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

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No: **1215/2019**

In the matter between:

NTIYISO CONSULTING CC
(Registration Number: 2005/015119/23) Plaintiff

and

MALUTI-A-PHOFUNG LOCAL MUNICIPALITY Defendant

JUDGMENT BY: C REINDERS, ADJP

HEARD ON: 11 MARCH 2022

DELIVERED ON: 22 AUGUST 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 13:00 on 22 August 2022.

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[1] On 15 March 2019 the plaintiff, Ntyiso Consulting CC, instituted action against the defendant, the Maluti-a-Phofung Local Municipality (the "MAP"), for payment in the amounts of R 1 924 119.36 and R 1 357 930.57 respectively. Plaintiff's action is premised on its appointment by the defendant to render certain services to it, amongst others billing support and debt collection. Plaintiff avers that a total amount of R 3 279 912.41 is owed by the defendant for such services rendered, subsequent to the defendant having appointed it as service provider in terms of a written letter of appointment.

[2] The plaintiff in its particulars of claim plead that on 12 July 2017 it submitted a written "Revenue Management and Enhancement Program Proposal" ("the proposal") to the defendant for consideration. The project costing is reflected in the proposal. Plaintiff was furnished with a written letter of appointment dated 30 August 2017 and signed by Mr MS Nyembe, the acting municipal manager at the time. Hereafter a Service Level Agreement was concluded and signed by Mr Nyembe on 4 September 2017 ("the SLA"). Two invoices for work done was rendered for the amounts as indicated hereinbefore. Despite demanding payment, defendant has failed to do so.

[3] The defendant opposed the relief claimed, raised a special plea headed "Illegality of appointment/contract" and filed a counter-claim for declaratory relief.

[4] At the heart of the disputes between the parties lies the procurement of services by an organ of state, *in casu* a municipality. I find it apposite to deal with the applicable legislative framework at this juncture already.

4.1 In ***Bohlokong Computer Solutions (Pty) Ltd v Maluti-a-Phofung Local Municipality [2021] JOL 51773 (FB)*** a full bench of this division in dealing with procurements as above, formulated a summary of the legislative imperatives:

> "[13] … The laws governing procurement by organs of state are governed by Section 217 (1) of the Constitution of 1996 (the constitution). It provides that 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 and cost effective. Ordinarily, the foundational principles set out in Section 217(1) require of the procuring authority to hold competitive bidding processes.
>
> [14] The Constitution provides for the enactment of the national legislation that stipulates a framework within which preferential procurement must be implemented. The Preferential Procurement Policy

Framework Act (PPPFA) was enacted in compliance with the aforementioned constitutional requirement. The PPPFA prescribes that an organ of state must determine its preferential procurement policy and implement it within the confines of the Act. The legislation does allow deviation from the normal processes where valid reason have been clearly set out.

[15] The Procurement in Municipalities is governed by the Local Government: Municipal Finance Management Act 5 of 2003 (The Act). The Act underpins the principles prescribed by section 217 of the Constitution. Its regulations provide for deviation from the normal processes of procurement where necessary. Regulation 32 of Municipal Supply Chain Management Regulations (Regulation 32) provides as follows:

"A supply chain management policy may allow the accounting officer to procure goods or services for the municipality or municipal entity under a contract secured by another organ of state, but only if-

a) the contract has been secured by that other organ of state by means of a competitive bidding process applicable to that organ of state;
b) the municipality or entity has no reason to believe that such contract was not validly procured;
c) there are demonstrable discounts or benefits for the municipality or entity to do so; and
d) that other organ of state and the service provider have consented to such procurement in writing.

Sub regulation (1) (c) and (d) do not apply if-

a) a municipal entity procures goods or services through a contract secured by its parent municipality; or
b) a municipality procures goods or services through a contract secured by a municipal entity of which it is the parent municipality"

[16] Regulation 32 allows a municipality or a municipal entity to dispense with the competitive bidding process **provided that such municipality or municipal entity complies with the requirements** stated above. The fundamental requirements set out in section 217 of the Constitution are of cardinal importance when the contracting authority elects to procure goods in terms of regulation 32. This

process serves as a cost saving measure and a tool to discourage a duplication of processes for procurement of the same goods or services by organs of state. It, therefore, makes business sense that the services procured by the requesting municipality and the price thereof must be exactly the same as those procured by the originating municipality." (own emphasis added)

