



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 57/2019

In the matter between:

THE CITY OF TSHWANE

METROPOLITAN MUNICIPALITY

MOEKETSI EMMANUEL MOSOLA

and

MOIPONE FLEET (PTY) LTD

FIRST APPELLANT

SECOND APPELLANT

RESPONDENT

Neutral citation: *City of Tshwane Metropolitan Municipality and Another v Moipone Fleet (Pty) Ltd* (Case no 57/2019) [2020] ZASCA 55 (27 May 2020)

Coram: CACHALIA, ZONDI and DLODLO JJA and LEDWABA and MABINDLA-BOQWANA AJJA

Heard: No oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 27 May 2020.

Summary: Contempt of court – alleged contravention not falling within the ambit of court order – whether contempt of court established.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mokose AJ sitting as court of first instance):

- 1 The appeal succeeds with costs, including costs consequent upon the employment of two counsel.
 - 2 The order of the court a quo is set aside and is substituted with the following: ‘The application is dismissed with costs, including the costs of two counsel.’
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JUDGMENT

Mabindla-Boqwana AJA (Cachalia, Zondi and Dlodlo JJA and Ledwaba AJA concurring)

Introduction

[1] This is an appeal against the judgment and order of Mokose AJ of the Gauteng Division of the High Court, Pretoria in which she declared the first appellant, the City of Tshwane Metropolitan Municipality (the City) and the second appellant, Dr Moeketsi Emmanuel Mosola (the City Manager) to be in contempt of an order granted by Davis AJ¹ (the Davis order) on 29 March 2017. The Davis order had directed the City to comply with its obligations to procure vehicles under a Public Private Partnership Agreement (the PPA) concluded between it and Moipone Fleet (Pty) Ltd (the respondent in this appeal) on 24 March 2016. And further interdicted it from concluding an agreement to procure vehicles from any other service provider

¹ *Moipone Group of Companies (Pty) Ltd v City of Tshwane Municipality* [2017] ZAGPHHC 149 para 11.

pending the final determination of the dispute between the parties as to whether the City had validly cancelled the PPA.

[2] As a sanction for holding the appellants in contempt of the Davis order, Mokose AJ imposed a sentence of six months' imprisonment on the City Manager, suspended for one year on condition that there was no further contravention of that order. She also interdicted the City from purchasing certain vehicles from any other service provider other than the Moipone Fleet pending the determination of the dispute referred to in the Davis order. On the eve of this appeal Moipone Fleet abandoned the order relating to the City Manager. It had no doubt became clear to Moipone Fleet that there was no basis for the contempt finding against him as he had not been cited as a party in the proceedings before Davis AJ.

[3] The appeal is with the leave of the court a quo and parties agreed to have it determined in terms of s 19(a) of the Superior Courts Act 10 of 2013 (the Superior Courts Act).

[4] The issues in this appeal are thus whether the court a quo was correct in holding the City in contempt of the Davis order and granting the interim interdict against it. The facts giving rise to the dispute are the following.

Brief facts

[5] On 24 March 2016, pursuant to a tender process for the procurement of fleet and fleet related services, the City entered into two agreements with Moipone Fleet to supply and provide it with full maintenance lease and ad hoc rental services of vehicles. One agreement pertained to the provision of non-specialised vehicles with a gross vehicle mass not exceeding 3 500 kilograms (Category A vehicles) and the

other concerned large vehicles for waste management services (Category C vehicles). The duration of each agreement was five years. The PPA that is in issue in these proceedings relates only to the provision of Category A vehicles.

[6] In terms of clause 7.1 of the PPA the City would make payments to Moipone Fleet in accordance with a schedule comprising capped specified amounts for each financial year totalling R352 185 208. That amount would be paid in respect of a maximum of 1 358 vehicles over the life of the agreement as per clause 7.2. This amount also represented the budget value of the agreement.

[7] In March 2017, Moipone Fleet launched an urgent application before Davis AJ, seeking an order, inter alia, compelling the City to comply with its obligations under the PPA, pending the finalisation of a dispute with it that had been referred to arbitration. It alleged that the City had refused to accept delivery of a number of vehicles from it and had, in breach of the PPA, placed orders directly with Moipone Fleet's suppliers, instead.

