IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 149200/2015
DATE: 21 JANUARY 2016

In the matter between:

ASATICO CIVIL AND CONSTRUCTION (PTY) LTD — Applicant

And

EKURHULENI METROPOLITAN MUNICIPALITY — Respondent

JUDGMENT

DAVIS, AJ

[1] This is an opposed application for summary judgment. It was previously enrolled for hearing on 14 August 2015 on which date it was removed from the roll and the Respondent ordered to pay the wasted costs. This was due to the fact that the Respondent had only on said date delivered its affidavit resisting summary judgment. At the hearing before me on 23 October 2015 the papers were complete and both parties had delivered helpful heads of argument.

SALIENT FACTS:

[2] The salient facts pertaining to the Applicant's cause of action are largely not in dispute. They can be summarised as follows:

2.1 The Applicant is a civil construction company and the Respondent is a metropolitan municipality established as such in accordance with the provisions of the Local Government: Municipal Structures Act, No. 117 of 1998.

2.2 During the second half of 2011 the Respondent invited bids for the rendering of infrastructure services for the upgrading and construction of roads and storm water infrastructure on an "*as and when required basis with effect from date of award until 31 December 2013.*"

2.3 The bid notice and invitation to bid *inter alia* contained the following:

> "*Bids are to be completed in accordance with the conditions and bid rules contained in the bid documents and supporting documents must be sealed and externally endorsed with the contract number and description and placed in (the) bid box … not later than 10:00 on Tuesday 13 September 2011. Bids will be opened immediately thereafter in public in the conference room ground floor at*

the abovementioned address. All bids shall hold good for 120 days as from the closing date of bids."

2.4 The Applicant has timeously delivered a compliant bid.

2.5 On or about 7 March 2012 the Applicant was informed that the Respondent's Bid Adjudication Committee had resolved that the Applicant's bid no. 31 for the contract was accepted and approved. A copy of the appointment letter, which was not in dispute, forms part of the papers.

2.6 In terms of the appointment letter and in terms of the Respondent's prescribed Supply Chain Management Policy satisfactory prescribed guarantees were required and certain further conditions regarding compliance with local authority prescripts, tax clearance certificates and insurance were all complied with and furnished by the Applicant.

2.7 The award was for the rendering of the aforementioned services "*… at an averaged estimated contract amount of R67 985 731,04*" at prescribed "*offered averaged rates*" set out in an annexure to the tender documents. These rates were subject to escalation based on the CPA with base month being September 2011.

2.8 During the period between March 2012 and October 2013 the Applicant was instructed by the Respondent from time to time to deliver services at various specified streets, townships and storm water reticulation, sidewalks and roads. For purposes of these "*as and when*" works Respondent had issued seven "*Letters of Instruction to Perform Work*", copies of which were annexed to the Particulars of Claim.

2.9 The Applicant alleged that it had complied with all its obligations in terms of its appointment and delivered the services required in the aforesaid Letters of Instruction. The Applicant has submitted invoices to the Respondent for the services rendered from time to time.

2.10 A feature of the case is that the Respondent's Director: Expenditure has issued a notice in the following terms on 2 April 2014:

> "*CONFIRMATION OF PAYMENTS TO MESSRS ASATICO CIVIL & CONSTRUCTION CC. CONTRACT A-*

IS(RW)03/2012: THE UPGRADING AND CONSTRUCTION OF ROADS AND STORM WATER INFRASTRUCTURE ON AN AS AND WHEN REQUIRED BASIS, WITH EFFECT FROM THE DATE OF AWARD UNTIL 31 DECEMBER 2013. It is hereby confirmed that Messrs Asatico Civil & Construction CC has done work in lieu of the abovementioned contract for the Ekurhuleni Metropolitan Municipality and has been paid an amount of R60 034 035,45 from the date of award until 31 December 2013. However it must be noted that an amount of R8 735 569,76 is still being processed for payment and is due and payable."

