



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 7434/2022

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

24/10/2023

DATE

M L TWALA

In the matter between:

ITHALA SOC LIMITED

Plaintiff

and

TECH MAHINDRA SOUTH AFRICA (PTY) LTD

First Defendant

LUVUWO KEYISE

Second Defendant

LEBOGANG SERITHI

Third Defendant

JUDGMENT

TWALA J:

- [1] The first defendant has taken an exception against the plaintiff's particulars of claim to the summons as amended on the basis that it lacks the averment

necessary to sustain the cause of action and or does not disclose the cause of action and or that it is bad in law. Primarily the cause of complaint is that it is incompetent for the plaintiff to set aside the service agreement on public law grounds without setting aside the administrative decision that resulted in the agreement.

- [2] The plaintiff is opposing the exception. I propose to refer to the parties herein as the plaintiff and defendant since the second and third defendants are not participating in these proceedings. However, I will refer to the defendants by their respective numbers where necessary.
- [3] It is common cause that on the 11th of April 2018 the plaintiff awarded RFP number 09/07, a tender for the supply, implementation, and maintenance of an integrated banking solution to the defendant who in turn accepted the award. Pursuant to the award, on the 11th of June 2018 the parties concluded RFP number 09/17, a written service agreement in terms whereof the defendant was contracted to supply, implement, and maintain the integrated banking solution for the plaintiff. The plaintiff was to pay fees to the defendant for equipment, software, deliverables, and services as set out in the statement of works or relevant schedules. It is undisputed that the plaintiff has, as a result of the service agreement, paid the defendant a sum of R34 973 512.55.
- [4] On the 23rd of February 2022 the plaintiff instituted action proceedings against the defendants whereby it sought the service agreement to be declared illegal and invalid and set aside for the tender process was fraught with irregularities and misrepresentations in that prior to the tender process that resulted in the first defendant being awarded the tender: (i) members of the first defendant held private meetings and exchanged private e-mails with members of the plaintiff in which the defendant was informed of the operation, requirements, and infrastructure in anticipation of the possible conclusion of the service agreement; (ii) the shared information was not made available to the other bidders – thus the defendant was placed at an advantage to the other bidders in contravention of section 217(1) of the Constitution of the Republic and the Public Finance Management Act; and (iii) the defendant did not achieve the

minimum score required to qualify for appointment thereby did not comply with the Supply Chain Management Systems of the plaintiff.

- [5] It is trite that an exception that a pleading does not disclose a cause of action strikes at the formulation of the cause of action and its legal validity. The complaint is not directed at a particular paragraph in the pleading but at the pleading as a whole, which must be demonstrated to be lacking the necessary averments to sustain a cause of action. Furthermore, it is trite that exceptions should be dealt with sensibly since they provide a useful mechanism to weed out cases without legal merit. However, an overly technical approach should be avoided because it destroys the usefulness of the exception procedure. (See *Telematrix (Pty) Limited t/a Matrix Vehicle Tracking v Advertising Standards Authority*¹).
- [6] Recently, the Supreme Court of Appeal in *Tembani and Others v President of the Republic of South Africa and Another*² referring to the authority quoted above stated the following:

"[14] Whilst exceptions provide a useful mechanism 'to weed out cases without legal merit', it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law, in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out; it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts."

- [7] I do not understand the plaintiff to be disputing that the service agreement came into existence as a result of the tender process that awarded the defendant the tender. Furthermore, the plaintiff does not raise any issue of irregularity or misrepresentation that induced it to conclude the service agreement. The plaintiff does not deny that it is a state-owned entity and as

¹SA 2006 (1) SA 461 (SCA).

²2023 (1) SA 432 (SCA) at 14.

such its decision to issue a public tender and appoint a service provider is an administrative decision.

[8] The fundamental question that arises, in this case, is whether it is competent for the plaintiff to resile from the service agreement concluded as a result of its decision to award the tender to the defendant if its processes, before the award of the tender, were flouted by its employees and members of the defendant. Put in another way, is it competent for the plaintiff to cancel or set aside the service agreement, which owes its existence in the award of a tender and claim back all the money it had paid to the defendant, without reviewing and setting aside the administrative decision that awarded the tender to the defendant.

[9] It is now settled that an unlawful administrative act exists in fact and may give rise to legal consequences for as long as it has not been set aside. Put differently, if the validity of consequent acts is dependent on no more than the factual existence of the initial act, then the consequent act will have legal effect for so long as the initial act is not set aside.

[10] In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*³ which laid down a principle that was quoted with approval by the Constitutional Court in *Magnificent Mile Trading 30 (Pty) Limited v Celliers NO and Others*⁴ the Court stated the following:

“[31] Thus the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.”

