IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

17 February 2025

DATE SIGNATURE

CASE NO: 47793/2015

In the matter between:-

ANTON KEYTER Plaintiff

VS

THE MINISTER OF ARTS & CULTURE OF

THE NATIONAL GOVERNMENT First Defendant

THE DIRECTOR-GENERAL, THE DEPARTMENT OF

ARTS AND CULTURE OF THE NATIONAL GOVERNMENT Second Defendant

Coram: Kooverjie J

Heard on: 3-5 February 2025

Delivered: 17 February 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 14 February 2025.

SUMMARY:

1. He who alleges must prove. See ***Pillay v Krishna*** and van ***Wyk v Lewis***.
2. SCM3, the framework applicable to the appointment of consultants by the Department does make provision in certain circumstances, not to procure consultants in terms of the competitive bidding process.

ORDER

It is ordered:-

1. The defendants are ordered to pay the plaintiff the amount of R6 462 968.00 (Six Million Four Hundred and Sixty Two Thousand Nine Hundred and Sixty Eight Rand).

2. The defendants are ordered to pay interest to the Plaintiff on the amount of R6 462 968.00 (Six Million Four Hundred and Sixty Two Thousand Nine Hundred and Sixty Eight Rand) at 9% per annum from 18 March 2015 to date of payment.

3. The defendants are ordered to pay the plaintiff's costs on High Court Scale B.

JUDGMENT

KOOVERJIE J

[1] The plaintiff, Mr Keyter instituted action proceedings against the defendants in this matter. The plaintiff claims damages in respect of the Service Level Agreement entered into between him and the Director-General, at the time Mr Xaba. The defendants will also be referred to as "the Department".

[2] The main thrust of the defendants' case is that the Service Level Agreement ("the agreement") entered into between the parties was unlawful as it was not in accordance with the SCM3 of 2003 ("the Practice Note 3").[1]

ISSUE FOR DETERMINATION

[1] Supply Chain Management Office Practice Note number SCM3 of 2003, practice note 3 applicable to the appointment of consultants.

[3] The main issue for determination is whether the impugned agreement was lawfully entered into and, if so, the extent of the loss of earnings the plaintiff had suffered.

THE PLEADINGS

[4] The plaintiff, in his particulars of claim, premised his case on the basis that a valid agreement was entered into with the Department. Therein the specific terms of the service level agreement were set out, more particularly as follows:

4.1 the agreement was entered into on 21 November 2012 with Mr Xaba, who represented the defendants;

4.2 the agreement came into effect immediately and would terminate upon the completion of all the deliverables together with the submission of a comprehensive report filed by the plaintiff;

4.3 the duration of the agreement was for a period of five years with the termination date being 20 December 2017;

4.4 the plaintiff was assigned to a project where he was to render specialised IT services and provide strategic support services to the Department. He was appointed as an expert consultant where specific work was assigned to him in terms of the project. Same is set out in annexure 'A' to the agreement;

4.5 the remuneration was in accordance with the Department's guidelines that prescribed the hourly rates for consultants. At the time the hourly rate was

R855.00 per hour. The hourly rate was to be revised in line with annual adjustments by 1 April of every year;

4.6 on 5 December 2014, the plaintiff was informed by the defendants that the agreement had been terminated.

[5] The plaintiff pleaded that the repudiation was unlawful. The agreement was subsequently cancelled. Although the plaintiff elected to accept the repudiation, he pursued his claim for damages in the form of loss of income that he should have received during the duration of the agreement.

[6] The defendants, in their plea, alleged that the plaintiff's appointment as a consultant was unlawful and irregular as the competitive bidding process as stipulated in Practice Note 3 was not followed. They raise this defence in their counterclaim where they pleaded that the agreement was terminated as it was unlawful and should be set aside.

[7] The evidence led at the trial dealt squarely with the issue: whether the impugned agreement was unlawful or not.

THE PLAINTIFF'S EVIDENCE

[8] Mr Keyter testified that he had rendered specialised services to the Department, since 2008. During that time, he contracted with the Department under his business name, namely Kovac Technologies.

[9] He explained his qualifications and the extent of his expertise in the IT field and particularly mentioned that he focused on software Development.

[10] He had worked with the Department since 2008 and did so on a continuous basis. The Department renewed the contracts with him during this time. At the time he worked closely with Mr Greef and Mr Ngcobo. He was also well acquinted with Mr Phala, who was already the Chief Information Officer at the time.

[11] Prior to the conclusion of the impugned agreement, he had various discussions with Mr Greef and Mr Ngcobo who requested him to continue assisting the Department going forward. He was, at that time, requested to draw up the terms of reference which were then incorporated into a workplan. The workplan defined the scope and capacity of the tasks that he was required to execute going forward.

