REPUBLIC OF SOUTH AFRICA

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

CASE NO: 32549/2018

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

Date: 24/01/24

In the matter between:

AFRICA WIDE CONSTRUCTION (PTY) LTD Plaintiff/Applicant

and

ESKOM HOLDINGS SOC LIMITED Defendant/Respondent

JUDGMENT

MAKOLA AJ:

Introduction and Background

[1] The excipient who is the plaintiff in the main action excepts to the respondent's ((Eskom), who is the defendant in the main action), plea on the grounds that it does not disclose a valid defence.

[2] The excipient issued summons against Eskom claiming R12,538,146.39 together with interest and costs. The claim is said to arise out of a contract concluded between the parties on 29 September 2016 for professional services to be rendered by the excipient.

[3] The excipient avers that it has complied with the terms and conditions of the contract by executing the services required; conducting an assessment and providing the assessment and invoice according to the contract and that Eskom has not disputed any of the assessments that have been provided and, it has previously made payments where the assessment and invoices of the excipient followed the same process.

[4] To this Eskom raises the following defences.

4.1 That it is an organ of state and is required to comply with applicable statutory and regulatory measures for a contract to be said to be valid; and

4.2 That the mandatory measures were not complied with, which rendered the contract invalid.

[5] Eskom denies further that:

5.1 the completion date was 19 February 2017.

5.2 the contract was extended.

5.3 the purported extension of the contract was valid.

5.4 payment is due because the contracts on which the excipient relies are invalid.

5.5 services were rendered.

[6] The excipient amplifies the basis of its exception as follows:

6.1 Eskom has failed to plead the facts which render the alleged "statutory and regulatory measures" applicable to this matter.

6.2 Eskom has failed to explain why the alleged "statutory and regulatory measures" render the contract "invalid and of no force and effect".

6.3 Eskom cannot contend that the contract is invalid and of no force and effect unless and until a court has reviewed and set aside the award of the contract to the plaintiff pursuant to a legality review. There is no allegation that such a review has occurred or that a court has declared the award of the contract to be invalid and therefore set it aside.

[7] The issue that arises is whether, upon all interpretation which it can reasonably bear, Eskom's plea discloses a defence (*Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa) Ltd* 2018 (3) SA 405 (*SCA) [9]).*

Summary of the parties' submissions

[8] The excipient's case can be summarised as follows. The defences pleaded by Eskom are not competent defences in law. Secondly, Eskom could not plead a defence of invalidity of the contract unless it has instituted a review application to set aside the contract. For the latter submission Mr Premhid, for the excipient, relies on *Trudon (Pty) Ltd (formerly TDS Directory Operations) v The National Prosecuting Authority and Another* (43247/2014) [2018] ZAGPPHC 827 (23 November 2018) [24]. I shall come back to this point later.

[9] Mr Premhid submitted further that Eskom's obligations under the contract were not negated by its plea of unlawfulness. Eskom , as an organ of state is obliged to comply with its contractual obligations until the contract is set aside. Eskom could not only plead a defence of unlawfulness, it must also show that the pleaded defence is competent in law.

[10] The issue in *Oudekraal* was "*whether or in what circumstances an unlawful administrative act might simply be ignored, and on what basis the law might give recognition to such acts [1].*". The court held that the public authorities could not justify a refusal to perform a public duty by relying without more on the invalidity of the originating administrative act. The public authority is required to take action to have set aside and not simply to ignore the impugned administrative act *[37].*

[11] Mr Premhid further argued that Eskom's reliance on paragraph [9] of *Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa) Ltd* 2018 (3) SA 405 (SCA), where the Supreme Court of Appeal held that an excipient must persuade the court that upon every interpretation which the

plea can reasonably bear, no defence is disclosed, did not avail Eskom because it has not launched review proceedings to set aside the impugned contract.

[12] Mr Ramolefe for Eskom argued that the test for exception is whether the plea discloses a defence. The excipient's real complaint is that Eskom's pleaded defence lacked particularity and not that there is no defence disclosed in the plea. A complaint based on lack of particularity could not be cured by an exception. Accordingly, the exception should fail. For this submission he relies on *Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa) Ltd* 2018 (3) SA 405 (SCA) [9].

