitute a party for another or correct a misnomer must surely depend on the intention of the litigants and their lawyers.

Counsel for the respondents argued that the intention of senior counsel must

have been to make Security Services the applicant. I do not agree, If senior

counsel had held such an intention, consequential changes to the founding affidavit would have been made. The heading amendment is obviously made to correct a misnomer.

33 It therefore follows that the amendment must be granted. As to costs, the respondents were within their rights to require SSG to apply for its heading amendment by substantive application. Generally, an amendment is an indulgence which will save a respondent who opposes the amendment from an adverse costs order. But in the present case, the respondents have been unsuccessful both on the facts and on the law. Some of their arguments were distinctly unreasonable. I think the fairest course is to make no order on the costs of the heading amendment.

34 I turn to the non-joinder point. The issue is whether the non- responsive tenderers ought to have been joined. Joinder of a party is only required as a matter of necessity, as opposed to convenience, if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned.[6]

35

The joinder issue must be examined in the light of the relief actually sought by the applicant in its notice of motion. Whether an applicant has claimed relief which is competent or whether the applicant will or will not in due course succeed is of no relevance to this enquiry. In the present case, the court is asked only to scrutinise the positions of SSG and Maduna. As I see it, the court is not asked to make any order which might prejudice the non-responsive tenderers. Their position was determined by the administrative actions which rejected their tenders for non-responsiveness. No request has been made to vary or set aside the administrative actions which terminated the participation of the non-responsive tenderers in the tender process. Until so varied or set aside, those actions are decisive in ending the participation of the non-responsive tenderers in the process. Had SSG asked for the entire process to be set aside, the position might have been different.

36 I therefore conclude that the joinder of the non-responsive tenderers was not required of necessity. The non-joinder point taken by VUT must fail. This point is merely an aspect of the main application which convenience required be determined separately. The incidence of the costs of the argument should form part of the material to be considered in the context of a costs order by the court which hears the main application. I shall therefore reserve these costs.

37 I make the following order:

1 The application to amend the heading to the notice of motion dated 29 September 2017 and the heading to the amended notice of motion dated 2 November 2017 brought by notice of motion dated 1 February 2018 is granted.

2 Each party must pay its own costs in the application to amend the headings.

3 The non-joinder point taken by the first respondent is dismissed. It is declared that the joinder of those tenderers whose tenders were found by the first respondent not to satisfy the mandatory requirements of the tender and were therefore found by the first respondent to be non-responsive is not required as a matter of necessity.

4 The costs incurred in relation to the argument of the non-joinder point on 26 March 2018 are reserved for determination by the court hearing the main application.

NB Tuchten

Judge of the High Court

28 March 2018

[1] Exemplified by *Van Heerden v Du Plessis* 1969 3 SA 298 O

[2] 2001 4 SA 211 W paras 17-20

[3] 2016 6 SA 272 GP para 30

[4] 2012 4 SA 593 SCA

[5] Who in a bygone age would have been said to have typed his work

[6] *Judicial Services Commission and Another v Cape Bar Council and Another* 2013 1 SA 170 SCA para 12

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Prepared on 11 October 2026 · Esheria