[17] In **Blue Nightingale Trading 397 (Pty) v Amathole District Municipality 2017 (1) SA 172 (ECG) at par.34** the court interpreted the requirements of regulation 32 as follows:

'The constitutionality of the exemption will always depend on the facts of the particular case. For the exemption to operate under section 110(2) of LGMFMA, I cannot conceive compliance with the constitutional imperatives unless the goods or services procured by the second organ of state are the same as that required by the first organ of state, and the contract price is the same. If the procurement by the second organ of state had withstood the scrutiny of due process, there is no need to duplicate the same process provided the goods or services and the contract price remain the same. If not, the procurement by the first organ of state was not subjected to the due procurement processes and supply management policy, and the constitutional imperatives are not met.'

[18] It follows that the terms of the contract between the appellant and the respondent had to mirror those between the appellant and Dihlabeng. …

[19] Of importance is that it **must be clear that the municipality will earn a discount or some benefit out of electing the Regulation 32 process**.". (own emphasis)

[20-22] …

[23] Government procurement was entrenched in the constitution to ensure transparency, fairness and competitiveness. With no contract existing between the appellant and the respondent and notice to the appellant that its services were terminated with immediate effect, the services it rendered post 31 August 2018 were in direct violation of

procurement prescripts inclusive of the Regulation 32 which founded the relationship between the parties. In **Gobela Consulting v Makhado Municipality (Case no 910 /19 [2020] ZASCA 180 22 December 2020)** Molemela JA remarked as follows when dealing with unsolicited services from service providers:

'[15] Section 113 of the Municipal Finance Management Act provides that a municipal entity is not obliged to consider an unsolicited bid received outside its normal bidding process; it may do so only in accordance with a prescribed framework. Regulation 2(3) of Municipal Supply Chain Management Policy Regulations provides that no municipality or municipal entity may act otherwise than in accordance with its supply chain management policy when procuring goods or services. Regulation 12 of the same Regulations stipulates that subject to Regulation 11 (2), a competitive bidding process must be followed for procurements above the transaction value of R 200 000 and in respect of long-term contracts (ie contracts with a duration period exceeding one year). The municipality, as an organ of state, was duty-bound to discharge all its duties and functions in accordance with those procurement prescripts.'"

4.2 In addition to the above, Mr MC Louw appearing on behalf of the defendant, invited my attention to a provision in Circular No 96 issued in terms of the Local Government: Municipal Finance Management Act 5 of 2003:

"**Panel of consultants/list of approved service providers and framework agreements**

Municipalities and municipal entities must not participate on a panel secured by another organ of state as a panel of consultants or a list of service providers or a panel of approved service providers is not a contract. Municipalities or municipal entities may only participate on framework agreements arranged by organs of state, for example, State Information Technology Agency (SITA), the relevant treasury; that are empowered by legislation to arrange such on behalf of other organs of state."

[5] Mr Louw summarised the defendant's special plea as follow:

"3.1 Plaintiff could only have been validly appointed- and the Service Level Agreement validly concluded- in terms of a competitive bidding process contemplated by Section 217 of the Constitution of the Republic of South

Africa, 1996 ("*the Constitution*"), unless the provisions of Regulation 32 of the Municipal Supply Chain Management Regulations were applicable.

3.2 No competitive bidding process preceded the appointment of Plaintiff and/or conclusion of the Service Level Agreement,

3.3 The provisions of Regulation 32 of the Municipal Supply Chain Management Regulations were not complied with in that:

- the appointment and Service Level Agreement were not secured "*under a contract secured by another organ of State*";

- (without detracting from the aforesaid) if the contract was secured under a contract secured by another organ of State, the other organ of State did not secure the appointment of Plaintiff by it in terms of a competitive bidding process;

- the Defendant did not have any reason to believe that a contract secured by another organ of State was validly procured;

- there were no demonstrable discounts or benefits for Defendant in appointment of Plaintiff and concluding of the Service Level Agreement;

- the other organ of state and the Plaintiff did not consent to the procurement in writing under and in terms of a contract secured by another organ of State.

