



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 460/2022

In the matter between:

KUNENE RAMPALA INC.

APPELLANT

and

NORTH WEST PROVINCE DEPARTMENT

OF EDUCATION AND SPORT DEVELOPMENT

RESPONDENT

Neutral citation: *Kunene Rampala Inc. v North West Province Department of Education and Sport and Development (460/2022) [2023] ZASCA 120 (15 September 2023)*

Coram: Mbatha, Mothle, Hughes and Matojane JJA and Mali AJA

Heard: 11 May 2023

Delivered: 15 September 2023

Summary: Public Procurement – validity of an addendum to the contract – whether concluded in contravention of s 217 of the Constitution, the Public Finance Management Act and the National Treasury Regulations – validity of setting aside of contract without collateral challenge.

ORDER

On appeal from: North West Division, Mahikeng (Petersen J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Hughes JA (Mbatha, Mothle and Matojane JJA and Mali AJA concurring)

[1] This appeal concerns a dispute arising from an addendum to a service level agreement duly concluded between the appellant, Kunene Rampala Inc. (KR Inc.), a firm of attorneys and the North West Province, Department of Education and Sport Development (the Department), the respondent. The appeal is with the leave of the high court, the North West Division, Mahikeng (the high court).

[2] The facts that give rise to this appeal are largely common cause. On 28 September 2015 the Department invited tenders to provide services to conduct evaluation, adjudication and supply chain management administrative services for the provision and delivery of Learner Teacher Support Material (LTSM), under closed tender EDU 04/15 NW. KR Inc. submitted a successful bid, and on 9 October 2015 the Department and KR Inc. concluded a Service Level Agreement (SLA) with the contracted price of R1 243 215. 60.

[3] According to the SLA, the duration of the contract was for a period of 12 months. The terms of reference for tender EDU 04/15 NW, highlighted the scope of services to be provided as follows:

- '(a) The handling of the closure of the tender.
- (b) The recording of the receipt of the tender documents.
- (c) The administering of the tender documents (i.e. sifting).
- (d) Performing evaluation of the tender (including site inspections).
- (e) The actual adjudication of the qualifying providers.
- (f) The recommendations of the successful bids to the Accounting Officer.
- (g) Prepare bid evaluation report and Bid adjudication report.
- (h) Recording of all proceedings in the Bid Evaluation committee meetings.'

[4] On 12 October 2015, just three days after the SLA was concluded, and before KR Inc. conducted any work, the parties concluded an addendum to the SLA without further procurement processes being followed. The heading of the addendum thus reads:

'BID NUMBER – EDU 01/05 NW: PROVISION AND DELIVERY OF STATIONERY TO DISTRIBUTORS WITHIN THE DEPARTMENT OF EDUCATION AND SPORT DEVELOPMENT IN THE NORTH WEST PROVINCE FOR 3 YEARS.'

Coupled with the above, the addendum specified its purpose under the definitions as: "Addendum" – this addendum regarding the appointment of KR Inc to render Supply Chain Management Administration for the provision and delivery of stationery to distributors relating to tender number: EDU 01/15(NW).'

[5] At this juncture, it is necessary to mention that the aforesaid bid EDU 01/15 NW, in the preceding paragraph, had gone out for tender under bid EDU 34/13 NW in November 2013. The tender award was reviewed and set aside in its entirety on 18 September 2014 by the high court, before Kgoele J, who declared that the tender award was improper, irregular, unlawful and invalid. The grounds for the declaration of invalidity are not necessary for this judgment. The Department was ordered to commence the tender award process *de novo*. The invitation in respect of bid EDU 01/15 NW went out for tender just ten days after the court order of Kgoele J. It is the substance of this bid that formed the addendum which was concluded between the parties.

[6] Notably the following appears in the preamble of the addendum:

'(d) AND FURTHER WHEREAS KR INC. professed to have the requisite skills to execute the services envisaged in the award of tender 01/15 and professes to have the appropriate, reputable and the necessary expertise to undertake and execute supply chain management administration services and oversight relating to delivery of stationery to distributors within the Department of Education and Sport Development in the North West Province;

....

(f) AND FURTHER WHEREAS it is the intention of the parties to align this addendum with the clause 4.2 of the service level agreement and the letter of appointment (engagement).'

Clause 4.2 of the SLA merely states that '[t]he Services will conform in all material respects to its service description as set out in the ...Engagement Letter.' The latter purely relays that the letter serves as a binding contract, however, 'no services must be rendered without obtaining an official purchase order.'

