



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

In the matter between:

Case No: 3712/2016

**NELSON MANDELA BAY METROPOLITAN
MUNICIPALITY**

Plaintiff

and

AFRISEC STRATEGIC SOLUTIONS (PTY) LTD

First Defendant

MHLELI MLUNGISI TSHAMASE

Second Defendant

TREVOR HARPER

Third Defendant

HELEN KEBLE N.O. ESTATE LATE PATRICK KEBLE

Fourth Defendant

ARMIEN MADATT

Fifth Defendant

SONGEXILE NKANJENI

Sixth Defendant

NOBUNTU MGOGOSHE

Seventh Defendant

MZWANELE LENMOD NDOYANA

Eighth Defendant

JUDGMENT IN RESPECT OF SPECIAL PLEAS

BANDS AJ:

[1] The plaintiff instituted action against the defendants for payment of certain sums of money, which the plaintiff paid to the first defendant during the period of November 2013 to September 2014, across nine separate payments¹ in the aggregate of R92,433.301.55. Various causes of action are formulated against the defendants.

[2] For present purposes, it is not necessary to set out the respective causes of action in detail. Insofar as the first defendant is concerned, the plaintiff in the first instance relies on the *condictio indebiti*. The second cause of action against the first defendant is based on an alleged intentional; alternatively, negligent misrepresentation. The causes of action as against the remainder of the defendants are based on the defendants' alleged failure to comply with their obligations as employees of the plaintiff.

¹ R471,836.99; R6,384,000.00; R18,697,889.96; R12,294,486.70; R2,919,368.09; R17,000,049.19; R28,530,164.40; R2,455,609.02; and R3,679,897.20

[3] When this matter came before me on the civil trial roll, the parties requested that I grant an order² pursuant to the provisions of Uniform Rule 33(4) separating the issues raised by the respective defendants in their special pleas³ from the remaining issues on the pleadings. The order was duly granted.

[4] Whilst the special pleas are not formulated in identical terms, the purport of the defences raised therein, on a proper construction thereof, are no different. Accordingly, it suffices for present purposes to repeat the content of the special plea raised by the first defendant:⁴

“2. The First Defendant pleads that –

2.1 the plaintiff’s decisions to procure goods and services from the First Defendant, constitutes administrative actions;

2.2 if the decisions of the Plaintiff to procure services from the First Defendant, under Contract No. SCM142/S was incorrect or unlawful, (which is denied) the Plaintiff was obliged to have initiated Review Proceedings in terms of the PAJA and/or the Principle of Legality to set aside its own alleged unlawful administrative actions;

² “1. That the questions of law as variously pleaded by the First; Second; Third; Fourth, Fifth; Seventh and Eighth Defendants as set out hereunder, together with the liability for the costs attendant thereon, be decided separately in terms of Rule 33(4) at the commencement of the trial:

1.1 by the First Defendant in paragraphs 2.1 to 2.4 of its special plea;

1.2 by the Second Defendant in paragraphs 2.1 to 2.4 of his special plea;

1.3 by the Third; Fifth; and Eighth Defendants in paragraphs 1.8 to 1.12 of their special plea;

1.4 by the Fourth Defendant in paragraphs 2.1 to 2.4 of her special plea; and

1.5 by the Seventh Defendant in paragraphs 2 and 5 of his special plea;

2. Costs are costs in the cause.”

³ With the exception of the Sixth Defendant, special pleas were raised by all defendants.

⁴ Pleadings bundle p 502d.

2.3 *until such time as the Plaintiff's alleged unlawful administrative actions have been set aside, the administrative actions are extant;*

2.4 *the First Defendant accordingly pleads (without making any admissions as to liability) that until such time as the Plaintiff has reviewed and set aside the alleged unlawful administrative actions, the Plaintiff has not sustained any damages viz the First Defendant and as such, has no claim against the First Defendant."*

[5] The special pleas are premised on the correctness of the facts as pleaded by the plaintiff in its particulars of claim and are, in essence, as follows.

[6] On 28 March 2012, the plaintiff invited tenders under Contract Enquiry Number SCM142/S/2011-2012 for the "*Supply, Installation and Maintenance of Enterprise Facilities Management System and Related Services.*" On 18 July 2012, the plaintiff advised the first defendant, in writing, of the acceptance of the first defendant's tender "*subject to the signature by the NMBM and the contractor [being the first defendant] of a formal contract regarding all terms of the agreement between the parties.*" Despite the award of the aforesaid tender to the first defendant, no formal contract was executed by the plaintiff and the first defendant. I pause to mention that the existence of such contract remains in dispute on the pleadings and is not an issue which I am called upon to determine in these proceedings.

[7] Pursuant to the award of the tender, the plaintiff gave instructions to the first defendant to undertake work, provide services and/or to supply goods to the plaintiff. In doing so, the plaintiff utilised contract number SCM142/S. The

further defendants facilitated payment of the first defendant's invoices rendered under contract number SCM142/S.