And consequently:

- the appointment of Plaintiff and the concluding of the subsequent Service Level Agreement violates the provisions of Section 217 of Constitution, Section 113 of the MFMA and Regulations 12 and 32 of the Municipal Supply Chain Management Regulations to the extent of the aforesaid non-compliance, and

- the appointment of Plaintiff and the conclusion of the Service Level Agreement are illegal, unenforceable and null and void."

[6] Mr Louw added that the defendant's plea to the merits entails that:

"

- the proposal amounts to an unsolicited bid,
- the signature service level agreement by its erstwhile municipal manager does not constitute a valid acceptance of the unsolicited bid,
- Plaintiff did not render the services as alleged,

- Plaintiff was not entitled to payment until such time as it had presented a progress report, and plaintiff did not present any progress reports, and
- There was consequently no obligation on it to make payment of the amounts claimed."

I was urged to conclude that, in view of the aforementioned, defendant is entitled to an order declaring the appointment and the service level agreement to be null and void.

[7] To prove its case plaintiff relied on the evidence of its only witness, Mr Andisa Ramavhunga, the group chief advisor of the plaintiff. I wish to state from the outset that Mr Ramavhunga made a favourable impression on me as an honest witness. I do not have any reason not to believe him and accept his evidence. The upshot of his evidence is the following:

7.1 The plaintiff provides several services, inter alia financial support, billing support and debt recovery, not only to the private sector but also to governmental organisations. He was personally involved the proposal (and subsequent letter of appointment and SLA) which originated from a chance meeting between himself and a representative of the defendant. He was given the opportunity of presenting the proposal to the Council of the Municipality by way of a presentation. The submission (annexed to the particulars of claim as "N1") was unsolicited in the sense that there was no public tender process. The project costing is set out in the proposal and divided into, amongst others, Billing Support and Debt Collection.

7.2 Subsequent to the proposal plaintiff received the letter of appointment from Mr Nyembe, dated 30 August 2017 (annexure "N3") in terms whereof plaintiff was appointed as "*Financial and Project Management Advisors to Assist with Funding Opportunities, Organisation and Management of Catalytic Projects*" for defendant. The duration of the contract was for 36 months and the scope of duties were set out fully.

7.3 Thereafter, the parties concluded the SLA which was signed by Mr Nyembe on 4 September 2017 (annexed to the particulars of claim as "N2"). The SLA document refers to: ***Regulation 32****:* "*Financial and Project Management Advisors to Assist with Funding Opportunities, Organisation and Management of Catalytic Projects*". (own emphasis added)

7.4 Pursuant to the SLA the plaintiff commenced executing its duties in terms thereof in September 2017. Three teams of personnel were tasked: one team was aimed at debt collection (based in Johannesburg), whilst two teams were stationed at the premises of the defendant to attend to the issues of electricity and water metering. The debt collection team commenced with calls to debtors as early as 4 September 2017, as is evident from documentation plaintiff relied upon.

7.5 The basis for reliance on Regulation 32 for the appointment and conclusion of the SLA stems from a prior engagement by Plaintiff with another municipality, namely the Dr Kenneth Kaunda District Municipality ("the KKDM"). Prior to the conclusion of the SLA and on 15 June 2017, the KKDM issued a letter to defendant relating to "*KKDM 13/14*". KKDM confirmed that it consented to defendant participating in the contract entered into between it and plaintiff "… *in terms of MFMA SCM regulation 32*", which contract (with the KKDM) was for appointment of plaintiff as "*Financial and project management advisors to assist with funding opportunities and organisation management of catalytic projects for KKDM for a duration of 3 years, Tender Notice KKDM 13/14"*.

7.6 According to Mr Ramavhunga plaintiff had previously been appointed by KKDM as a service provider "for the same services". Plaintiff had submitted a tender in response to the tender notice published by the KKDM which called for bids for "the appointment of financial and project management advisors to assist with funding opportunities and organisation management of catalytic projects for KKDM for a duration of 3 years, Tender Notice KKDM 13/14". The tender document was admitted into evidence.

7.7 The "*scope of work*" (deliverables) in terms of tender no. KKDM 13/14 is described as "*to appoint an independent, professional and suitably qualified service provider/s to support the Dr Kenneth Kaunda District Municipality in the appointment of financial and project management advisors to assist with funding opportunities and organisation and management of catalytic projects for Dr Kenneth Kaunda District Municipality for a duration of three years (finance department)*".

