IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 25558/2021

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

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In the matter between:

CHAPMAN FUND MANAGER (PTY) LTD Plaintiff

and

MINISTER OF PUBLIC WORKS First defendant

DIRECTOR-GENERAL OF PUBLIC WORKS Second defendant

JUDGMENT

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van der Westhuizen, J

[1] The plaintiff issued summons against the defendants for payment of monies due and owing under a contract between the parties. The said

contract followed upon the grant of a tender to the plaintiff. The defendants defended the action.

[2] The contract entered into upon the successful award of the tender provided for an extension of that contract for a further period on the same terms and conditions of the initial contract. It was contemplated in the relevant clause that the option of extending the contract was for the defendants' prerogative. It was common cause that the contract was extended for a further period, but for the defendants' plea that such extension was unlawful. The non-payment of invoices flowed from the extended contract.

[3] The essence of the contract was for the supply of services and equipment to property occupied by the first defendant for energy saving in respect of electricity used by the first defendant and for which it was liable to pay. The sole financial burden of rendering the service, management thereof and installation of energy saving devices fell upon the plaintiff. In return, the first defendant would pay 50% of the savings achieved through the plaintiff's interventions, to the plaintiff. Where there were no savings, no payment befell the plaintiff.

[4] The case was allocated to me for case management and eventually a trial date was set for the period 4 March 2024 to 22 March 2024.

[5] When the matter was called on 4 March 2024, the plaintiff commenced leading oral evidence in respect of invoices submitted to the defendants that were allegedly not paid by the defendants. The evidence of the witness, a Mr Johan Gouws, was not completed on 4 March 2024 and continued on the following day. On the third day, although the first witness' evidence was yet to be completed, the plaintiff indicated that it would interrupt the evidence in chief of the first witness and would lead the evidence of a second witness instead. Apparently, the second witness, a Mr M Dlamini, was an erstwhile employee of the defendants and his availability was limited. Counsel

for the defendants did not object to the procedure suggested by the plaintiff.

[6] The evidence of the second witness would relate to the alleged extension of the contract entered into following on the award of the tender to the plaintiff. During the cross-examination of Mr Dlamini, the defendants raised the issue of alleged illegality of the extended contract. On behalf of the defendants it was argued that at all times the issue of alleged illegality of the extension of the contract was in issue as it was pled in the defendants' plea. The plea in respect of the alleged illegality of the extension of the contract referred to alleged non-compliance with section 217 of the Constitution. No special plea in that regard was filed. Nor was it raised as a point to be considered in a stated case. There simply was no compliance with the provisions relating to the raising of a constitutional point. Should the plea of illegality be upheld, it would render the action irrelevant and it stood to be dismissed.

[7] In view of the fact that adjudicating upon that plea of illegality only after all evidence was heard, would severally impact on the waste of court resources, court time and have a severe impact upon costs unnecessarily incurred should the plea of illegality eventually be upheld. After a debate on that point, the parties agreed that in terms of the provisions of Rule 33(4) of the Uniform Rules of Court a separation should be ordered on the limited issue of alleged illegality. I so ruled.

[8] After the conclusion of the cross-examination and re-examination of Mr Dlamini, the matter stood down to enable the defendants to consult with their possible witness in reply to the evidence of Mr Dlamini. The defendants called a Mr M Rakau and a Mr M Legotlo, both employed by the defendants. After the leading of their evidence, the parties requested time to prepare and file heads of argument on the limited separated issue of alleged illegality and to present oral argument in addition. It was so ruled. Oral argument, in addition to the heads of argument, was received on Thursday, 14 March 2024. The parties

accepted that insufficient reserved court time was available after a ruling on the limited separated issue of alleged illegality for the action to be completed. I indicated that I would attempt to deliver judgment on the limited separated issue during the last week of the reserved dates for the action. Accordingly, judgment on the limited separated issue was reserved.

[9] This is the judgment on the limited separated issue.

[10] The plaintiff bore the onus of proving an extended contract, whilst the defendants bore the onus on the alleged non-compliance with the provisions of section 217 of the Constitution in respect of the alleged issue of illegality.

[11] The evidence of Mr Dlamini sought to prove the plaintiff's case that a valid extension of the contract entered into following on the successful award of the tender to the plaintiff existed. The plaintiff submitted that it had discharged its onus of proving a contract on that evidence. That led the defendants to prove non-compliance with the provisions of section 217 of the Constitution, *i.e.* the issue of illegality.

[12] The defendants initially admitted that there was a lawful extension of the contract. However, in an amended plea it denied that such extension was unlawful and further did not comply with the provisions of section 217 of the Constitution. The non-compliance related to the alleged breach of the requirement in subsection 217(1) of the Constitution, namely, "*contacts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."*

[13] Section 217 of the Constitution provides as follows:

> "*(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified national legislation, contacts 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 or 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."

