



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

CASE NO: 149200/2015

In the matter between:

ASATICO CIVIL AND CONSTRUCTION (PTY) LTD

Applicant

And

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

.....
DATE SIGNATURE

EKURHULENI METROPOLITAN MUNICIPALITY

Respondent

JUDGMENT

DAVIS AJ

[1] In this matter I granted summary judgment against the Respondent by way of a judgment dated 24 November 2015. The Respondent applied for leave to appeal and this is my judgment on the Respondent's application for leave to appeal to a Full Bench of this Division. For ease of reference and sake of convenience the parties shall be referred to as Plaintiff and Defendant respectively.

[2] Without reiterating the salient facts found in the judgment (and which were not attacked in the application for leave to appeal), the position is the following:

- 2.1 Pursuant to a timeously delivered compliant bid by the Plaintiff, the Defendant's Bid Adjudication Committee resolved on 7 March 2012 to award a contract for the rendering of infrastructure services for the upgrading and construction of roads and stormwater infrastructure on an *"as and when required basis with effect from date of the award until 31 December 2013"*.
- 2.2 The award was *"... at an average estimated contract amount of R67 985 731.04"* subject to escalation based on the CPA with base month being September 2011.
- 2.3 During the period between March 2012 and October 2013 the Plaintiff, on instructions by the Defendant from time to time delivered services at various specified streets in various townships and performed stormwater reticulation, sidewalks and road infrastructure works.
- 2.4 For purposes of these *"as and when"* works, the Defendant had issued 7 *"letters of instruction to perform work"*, copies of which were annexed to the Particulars of Claim.
- 2.5 As a result of the aforementioned performance of works, the Defendant made payments to the Plaintiff from time to time the total amount being R60 034 035.45. The Defendant has confirmed this in writing whilst further confirming the following:

“However it must be noted that an amount of R8 735 569.76 is still being processed for payment and is due and payable.”

(This letter of confirmation was dated 2 April 2014 and referred to the works time period having expired on 31 December 2013.)”

2.6 After certain payments, the Plaintiff issued a demand of R5 856 931.76 and, after further payments, instituted the present action for the outstanding balance of R2 860 002.75.

[3] The relevant applicable portion of Section 17 of the Superior Courts Act, No. 10 of 2013 provides that:

“17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success ...”

[4] In argument in support of the Defendant’s application for leave to appeal, the Defendant relied on the same four “*defences*” referred to in paragraph [3] of my judgment. These were the four defences relied on in the affidavit resisting summary judgment and are the following:

“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.”*

[5] Ad “*the amount claimed has not been agreed upon*”:

5.1 In the Defendant’s affidavit resisting summary judgment this defence was based on the statement that “... *the Respondent has not agreed to pay the Applicant the amount claimed in these proceedings ...*”. A further allegation was made that the work allegedly done first had to be “*assessed to determine whether or not it is worth the amount claimed in these proceedings*”.

5.2 In view of the vagueness of the contents of the affidavit resisting summary judgment and in view of the Defendant’s own written admission to which I had referred to above (which was not denied or placed in dispute) I am unable to form the opinion that the Defendant has a reasonable prospect that on appeal a Full Bench could find that a *bona fide* defence has been disclosed in this regard.

[6] Ad the alleged exceeding of the amount in the appointment letter:

6.1 The appointment letter firstly refers to an average amount. Secondly, it is exclusive of VAT. Thirdly it needs to be increased with the annual CPA. If all this is done, then the total amount claimed by the Plaintiff does not exceed the amount in the appointment letter.

6.2 There is furthermore no explanation by the Defendant on this aspect when reference is had to the admissions contained in the confirmation letter of 2 April 2014.

6.3 I am similarly unable to form the opinion that the Defendant has a reasonable prospect that a Full Bench on appeal can find that a *bona fide* defence has been disclosed in this regard.

[7] Ad unlawful instructions:

In similar fashion as in the main application, it was conceded that this “*defence*” is dependant on the “*defence*” based on the invalidity of the appointment.

[8] Ad invalid appointment:

8.1 The Defendant contends that the award of the tender after the expiry date of the bids was invalid and unlawful.

8.2 In this regard I was yet again referred to the judgment of Southwood J in **Telkom SA Ltd v Merid Trading (Pty) Ltd and Others** (as dealt with in paragraph [7] of my judgment).

- 8.3 Having regard to the abovementioned decision and the various other cases referred to in my judgment, I concluded that the Defendant's argument that once the validity periods of proposals in a procurement process have lapsed, any acceptance of such proposals and also any appointments pursuant to such acceptance would constitute constitutionally invalid administrative acts, was correct.
- 8.4 Despite the aforesaid, it remained a fact that at no stage during the existence of the contract period nor up to the date of confirmation of amounts due, owing and payable by the Defendant on 2 April 2014 nor at any stage prior to or subsequent to the Plaintiff's various demands and at no stage further up to institution of action or thereafter up to the date of the hearing of the summary judgment application (and subsequently also neither up to date of the application for leave to appeal) had the Defendant taken any steps to have the existing (invalid) administrative act reviewed or set aside.
- 8.5 In my view the "*Oudekraal principle*" still finds application namely 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.
- 8.6 In the present instance, the invalid administrative act had taken place on 7 March 2012. The contract period to which the invalid act applied, had

expired in December 2013. The work which the Plaintiff performed and for which it claimed payment took place within this period.

8.7 The Defendant's confirmation that the work had been done and that an amount was due and payable for it took place on 2 April 2014.

8.8 In the above circumstances, the "*legal consequences*" of the invalid administrative act as referred to in **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004(6) SA 222 (SCA) and **MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd t/a Eye and Laser Institute** 2014(3) SA 481 (CC) and **Bengwenyama Minerals v Genorah Resources (Pty) Ltd** 2011(4) SA 11 (CC) are all applicable.

8.9 One should also have regard to the factual consequences of the invalid act as referred to in **Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd** 2010(4) SA 359 (SCA) at [15] – [19] and the cases referred to there including the **Sapela**-case referred to in my judgment.

8.10 Taking the above into consideration, I yet again had regard in the judgment to **Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others** 2008(2) SA 638 (SCA) and annotations thereof.

8.11 In the present instance, all the work had already been performed and completed in terms of the invalid administrative act and no facts had

been disclosed in the Defendant's affidavit resisting summary judgment why the present matter should not be treated in the same manner as in the Sapela-case. Counsel for the Defendant reiterated that the Defendant had not been obliged to do so but in my view that submission flounders on the requirement that that is exactly what the Defendant was supposed to do, namely disclose a *bona fide* and valid defence.

8.12 In my view in the present circumstances it is not enough for the Defendant to simply *ex post facto* point to the invalidity of the administrative act without adducing any facts or evidence as to what the consequences of such invalidity should be.

8.13 I am unable to conclude or form the opinion that, in these circumstances, the Defendant has a reasonable prospect of success that a Full Bench on appeal can simply find that the raising of the invalidity issue constitutes a sufficient answer to the principles enunciated by the Supreme Court of Appeal and the Constitutional Court in the cases to which I had referred or that the requirements resisting summary judgment have been met.

[9] The application for leave to appeal is therefore refused with costs.

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