



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 99/2019

In the matter between:

MILLENNIUM WASTE MANAGEMENT (PTY) LTD

APPELLANT

and

SOL PLAATJE MUNICIPALITY

RESPONDENT

Neutral citation: *Millennium Waste Management (Pty) Ltd v Sol Plaatje Municipality* (Case No 99/2019) [2021] ZASCA 35 (7 April 2021)

Coram: PONNAN, MOCUMIE, MAKGOKA and DLODLO JJA and LEDWABA AJA

Heard: 11 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the website of the Supreme Court of Appeal and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 7 April March 2021.

Summary: Contract – unenforceable agreement to agree. Special leave – requires something more than reasonable prospects of success on appeal – court hearing appeal decides whether special circumstances exist – no special circumstances found – appeal struck from the roll with costs.

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberley (Pakati ADJP, Mamosebo J and Stanton AJ sitting as court of appeal):

The appeal is struck from the roll with costs.

JUDGMENT

Dlodlo JA (Ponnan, Mocumie and Makgoka JJA and Ledwaba AJA concurring):

[1] In January 2006, the respondent, the Sol Plaatje Municipality (the Municipality) issued an 'invitation for proposals (the invitation) for the operation of the Kimberley & Ritchie Waste Disposal Site (the site)'. In response to the invitation, on 20 February 2006, the appellant, Millennium Waste Management (Pty) Ltd (Millennium Waste), submitted a written tender to the Municipality, which was judged 'responsive'.

[2] On 25 July 2007, the Municipal Manager of the Municipality wrote to Millennium Waste:

'RE: INVITATION FOR PROPOSAL FOR THE OPERATION OF THE KIMBERLEY AND RITCHIE WASTE DISPOSAL SITES

I have a pleasure in advising you that your offer submitted in response to the abovementioned tender has been accepted.

Council's representative for this work will be in contact with you shortly to finalise logistical arrangements for the execution of this contract.'

[3] According to Millennium Waste, it took possession of the site on 1 October 2007, and thereafter rendered services, for which it invoiced the Municipality. When the Municipality declined to pay, it caused summons to be issued against the Municipality out of the Northern Cape Division of the High Court, Kimberley. The claim failed before Lever AJ, who absolved the Municipality from the instance. The learned judge ordered Millennium Waste to pay the costs of the action. An appeal to the full

court, likewise failed. The full court (per Pakati ADJP (Mamosebo J and Stanton AJ concurring)) dismissed the appeal with costs. The further appeal by Millennium Waste is with the special leave of this court. In this regard it is important to emphasise that what is required is some additional factor or criterion.¹ The fact that leave to appeal has been granted upon application to the President of this court is not decisive of that enquiry. It remains for this court upon a consideration of the appeal to make that determination.

[4] The issue for determination is whether, as alleged by Millennium Waste, the payments were due to it under a contract, which had come into being when it was advised by the Municipal Manager of the Municipality that its tender had been accepted. However, the mere notification that its tender had been accepted, did not, without more, result in a contract. As the letter of 25 July 2007 made plain ‘arrangements for the execution of [the] contract’ still needed to be finalised.

[5] That accords as well with what had been contemplated by the invitation. The invitation did not contemplate, without more, a contract coming into being upon the mere determination by the Municipality that a particular tender was responsive and the intimation by the Municipality that a particular tender had been accepted. Clause 3.12 of the invitation made that clear. It provided:

‘3.12 Finalisation of the contract

- Discussion to reach agreement on all points and sign contract shall be held at the following address:

Sol Plaatje Municipality

First floor, Old Mutual Building (Civic Centre Building)

Corner Jan Smuts Boulevard & Lundhurst Street

Kimberley

- Discussion will include the content of the proposal, the proposed work plan, budget staffing and any suggestions made by the firm to improve the Required Services. The council and the firm will then work out an agreed final Terms of References and staffing. The agreed work plan and final Terms of Reference will then be incorporated into the “Required/Description of Services” and form part of the contract.