[14] The framework referred to in subsection (3) of section 217 of the Constitution was regulated in terms of *inter alia* the Public Finance Management Act, 1999 (the PFMA). It prescribed the calling for tenders in certain circumstances as provided for in the Schedules and Regulations under the PMFA. That is common cause.

[15] The defendants contended that for purposes of this enquiry, it necessitates a determination whether there has been a breach in respect of the requirement *"in accordance with a system which is fair, equitable, transparent, competitive and cost-effective"* as stated in subsection 217(1) of the Constitution. No reliance was placed in particular on the provisions of the PFMA, but for an oblique reference to a schedule to the PFMA. The main defence remained a reliance on section 217 of the Constitution. An oblique reliance by the defendants was placed on Regulation 16A 6.1 of the treasury Regulations with

reference to certain threshold values in Practice note 8 of the National Treasury.

[16] The defendants raised three reasons why there was no compliance with the aforementioned requirement of subsection 217(1) of the Constitution, namely:

1. It was unfair to service providers who could have been interested in rendering the services and/or goods rendered by the plaintiff;

2. It was not competitive because other service providers did not submit bids or quotes for services that would be rendered consequent to the extended agreement; and

3. It was otherwise not transparent and not cost effective as it was not in terms of a public tender and that the payments were made based upon the equipment of which ownership of that equipment befell the first defendant after the initial 7 year period.

[17] The plaintiff contended that the provisions of section 217 of the Constitution, in respect of the matter *in casu,* do not apply for the following:

(a) The tender called for the supply of services for energy savings to the first defendant in respect of electricity used by the first defendant and for which it was liable to pay;

(b) After the award of the tender to the plaintiff, a contract was prepared between the parties. It contained provisions for the supply of energy saving services and the relevant equipment to achieve such energy savings;

(c) That contract was for an initial period of 7 years, subject to an extension for a further period, at the behest of the first defendant, which the plaintiff could accept or not. The contract would endure for the 7 year period commencing in May 2003 and end in May 2010;

(d) In terms of clause 2 of the contract, the plaintiff requested the first defendant whether it intended to extend the contract for a further period and in that event, a proposal was put before the defendants;

(e) The defendants subsequently considered the plaintiff's proposal and in turn submitted a report to the Bid Committee of the first defendant. In that report, a proposal was included to extend the contract for a period of 10 years on the same terms and conditions as the existing contract;

(f) A letter was addressed by the defendants to the plaintiff that clearly stated the first defendant's intention to extend the contract on the same terms and conditions as the existing contract. The plaintiff accepted that proposal in writing. No "new" contract was signed between the parties. The existing contract was extended and continued after the initial 7 years for a period of 10 years that ended in 2020;

(g) The extension of the contract did not constitute a variation, modification, waiver or consent to depart from the position of the contract as contemplated in clause 28 thereof.

[18] Clause 2 of the contract that followed on the award of the tender, reads as follows:

"*This Agreement shall terminate 7 years after signing this Contract. The Department of Public Works reserves the right to extend the Contract period after mutual agreement with the*

Contractor. The Contractor may choose to waiver (sic) *such an offer by the Department."*

[19] It was common cause that the contract that followed on the lawfully granted award of the open tender to the plaintiff endured from 20 May 2003 to 20 May 2010. It was common cause that during 2008 the parties agreed to extend the contract for a further period of 10 years that would endure from 20 May 2010 to 20 May 2020. The only issue being that the defendants alleged that the procedure to extend the contract fell short of the requirements stipulated in subsection 217(1) of the Constitution, and hence was unlawful.

[20] The evidence of Mr Dlamini was not tarnished during cross-examination. He withstood the attack on his evidence. It is to be noted that nothing was put to Mr Dlamini in respect of what the defendants' witnesses would testify. The defendants' case was simply not put to Mr Dlamini. His evidence was undisputed. His evidence can be summarised as follows:

(1) At the relevant time during 2008 he was the Regional Manager: Gauteng North Regional office of the first defendant;

(2) During that period, the plaintiff, through a director of it, addressed a letter to Mr Dlamini enquiring whether the first defendant intended to extend the contract as provided for in clause 2 thereof. A proposal was included should the first defendant elect to extend the contract. The proposal referred to a 10 year period of extension;

(3) The said letter comprehensively dealt with the projected summary of benefits after the 7 years with continued investment of capital expenditure by the plaintiff;

(4) The regional Bid Committee, chaired by Mr Dlamini, received a memorandum drawn by Mr Shabane from the property payments section. In that memorandum Mr Shabane recommended that approval be granted to extend the energy saving contract for a further period of 10 years. That memorandum was signed by Mr Shabane and the Director: Property Management. That memorandum was signed on 4 April 2008;

(5) The Regional Bid Committee, of which Mr Dlamini was the chair, met on 9 April 2008. The recommendation of the extension of the contract was included on the agenda for that meeting,. After deliberations on that issue, the Bid Committee unanimously agreed to extend the contract for a period of 10 years. The Bid Committee comprised a wide representation by all relevant regional sub-departments of the first defendant;

(6) At that meeting, it was further noted that the plaintiff's systems be used as blue print for roll out to other provinces;

(7) The first defendant confirmed the extension of the contract to the plaintiff in writing on 11 April 2008;

(8) On 17 April 2008, the plaintiff accepted the first defendant's extension offer in writing.