2.11 On 19 November 2014 the Applicant delivered a letter of demand which was stated to be in terms of Section 3 of the Institution against Certain Organs of State Act, No. 40 of 2002 which referred to the aforesaid letter and thereafter stated the following:

"*6. Our client has instructed as that, as at date hereof, the amount of R5 856 931,76 remains outstanding which amount is now due and payable to our client. We attach hereto, marked Annexure "AS2" a statement reflecting the aforementioned amount.*

> 7. *In view of the above it is our instructions to demand from you, as we hereby do, payment in the amount of R5 856 931,76 …*"

2.12 The Applicant pleaded in the Particulars of Claim that, since the aforesaid letter of demand, the Respondent has made further payments and in the Summons only the amount of R2 860 002,75 was claimed and a statement of account reflecting this balance was annexed.

RESPONDENT'S "*DEFENCES*":

[3] In the affidavit resisting summary judgment, the Respondent's Executive Manager: Corporate and Legal Services raised the following defences (in reverse order):

3.1 "*The amount claimed has not been agreed upon*".

3.2 "*The amount claimed exceeds the amount in the appointment letter.*"

3.3 "*Unlawful instructions.*"

3.4 "*The Applicant's appointment is invalid.*"

AD "*THE AMOUNT CLAIMED HAS NOT BEEN AGREED UPON*":

[4] 4.1 The Respondent's deponent alleged in his affidavit resisting summary judgment that the Applicant's claim is not for a liquidated amount. This allegation is simply based on the following statement:

> "*… in that the Respondent has not agreed to pay the Applicant the amount claimed in these proceedings.*"

4.2 In the absence of any particularity substantiating this statement, and in particular in view of the letter of the Director: Expenditure of the Respondent dated 2 April 2014 referred to above as well as the appointment itself, this allegation is both unfounded and lacks the particularity required from an affidavit seeking to resist summary judgment.

4.3 The Respondent's deponent further denies that the Applicant has in fact rendered services "*… worth the amount claimed by it in these proceedings*". No particularity is furnished in respect of this denial and the denial is followed by the following statement:

> "*The work which was allegedly done must first be assessed to determine whether or not it is worth the*

> *amount claimed in these proceedings. This cannot be done by the summary judgment court – this is what is done by a trial court.*"

4.4 Apart from the vagueness of the statement, there is no reliance on any contractual term regarding such pre-assessment or establishment of "*worth*" prior to payment. Of course, a party claiming payment can only do so once it has rendered the service it was contracted to do but there is no indication on the papers that this had not been done. Yet again, the letter of 2 April 2012 appears to confirm that such performance has indeed taken place. That can be the only manner in which the admission contained in the letter to the effect that the amount mentioned therein "*is due and payable*" can be interpreted. Significantly, the deponent for the Respondent fails to deal with the contents of this letter or to engage with it at all. This failure was also a recurring feature during the argument of the matter.

4.5 In my view no *bona fide* defence has been set out in this regard "*… in a manner which is not inherently and seriously unconvincing*".

<u>See</u>: **<u>Breytenbach v Fiat SA (Pty) Ltd</u>** 1976(2) SA 226 (T) (to which judgment I was referred to on behalf of the Respondent).

<u>AD THE ALLEGED EXCEEDING OF THE AMOUNT IN THE APPOINTMENT LETTER</u>:

[5] 5.1 Under this heading the deponent on behalf of the Respondent referred to the amount mentioned in the appointment letter and alleged that "*on a proper interpretation*" thereof that the Applicant's claim was limited to the amount stated therein. He concluded that "*therefore, the Applicant is not entitled to be paid more than this amount*".

5.2 This allegation patently ignores or fails to take into account that the appointment letter referred to an "*averaged estimated contract amount*" and further fails to take into account that the amount excludes VAT and escalation.

5.3 Significantly, the Respondent's deponent again failed to deal with the aspects pleaded in the Particulars of Claim to which I have referred in paragraphs 2.10 to 2.12 *supra*.

5.4 The Respondent's contention further contains no statement of fact or particularity. It therefore fails to satisfy the requirements set out in **Maharaj v Barclays National Bank Ltd** 1976(1) SA 418 (A) (to which I was also referred to on behalf of the Respondent).