[8] It is apposite at this juncture to record that the further defendants are either, former employees of the plaintiff; alternatively, are still in the plaintiff's employ. The second defendant was formerly employed by the plaintiff as the Project Manager: Integrated Public Transport System. The third defendant is employed by the plaintiff as its Chief Financial Officer. The fourth defendant,⁵ prior to his demise, was employed by the plaintiff as its Director: Facilities. The fifth defendant succeeded the fourth Defendant as the Plaintiff's Director: Facilities. The sixth defendant is employed by the plaintiff as its Contracts Controller in the Supply Chain Management Unit. The eighth defendant is employed as the Executive Director: Corporate Administration by the plaintiff.

[9] The plaintiff takes issue with the manner in which the facts, as pleaded by the plaintiff, have been paraphrased by the defendants in their respective special pleas. The plaintiff avers, for example, that insofar as the second and fourth defendants record that the plaintiff's "*decision*" to procure services from the first defendant, under contract number SCM142/S, constitutes administrative action, the plaintiff did not plead any such decision.⁶ Similarly, insofar as the first defendant contends that it was averred by the plaintiff that it "*utilised*" contract number SCM142/S to procure goods and services from the first

⁵ Now represented herein by the executrix of his estate.

⁶ Pleadings bundle page 532c at paragraph 2.1, read with 2.2 (in respect of the second defendant); and pages 588c and 588d at paragraph 2.1, read with 2.2 (in respect of the fourth defendant)

defendant, no such decision is pleaded. Accordingly, the plaintiff contends that inasmuch as the defendants conclude that the plaintiff pleaded a decision, which it did not, such decision being a *sine qua non* of each of the special pleas, the special pleas fall to be dismissed on this ground alone. I do not agree.

[10] The main thrust of the plaintiff's argument is that after pleading the series of events which occurred after the resolution of the Bid Adjudication Committee, the plaintiff set out various steps taken *inter alia* by the defendants. The plaintiff contends that it did not plead that any one of such steps constituted a decision, nor is it a necessary implication of the facts pleaded.

[11] Paragraph 68.3 of the plaintiff's particulars of claim records as follows:⁷

"all instructions given by the Plaintiff to the First Defendant and/or all orders placed by the Plaintiff with the First Defendant to undertake work, provide services or to supply goods giving rise to the submission by the First Defendant to the Plaintiff of the invoices and giving rise to the first to ninth payments were unlawful;"

[12] The instructions to which the plaintiff refers in paragraph 68.3 are pleaded in paragraphs 46 to 64 of the plaintiff's particulars of claim. By way of example, paragraph 46 reads as follows:

"46. On or about 26 November 2013, the amount of R471 836,99 including VAT ("the first payment"), was paid by the Plaintiff to the First Defendant by means of electronic funds transfer ("EFT"). A copy of the remittance advice reflecting this transaction is annexed hereto as POC14. The first payment was preceded by the following:

⁷ Pleadings bundle page 74.

- 46.1 *On or about 10 September 2013, at the request of the Second Defendant, the First Defendant provided to him a budget estimate for the relocation of the Integrated Public Transport Operations Centre and the IPTS offices to the South End Fire Station Building (a copy of which is annexed hereto marked POC15).*
- 46.2 *On or about 27 September 2013 the Second Defendant issued to the First Defendant a corresponding Contract Services Request ("CSRD") with number 2014CSRD06522 under Tender SCM142/S;*
- 46.3 *The First Defendant submitted to the Plaintiff (for attention by the First Defendant) invoice number INA 11126 dated 5 November 2013 with the Plaintiff's reference 2014CSRD06522 (a copy of which is annexed hereto marked POC16) for an amount of R471 836,99 including VAT;*
- 46.4 *On or about 14 November 2013 the Fifth Defendant caused a Contract Payment Certificate number 2014 CNTP09697 (a copy of which is annexed hereto marked POC17) to be generated in respect of the First Defendant's invoice number INA 11126 under the contract for "Supply, Installation and Maintenance of Enterprise Facilities Management System and related Services" (i.e. Tender SCM142/S) providing for payment by the Plaintiff to the First Defendant of the sum of R471 836.99 including VAT of R57,944.89. On this certificate, the Eighth Defendant approved the payment by his signature thereto.*

[Own underlining].

- [13] Implicit in paragraph 68.3 of the plaintiff's particulars of claim is that notwithstanding the failure on the part of the plaintiff and the first defendant to execute a formal contract following the award of the tender (as is accepted for the present purposes), a decision was taken by the plaintiff to procure the services of the first defendant to (i) undertake work; (ii) to provide services; and/or (iii) to supply goods to the plaintiff, which, if regard is had to paragraph 46.4 of the plaintiff's particulars of claim, was done "*under the contract for "Supply, Installation and Maintenance of Enterprise Facilities Management*

System and related Services” (i.e. Tender SCM142/S)”. I refer to this decision as the “procurement decision”.

[14] There is accordingly no merit in the argument on behalf of the plaintiff that no decision has been pleaded. Moreover, the attempt by the plaintiff to distance itself from the steps taken by its own employees, is in my view, farcical.

[15] Having established the procurement decision on behalf of the plaintiff, it remains to be determined whether such conduct amounts to administrative action.

