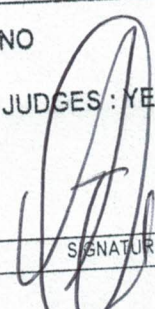




(1) REPORTABLE : YES / NO	
(2) INTERESTED TO THE JUDGES : YES / NO	
(3) REVISED 8/6/17 DATE	
SIGNATURE	

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 778/2012

In the matter between:

GOBELA CONSULTING CC

PLAINTIFF

And

MAKHADO MUNICIPALITY

DEFENDANT

JUDGMENT

MOKGOHLOA DJP

1. The plaintiff sues the defendant for payment of an amount of R5 113 470.00. The claim is based on what is alleged in the amended particulars of claim as follows:

"4. On or about 22 February 2011, the plaintiff, on invitation by the municipality, alternatively, the erstwhile municipal manager, one Shadrack Tshikalange

(Tshikalange), submitted a proposal to review and develop the anti-corruption strategy and capacity building for the municipality. The proposal was entitled 'Proposal to Review and Develop the Anti-Corruption Strategy and Capacity Building for Makhado Municipality.

.....

8. Pursuant to and as a result of the proposal, the plaintiff was appointed and the appointment was confirmed in a letter dated 5 May 2011. The said letter was signed by Tshikalange,, who was acting in his course and scope of employment as a municipal manager.
9. Pursuant to the appointment of the plaintiff, the plaintiff performed in preparation for the review and capacity building for the Makhado Municipality Officials in terms of the proposal. The plaintiff performed in one or more or all of the following ways:
 - 9.1 .Drafting, preparing and printing manuals for training;
 - 9.2. employing professionals to execute the duties in relation to the proposal;
 - 9.3. drafting, preparing and printing flyers in relation to the proposal;
 - 9.4. employing support staff who will execute the project as per the proposal, amongst other things.
10. In breach of its obligation in terms of the agreement embodied in the proposal and / or letter of appointment, defendant has, despite due demand, failed, refused and / or neglected to allow plaintiff to perform its obligations in terms of the proposal".

2. The above facts are largely not in dispute except that Mr Abaphunane Mavhandu (Mr Mavhandu), the director of the plaintiff, stated in his testimony during the trial that the defendant did not make any invitation to the plaintiff. According to Mr Mavhandu, he

actually read in a local newspaper a notice disclaimer by the defendant wherein it was stated that there were problems of corruption within the municipality. He contacted the defendant and spoke to one Ms Ndou an official of the defendant. Mr Mavhandu offered his service of training the defendant's officials on anti-corruption and fraud. Ms Ndou referred him to Mr Tshikalange the municipal manager, who requested Mr Mavhandu to submit a proposal. Mr Mavhandu submitted the proposal and met with Ms Ndou and Mr Tshikalange. They discussed and accepted his proposal.

3. A month or two later, and on 05 May 2011, Mr Mavhandu received an appointment letter from the defendant. The letter stated that his company was appointed to conduct training on anti-corruption and fraud for 745 officials and councillors. The program was to run from May to November 2011 at a cost of R7 500.00 per person. Mr Mavhandu was requested to start the training immediately. He responded by delivering his acceptance letter to the defendant. He met with Ms Ndou who explained to him that the program was to be rolled out in stages and the trainees will be divided into four groups. The defendant was to provide the venue for the training.
4. Based on the above, Mr Mavhandu employed extra staff and entered into service agreements with other four facilitators to assist in the training.
5. Mr Mavhandu and his crew arrived at the agreed venue on the agreed date to start with the project. Ms Ndou informed him that the training could not proceed as there were problems between the mayor and the ANCYL. They were requested to wait until the problem is solved. After some days and when the training could not start, Mr Mavhandu released the facilitators.
6. The defendant raised two special pleas which were later withdrawn. It however proceeded and pleaded that the appointment of the plaintiff was invalid and unlawful as it did not conform with the Municipal Finance Management Act and the defendant's Supply Chain Management Policy.
7. The starting point will be in the provision of s 217 of the Constitution¹ which reads.

¹ Constitution of the Republic of South Africa Act 108 of 1996

- '(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 cost-effective.*
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-*
 - (a) categories of preference in the allocation of contracts; and*
 - (b) the protection and advancement of persons, or categories of persons, disadvantaged by unfair discrimination.*
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'*

8. *Section 2 of the Local Government: Municipal Finance Management Act (LGMFMA)² provides:*

'The object of this Act is to secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities by establishing norms and standards and other requirements for-

- (a) ensuring transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities and municipal entities;*
- (b) the management of their revenues, expenditures, assets and liabilities and the handling of their financial dealings;*
- (c) ...*

² 56 of 2003

(d) ...

(e) ...

(f) *Supply chain management; and*

(g) ...'

9. Section 111 of the LGMFMA provides that each municipal entity must have and must implement a supply chain management policy. The policy must comply with the provisions of s217 of the Constitution.
10. Regulation 12 of the Supply Chain Management Policy implemented in terms of the LGMFMA provides:

"Range of procurement processes.