[21] None of the foregoing evidence was disputed in cross-examination, other than that the Bid Committee was obliged to follow an open tender process. Mr Dlamini's response was simple: there was no need to follow an open tender process as the contract in clause 2 thereof provided for an extension at the behest of the first defendant, and furthermore that the extension would continue on the same terms and

conditions of the contract that was in place at the time. No new terms or conditions were agreed upon.

[22] As recorded earlier, the defendants called two witness to counter the evidence of Mr Dlamini and to support the plea of illegality. The first witness called by the defendants was Mr Rakau, the first defendant's head of legal services at the time. His evidence related to an investigation into the extension of the contract and alleged "irregularities" thereto. However, his evidence was vague, lacked particularity and was not completed. The defendants abandoned his evidence without any cross-examination of that witness. That evidence, in view of the abandonment by the defendants, stands to be struck. No evidentiary value can be attributed thereto.

[23] The second witness called on behalf of the defendants was a Mr Legotlo. That witness simply handed in, as Exhibit A, a spreadsheet purporting to show all payments made in terms of the contract for the initial 7 years and all payments made in terms of the extended contract. The plaintiff denied the content of the spreadsheet. It was apparently obtained from the first defendant's departmental computer system. In presenting that evidence, there was no compliance with the provisions of section 15(3) of the Electronic Communications and Transactions Act, 25 of 2002. No basis was laid for the admission of that evidence. Furthermore, Mr Legotlo admitted that he did not collate the figures on the spreadsheet himself. No application was made on behalf of the defendants for the admission thereof in terms of the provisions of the Law of Evidence Amendment Act, 45 of 1988. That disposed of any compliance with, or applicability, of the provisions of the Law of Evidence Amendment Act. The relevance of Exhibit A in respect of the separated issue of legality was not indicated, nor argued on behalf of the defendants. It took the separated issue no further.

[24] From the foregoing, it follows that the defendants placed no evidence before the court in support of its contention of the breach of the provisions of section 217(1) of the Constitution.

[25] The plaintiff relied upon the dicta in paragraph [25] of *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012(2) SA 542 SCA in support of its contention that compliance with the provisions of section 217(1) of the Constitution was not relevant, nor required. In particular, the plaintiff submitted that the call for open tenders in respect of the services to be rendered as contained in the extended contract was not required in the present instance.

[26] In *3P*, *supra,* the Supreme Court of Appeal held in paragraph [25]:

> "*It is clear that the renewal of the services agreement did not give rise to a new service agreement; it simply extended the duration of the services agreement for a period of 3 years. Properly interpreted, clause 2.3 of the agreement provides for a renewal for a period of two years on the same terms as before subject only to such amendments as may be negotiated and agreed between the parties. … As there was no new service agreement, there was no new procurement of goods or services and it was therefore in my view not necessary to follow a competitive public bidding process in this regard."*

[27] The defendants challenged that judgment on a number of grounds:

(a) In terms of clause 2 of the original agreement, the period of the original agreement shall terminate after 7 years, *i.e.* that the contract would terminate after a specific period;

The defendants obtusely ignore the rest of that clause 2 where it is specifically recorded that the first defendant had the right to extend that contract for a further period on mutual agreement and which the plaintiff had the right to decline. There is no merit in that submission.

(b) The defendants further submitted that if the contract was indeed extended, it amounted to a contract for the procurement of the supply of goods and services, thus falling within the ambit of section 217 of the Constitution.

There is equally no merit in that submission. Firstly, it was common cause that no new contract was concluded. The duration of the contract following on the lawfully awarded tender to the plaintiff, was merely extended on the same terms as the contract. The defendants' attempt to aver that the inclusion of "additional buildings" is of no consequence. The contract in fact anticipated such addition.

(c) It was further the defendants' contention that the extended contract concerned the procurement of goods or services in excess of R 500 000, and thus constituted a contravention of Practice Note 8 issued in terms of the PFMA. That note required a competitive bidding process to be followed in such event.