[11] In the *Magnificent Mile Trading* case quoted above, the Constitutional Court further considered the Oudekraal principle and quoted from the case of *MEC for Health, Eastern Cape and Another v Kirland Investment (Pty) Ltd t/a Lazer Institute*⁵ the Court stated the following:

³ 2004 (6) SA 222 (SCA) at 31.

⁴ 2020 (4) SA 375 (CC).

⁵2014 (3) SA 481 (CC).

“[51] It is for this reason that the rule of law does not countenance this. The Oudekraal rule averts the chaos by saying an unlawful administrative act exists in fact and may give rise to legal consequences for as long as it has not been set aside. The operative words are that it exists ‘in fact’. This does not seek to confer legal validity to the unlawful administrative act. Rather, it prevents self-help and guarantees orderly governance and administration. That this is about the rule of law is made plain by Kirland:

‘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.’”

[12] It is undisputed that the service agreement was concluded as a result of the decision to award the tender to the defendant. The unlawful conduct that is complained of by the plaintiff occurred before the award of the tender. The plaintiff does not complain, or challenge nor is it alleging any breach of the terms of the service agreement which entitles it to resile from it or set aside. The plaintiff cannot appropriate to itself the right to determine the lawfulness or unlawfulness of the administrative act because that is strictly in the domain of the Courts. I align myself with the above authorities in that, if the plaintiff were to be allowed to decide the legality of the contract, it would amount to self-help.

[13] There is no merit in the plaintiff's argument that it was not necessary for it to first review and set aside the decision to award the tender before seeking the declaratory of the service agreement to be illegal and invalid. The plaintiff places its reliance on *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC*⁶. *Qaukeni* is distinguishable from the present case in that the municipality was sought to be interdicted from terminating the contract until it was lawfully terminated. In defending itself and by way of a counter claim or

⁶2010 (1) SA 356 (SCA).

application, the municipality raised the issue of legality of the contract for it was concluded in breach of its prescribed procurement processes.

[14] In *Qaukeni*, the court stated the following:

“[26] While I accept that the award of a municipal service amounts to administrative action that may be reviewed by an interested third party under PAJA, it may not be necessary to proceed by review when a municipality seeks to avoid a contract it has concluded in respect of which no other party has an interest. But it is unnecessary to reach any final conclusion in that regard. If the second appellants’ procurement of municipal services through its contract with the respondent was unlawful, its invalid and this is a case in which the appellants were duty-bound not to submit to an unlawful contract but to oppose the respondent’s attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application. In doing so it raised the question of the legality of the contract fairly and squarely, just as it would have done in a formal review. In these circumstances, substance must triumph over form. And while my observations should not be construed as a finding that a review of the award of the contract to the respondent could not have been brought by an interested party, the appellants’ failure to bring formal review proceedings under PAJA is no reason to deny them relief.”

[15] In my judgment, it is therefore not open to the plaintiff, who instituted the proceedings in this case, to just ignore the decision that brought about the existence of the contract and challenge the legality thereof (the contract) on the basis of the conduct that influenced the award of the tender to the defendant. It is incumbent on the plaintiff who as an initiator of this action to bring proceedings to review and set aside its own decision on the principle of legality and then cancel the contract if the Court finds that the decision was unlawful. Even if the contract was to be cancelled, the tender award would remain in extant for the decision to award the tender would not have been set aside and legal consequences would flow therefrom.

[16] I am unable to disagree with the defendant that there is insufficient evidence before this Court to determine the legality and invalidity of the service agreement since no record of the tender process has been filed. The plaintiff

testified that the defendant was placed at an advantage from other bidders but has not afforded any of those bidders an opportunity to participate in these proceedings. It is therefore my considered view that the plaintiff should first review and set aside its decision to award the tender to the defendant, for as long as that decision remains in existent, it will have legal consequences. The ineluctable conclusion is therefore that the plaintiff's particulars of claim are excepiable and the defendant is entitled to the order that it seeks in terms of the notice of motion.

[17] In the result, the following order is made:

1. The exception is upheld;
2. The plaintiff is afforded 10 days from the date of this order to remove the cause of complaint;
3. The plaintiff is to pay the costs of this application including the costs of two counsel.

TWALA J
JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the order is deemed to be the 24th of October 2023.

Appearances

For the Plaintiff: Advocate A Stokes SC

Instructed by: Ramdass & Associates
Tel: 031 312 2411
shahir@ramdass.co.za

For the Defendants: Advocate A D Stein SC
Advocate MCJ Van Kerkhoven

Instructed by: Bowman Gilfillan Incorporated
Tel: 011 263 9000
richard.shein@bowmanslaw.com

Date of Hearing: 9th of October 2023

Date of Judgment: 24th of October 2023