[12] After internal discussions amongst the officials of the Department were held, he was approached and advised that a service level agreement would be entered into with him, provided that, *inter alia*, it conformed to the prescribed tariffs.

[13] It was on this basis that the agreement was drawn up and eventually signed by him. In terms of the agreement he was to assist the Department going forward with open and free source migration as well as the maintenance of the infrastructure during the Department's relocation to the new premises, located at Kingsley Centre in Pretoria.

[14] Mr Phala was aware of the specialized services that he was rendering to the Department at the time. After the signing of the agreement he was advised by the Director-General and Mr Ngcobo that he was to focus on the tasks which were necessary for the relocation of the Department.

[15] He then explained how he had prepared his monthly timesheets together with a report setting out the progress he made in the project. Same were submitted to the Department, as well as to Mr Phala. The timesheets were based on the hours he would have spent working on the project each month. His calculations excluded his leave, weekends, and public holidays.

[16] His evidence under cross-examination confirmed his testimony. He again explained how the calculations for the prospective loss of income was arrived at. When it was put to him that his contract was not in accordance with the Practice Note 3, as no competitive bidding process had taken place, his response was that he was not aware of the internal processes that the Department followed when entering into contracts with consultants. He also confirmed that he was not requested to submit his proposal by virtue of the competitive bidding process.

[17] Under re-examination he confirmed that the rates set out in his timesheets were in accordance with the Department's guidelines and reflected only the hours that he would have worked in a month. He also confirmed that he was not part of the final decisions amongst the Department's officials where the decision was made to enter into a service level agreement with him.

THE DEFENDANT'S CASE

[18] Mr Phala's testimony was brief. He, in essence, testified that the consultant had not participated in a competitive bidding process. Premised on this observation, he concluded that the agreement was unlawful. He does so without any evidence demonstrating why the agreement was unlawful. In fact, he testified that the agreement was concluded without his involvement.

[19] He also confirmed under cross-examination that "red file system" was in operation in the Department, which contained certain contracts. He testified that he had only seen the impugned agreement after the parties had signed. He was not aware that it was part of "the red file system".

[20] During cross-examination Mr Phala confirmed that the Director-General is the accounting officer of the Department and is empowered to enter into contracts with consultants. He also clarified that the plaintiff continued the tasks that he was assigned to do previously. He, however, added that there were certain new projects that Mr Keyter was required to undertake in terms of the impugned agreement. He recalled that prior to 2008 Mr Keyter was paid in accordance with the prescribed tariffs set out in the guidelines.

ANALYSIS

[21] After having considered the pleadings, the testimonies of both witnesses as well as the arguments presented by counsel for both parties, it became evident that

the core dispute for determination is whether the impugned agreement was lawful or not.

[22] From the outset, it should be noted that the defendants' case in terms of their pleadings was initially premised on both the breach of contract as well as the unlawfulness of the agreement. However during the trial, evidence was only led on the lawfulness issue.

[23] I have further noted the correspondence to Mr Keyter, namely the notice of breach of the Service Level Agreement where Mr Keyter was informed, *inter alia*, that he neglected to do any work in respect of certain key divisions and the identified projects. Thereafter, on 5 December 2014, a termination letter was communicated to Mr Keyter advising him that the agreement was terminated. It is evident that initially the Department's reason for the termination was not at all premised on the unlawfulness issue.

[24] However, during the trial, evidence was only led on whether the agreement was lawful or not. The defendants' case, in law, is premised exclusively on Practice Note 3.

[25] I find that the defendants, on a balance of probabilities, have failed to established any facts that would enable this court to come to the conclusion that the agreement was unlawful, more specifically, if one considers Practice Note 3.

[26] Practice Note 3 expressly makes provision for the general procedure when procuring the services of the consultant, namely that the competitive bidding process should be followed. However provision is also made for the accounting officer (the Director-general, Mr Xaba in this case) to enter into contracts with consultants without having followed the competitive bidding process.

[27] In context, Practice Note 3 is derived from the Constitution and the Public Finance Management Act ("the PFMA"). Both section 217(1) of the Constitution and section 38(1)(a)(iii) of the PFMA provides that when an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

[28] Section 76(4)(c) of the PFMA provides that National Treasury may make regulations or issue instructions to all institutions to which the PFMA applies, concerning the determination of a framework for an appropriate procurement and provisioning system. By virtue of section 76(4)(c) of the PFMA, a framework for supply chain management was promulgated in Government Gazette Nr. 25767 on 5 December 2003 as "Treasury Regulations". Practice Note 3 sets out the specific framework applicable to the appointment of consultants at the time.