Legal principles

[13] A pleading lacks averments that are necessary to sustain a defence (i) where the pleading does not justify the conclusions drawn therein or (ii) where the defence raised, though adequately pleaded, does not in law constitute a defence to the claim.

Trudon and why it is distinguishable

[14] In *Trudon (Pty) Ltd (formerly TDS Directory Operations) v The National Prosecuting Authority and Another* (43247/2014) [2018] ZAGPPHC 827 (23 November 2018) the court was concerned with whether the defendants (both organs of state) were entitled to ignore their own decision to conclude agreements on the basis that, in their own view:

14.1 The agreements were unlawful, in circumstances in which they have failed to take proper steps to have a court confirm their view through a "direct view"; and

14.2 Second, whether the defendants were entitled, in the absence of a direct review, to wait until the plaintiff sought to enforce its rights under the agreements before raising their constitutional argument as a defence to the plaintiff's claims through a "collateral challenge"*[8].*

[15] The court held that, even an allegedly unlawful administrative act stands as a fact unless it is set aside and, that the defendants were not entitled to ignore their own decisions to conclude the agreements on the basis that the agreements were unlawful, when they had failed to take proper steps to have a court confirm their view through a review, or at the very least by way of an application for a declarator *[19]* [1].

[16] Whether a matter constitutes appropriate circumstances for an organ of state to challenge the lawfulness of exercises of public power by way of reactive challenges depends on the facts of each case (*Trudon* [*22] and [23]).*

[17] The court observed that in the absence of a formal review, application or counter-application, the defendants could nevertheless proceed by way of a collateral challenge against invalidity in proceedings that are not in themselves designed to impeach the validity of the act or agreement in question (*Merafong City Local*

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[1] The court relied on *Kirkland, Quakeni Local Municipality and Another v FV General Trading CC* 2010 (1) SA 356 (SCA); *Merafong City Local Municipality v Anglo Gold Ashanti Ltd* 2017 (2) SA 211 (CC); *Economic Freedom Fighters v Speaker, National Assembly and others* 2016 (3) SA 580 (CC); *President of the Republic of South Africa and others v South African Dental Association and Another* 2015 (4) SA BCLR 388 (CC)).

Municipality v Anglo Gold Ashanti Ltd 2017 (2) SA 211 (CC)). The permissibility of a reactive challenge by an organ of state depends on a variety of factors .(*Bengwenyama Minerals (Pty) Ltd v Genorah (Pty) Ltd* 2011 (4) SA 113 (CC) at *[85]).*

[18] On the question whether the defendants were entitled, absent a review, to wait until the plaintiff sought to enforce its rights under the agreements before raising their constitutional argument as a defence to the plaintiff's claim through a collateral damage, the court in *Trudon* resolved the issue in favour of the plaintiff, service provider. It said that it was not appropriate for the defendants to seek to invalidate the agreements on the basis of a constitutional challenge raised by way of a special plea without enabling the plaintiff to benefit from the procedural and substantial safeguards that would be available in a review or an application.

[19] *Trudon* was resolved on the facts of that case based on the submissions made by the party that sought to enforce the agreements concluded with the organs of state. The court concluded that, on the facts of that case, the organs of state could not raise the collateral challenge defence. The only remedy available to the defendants was to institute a direct review or at the very least bring an application for a declarator. To raise a collateral issue as they did by way of a special plea could not on any of the authorities be countenanced.

[20] In my view *Trudon* is distinguishable from the facts of the present case: (a) The relief sought by the state organs by way of a declarator (b) the separation under Rule 33(4) of the legal issues to be determined by the court (c) the determination of whether there existed appropriate circumstances that permitted the

defendants to raise a collateral challenge to the enforcement of the contract. None of the above considerations arise in the present case.

[21] It is clear from a consideration of the authorities that Eskom is entitled to raise invalidity of the contract between the parties as a collateral challenge where justice requires it and only in appropriate circumstances. As to permissibility to raise invalidity, that depends on a variety of factors. The collateral challenge itself is recognised as an exception to the *Oudekraal* principle.[2]

[22] It is not necessary for Eskom to first launch review proceedings in order for it to be able to raise the collateral challenge of invalidity of the contracts concluded with the excipient.