¹ *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 561E-F.

- Discussion of finances will be confined to accommodate any agreed technical modifications and their impact on the cost of services. Unless there are exceptional reasons, discussions will involve neither the remuneration rates for staff (no breakdown of fees) nor other proposed unit rates. In no event will the final cost of services exceed the original budget.
- Consultants should, in their proposals, provide assurances that the experts named will be available. The Sol Plaatje Municipality expects to conclude a contract on the basis that the experts named on the Proposal are available. Due to the urgent of the nature of the work required the Sol Plaatje Municipality will not consider sub situations during contract finalisation. If it is established that key staff were offered in the Proposal without confirming their availability, the firm may be disqualified.
- The discussions will conclude with a review of the draft form of the contract. The Sol Plaatje Municipality and the firm should then initial the agreed contract. If the parties fail to reach an agreement, the Sol Plaatje Municipality will invite the firm that received the second highest score to enter into discussion.'

[6] Indeed, paragraph 5 of Millennium Waste's particulars of claim alleged:

'It was an express term of the tender that discussion will take place between the parties regarding the content of the proposal, the proposed work plan, budget staffing and any suggestions made by plaintiff to improve the required services, discussions will take place regarding finances, discussions will conclude with a review of the draft form of the contract and the contract will be awarded following the discussions with the successful tenderer.'

[7] Clause 3.12 thus envisaged: further discussions; agreement on all points; and the signing in due course of a contract. It is common cause that none of that happened. In the circumstances, as Millennium Waste's claim rests on an unenforceable agreement to agree,² it had to fail.

[8] Both before the full court and before us, counsel for Millennium Waste sought to circumvent the provisions of clause 3.12 by suggesting that those provisions did not apply to Millennium Waste. This, according to counsel, was because Millennium Waste tendered only for the 'Operations' portion of the contract. According to him clause 3.12 applied only to the 'Technical' portion of the contract. There is no merit in

² See inter alia *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA); *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA); [2005] 2 All SA 16 (SCA); *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC* [2019] ZASCA 178; 2020 (2) SA 419 (SCA) and *Sontsele v 140 Main Street Properties CC and Another* [2020] ZASCA 85.

this submission. As the full court correctly pointed out, the tender document was one composite document and had to be read as such. In any event, this submission is in conflict with Millennium Waste's pleaded case as set out above.

[9] It is necessary to add that although interpretation is a matter for the court, not for witnesses,³ the parties generated a record in excess of 1500 pages, all of which was irrelevant to the issue on which the case turned.

[10] There is no merit in the appeal to this court. As it was put in *Stu Davidson and Sons (Pty) Ltd v Eastern Cape Motors (Pty) Ltd* [2018] ZASCA 26 paras 18 and 19:

‘ . . . That two judges of this court gave special leave to appeal does not mean that we are not required to consider whether we actually should be entertaining the appeal at all: *National Union of Mineworkers v Samancor Ltd* [2011] ZASCA 74 para 15. The normal criterion of reasonable prospects of success applies to both ‘special leave’ and ‘leave’ (*Westinghouse* at 561E-F). Given that there is no merit at all in the appeal, there are no reasonable prospects of success, much less special circumstances.

Here, the amount in issue is minimal. There is no legal question to be determined. There is no factual dispute that requires reconsideration. There is no reason why an appellate court should determine any matter arising from the first appeal further. Again, it is trite that where there has been no manifest denial of justice, no important issue of law to be determined, and the matter is not of special significance to the parties, and certainly not of any importance to the public generally, special leave should not be granted. (See *Westinghouse* above and *National Union of Metalworkers of South Africa & others v Fry's Metals (Pty) Ltd* [2005] ZASCA 39).’

[11] The appeal is accordingly struck from the roll with costs.

DV Dlodlo
Judge of Appeal

³ *KPMG Chartered Accountants (SA) v Securefin Limited and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA); [2009] 2 All SA 523 (SCA).

APPEARANCES:

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