[7] Pertinently, the addendum spelt out the task to be undertaken as the provision and delivery of stationery to the distributors, bearing in mind that in terms of the SLA the appellant was tasked to evaluate, adjudicate and identify the service provider, to supply chain management services, and to conduct the provision and distribution function. Further, the lifespan of the work under the addendum was 'for a period of 3 years or any such extended period'. Whilst, the lifespan of the SLA was only 12 months.

[8] The effect of the addendum was that: KR Inc. under the SLA was to provide services to conduct evaluation, adjudication and supply chain management administrative services for the provision and delivery of LTSM; having provided such service under the addendum, KR Inc. would be rendering the services for which they had evaluated and adjudicated upon, in that, they would be providing and delivering the stationery to distributors. This in turn resulted in the contract of KR Inc. being increased by three years. In addition, the scope of work to be conducted was increased. The net effect was that the fees due were also increased. Consequently, the appellant was able to charge an amount equivalent to 15 % of the budget spent by the respondent on the procurement of services envisaged. According to the appellant, as per their claim against the respondent, the fee due to them was an amount of R46 650 000.00.

[9] KR Inc. performed and completed its duties in terms of the SLA signed on 9 October 2015 for bid EDU 04/15 NW and was duly paid therefore. On 23 December 2016, pursuant to the conclusion of the addendum, KR Inc. issued its invoice to the Department. On 15 March 2017, KR Inc. gave notice of its intention to institute legal proceedings in terms of s 3 of the Institution of Legal Proceedings against Certain Organs of State Act.¹

[10] On 22 March 2017, the Department wrote a letter of cancellation to KR Inc. advising KR Inc. that it had come to the Department's attention that the addendum was invalid as it 'encompassed new scope of work as well as [the] new terms and conditions different from the tender you responded to and [were] appointed for.' The Department sought that KR Inc. give reasons within 14 days, as to why the addendum should not be terminated. According to KR Inc., this letter of cancellation repudiated the addendum, which it so accepted. Consequently, on 1 November 2017, KR Inc. served a summons for damages on the Department for repudiating the contract.

[11] KR Inc.'s particulars of claim, in relation to the addendum, alleges that it was concluded in order 'to secure the proper and efficient distribution of LTSM throughout the province before the start of the 2016 school year.' Further, that the services set out in the addendum 'flowed from' the tender EDU 04/15 NW which had been awarded to KR Inc. In addition hereto, KR Inc. pleaded in the alternative that through the addendum, a single source procurement arose which dealt with additional work that could not be separated from the work assigned under the SLA without great inconvenience. This was necessitated by the emergency situation that the Province found itself in, to deliver the LTSM to the schools before the commencement of the 2016 school year.

[12] The Departments case was simply that the addendum was concluded without complying with the procurement prescripts and as such, it sought that the contract be declared unlawful and invalid. It specifically pleaded that the addendum was concluded in contravention of s 217 of the Constitution of the Republic of South

¹ Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.

Africa² (the Constitution), Regulation 16A of the Treasury Regulations issued in terms of the Public Finance Management Act³ (PFMA) and the National Treasury Instruction Supply Chain Management Instruction Notes, in that, no bidding process was undertaken. The respondent asserted in its plea that the addendum was in fact concluded before any work had been done in respect of the SLA under bid EDU 04/15 NW and as such, denied that the addendum was concluded to avert an 'emergency situation in the Province'... 'in order to secure the proper and efficient distribution of the LTSM throughout the province before the start of the 2016 school year'.

[13] The matter came before Petersen J in the court a quo who dismissed the claim with costs. The high court found that the appointment of KR Inc. as the suitable service provider came about by way of a mere 'swoop of the pen' with a total disregard to fair, equitable and transparent processes as is envisaged by s 217 of the Constitution. In addition, it concluded that the addendum extended 'the SLA without an open tender process, was clearly contrary to the Treasury's Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management.' Placing reliance on *Gobela Consulting CC v Makhado Municipality*⁴ and *Valor IT v Premier, North West Province and Others*⁵ (*Valor IT*), the high court also found that on the evidence before it, the Department was entitled to challenge the validity and lawfulness of the addendum in its plea, without seeking to review and set it aside. It accordingly dismissed KR Inc.'s claim as the contract was concluded in breach of the applicable procedure prescripts and was thus invalid and unlawful.

[14] The crisp question in this appeal is whether the high court was correct in finding that the contract was invalid, unlawful and in breach of the applicable procedure prescripts, in the absence of a counter-application seeking a review and setting aside of the addendum.

² The Constitution of the Republic of South Africa, 108 of 1996.

³ Public Finance Management Act 1 of 1999.

⁴ *Gobela Consulting CC v Makhado Municipality* (910/19) [2020] ZASCA 180.

⁵ *Valor IT v Premier, North West Province and Others* [2021] (1) SA 42 (SCA).