[8] The City contended that the PPA had lapsed due to the fact that the suspensive conditions contained in clause 2.1 had neither been fulfilled, nor lawfully waived. The agreement had therefore lapsed and thus permitted it to deal directly with Moipone Fleet's suppliers. Davis AJ, however, found against the City and made an order which, inter alia, read as follows:

- '1. The Respondent [the City] is directed to comply with its obligations under the Public Private Partnership Agreement ("the agreement") concluded between the Applicant [Moipone] and the Respondent on 24 March 2016 pending the final conclusion of any process, application, action or arbitration whereby the validity of the agreement is finally determined or until such time as the agreement is validly cancelled.

2. The Respondent is interdicted and restrained from appointing and/or concluding any agreement with any other service provider for the rendering of the services that the Applicant is obliged to render in terms of the agreement pending the final determination of the validity or valid cancellation thereof as aforesaid.’

[9] The City’s application for leave to appeal the Davis order was sought and dismissed. A further attempt to appeal to this Court was also dismissed, no doubt because the order was interlocutory and therefore not appealable.

[10] Subsequent to the Davis order further litigation ensued between the parties in which Moipone Fleet sought to enforce the PPA. The first such application served before Vuma AJ. Here the City was accused of issuing purchase orders for managed maintenance of category A and C vehicles in breach of clause 39 of the agreement and of the Davis order. I deal with clause 39 shortly. Vuma AJ found that the Davis order required ‘the immediate cessation by the City from dealing with Bulldozer and Xmoor at the expense of the PPP agreement since anything contrary by the City seeks to undermine the said order.’² However the order she granted prohibiting such dealing was later rescinded for reasons that are not germane to this appeal.

[11] In July 2018 a further urgent application, which is the subject of this appeal, was brought before Mokose AJ. Moipone Fleet sought a declaratory order that the appellants were in contempt of the Davis order. Compliance with that order as well as an interdict was also sought the effect of which would restrain the City from issuing ‘Purchase orders and/or appointing and/or concluding any agreement with any service provider. . . pending the final determination of the validity or valid cancellation thereof. . .’ The complaint in this instance was that the City had

² *Moipone Group of Companies (Pty) Ltd v City of Tshwane Metropolitan Municipality and Another* [2017] ZAGPPHC 1222 para 40.

procured 103 light delivery vehicles (the vehicles) from a service provider other than Moipone Fleet in violation of clause 39 of the agreement as well as the Davis order.

[12] Clause 39, which lies at the heart of the dispute, is an exclusivity clause in favour of Moipone Fleet. It provides as follows:

‘39.1 In consideration for the Private Party [Moipone] rendering the Services in terms of this Agreement, the City shall (save as may be provided expressly to the contrary in this Agreement), for the duration of this Agreement and during any period of termination notice given in terms of this Agreement, *source all its fleet requirements from the Private Party*. In this regard it is recorded that this exclusivity shall relate solely to the provision by the Private Party of vehicles which cater for the Function of the vehicles. The City shall accordingly be entitled to source additional fleet requirements from a third party only if and to the extent that:

39.1.1 the Contractor is unable to fulfil such requirements in which event the loss of exclusivity shall apply only to the extent that, and for so long as, the Private Party cannot perform the particular requirement in question under this Agreement; or

39.1.2 the City is acting in terms of a right granted in terms of the SLA, to source a vehicle from a Third Party.

provided that the City may, subject to giving the Private Party prior written notice thereof, undertake the outsourcing of a particular service, an aspect of which may include the provision of a vehicle provided that:

39.1.3 the main purpose of that outsourcing is to obtain a service and not the use of a vehicle; and

39.1.4 the outsourcing shall not be used to circumvent the provisions of this Agreement, in particular the principle that the City shall source all its fleet requirements exclusively from the Private Party. (Emphasis added.)’

[13] In response to Moipone Fleet’s allegation that the City was in breach of this clause, the City maintained that it had purchased the vehicles directly from the

original manufacturer through a transversal contract procured by National Treasury, to which Moipone Fleet had consented and in which it had participated. A procurement of this nature was not prohibited by the PPA. According to the City, the exclusivity for which provision is made in clause 39 applied only to the leasing of vehicles and matters related thereto. It had no bearing on outright purchases, which was the subject of the present complaint. It further maintained that it had exhausted the procurement value limit of R70 125 385 allocated to be spent on procuring vehicles from Moipone Fleet under the PPA for the 2017/2018 financial year and that there was no longer a lawful basis to procure new vehicles from it. Any further procurement of vehicles from Moipone Fleet under the PPA, the City submitted, would therefore have constituted irregular expenditure and would not have been cost-effective.