AD "*UNLAWFUL INSTRUCTIONS*":

[6] Although this was stated by the deponent on behalf of the Respondent as a separate ground of a purported defence, none of the seven instructions pleaded in the Applicant's Particulars of Claim was individually attacked. The basis for this statement was purely reliant on the argument that the appointment itself was invalid, as dealt with hereunder.

AD INVALID APPOINTMENT:

[7] 7.1 The Respondent's deponent's submission is simply that in terms of the invitation to bid, the bids would only hold good for 120 days from the closing date of the bid, i.e. up to 13 January 2012.

7.2 The Respondent alleged that after said date the Respondent was not in law competent to accept or reject the bids and accordingly the acceptance of the bid on 5 March 2012 was invalid and unlawful.

7.3 In support of the aforementioned allegation the Respondent relied on an unreported judgment of Southwood J in the Gauteng Division of this Court under case nos. 27974/2010 and 25945/2010 in **Telkom SA Ltd v Merid Trading (Pty) Ltd and Others** as quoted with approval in **Joubert Galpin Searle Inc and Others v Road Accident Fund** 2014(4) SA 148 (ECP) per Plaskett, J.

7.4 In the judgment of Southwood J the court *inter alia* held at [14]:

> "*As soon as the validity period of the proposal had expired without the Applicant awarding a tender the tender process was complete – albeit it unsuccessfully – and the Applicant was no longer free to negotiate with the Respondents as if they were attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the Applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award a tender*

> *within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender. Negotiations with some tenderers to extend the period of validity lacked transparency and was not equitable or competitive …*"

7.5 The heads of argument delivered on behalf of Respondent also relied on a judgment of Kollapen J in **City Connect Business Solutions (Pty) Ltd v City Manager of the City of Tshwane Metropolitan Municipality** [2015] ZAGPPHC 115 (4 March 2015) wherein the decisions of Southwood J and Plaskett J quoted above were relied on with approval.

7.6 It must immediately be apparent that, in the matter under consideration, there was no negotiation with the Applicant or with any other tenderer to enter into a contract after the bid validity period. There was on the face of it no differentiation in the treatment of bidders. All the bids were apparently equally assessed and the Respondent simply unduly delayed in awarding the tender. There was therefore no prejudice to the principles of equitable competitiveness.

7.7 In the **Joubert Galpin Searle**-case the Road Accident Fund commenced a process aimed at obtaining consent "*of the* *bidders who had not been eliminated from the process*" to extend the tender validity period after it had lapsed. This is, again, not a feature of the case under consideration.

7.8 Another set of distinguishing factors are the facts that the contract period for which the bid had been awarded had itself expired and there were no outstanding items in respect of the tender, neither in the form of outstanding instructions or work to be performed. Save for payment of the balance of the contract works, the works, the instructions, the performance and, apparently, the assessment of the performed works, had all been completed.

7.9 However, even if one were to have regard to the distinguishing features, the Respondent's argument that once the validity period of proposals in a procurement process has lapsed, any acceptance of such proposals and appointments pursuant to such acceptance would constitute constitutionally invalid administrative acts, appears to be correct.

7.10 Pursuant hereto, it has been held that:

"*Logic, general legal principle, the Constitution and the binding authority of* [the Constitutional 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. It is an approach that accords with the rule of law and principle of legality*".

See: **Allpay Consolidated Investment v CEO, SA Social Security Agency** 2014(4) SA 179 (CC) at [30].

7.11 Insofar as the "*default position*" is concerned, the Applicant sought to rely on the "*Oudekraal-principle*" enunciated in **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004(6) SA 222 (SCA). The effect of this judgment is that until an invalid administrative action is set aside by a court in proceedings for judicial review, it exists in fact and has legal consequences that cannot simply be overlooked.

See also: **MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute** 2014(3) SA 481 (CC)

South African Reserve Bank v Shuttleworth 2015(5) SA 146 (CC) at [32].