[15] The starting point is s 217 of the Constitution. Section 217 provides as follows:

'(1) 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, 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 allocation of contracts; and

(b) the protection and 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 section (2) must be implemented.'

[16] In *Valor IT*, this Court was seized with the failure to comply with the public procurement processes as is required by s 217 of the Constitution. The importance of s 217 was eloquently enunciated by Plasket JA:

'Section 217 of the Constitution requires organs of state such as the Department, when it procures goods and services, to do so in terms of a system that is 'fair, equitable, transparent, competitive and cost-effective'. Its purpose is to prevent patronage and corruption, on the one hand, and to promote fairness and impartiality in the award of public procurement contracts, on the other. In order to do so, statutes, such as the Public Finance Management Act 1 of 1999 (the PFMA), subordinate legislation made under the PFMA, such as the Treasury Regulations, and supply chain management policies that have to be applied by organs of state, all give effect to s 217.

In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*, Froneman J said of this legal framework that compliance with it was required for a valid procurement process and its components were not mere 'internal prescripts' that could be disregarded at whim. The consequence of non-compliance is clear: in *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC*, Leach JA held that a public procurement contract concluded in breach of the legal provisions 'designed to ensure a transparent, cost-effective and competitive tendering process in the public interest, is invalid and will not be enforced'.¹⁶

[17] Turning back to the facts of this case, by the addition of the addendum, the transaction value was way over the threshold of R500 000.00. As such, an open

⁶ Ibid paras 40 – 41.

tender process was mandatory in terms of clauses 3.4.1 and 3.4.2 of the Treasury Practice Note.⁷ By adopting the addendum on the basis of the transaction value alone amounted to flouting with the requisite public procurement prescripts and non-compliance thereof. No open-tender process was adopted, as such, there were no competitors against whom KR Inc. could compete. There is also no further alternative pricing or an alternative service provider. In such circumstances, the conclusion of the addendum did not comply with s 217 of the Constitution. This culminated in a process adopted for the appointment of KR Inc. being 'a system which was [NOT] fair, equitable, transparent, competitive and cost-effective' as required by s 217 of the Constitution. Thus, at variance with the principles of legality, since the Department had no authority to conclude the addendum in the first place.

[18] Much dispute was made by KR Inc. that the supply chain management services, which are catered for in the addendum, in fact formed part of the services it had to perform in terms of SLA, and 'the conclusion of the addendum [merely] flowed from the award' of tender EDU 04/15 NW. This is clearly not correct. In terms of the SLA, KR Inc. merely had to appoint the service provider and the supply chain management service, in respect of the LTSM. However, the addendum now sought that KR Inc. execute, as the supply chain management service would, the provision and delivery of the stationery in terms of the LTSM. Hence, in respect of the addendum there was an increase in the scope of work to be conducted; an increase in the duration period for the work to have been performed; and naturally an increase in the fees to be paid to KR Inc.

[19] KR Inc. contended that the addendum was valid as it was a single source procurement, which arose as a result of an emergency situation as 'the provision and delivery of the LTSM had to take place before the commencement of the 2016 school year'. From the facts of this case, it is clear that there is no evidence that the Department sought to conclude the addendum to avert an emergency situation, as was the case in *Valor IT* 'that no urgency or emergency circumstances justified a departure from the prescript'. In these circumstances, since there has been non-compliance with the public procurement prescript, the conclusion of the addendum is unlawful and invalid.

⁷ Treasury Practice Note No 8 of 2007/2008.

[20] I now turn to address the issue of a collateral and reactive challenge. It is noted that KR Inc. appreciates that which was enunciated in *Gobela* in respect of collateral challenges. However, it argues that the high court should not have applied the principles of *Gobela* in this matter, as the facts of that case are distinguishable from this case. It is well settled now that if justice is to be served, a court is entitled to declare a contract invalid and unlawful, even if a collateral challenge is absent, in instances of a review of an invalid and unlawful contract. Importantly, it would depend on the facts of each case, in order to ensure that justice is served.

[21] In *Gobela*, likewise in this case, the court was seized with the question of whether a declaration of invalidity and unlawfulness could be pronounced without a collateral challenge being raised to review and set aside the offensive contract. Molemela JA writing for this Court summarised the position as follows:

‘The law relating to collateral challenges was settled by the Constitutional Court in *Merafong City Local Municipality v AngloGold Ashanti Limited*⁸ (*Merafong*). Having surveyed the pre-constitutional case-law, the majority judgment found that South African law has always allowed a degree of flexibility in reactive challenges to administrative action. Having considered the impact of the Constitution on that body of law, it re-asserted that the import of *Oudekraal* was that the government institution cannot simply ignore an apparently binding ruling or decision on the basis that it was patently unlawful, as that would undermine the rule of law; rather, it has to test the validity of that decision in appropriate proceedings. The decision remains binding until set aside. That court expressed some guidelines for assessing the competence of a collateral challenge. With specific reference to *Kirland*, it stated as follows:

“But it is important to note what *Kirland* did not do. It did not fossilise possibly unlawful – and constitutionally invalid – administrative action as indefinitely effective. It expressly recognised that the *Oudekraal* principle puts a provisional brake on determining invalidity. The brake is imposed for rule of law reasons and for good administration. It does not bring the process to an irreversible halt. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule of law reasons, the decision stands.