[23] I accordingly conclude that *Trudon* is distinguishable.

Does the plea disclose a defence ?

[24] The key question, however, remains , whether the plea discloses a defence cognisable in law. It is trite law that procurement by an organ of state that fails to comply with the procurement prescripts is invalid and of no force and effect.

[25] In *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd*[3] the court was concerned with the validity of two leases of immovable property concluded between the RAF and a provincial department without the provincial tender board having arranged the hiring of the premises as was required by statute, the court concluded that the leases were invalid. The court said:

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[2] *Oudekraal Estate (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

[3] *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA)

"As to the mischief which the Act seeks to prevent, that too seems plain enough. It is to eliminate patronage or worse in the awarding of contracts, to provide members of the public with opportunities to tender to fulfil provincial needs, and to ensure the fair, impartial, and independent exercise of the power to award provincial contracts. If contracts were permitted to be concluded without any reference to the tender board without any resultant sanction of invalidity, the very mischief which the Act seeks to combat could be perpetuated.

As to the consequences of visiting such a transaction with invalidity, they will not always be harsh and the potential countervailing harshness of holding the province to a contract which burdens the taxpayer to an extent which could have been avoided if the tender board had not been ignored, cannot be disregarded. In short, the consequences of visiting invalidity upon non-compliance are not so uniformly and one-sidedly harsh that the legislature cannot be supposed to have intended invalidity to be the consequence. What is certain is that the consequence cannot vary from case to case. Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in the particular case."[4]

[26] The SCA in *Quakeni*[5] stated the position as follows:

"…It is not a question of a court being entitle to exercise a discretion having regard to issues of fairness and prejudice. Rather, the question is one of legality.

[15] Consequently, in a number of decisions this court has held contracts concluded in similar circumstances without complying with prescribed competitive processes are invalid."[6]

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4 at paras [8] and [9]

5 *Municipal Manager: Qaukeni v General Trading CC* 2010 (1) SA 356 (SCA)

6 at paras [14] and [15]

[27] The court concluded as follows:

> *"I have therefore no difficulty in concluding that a procurement contract for municipal services concluded in breach of the provisions dealt with above which are designed to ensure a transparent, cost-effective and competitive tendering process in the public interest, is invalid and will not be enforced."*[7]

[28] The SCA in *Chief Executive Officer, SA Social Security Agency NO & others v Cash Paymaster Services (Pty) Ltd*[8] put the position as follows:

> *"Section 217(1) of the Constitution prescribes the manner in which organs of state should procure goods and services. In particular, organs of State must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. This implies that 'system' with these attributes has to be put in place by means of legislation or other regulation. Once such a system is in place and the system complies with the constitutional demands of section 217(1), the question whether any procurement is 'valid' must be answered with reference to the mentioned legislation or regulation."*

[29] Without question , procurement contracts that do not comply with prescripts are invalid and unenforceable. This means that a defence of based on non-compliance with procurement prescripts is a valid defence in law.

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[7] At para [16]

[8] 2012 (1) SA 216 (SCA) at para [15]

[30] Furthermore, as can be seen from the formulation of the grounds underpinning the exception, the complaints against Eskom relate to lack of particularity. An exception is not intended to address such complaints.

Conclusion

[31] I summarise my conclusion from the above discussion.

31.1 Eskom's pleaded defence is not bad in law.

31.2 Eskom's conclusion that the contract would be invalid if the applicable statutory and regulatory measures were not complied with is justified by the allegations made . Put differently, if what Eskom says about a failure to comply with procurement prescripts is true, it would follow that the contract would be invalid.

31.3 Eskom is not precluded from raising invalidity as a collateral challenge.

[32] I conclude that the excipient has failed to demonstrate that upon every interpretation which the plea can reasonably bear, no defence is disclosed. Accordingly, exception must fail.

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

The exception is dismissed with costs.

BL MAKOLA
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING:	3 August 2020
DATE OF JUDGMENT	21 January 2021
Counsel for the excipient/plaintiff:	K Premhid, instructed by Bilaal Dawood Attorneys, Johannesburg
Counsel for Eskom/defendant:	K Ramolefe, instructed by Raynard & Associates Inc, Johannesburg