[14] However, Mokose AJ dismissed the City's submissions and found the appellants to have acted in contempt of the Davis order. She also granted the interdict against it referred to earlier. Before the City's application for leave to appeal against her order was heard, Moipone Fleet applied to the high court, in terms of s 18 of the Superior Courts Act, for the immediate operation and execution of the order. The matter came before Tuchten J. He expressed serious doubt as to the correctness of the interpretation that Vuma AJ and Mokose AJ had placed on clause 39. In his view, the clause limited Moipone Fleet's exclusivity to the procurement of leased vehicles for the City; it did not apply to vehicle's the City may wish to purchase from any other service provider. Accordingly, it was entitled to purchase vehicles, without breaching this clause. He concluded that:

'The purchase of the vehicles would fall outside the agreement, and would therefore not have been the subject of the prohibition under the order of Davis AJ, and therefore ought not to have been the subject of a prohibition by [Mokose AJ] because it was the purchase of vehicles that was before

[Mokose AJ] in the case that came before her. So to summarise on this aspect I think that there are distinct prospects on appeal.³

[15] He further questioned, quite rightly in my view, how the City Manager could have been held to be in contempt of the Davis order and given a suspended sentence of imprisonment in the light of his defence to the complaint against him. The learned judge emphasised the trite requirement of proof beyond reasonable doubt before a prison sentence could be imposed, which was not met in this case.⁴

Analysis

[16] It is also trite that before a party may be found in contempt of a court order, the breach must have been both wilful and mala fide.⁵ The question is whether the conduct of the City contravened the Davis order.

[17] As I pointed out earlier the issue before Davis AJ was whether suspensive conditions contained in clause 2.1 of the PPA had been fulfilled. The learned judge found that they had. It was on that basis that an interdict was granted prohibiting the City from appointing other service providers to render the service that Moipone Fleet was obliged to render pending determination of the dispute about the validity of the City's cancellation of the PPA.

[18] In the application before Mokose AJ, Moipone Fleet, broadened the scope of the dispute that was before Davis AJ. A different issue was raised. Moipone Fleet was now placing reliance on clause 39 of the agreement, the complaint being that by purchasing vehicles from other service providers the City was 'sourcing' its fleet

³ Unreported judgment: *Moipone Group of Companies (Pty) Ltd v City of Tshwane Metropolitan Municipality* case number 2018/5 1929 dated 8 November 2018 at 7.

⁴ *Ibid.*

⁵ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at 332.

requirements from other service providers in breach of clause 39. It contended that the words ‘*source all its fleet requirements*’ encompassed purchases, leases and all vehicles acquired for use and possession by the City. The City took issue with this interpretation contending that Moipone Fleet’s exclusivity was limited to the leasing arrangement.

[19] The conduct complained of before Mokose AJ was clearly not the same as the issue that served before Davis AJ. On that point alone, the contempt application should have been dismissed. But a proper interpretation of clause 39 also demonstrates conclusively that the court a quo erred in the interpretation it gave to the clause. I examine this issue below after considering whether the interim interdict she granted against the City is appealable.

[20] The interdict was almost identical in terms to that which was given by Davis AJ, the notable difference being the inclusion of purchase orders and sourcing of Category A and C vehicles from any third party other than Moipone Fleet. Her order was also made pending the determination of the validity or valid cancellation of the agreement.

[21] Interim orders are usually not appealable because they are not final in effect. This was not an issue raised by either party, but it is important for this Court to deal with it. In *Atkins v Botes* this Court held that:

‘[A]n interim interdict is appealable if it is final in effect and not susceptible to alteration by the court of first instance. The decision also emphasised that in determining whether an order is final in effect, it is important to bear in mind that “not merely the form of the order must be considered

but also, and predominantly, its effect”. The crucial question in the appeal is therefore whether the granting of the interim interdict was final in effect.’⁶

[22] The answer to this would depend on whether the purchase of the vehicles fell within the scope of the agreement, the validity of which was to be determined at a later stage. Mokose AJ did not consider this issue at all.