Oudekraal and *Kirland* did not impose an absolute obligation on private citizens to take the initiative to strike down invalid administrative decisions affecting them. Both decisions

⁸ *Merafong City Local Municipality v AngloGold Ashanti Limited* (CCT106/15) [2016] ZACC 35; 2017 (2) SA 211 (CC).

recognised that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down. Neither decision expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid. As important, they did not imply or entail that, unless they bring court proceedings to challenge an administrative decision, public authorities are obliged to accept it as valid. And neither imposed an absolute duty of proactivity on public authorities. *It all depends on the circumstances.*

....

Against this background, the question is whether, when AngloGold sought an order enforcing the Minister's decision, Merafong was entitled to react by raising the invalidity of her ruling as a defence.

....

A reactive challenge should be available where justice requires it to be. That will depend, in each case, on the facts. (Emphasis added.) ”⁹

[22] In this case, the addendum is such that the invalidity thereof cries out that justice be served. Before the period of the addendum came to an end, in fact after a year, KR Inc. issued out an invoice seeking payment of R46 million without the work being complete; work which was calculated to be done for the entire three year period of the addendum. It would not be in the interest of justice to allow for this fruitless and wasteful expenditure.

[23] Further, the invalidity of the addendum was raised in the Department's cancellation letter and in its plea; thus KR Inc. was well aware of the case it was to meet and it would therefore, be an injustice to say the lack of a counter-application precludes the Department from seeking a declaration of invalidity and unlawfulness. The Department pleaded non-compliance with s 217 of the Constitution, contravention of Regulation 16A of the Treasury Regulations issued in terms of the PFMA and contravention of the National Treasury Instruction Supply Chain Management Instruction Notes. The high court in its judgment mentioned that, the Department, even in the absence of a collateral challenge, had raised the validity and lawfulness of the addendum in the pleadings.

[24] Yet, another consideration by the high court, was the manner in which the addendum came about, which the Department carefully pleaded that it was entered into three days after the SLA was concluded. No work, whatsoever, had been

⁹ *Gobela op cit* fn 4 at para 18.

undertaken or conducted by KR Inc. at that stage in terms of the SLA. Thus, the efficiency of KR Inc. being best to manage the task set out in the addendum could not have been established by then. This dispels the contention by KR Inc. that the addendum was concluded 'in order to serve the proper and efficient distribution of LTSM throughout the province before the start of the 2016 school year' and that an emergency situation had arisen.

[25] Lastly, the court a quo was correct in entertaining the collateral challenge of the Department, and declaring the addendum invalid and unlawful, for non-compliance with the prescripts of the public procurement processes. This is clearly contrary to what s 217 of the Constitution seeks to prevent, in respect of organs of state, like the Department in this case. Therefore, the declaration of invalidity and unlawfulness of the addendum by the high court was warranted and justice required that the collateral challenge be entertained.

[26] As a last resort, KR Inc. sought that we grant a just and equitable remedy under s 172(1)(b) of the Constitution, as this Court did in *Greater Tzaneen Municipality v Bravospan*.¹⁰ In essence, KR Inc. wanted compensation for the period that it had rendered the relevant services in terms of the addendum, as a just and equitable remedy under s172 (1)(b). The difficulty that it encounters is that, this sort of remedy is normally sought whilst in the same proceedings. In this instance, the relief sought was not sought in the high court. In addition, the facts relevant to make a determination or order as is contemplated in s 172(1)(b) are not before us. Importantly, the Department would be prejudiced, as the relief and remedy sought at this late stage was neither raised in the papers nor was it before the high court, but merely raised from the bar.

[27] In the circumstance of this case, the addendum was unlawful and invalid and justice requires that the impugned addendum be declared as such. As regards to costs, there is no reason to depart from the general rule that costs follow the result.

[28] In the result:

The appeal is dismissed with costs.

¹⁰ *Greater Tzaneen Municipality v Bravospan* 252 CC (428/2021) [2022] ZASCA 155.

W HUGHES
JUDGE OF APPEAL

Appearances

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