Similarly, there is no merit in that submission. The contract explicitly provided that the plaintiff would bear the financial burden in setting up the capital required to supply and install the energy saving devices and the management thereof. The project would be undertaken at no cost to the first defendant. It would only benefit from the savings achieved by the installation and management of the energy savings devices. The parties would share equally in such savings. In terms, the first defendant would only enjoy the benefit of the energy savings achieved, and where there was no savings, it paid nothing. Furthermore, at the end of the contract, the ownership in the energy saving devices would accrue to the first defendant at no cost to it. Clearly a win-win situation for the first defendant. Accordingly, there was no transgression of the provisions of Practice Note 8.

(d) On behalf of the defendants it was submitted that whenever an organ of state contracts for goods or services, that organ of state was obliged to adhere to the provisions of section 217 of the Constitution. In this regard, reliance was placed upon a host of authorities:

1. Firstly, reliance was placed upon the dicta in *Airports Company South Africa SOC LTD v Imperial Group Ltd et al.*[1] That matter concerned a request for bids in respect of an open tender and in particular of the terms of that bid request, unlike the present matter where there was an extension of the duration of a contract granted on a lawful award of a tender. It finds no application *in casu*.

2. Further reliance was placed upon *Eastern Cape Development Agency et v Agribee Beef Fund (Pty) Ltd et al.*[2] That judgment concerned the conclusion of a tripartite agreement entered into between two organs of state and a private party. The issue to be adjudicated was whether the agreement concluded was one for the procurement of goods or services. No procurement procedure as intended for in section 217 of the Constitution was followed. The parties merely entered into the tripartite agreement. That matter is clearly distinguishable from the present instance.

   None of the aforementioned cases dealt with, nor considered the *3P* matter. That authority remains applicable and in point in this matter.

[1] 2020(4) SA17 (SCA)
[2] [2022] JOL 51939 (SCA)

(e) There is no merit in the defendants' contention that, following and open tender bid request, another party may have tendered for a split of the savings on a formula of, e.g. 70/30 in the first defendant's favour. That submission was extremely speculative and no supporting submissions were made, or supporting facts were presented therefor were placed before the court. It is of no moment that for a speculative reason, the first defendant was obliged to follow a prescribed procurement procedure. It could well be speculated that another party may have sought a higher percentage in its favour.

(f) It was further submitted on behalf of the defendants that the extension of the contract varied the terms of the contract in a material way by extending the initial period of 7 years to 10 years. There is no merit in that submission. Clause 2 of the contract clearly made provision for the extension of the contract at the behest of the first defendant on mutual agreement between the parties and did not qualify any period of extension. The period of extension would follow on mutual agreement between the parties.

[28] Much was made on behalf of the defendants that the energy saving devices were to become the property of the first defendant in terms of clause 4.3 thereof. That submission ignores the precise wording of that clause which clearly states on the termination of that contract. The contract was not terminated, but extended for a further period. Only after that extended period elapsed, would the contract terminate.

[29] In view of all the foregoing, the extension of the contract for a further period did not fall foul of the provisions of section 217 of the Constitution. In the particular circumstances the provisions of that section simply did not apply.[3]

[3] See *3P, supra*

[30] The plaintiff contended that in view thereof that the extended contract had run its full course, no possible purpose could be served setting same aside. In that regard, the court has a discretion to decline to set aside a contract due to inconsistency with section 217 of the Constitution.[4]

[31] It follows that the defendants have not discharged the onus upon them in respect of separated issue of illegality. That issue stands to be decided in favour of the plaintiff.

[32] In view thereof that insufficient time remained in respect of the period for which this action was enrolled, and further in view thereof that the evidence in respect of the plaintiff's claim for payment has yet to be completed, the action stands to be postponed.

I grant the following order:

1. It is declared that, on or about 11 April 2008, the parties lawfully, by agreement, extended the contract, following on the lawful award of Public Tender number PTA03/0006 to the plaintiff, on the same terms and conditions for an additional period of 10 years which period was calculated from 20 May 2010 to 20 May 2020;

2. The defendants are ordered to pay the costs of the trial from Wednesday 6 March 2024 to Thursday 14 May 2024, which costs shall include the costs consequent upon the employment of two counsel;

3. The matter is postponed to a date to be arranged with the Deputy Judge President in consultation with the trial judge;

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[4] *Chairperson, Standing Tender Committee et al v JFE Sapela Electronics (Pty) Ltd* 2008(2) SA 638 (SCA)

4. The balance of the costs is reserved.

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C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicant:	Adv P Ellis SC Adv A Ellis
Instructed by:	Weavind & Weavind Attorneys
On behalf of Respondent:	Adv M Mojapelo SC Adv V Mabuza
Instructed by:	State Attorney, Pretoria
Dates of Hearing:	04 - 14 March 2024
Judgment Delivered:	26 March 2024