[23] The Court was thus called upon to interpret the reach of clause 39, an issue as I have pointed out was entirely different from what was before Davis AJ. It is now established that when interpreting a document, the point of departure is the language in question read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.⁷

[24] Clause 39 is not the clearest of provisions. It must however be read and understood within the context and scheme of the PPA. It is not disputed that the procuring of the vehicles from Moipone Fleet was through a leasing vehicle system. This much is evident from the agreement, starting with the “definitions clause”, which refers to a ‘full maintenance lease’ and ‘lease agreement’. The preamble refers to a “co-sourcing mechanism” to achieve the purposes of the agreement.

[25] In interpreting clause 39, regard must be had to the Request for Proposal document.⁸ The concept of co-sourcing arose from a recommendation in a study commissioned by the City to ascertain the most suitable method of undertaking its fleet services. According to the Request for Proposal document, co-sourcing of fleet

⁶ [2011] ZASCA 125; 2011 (6) SA 231 (SCA) para 6.

⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

⁸ The circumstances in which a contract was entered into may become relevant in the interpretation process in ascertaining the intention of the parties. See *Novartis South Africa (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA); [2015] 4 All SA 417 (SCA) para 27.

services entails a hybrid situation where some fleet management functions are undertaken internally whilst others are through the private sector. It says that the City requires ‘the use and enjoyment of the vehicles with no intention of ownership’. Some of the objectives for co-sourcing its fleet provision and management were to develop in-house capacity, ensure transport needs are met and to ensure the City is divested of the risks and responsibilities relating to owning and maintaining vehicle fleets.

[26] Moipone Fleet contends that it is within that stated objective that clause 39 should be understood because acquisition of vehicles through means other than the co-sourced mechanism would undermine the stated objective. According to it, the relevant clause unequivocally states that the City shall ‘source all its fleet requirements from the Private Party’ which should be understood to mean all fleet requirements of the City (without the exclusion of purchasing) would be met by Moipone Fleet. Its view is that the clause does not concern itself with the method of how those requirements would be met.

[27] I am unable to agree with this contention. It is not supported by the scheme of the agreement or even by the Request for Proposal document that Moipone seems to rely on. Nothing in clause 39 read in the context of the agreement indicates that the City was prohibited from purchasing vehicles from other suppliers. The fact that it had found co-sourcing in the form of a leasing arrangement to have been a cost effective mechanism at the time, did not mean that it could not embark on other cost effective methods to source its fleet requirements, including purchasing of its vehicles. To illustrate this point it is alleged on behalf of the City that when it purchased the vehicles from the original manufacturer it spent R239 000 per vehicle,

including maintenance, whereas to lease a vehicle would have cost over R420 000 per vehicle, over a five year period.

[28] Tuchten J's observation that the purchase of vehicles fell outside the purview of the agreement was undoubtedly correct. Under the circumstances, it is evident, in my view, that Mokose AJ's interim order was final in effect because the purchase of the vehicles, which her order prohibited, was not an issue that would be revisited when the validity of the agreement was determined at a later stage. The interim interdict is thus appealable. Based on my interpretation of clause 39, it should not have been granted.

[29] In light of that, it is not necessary to deal with the other issues raised on behalf of the City, including the point that it would have exceeded its procurement value limit for the financial year or would have been guilty of irregular expenditure had it procured the vehicles from Moipone Fleet. It is also not necessary to deal with other grounds as to why wilful and mala fide contravention of the Davis order was not established.

[30] In the result, I make the following order:

- 1 The appeal succeeds with costs, including costs consequent upon the employment of two counsel.
- 2 The order of the court a quo is set aside and is substituted with the following:
'The application is dismissed with costs, including the costs of two counsel.'

N P MABINDLA-BOQWANA
ACTING JUDGE OF APPEAL

Written submissions

For appellants: K Tsatsawane SC, with K Magano and C Marule

Instructed by: Gildenhuis Malatji Inc, Pretoria
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For respondent: Main heads of argument by M Sello SC

Supplementary heads of argument by D Mpofu SC, with him
M Sello SC and M Qofa

Instructed by: Van Zyl Le Roux Attorneys, Pretoria
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