- (1) A supply chain management policy must, subject to regulation 11 (2), provide for the procurement of goods and services by way of-

- (a) petty cash purchases, up to a transaction value of R2 000 (VAT included);
- (b) written or verbal quotations for procurements of a transaction value of over R2 000 up to R10 000 (VAT included);
- (c) formal written price quotations for procurements of a transaction value over R10 000 up to R200 000 (VAT included);
- (d) a competitive bidding process for –
- (i) procurements above transaction value of R200 000 (VAT included);
- and

(ii) the procurement of long term contracts.

(2) A supply chain management policy may allow the accounting officer –

(a) to lower, but not to increase, the different threshold values specified in sub regulation (1).

11. Section 113 of LGMFMA provides that a municipal entity is not obliged to consider an unsolicited bid received outside its normal bidding process. If it decides to consider such unsolicited bids, then the consideration must be done in accordance with the prescribed framework. These are that:

(a) The service offered in terms of the bid is proven to be unique innovative concept;

(b) The reasons for not going through the normal bidding processes are found to be sound.

12. Applying the above legislation to the instant matter, it is clear that the appointment of the plaintiff to review and develop the anti-corruption strategy for the municipality, albeit a good initiative, is in breach of the provisions of the above stated legislation which are designed to ensure a transparent, cost-effective and competitive tendering process in the public interest. Therefore such appointment is invalid and will not be enforced.

13. The plaintiff does not dispute the applicability of these legislation in the present matter. It however argued that the defendant cannot plead that the contract is invalid without filling a counter claim for a declaratory order. I find that this argument lacks substance and wish to demonstrate as follows:

14. In MEC for Health, Eastern Cape and Another v Kirland Investment (Pty) Ltd³, Kirland instituted a review application impugning (i) the decision of the Superintendent – General (SG for Health in Eastern Cape) refusing to approve Kirland's application to establish

³ 2014 (3) SA 481 (CC)

private hospitals in the Eastern Cape; (ii) the decision of the Acting SG to approve the application; (iii) the SG's decision to withdraw that approval; and the MEC's decision to dismiss Kirland's internal appeal. The High Court set aside the impugned decision. The appeal to the Supreme Court of Appeal (SCA) was unsuccessful.

15. Despite finding that the approval of the Acting SG was invalid, the Supreme Court of Appeal left the invalid approval intact after reviewing the High Court's order. The SCA held that it lacked jurisdiction to set aside the Acting SG's decisions because they have never been taken on review.
16. The Constitutional Court (CC) held that whilst it is true that the officials of the Department of Health failed to take the Acting SG's approval on review, and since the SCA had found that the approval was invalid as it was unlawfully made, the Court ought to have declared it invalid. The CC held further that the SCA did not require the request for review to assume jurisdiction over the matter as it already had jurisdiction because the validity of the approval was one of the issues pertinently raised in the pleadings and canvassed in the evidence.
17. Similarly, in the present matter, the plaintiff sues the defendant on the basis of the appointment letter dated 5 May 2011. This letter was pursuant the plaintiff's proposal to render services to the defendant. Admittedly, the appointment of the plaintiff by the defendant was invalid and unlawful. As stated in Kirland's case, 'a decision flowing from such conduct must not be allowed to remain in existence on the technical basis that there was no application to have it reviewed and set aside.'⁴
18. Furthermore, the invalidity of the plaintiff's proposal and subsequent appointment was canvassed in the defendant's plea. Paragraph 3 thereof reads:

"The Defendant pleads that the request did not abide by the Municipal Finance Management Act 2003 and the Defendant's Supply Chain Management Policy and such request is invalid and unlawful"

What is missing in the paragraph is the sentence to the effect that the defendant sought to have the appointment reviewed.

⁴ Ibid in para 44

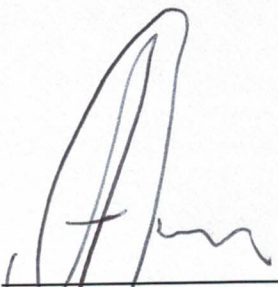
19. It is clear and cannot be disputed that the appointment of the plaintiff is unlawful and invalid. This conduct offends the provisions of section 217 of the Constitution and the LGMFMA which requires that when an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable and transparent.

20. I fully agree with the Constitutional Court when it stated:

*"Corrupt practises should not escape the reach of our courts solely on the basis that no application to have them set aside was made. If the validity of a corrupt decision were raised in the pleadings, a court is duty-bound to declare it invalid if that is established by evidence. Section 172 (1) (a) of the Constitution obliges every court, when deciding a constitutional matter within its powers, to declare invalid any conduct that is inconsistent with the Constitution. The section admits on no discretion."*⁵

Order

1. The plaintiff's claim is dismissed with costs.


MOKGOHLOA DJP

⁵ Ibid in para 46

REPRESENTATIONS

- | | |
|------------------------------|---------------------------------|
| 1. For the Plaintiff | : Adv T. Seboko |
| Instructed by | : Ramatshila Mugeru Attorneys |
| | |
| 2. Counsel for the defendant | : Adv K Lengane |
| Instructed by | : Nengwekhulu Tshiwandalani Inc |
| | |
| 3. Date of hearing | : 22 March 2017 |
| | |
| 4. Date handed down | : 08 June 2017 |