IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no: 3972/2020

In the matter between

EMS SOLUTIONS (PTY) LTD **PLAINTIFF**

and

MOHOKARE LOCAL MUNICIPALITY **RESPONDENT**

Neutral citation: *EMS Solutions (PTY) Ltd v Mohakare Local Municipality (3972/2020)*

Coram: MAHLANGU AJ

Heard: 26 JULY 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be at 14h30 on 7 August 2024

Summary: Invalidity of the agreement – an administrative agreement and its legal consequences remain in effect until it is set aside by a court in judicial review – legal consequences cannot simply be overlooked.

ORDER

The order is made in terms of the draft order marked 'X'.

JUDGMENT

MAHLANGU AJ

INTRODUCTION

[1] This trial originates from an application on motion brought by EMS Solutions (Pty) Ltd (Plaintiff), to enforce payment of a monetary debt of R5 346 856.09, allegedly owed to it by Mohokare Local Municipality (Respondent) together with interest and costs, in respect of services rendered pursuant to having been appointed as a service provider for the Respondent in respect of two separate procurement contracts, the VAT recovery services agreement and the Fixed Asset Registers agreement.

[2] The application was opposed by the Respondent, who filed a counterclaim for an order declaring the VAT recovery services agreement (the agreement) unlawful, invalid and null and void, alternatively that the Applicant's appointment in respect of the VAT recovery services be set aside and rescinded. After the pleadings were closed and the application enrolled for hearing, the matter was referred to trial and not on any specific issue.

BACKGROUND FACTS

[3] On 30 June 2016, the Respondent appointed the Plaintiff for the preparation of its Fixed Asset Register-Infrastructure for the years 2016/2017 and 2017/2018. The parties agreed that the Fixed Asset Registers agreement was lawful. The Plaintiff was appointed by the Respondent for the VAT Recovery Services on 5 December 2017 for

a period of 36 months. The following is provided in the appointment letter:

'We have pleasure informing you that under Section 36 of the Municipal Supply Chain Management Regulations as published in the Government Gazette on 27636 of 30 May 2015 we have appointed you as per your submitted proposal for the above-mentioned project, outlined as per budget.'

[4] The appointment of the Plaintiff was subsequent to the proposal made to the Respondent on 1 December 2017. Paragraph 3 of the proposal provides that '[d]uring the conduction of the aforementioned procedures, we will ensure that the Municipality is and has been complying with the requirement of the VAT act'. Paragraph 5 of the proposal provides that '[w]e will assist you will all VAT queries by SARS. We will report to you on our findings and provide you with the amount claimable and a document setting out our supporting calculations with a follow through of administration and liaison with SARS for VAT recoveries. Any long outstanding refund issues (6 months and longer) will be addressed by EMS. Our fee rate will apply to any refund successfully concluded on behalf of the municipality'.

[5] The work to be rendered by the Plaintiff in terms of the agreement was to 'identify VAT savings and recover those savings from the South African Revenues Services (SARS) for the 2013 to 2017 financial years', which would entail 'qualifying and claiming overpaid VAT, and/or quantifying and claiming unclaimed input tax on the Respondent's expenses'; and that the Plaintiff would be entitled to 35% VAT savings received by the plaintiff. Further, the Plaintiff assisted the Respondent in VAT recovery service based on the emails that emanated from the Respondent's senior financial manager, Elmien Wilken. The following was one of the emails exchanged between the Respondent's senior financial manager and the Plaintiff:

'[Plaintiff:] Please find attached the workings for the VAT return of 2021.

The VAT amounts to a refund of R401 047.69.

Can you please confirm if you are in agreement and if we can continue with the VAT submissions?

[Respondent:] Thank you very much for your email.

Please go ahead with the submission to SARS.

Thank you in advance.'

[6] The Respondent disputed the validity of the agreement and subsequently filed a counter-claim.