7.8 On 2 February 2015 the KKDM issued a letter to plaintiff confirming that its tender offer had been accepted as part of the panel on a basis as per specification of the tender ("the panel appointment"). On 9 February 2015 plaintiff accepted the appointment to the panel of consultants of the KKDM, ("the acceptance*"*). The acceptance of the tender meant that plaintiff could be allocated work/contracts in the future, as part of the panel of service providers. On 30 August 2017 KKDM indeed appointed Plaintiff, in terms of a "written memorandum of agreement", to do "a comprehensive feasibility study for the regional hazardous waste project and the applicable PPP procurement documentation in respect of hazardous waste".

7.9 During cross-examination Mr Ramavhunga conceded that the appointment by the KKDM on 2 February 2015 was as a consequence of plaintiff having been enrolled on the panel of consultants. Plaintiff's appointment by the defendant was only made after the letter issued by the KKDM 15 June 2017 confirming that it consented to defendant participating in the contract entered into between it and plaintiff "… *in terms of MFMA SCM regulation 32*." The scope of work in the SLA (with defendant) was "*Financial and Project Management Advisors to Assist with Funding Opportunities, Organisation and Management of Catalytic Projects*" (whilst there was nothing about hazardous waste in the SLA), and in the KKDM appointment letter, the scope of work relates to hazardous waste. Moreover, whilst the panel appointment (of plaintiff) was one of several service providers to act as consultants to the KKDM, the

appointment by defendant in terms of the SLA, was the only appointment of a service provider to the work.

7.10 Mr Ramavhunga explained that the scope of work covered by the KKDM Project was substantially wider than what was covered by the defendant's project. In this regard he referred to the scope of work as per the KKDM appointment which entailed a wide scope of work falling under different categories("Panels") as is "reflected in Tender KKDM13/14 ("Part C3 Scope of Work")". In terms of the SLA concluded with the defendant the scope of work entailed "Billing Support, Bill Presentment and Payment; Electricity Vending; New accounts into billing systems; Retrospective billing; Property data (valuation roll) and Electricity Losses."

7.11 In respect of the pricing structure Mr Ramavhunga could not dispute that the fees in terms of the pricing schedule contained in the SLA (concluded with defendant) do not appear in the panel appointment or the KKDM appointment. He could also not deny that neither the panel appointment nor the KKDM appointment have a pricing schedule. He however explained that such a pricing schedule would only have been applicable once the plaintiff was appointed in terms of its initial panel selection.

[8] The defendant did not call any witnesses. Accordingly, as submitted by Mr B Gradidge representing plaintiff, the evidence of Mr Ramavhunga stands uncontested. The defendant's denial that plaintiff rendered services to it, is in my view patently wrong. From the testimony of Mr Ramavhunga and the supporting documents, it would seem that the plaintiff indeed rendered services to the defendant, at the very least those relating to debt recovery to the defendant, who in the words of Mr Ramavhunga "at the time was bleeding dead".

[9] Mr Gradidge urged me to give specific consideration to the fact that defendant was well aware of the KKDM Project given the content of the SLA and "any attempt now to escape the consequences of the contract on the basis of a

technicality should not be countenanced." The fundamental requirements set out in section 217 of the Constitution are of cardinal importance when the contracting authority elects to procure goods in terms of Regulation 32. I do not view opposition by the defendant in respect of the mandated legislative prescriptions as "a technicality".

[10] Mr Louw submitted, amongst others, that the appointment of plaintiff was as a service provider placed on the panel of consultants to act as advisors to the KKDM, nothing more and nothing less. I am in agreement with him. It is in my view evident firstly from the tender notice calling for bids for "the appointment of financial and project management advisors to assist with funding opportunities and organisation management of catalytic projects for KKDM for a duration of 3 years, Tender Notice KKDM 13/14". Hereafter the letter of 2 February 2015 issued by the KKDM to plaintiff, confirmed that its tender offer had been accepted **"as part of the panel on a basis on as and when basis as per specification of the tender"**. Plaintiff's acceptance on 9 February 2015 was in respect of the appointment to the panel of consultants of the KKDM. Accordingly, the defendant could not have secured the services of the plaintiff as mandated by the MFMA circular no 96 referred to above. Even should I be wrong in this finding, the plaintiff is still faced with the legislative imperatives of Regulation 32. I have difficulty in finding that the requirement of "demonstrable discounts or benefit for defendant in the appointment of plaintiff" (and the subsequent conclusion of the service level agreement) was met.