7.12 An undue delay in reviewing and setting aside an administrative act which resulted in an invalid contract is a public policy consideration which may militate against setting aside such an administrative act.

See: **Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad** 1978(1) SA 13 (A);

Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd 2009(4) SA 628 (SCA) at 637;

Khumalo and Another v MEC for Education, KwaZulu Natal 2014(5) SA 579 (CC).

7.13 In the present instance 3½ years have elapsed since the invalid appointment at the time when the action was instituted and more than 1½ years have lapsed since the expiry of the contract period itself by the time that action was instituted. At no stage during this whole period and neither even in its opposition to the application for summary judgment had the Respondent attempted any review proceedings, threatened with the institution thereof or made any effort to have the appointment set aside. More significantly, no steps had been taken in defying the appointment or in not making payment in compliance therewith, save for the balance claimed in the Particulars of Claim.

7.14 In the present instance, the Respondent has simply not sought to have its own invalid administrative act set aside. In this regard it has also been held that even where a decision was defective, an organ of State should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process and must apply formally to a court to set aside the defective decision so that the court can properly consider its effects on those subject to it.

See: **MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute**, *supra* at par. 64 and 105.

7.15 The apparent anomaly that flows from the above and the **Oudekraal** principle to the effect that an unlawful act can produce legally effective consequences "*… is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the*

Constitution and PAJA by providing for a just and equitable remedy in its wake."

See: **Bengwenyama Minerals v Genorah Resources (Pty) Ltd** 2011(4) SA 113 (CC) at [85].

7.16 The proper approach quoted with approval in the **Bengwenyama Minerals**-case and the **Allpay Consolidated Investment**-case is that stated by Moseneke DJC in **Steenkamp NO v Provincial Tender Board, Eastern Cape** 2007(3) SA 121 (CC) at paras. [29] and [30] namely:

> "*It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public law remedies and not private law remedies. The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function … Ultimately the purpose of a public remedy is to afford the prejudiced party*

administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law … Examples of public remedies suited to vindicate breaches of administrative justice are to be found in Section 8 of the PAJA. It is indeed so that Section 8 confers on a court in proceedings for judicial review a generous jurisdiction to make orders that are just and equitable."

7.17 Applying these principles to the present case, I find that it was insufficient for the Respondent to simply refer to the invalidity of the appointment and the vulnerability of its administrative act without dealing with any of the aforesaid issues which would arise once the act has been declared invalid. Important considerations which the Respondent clearly purposely sought to avoid were the factors mentioned in paragraphs 2.10 – 2.12 and 7.6 – 7.8 *supra*.

7.18 In **Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others** 2008(2) SA 638 (SCA) the invalid administrative acts in a tender process was allowed to stand *inter alia* due to the extent of the completion of the work. In the present instance, all the work had already been completed and the only consequence in setting aside the invalid administrative acts or upholding the Respondent's current defence, would be to deprive the Applicant of money to which it is entitled as payment for works in respect of which the public within the area of jurisdiction of the Respondent has already received the benefit and would still continue to enjoy such benefit. No defence was disclosed as to why the present matter should, in the circumstances, not be treated as a similar exception as in the **Sapela**-case to the "*default-position*" following an invalid administrative act.

7.19 The failure of the Respondent and its deponent to deal with the particularity of the Particulars of Claim, the various instruction letters, the invoices, statements and undertakings to pay annexed thereto, including but not limited to the letter of 2 April 2014 as well as the factors mentioned hereinbefore, appears to be a conscious avoidance of issues which, in my view, does not amount to the *bona fide* tendering of a defence.

[8] I am therefore of the view that the Respondent has not satisfied the requirements for resisting summary judgment.

[9] In the premises summary judgment is granted against the Defendant for:

1. Payment of the amount of R2 860 002,75;

2. Interest on the aforesaid amount at the rate of 9% per annum from 19 November 2014 to date of payment;

3. Costs of suit.

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N DAVIS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date of Hearing: 23 October 2015

Date of Judgment: 21 January 2016

Applicant: Adv: Pretorius WG

Respondent: Adv: Mofokeng Z