VAT RECOVERY SERVICES AGREEMENT

[7] The Respondent alleged that the appointment of the Plaintiff in terms of the agreement was an 'unsolicited bid' as contemplated by Regulation 36 of the 2005 Municipal Supply Chain Regulations[1] (Regulations). The Plaintiff's witnesses testified that, the appointment of the Plaintiff to assist with VAT recovery services was on the basis that the Respondent was of dire financial position and that the Respondent was not able to pay monthly PAYE.

[8] Section 36 of the Regulations provides that:

'(1) A supply chain management policy may allow the accounting officer -

(a) To dispense with the official procurement process established by the policy and procure any required goods or services through any convenient process, which may include direct negotiations, but only–

(i) In an emergency

(ii) . . .'

[9] The main contention of the Respondent's counter-claim application was that the Plaintiff's appointment was without a formal application. Mr Zietsman submitted on behalf of the Plaintiff that, the counter claim application brought by the Respondent was a self-review for an order to declare the appointment of the Plaintiff for the VAT recovery services for a period of 36 months unlawful, invalid and null and void, alternatively that the appointment be set aside and rescinded. Mr Zietsman submitted that such an application falls under the Uniform rule 53(1), which includes the provision of the Record.

[10] The review application was issued after the Plaintiff performed work for the Respondent and the Respondent received the benefit of R35 million from the work done by the Plaintiff.

[1] Regulations (published in GN 868; G 27636) as determined in the Local Governance: Municipal Finance Management Act 56 of 2003.

[11] The Plaintiff referred the court to the matter of *Jockey Club of South Africa v Forbes*,[2] where Kriegler AJA held that:

'The Rule thus confers the benefit that all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the Court have identical papers before them when the matter comes to Court.'[3]

[12] The Respondent submitted that the agreement was unlawful as it did not cater for the proposal as submitted, except on request of Elmien Wilken and raising the substantial fee of 35% on full amount of VAT credits in respect of those submissions in which it had raised invoices.

THE EVIDENCE

[13] Three witnesses testified on behalf of the Plaintiff. There was no testimony given on behalf of the Respondent. The main issue raised by the Respondent was that the fees claimed by the Plaintiff in respect of VAT refunds is not covered by the proposal. A brief discussion of the evidence led by the Plaintiff's witnesses is warranted.

[14] Mr Wagner and another witness, Mr Olivier, comprehensively testified on the scope and ambit of the work performed where the Plaintiff assisted the Respondent with profit recovery. The total benefits recovered by the Plaintiff on behalf of the Respondent amounted to R35 034 781.63. The total amount owed to the Plaintiff in terms of the agreement is R3 068 906,14.

[15] Mr Louw submitted on behalf of the Respondent that the Plaintiff was not supposed to perform VAT recovery service work for the Respondent in terms of the submitted proposal. However, both Mr Wagner and Mr Olivier were adamant that the work done by the Plaintiff in terms of the agreement was in terms of the proposal. They further testified that the Respondent received the permission to assist with the VAT recovery services from the Respondent's finance manager who was communicating with them via email. They testified that, the Respondent could not have received any VAT refunds from SARS unless it was compliant with VAT requirements and its PAYE account is up to date. Both Mr Olivier and Mr Struwig testified that, they assisted the Respondent to be VAT compliant and that was why the VAT returns were submitted and

[2] *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A).
[3] Ibid at 660F-G.

the Respondent's PAYE account was up to date.

[16] During cross-examination, Mr Louw put it to both Mr Olivier and Mr Struwig that some of the returns were submitted late. This they conceded but explained that the reason was because whenever the invoices were to be submitted, they had to wait for permission from the Respondent, which was normally received after the due date. According to Mr Struwig, the Respondent became compliant during October 2019.

[17] In turn, Mr Olivier testified that, the Respondent was entitled to a fee of 35% in respect the VAT credits for each month in respect of which an invoice was submitted, and that it was entitled to such percentage on the total credit of the VAT 201's which were submitted on behalf of the Respondent by the Plaintiff.