[11] Mr Gradidge submitted that "such benefits are clear:

Given the contents of the documents referred to in evidence, including the defendant's own documents which shows that an amount of approximately R 10 000 000.00 had been collected by the Plaintiff by November 2017;

In addition hereto, it is quite clear that when comparing August 2017 to September 2017, which was the first month in which the Plaintiff started collecting money, there was an increase in revenue by approximately R 13 000 000.00".

[12] This argument does not find favour with me. In my view compliance with this requirement of Regulation 32 cannot be determined *ex post facto*. At the time

when the SLA was concluded, this requirement must have been met. There must have been scrutiny of the terms of the contract to determine whether such benefits were evident. Since neither the panel appointment nor the KKDM appointment contains a pricing schedule, it follows that there could not have been a determination of whether the prices charged by the plaintiff indeed amounted to "demonstrable discounts or benefits". No comparison was done of the pricing structure either in general in relation to the type of procurement, or in the SLA concluded between the plaintiff and KKDM. In my view this was of the utmost importance as no other service providers could compete for the awarding of a service delivery contract and demonstrate that it could render the services at a lower price than the plaintiff.

[13] Mr Gradidge criticized the reliance placed by Mr Louw on the *Blue Nightingale* principle that the contracts should mirror each other in relation to the scope of work and the pricing schedule, stating that *in casu*, the scope of work was indeed wider **and amounted to a lesser amount to be paid by the defendant for the services rendered as it would have been in appointing another service provider** (own emphasis). However, even in the event that plaintiff succeeded in proving that: prior to the conclusion of the SLA the contract had been secured by KKDM by means of a competitive bidding process, MAP had no reason to believe that such contract was not validly procured and the KKDM had consented to the said procurement in writing, it was still incumbent on plaintiff to prove that at the time and prior to the conclusion of the SLA, there were demonstrable discounts or benefits for MAP in the appointment of plaintiff and concluding the Service Level Agreement. In my view plaintiff could not succeed in proving that there was compliance with Regulation 32 for the reasons as set out above. I might mention that Mr Gradidge urged me to find that plaintiff had demonstrated at least "substantial compliance". There is no room for an interpretation of Regulation 32 that "substantial" compliance will suffice. The wording is clear. The legislature did not intend an option for compliance with Regulation 32 by inserting the word "or" between a), b) and c). In fact, it inserted the word "and" after the requirement in c), leaving no room for an interpretation of compliance in any alternative.

[14] In light of the aforementioned in my considered view the appointment of plaintiff by defendant, and the subsequent SLA concluded, did not muster the mandatory legislative prescripts for procurements in terms of Regulation 32. It therefore violates the provisions of Section 217 of Constitution, Section 113 of the Local Government Municipal Finance Management Act 5 of 2003 and Regulations 12 and 32 of the Municipal Supply Chain Management Regulations to the extent of the aforesaid non-compliance. The appointment of plaintiff and subsequent conclusion of the SLA is accordingly unlawful and invalid and null and void *ab initio*.

[15] It follows therefore that the plaintiffs action is dismissed and the counter-claim of defendant is upheld. There is no reason why costs should not follow suit.

[16] Consequently I make the following order:

1. The plaintiff's claim is dismissed.

2. It is declared that the appointment of plaintiff by defendant on or about 30 August 2017 in accordance with the letter of appointment, annexure "N3" to the particulars of claim, is invalid, unenforceable and null and void.

3. It is declared that the Service Level Agreement entered into between plaintiff and defendant on or about 4 September 2017, annexure "N2" to the particulars of claim, is invalid, unenforceable and null and void.

4. Plaintiff to pay the costs of the action.

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C. REINDERS, ADJP

On behalf of the plaintiff: Adv B Gradidge

Instructed by:	N. Moola Incorporated c/o Honey Attorneys BLOEMFONTEIN
On behalf of the respondent:	Adv MC Louw
Instructed by:	Bokwa Attorneys Welkom c/o Hill, McHardy & Herbst Inc BLOEMFONTEIN