

SOUTH AFRICA / JUDGMENT

Gcwabe Consulting (Pty) Ltd v South African Police Services (46817/2015)

[2022] ZAGPPHC 601 (10 August 2022)

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COURT

North Gauteng High Court, Pretoria

BEFORE

N Janse van Nieuwenhuizen

CASE / FILE NUMBER

46817/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

Case

Number:46817/2015

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

YES

10

August 2022

In

the matter between:

GCWABE

CONSULTING (PTY)

LTD

Plaintiff

and

SOUTH AFRICAN POLICE

SERVICES

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

- [1] The plaintiff's action is based on a written contract entered into between the parties on 18 March 2013, in terms of which the plaintiff would supply and fit new and overhauled petrol and diesel

motor vehicle engines in the defendant's motor vehicle fleet. The plaintiff alleges that the defendant had unlawfully cancelled the contract, which cancellation the plaintiff deemed as a repudiation of the contract. The plaintiff accepted the repudiation and instituted this action in which it claims payment of the damages it had suffered as a result of the defendant's conduct.

- [2] The defendant defends the claim and has raised several defences in its plea.

- [3] Having considered the issues in dispute between the parties, I issued a separation order in terms of rule 33(4), which order reads as follows:

"The issue of the validity of the agreement as per the Defendant's plea at paragraph 11 and counter-claim read together with paragraph 10-12 of the Plaintiff's plea to the counter-claim, is separated for adjudication before all other issues."

- [4] In the result, this judgment is only concerned with the separated issue as defined supra.

- [5] The parties did not present any evidence and confined their

submissions

to the averments contained in the pleadings.

Pleadings

Defendant's claim

- [6] Paragraph 11 of the defendant's plea raises the defence of the invalidity or illegality of the contract between the parties. In amplification of the plea, the paragraph refers to the defendant's counter-claim.
- [7] The counter-claim is based on contractual invalidity and in the alternative on constitutional invalidity.

Contractual invalidity

- [8] In respect of contractual invalidity, the defendant avers that the written contract between the parties was concluded as a result of the plaintiff being the successful bidder of tender number 19/1/9/1/38TV(11).
- [9] The defendant stated in paragraph 5 that the relevant express terms of the agreement were:

“5.1 the Plaintiff certified that it was satisfied as to the correctness and validity of its bid, that the price(s) and rate(s) covered all the goods and works specified in the bidding documents, that the price(s) and rate(s) covered all its obligations and that the Plaintiff accepted that any mistakes regarding the price and tares and calculation would be at its own risk; (clause 3 of contract 4 – purchase of goods / works SBD7.1)

5.2 at the closing date and the time of the bid, each bidder had to submit with its/his/her bid documents a complete itemized price list containing prices of all items. All prices included on the price list had to be firm, and not subject to any escalations, except

exchange rate variations for year 1 and 2. Failure to comply would invalidate the bid; (clause 2.9.6 of bid specification)

5.3 The Plaintiff certified that prices quoted would be firm for 12 months; (questionnaire per item)

5.4 the Plaintiff certified that three price schedules had to be completed for each province; (questionnaire per item)

5.5 the Plaintiff certified that if all three price schedules were not completed, its offer would be invalid; (questionnaire per item).”

[10] The price lists submitted by the Plaintiff did not comply with the aforesaid terms and were incomplete.

[11] The plaintiff’s failure to submit a comprehensive price list as required by the bid specification, invalidated, according to the defendant, the plaintiff’s bid and it is ab initio invalid.

[12] Accordingly, no agreement came into existence due to the invalidity of the tender. The agreement dated 18 March 2013 therefore falls to be set aside.

Constitutional invalidity

[13] In the alternative and in respect of constitutional invalidity, the defendant relies on section 217 of the Constitution that provides as follows:

(1) When an organ of state in the national, provincial or local sphere of government or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and costeffective....”

[14] The closing date for the submission of bids was 17 July 2012.

[15] It is common cause between the parties that the defendant’s Bid Adjudication Committee invited bidders on 5 December 2012 to provide a list of prices based on a basket of 30 items specified by the defendant (“the amended price list”).

[16] The defendant contends that the invitation is a deviation of the tender conditions as advertised during July 2012 and falls foul of the procurement requirements contained in section 217 of the Constitution.

[17] In the result, the tender and concomitant contract should be set aside in terms of section 172(1) of the Constitution alternatively on the ground that it offends against the principle of legality.