APPLICATION OF FACTS TO THE LAW

[18] The Respondent failed to file any record relating to the review application he brought against the agreement. It is my view that the review proceedings falls under the provisions of the Uniform rule 53. Rule 53(1) provides that all proceedings to bring under review shall be in accordance with Rule 53(1).

[19] In *Democratic Alliance and others v Acting National Director of Public Prosecutions*[4] the SCA held that:

'It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available, whether in terms of Rule 53 or by courts exercising their inherent power to regulate their own process. Without the record a court cannot perform its constitutionality entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated would be infringed.' (Footnotes omitted.)

[20] Mr Louw, on behalf of the Respondent, submitted that this court may entertain the application to set aside the procurement process without a formal condonation application. I am not in agreement with this submission. I am of a view that the condonation and the review application should be brought in terms of the Uniform Rules of Court.

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[4] *Democratic Alliance and others v Acting National Director of Public Prosecutions* and Others [2012] ZASCA 15; 2012 (3) SA 486 (SCA).

[21] The Respondent benefitted R35 million from the services rendered by the Plaintiff in terms of the agreement. The Respondent received the benefits as a result thereof and its PAYE was made up to date due to the work done by the Plaintiff. The Plaintiff was therefore entitled to 35% of the benefit received by the Respondent with its assistance.

[30] The Plaintiff referred to the following cases with which I am in agreement. In *Oudekraal Estates v City of Cape Town*[5] (*Oudekraal*), the Court discussed the so-called Oudekraal principle in which it was stated that, the administrative decisions are binding unless set aside. The Court held:

'For those reasons it was clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In my view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. . .'[6]

[22] In *MEC for Health, Eastern Cape and Another v Kirkland Investments*[7] the Court held:

'The fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality. As Khampepe J stated in Welkom, "[t]he rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process." For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality. The clarity and certainty of governmental conduct, on which we all rely in organizing our lives, would be imperiled if irregular or invalid administrative acts could be ignored because officials consider them invalid.'

[23] It is my view that the evidence of Mr Olivier and Mr Struwig that the Plaintiff assisted

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[5] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others [2004] ZASCA 48; [2004] 3 All SA 1 (SCA).

[6] Ibid para 26

[7] *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC).

the Respondent with the VAT returns, queried SARS in respect of the submitted returns and pursued VAT audits following the submitted returns and debt equalization, was truthful. They did all the work to make sure that the Respondent becomes VAT complaint. Both Mr Olivier and Mr Struwig testified that the Respondent was not going to receive any VAT refunds from SARS unless it was fully compliant with VAT requirements and that its PAYE account was up to date. It is therefore my view that the work performed by the Plaintiff in assisting the Respondent with the VAT recovery services falls under paras 3 and 5 of the proposal. The Plaintiff also performed the work on behalf of the Respondent based on the emails emanating from the Respondent's senior finance manager where the Plaintiff was asked to assist the Respondent with the VAT returns, queries in respect of the returns and VAT audits following the returns and the debt equalization.

[24] It is therefore my view that the work done by the Plaintiff on behalf of the Respondent cannot 'simply [be] disregarded as if it never existed' and its 'legal consequences cannot simply be overlooked.' In this matter, the legal consequence achieved by the Respondent due to the assistance of the Plaintiff was that the Respondent became SARS compliant and its PAYE account became up to date.

CONCLUSION

[25] In the circumstances the Plaintiff successfully proved its claim in respect of the VAT recovery services and in respect of the Fixed Asset Register which was conceded by the Respondent.

COSTS

[26] The costs of both the application and the counter application stood over for the determination at hearing of the trial. It is trite that costs follow the result and it is therefore my view that the costs of the application should follow the results of the trial and are therefore awarded in favour of the Plaintiff.

ORDER

[27] Order is made in terms of the draft order marked "X"

[redacted]

MAHLANGU AJ

Plaintiff's representative:	PJJ Zietsman SC
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