[29] The preamble of the Practice Note clearly stipulates:

"Consultants should be appointed by means of competitive bidding processes whenever possible. All bids and contracts should be subject to the general conditions of contract ("GCC") issued by the National Treasury."[2]

[30] The general approach which makes room for competitive bidding process is set out in clause 4 of the Practice Note. Of relevance is clause 4.2 which stipulates that other methods of selection are available to the accounting officer when it is appropriate. Clause 4.2 stipulates:

"In the majority of cases, these considerations can best be addressed through competition amongst firms in which selection is based both on the quality of the services to be rendered and on the cost of the services to be provided (Quality – and Cost – Based Selection [QCBS] as described in paragraph 9.3. However there are cases where QCBS is not the most appropriate method of selection. The complex and highly specialised assignments or those that invite innovations selection based on the quality of the proposal alone, quality based selection [QBS] would be more appropriate. Other methods of selection and the circumstances in which they are appropriate or outlined in paragraph 10."

[31] Paragraph 10 stipulates that Quality Based Selection ("QBS") is appropriate in respect of a complex highly specialised assignment where it is difficult to define precise terms of reference and the required input from the consultants is required in the proposals. Under this system there are technical proposals and financial proposals which are considered by the accounting authority and consultants are required to negotiate a financial proposal.

[2] My underlining

[32] Under the QBS selection, single source selection is used in exceptional circumstances provided that consideration is given to the overall interest of the client and the project. More importantly, with regard to single source selection, the accounting authority is required to record the basis for the selection, prior to concluding the agreement.

[33] Clause 10.5.6 prescribes the fee rates for consultants. It stipulates:

"Provision in exceptional circumstances to appoint the consultants provided that the guidelines and hourly fee rate for consultants issued by the Department of Public Service and Administration is used as a benchmark to establish the appropriate tariffs to determine the reasonableness of the tariffs."

[34] Having regard specifically to clause 8.2 of the impugned agreement, it is recorded that the Director-General has full authority to enter into an agreement and will secure the necessary authorizations as required for the agreement and that he/she would comply with all the laws and governance applicable to the South African government departments. This entails that Mr Xaba had the authority to enter into the agreement, provided that he complied with the relevant prescripts.

[35] The defendants' persistence, in argument, that the consultant's services should have been procured through the general process, namely that the competitive bidding process, has no merit. The defendants further contended that no exceptional circumstances existed for the accounting officer at the time to not have followed the competitive bidding process. However, they raise these

defences without presenting any evidence reflecting that Mr Xaba acted unlawfully.

[36] Every state organ is obliged to maintain their recordkeeping, particularly when agreements of this nature are concluded and when there are deviations from the general process. Likewise the Director-General, Mr Xaba, was duty-bound to maintain such record keeping and take into consideration all the factors before he entered into the agreement with the consultant. The defendants failed to present any such evidence. The question that begs an answer is- how is this court required to draw a conclusion in their favour without evidence to support their case.

[37] The defendants have failed to prove that the agreement was unlawful. The onus was on the defendants to prove the unlawfulness. The duty is cast on the defendants to satisfy the court that they are entitled to their defence. The burden of proof never shifts. This goes hand in hand with the latin maxim *"actio incumbit probatio"*. Plainly put, he who alleges, must prove.[3]

[38] In conclusion, I find that the plaintiff has proved his claim for damages. He pleaded that a valid agreement was in place.

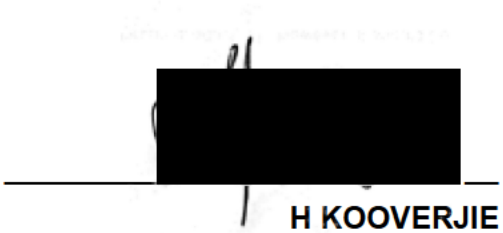
QUANTUM

[3] Van Wyk v Lewis 1924 AD 438 at 444
Pillay v Krishna 1946 AD 946 at 952 to 953

[39] On the issue of quantum, I was informed that the parties had engaged with each other on the quantum amount. The calculations for the prospective loss of income was in accordance with the Department's guidelines and calculated by having regard to the exclusion of the weekends, public holidays and the leave that would have been taken.

[40] It was agreed that if the plaintiff succeeds, then the amount of R6,462,968.00 at 9% per annum from 18 March 2015 to date of payment, should be awarded. There is further no reason why the costs should not follow the result.

[41] In the premises, the applicant succeeds in this action proceedings.



H KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the plaintiff:	*Adv. Leon van Gass*
Instructed by:	*Serfontein, Viljoen & Swart Attorneys*
Counsel for the Respondent:	*Adv C Georgiades (SC)* *Adv R Mudau*
Instructed by:	*State Attorney, Pretoria*
Date heard:	*3-5 February 2025*
Date of Judgment:	*17 February 2025*