Plaintiff's plea

[18] In respect of contractual invalidity, the plaintiff pleaded as follows:

"10.1 The plaintiff admits that annexure P4 is the price list it submitted with the tender.

10.2 The plaintiff further pleads that all tenderers submitted price lists which were incomplete. The defendant afforded all tenderers, including the plaintiff, a further opportunity to submit further price information in accordance with the guidance provided by the defendant."

10.3 The plaintiff denies that its bid was invalidated and/or that it was invalid ab initio for the reason alleged by the defendant or

at all.

10.4 The plaintiff denies that no agreement came into effect for the reasons alleged by the defendant or that it falls to be set aside

for any reason."

[19] The plea in respect of constitutional invalidity reads as follows:

"12.1 The plaintiff denies that it failed to submit a completed price list.

12.2 The defendant afforded all tenderers, including the plaintiff, the opportunity to submit revised price lists incorporating information as directed by the defendant.

12.3 The conduct of the defendant to allow all the tenderers, including the plaintiff, to submit revised price lists was lawful and valid.

12.4 The award of the tender is valid and remains binding on the parties. The plaintiff rendered services and the defendant received services in the performance of the tender.

15. The plaintiff denies that the contract is void or voidable for the reasons stated and that it stands to be set aside on any ground."

Discussion

- [20] In the heads of argument filed on behalf of the defendant and during oral submissions, Mr van der Merwe SC, counsel for the defendant, referred to further terms of the contract than those that were relied upon in the counterclaim. After a careful analysis of the further terms, Mr van der Merwe submitted that the contract as signed is *contradictio in terminis* in that it provides that the bid is invalid, and it is also void for vagueness.
- [21] Mr Mureriwa, counsel for the plaintiff, pointed out that the contradiction in *terminis* defence does not appear in the counter-claim and objected to the defence being introduced in argument.
- [22] I agree with Mr Mureriwa. The separation issue pertains to the defendant's pleaded case in its counter-claim. It is manifestly unfair to the plaintiff to introduce a new defence during argument.
- [23] In the result, I will confine this judgment to the defences as pleaded in the defendant's counter-claim.
- [24] The defendant submits that the bid conditions leave no room for a bid to be valid where all the prices on the list were not completed. In support of the aforesaid contention, the defendant relied on clause 2.9.6 *supra*. The defendant also referred to the following portion on p. 114 of the bid document: "IF ALL THREE PRICE SCHEDULES WERE NOT COMPLETED YOUR OFFER WIL BE INVALID."
- [25] The plaintiff's bid was as a result invalid and accordingly a valid contract could not be concluded.
- [26] The plaintiff submits that it is the defendant that changed the price lists. The plaintiff accepted the amendment and complied with the amended requirement by submitting the requested price lists. The contract is as result valid.
- [27] Insofar as amendments to the contract is concerned, Government Procurement: General Conditions of Contract, July 2010, provides in clause 18 as follows:
- "No variation in or modification of the terms of the contract shall be made except by written agreement signed by the parties concerned."*
- [28] The clause is not applicable to the facts in *casu*. The parties have not amended the terms of the contract that was signed on 18 March 2013. It is the defendant that amended the price listing condition after the bid process was closed.
- [29] Thereafter and in terms of the amended condition, the plaintiff submitted its price lists, and the contract was concluded on the aforesaid price lists.
- [30] The defendant did not refer me to any principle in the law of contract or to any tender conditions that prohibit the amendment of bid conditions prior to the conclusion of a contract.

- [31] In the result, I am of the view that the amendment of the bid conditions prior to the conclusion of the contract between the parties, does not invalidate the contract.
- [32] I agree with the defendant that the amendment of the bid conditions subsequent to the closing date for bids, offends the provisions of section 217.
- [33] The initial bid conditions in respect of pricing offered a fair, equitable and transparent opportunity to the public to submit a bid. The moment the defendant changed these conditions and made the amended conditions known to a select few, the bid process became unfair, inequitable and without transparency. The requirement in section 217 that the bid process must be competitive, was also violated. Only a select few could after the close of the bid submit competitive bids.
- [33] Mr Mureriwa submitted that the mere fact that the price list conditions were changed, does not necessarily lead to the setting aside of the contract. In support of the aforesaid submission. Mr Mureriwa referred to the Supreme Court of Appeal judgment in *Chief Executive Officer, Southern African Social Security Agency and Others v Cash Paymaster Services Pty (Ltd)* 2012 (1) SA 216 SCA in which the court held as follows at para [29]:

“In any event this court in Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd held that ‘(n)ot every slip in the administration of tenders is necessary to be visited by judicial sanction’ (para 21). Considerations of public interest, pragmatism and practicality should inform the exercise of a judicial discretion whether to set aside administrative action or not.”