[16] It is trite that a decision to award or refuse a tender constitutes administrative action. This is so because the decision is taken by an organ of state which wields public power or performs a public function in terms of the Constitution or legislation and the decision materially and directly affects the legal interests or rights of tenderers concerned.⁸ Wallis JA, writing for the Supreme Court of Appeal in *Polokwane Local Municipality v Granor Passi (Pty) Ltd*⁹ stated as follows:

“In my view a decision regarding the implementation of a contract to which the municipality is a party is an act of administration. It was taken by an organ of state, exercising a public power or function in relation to the enforcement of a contract concluded in terms of the empowering provisions governing transactions of this character.”

⁸ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at paragraph 21.

⁹ [2019] 2 All SA 307 (SCA) at paragraph 11.

- [17] In *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for Road Freight Industry*,¹⁰ the following comment of Nugent JA is relevant:

“Government and its agencies are expected to be publicly accountable for the contracts that they conclude because they are spending public money and there are two principal reasons why that should be so. In the first place the public is entitled to be assured that its moneys are properly spent. And secondly, the commercial public is entitled to equal opportunity to benefit from the bounty of the state to which they are themselves contributories. The accountability of government for which procurement is expressly provided for in s 217 of the Constitution, which requires that government bodies must contract ‘in accordance with a system which is fair, equitable, transparent, competitive and cost effective’...”

- [18] Whilst in *Granor Passi* the decision pertained to the implementation of a contract which had factually been concluded, there can be no doubt that the procurement decision in the present instance, meets the necessary requirements for it to constitute administrative action within the ambit of section 33 of the Constitution.

- [19] It is established law that until such time as an administrative action is set aside by a court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot be overlooked. In *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others*,¹¹ the court at paragraph [26] emphasised that:

“The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always

¹⁰ (410/09) [2010] ZASCA 94 (19 July 2010) at paragraph 44.

¹¹ 2004 (6) SA 622 SCA.

recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.”

[20] The plaintiff itself at paragraph 68.3 of its particulars of claim concedes that the instructions given by the plaintiff to the first defendant and/or all orders placed by the plaintiff with the first defendant to undertake work, provide services or to supply goods giving rise to the submission by the first defendant to the plaintiff of the invoices and giving rise to the first to ninth payments were unlawful.

[21] It was incumbent upon the plaintiff to bring review proceedings to set aside the procurement decision, being a review of its own decision, in accordance with the principle of legality.¹² Such decision cannot simply be ignored by the plaintiff.

[22] In *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*,¹³ Cameron J at paragraphs [64] and [65] succinctly stated:

“[64] Can a decision by a state official, communicated to the subject, and in reliance on which it acts, be set aside by a court even when government has not applied (or counter-applied) for the court to do so? Differently put, can a court exempt government from the burdens and duties of a proper review application, and deprive the subject of the protections these provide, when it seeks to disregard one of its own officials’ decisions? That is the question the judgment of Jafta J (main judgment) answers. The answer it gives is Yes. I disagree. Even where the decision is defective – as the evidence here suggests – government should generally not be exempt from the forms and processes of review. It should be held to the pain

¹² *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC).

¹³ 2014 (3) SA 481 (CC).

and duty of proper process. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it.

[65] The reasons spring from deep within the Constitution's scrutiny of power. The Constitution regulates all public power. Perhaps the most important power it controls is the power the state exercises over its subjects. When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government should not be allowed to take shortcuts. Generally, this means that government must apply formally to set aside the decision. Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in which all factors for and against are properly weighed."

[23] Until such time that the procurement decision is set aside, (i) it exists in fact and has legal consequences that cannot be overlooked; and (ii) the plaintiff has not sustained any damages viz the first defendant, and as such, has no claim against the further defendants.

[24] I am accordingly of the view that the special pleas filed on behalf of the first, second, third, fourth, fifth, seventh and eight defendants ought to be upheld with costs.

[25] Insofar as a number of the defendants seek a dismissal of the plaintiff's claim on the basis that any proposed review proceedings initiated by the plaintiff has no prospects of success given what they allege to be a deliberate and inordinate delay, such question goes beyond the scope of these proceedings and remains to be determined in the appropriate forum after being fully ventilated.

[26] In the circumstances, the following order is issued:

1. The first, second, third, fourth, fifth, seventh and eight defendants' special pleas are upheld with costs.

I BANDS

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff: Adv RG Buchanan SC

Instructed by: Gray Moodliar Inc, 19 Raleigh Street, Central

For 1st defendant: Adv AJR van Rhyn SC

Instructed by: Kramer Wiehmann Inc., KW Building, 24 Barnes Street,
Bloemfontein

For 2nd defendant: In person

For the 3rd and 5th defendants: Adv P Jooste

Instructed by: Kaplan Blumberg Attorneys, Southern Life
Gardens, Second Avenue, Newton Park

For 4th defendant: Mr Friedman

Instructed by: Friedman Scheckter Attorneys, second Avenue, Newton Park

For 8th defendant: In person

Coram: Bands AJ

Date heard: 2 February 2022

Delivered: 27 September 2022