- [34] In *Allpay Consolidated Investments Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and*

Others 2014(1) SA 604 CC, the Constitutional Court, however, held as follows in respect of a finding that public interest matters require greater caution in finding that grounds for review exist:

“[24] This approach to irregularities seems detrimental to important aspects of the procurement process. First, it undermines the role procedural requirements play in ensuring even treatment of all bidders. Second, it overlooks that the purpose of a fair process is to ensure the best outcome; the two cannot be severed. On the approach of the Supreme Court of Appeal, procedural requirements are not considered on their own merits, but instead through the lens of the final outcome. This conflates the different and separate questions of unlawfulness and remedy. If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed”.

- [35] Under the heading Procurement framework legality, the Constitutional Court held as follows:

- [31] In *Steenkamp Moseneke DCJ* stated:

'Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of State in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in s 33 and the basic values governing public administration in section 195(1).'

In Millennium Waste the Supreme Court of Appeal (per Jafta JA) elaborated:

'The . . . Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer (s 217). The section requires that the tender process, preceding the conclusion of contracts for the supply of goods and services, must be "fair, equitable, transparent, competitive and cost-effective". Finally, as the decision to award a tender constitutes administrative action, it follows that the provisions of [PAJA] apply to the process.' 30 [Footnotes omitted.]

.....

[34] An 'acceptable tender' under the Procurement Act is any 'tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document; . . . ' 33 The Preferential Bidding Procurement Regulations 34 (Procurement Regulations) define a tender as —

'a written offer in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive tendering processes or proposals; . . . ' 35

[36] In view of the aforesaid criteria, the changing of price list conditions subsequent to the bid being closed can hardly be described as an "administrative slip". In *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 SCA, the court dealt with the importance of treating tenderers equally:

"[30] Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for

the same thing. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of tender."

[37] Mr Mureriwa, further, submitted that the court cannot declare the contract invalid, if the record of the decision to call for amended price lists is not before court. The record would indicate what the reasons for the Bid Adjudication Committee's decision is. This is important because Regulation 16A6.4 provides as follows:

“If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.”

- [38] The problem with the aforesaid submission, is that it did not form part of the plaintiff's plea to the defendant's allegations in respect of constitutional invalidity. If it was the plaintiff's case that the decision by the Bid Adjudication Committee to request new price lists was taken in terms of Regulation 16A6.4 and therefore valid, the record of the decision might have been relevant.
- [39] Furthermore and if the defendant was of the view that the procurement for the supply and fitment of new and overhauled petrol and diesel motor vehicle engines, fell within the ambit of Regulation 16A6.4, it would not have issued a public tender.
- [40] The problem with the price lists in the published tender was, according to the submissions by the parties, that none of the bidders submitted completed price lists, because it was simply impractical if not impossible to do so. Instead of cancelling the tender and publishing a new tender with the amended price list, the defendant solved the problem by changing the price list conditions after the bid was already closed.
- [41] One should, furthermore, bear in mind that the plaintiff's defence as pleaded in its plea is premised on the fact that the decision was made known to all the tenderers. In the result the plaintiff submits that the changed bid conditions were transparent and fair, all tenderers were treated equally, and the bidding process was competitive.
- [42] The plaintiff's submission fails to take into account that the public and more specifically potential bidders, were unaware of the amended bid condition. In order for the bid process to be transparent, fair and equitable, the amended conditions should have been published to give all interested parties an opportunity to submit a competitive bid.
- [43] In the result, it is patently clear that the bid process deviated from the basic requirements for a valid tender and the tender as well as the concomitant contract stands to be declared invalid in terms of section 172(1)(a) of the Constitution.

ORDER

In the premises, I issue the following order:

1. The contract between the parties is declared invalid.
2. Costs are reserved.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:

1, 2, 3 and 05 August 2022

DATE DELIVERED PER COVID19 DIRECTIVES:

APPEARANCES

For the Plaintiff

: Advocate I Mureriwa

Instructed by :

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For the Defendant :

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