




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
1/4/2014 <u>DATE</u>	 <u>SIGNATURE</u>

2/4/2014

CASE NO: 54646/2010

In the matter between:

H R COMPUTEK (PTY) LTD

Plaintiff

and

STATE INFORMATION TECHNOLOGY AGENCY
(PTY) LTD

Defendant

JUDGMENT

MOTHLE J

INTRODUCTION

1. The Plaintiff in this matter, H R Computek (Pty) Ltd ("*Computek*") has sued the State Information Technology Agency (Pty) Ltd ("*SITA*") for an amount of R2,000,000.00 for services Computek claims it has rendered, as a service provider in terms of a contract concluded in 2007. SITA's contention in essence is that there was no contract between the parties in 2007, on which the alleged claim can be based.
2. Computek first approached the Court by way of application. In that application, several affidavits were exchanged between the parties and when the matter came to Court, the parties by themselves agreed that there were disputes of fact which would require the matter to be referred to trial. Computek delivered a declaration to which SITA filed a plea. The matter then came before this Court as action proceedings.
3. Computek called only one witness, Mr H R Chakala ("*Chakala*") who is the Chief Executive Officer ("*CEO*") of this company. At the end of his evidence Computek closed its case. SITA then applied for absolution from the instance with costs.

BACKGROUND

4. Chakala testified that in 2007 Computek was invited by the Department of Local Government and Housing of the Limpopo Province (*"the Department"*) to make a presentation for development of a model solution in the monitoring and evaluation of performance management in the municipalities. SAS, which is the company that supplies software for that solution model, also attended the presentation. Subsequent thereto the Department, through SITA, purchased the software in 2007 from SAS.
5. Chakala further testified that Computek, on invitation by the Department, made a proposal as to the implementation model. The Department requested Computek to consider a reduction of the amount originally quoted for the service. The Department claimed that the implementation costs as quoted would exceed the amount available in the budget. A new proposal with a reduced amount was forwarded to the Department somewhere in November 2007.
6. Following that proposal, Chakala alleges that SITA, represented by their Regional Office manager one Calvin Kekana (*"Kekana"*),

issued a letter of award to Computek on 19 December 2007 under reference "*RFQ 348 LIMPDLGH003 2007 PERF MGT*" (hereinafter referred to as "*RFQ 2007*"). The letter of award stated that the proposal/quote from Computek has been accepted by SITA and that Computek should confirm acceptance within one day after receipt of that letter. Computek accepted the award on 4 of January 2008.

7. Chakala further testified that after receipt of this letter and formal acceptance of the award, he requested a meeting with the officials of the Department so as to discuss the implementation of the project. This meeting was held on 16 January 2008, where after Computek began with the implementation of the project.
8. According to Chakala it was during or about February 2008, while they were busy with the implementation of the project on the basis of the 2007 letter of award, that SITA issued a request for quotation for the same project. This request for quotation came under the reference number of RFQ 348 LIMP005 DLGHP MS ("*RFQ of 2008*"). This RFQ 2008 called for quotation in regard to services for the implementation of this project. Chakala testified that he was requested by the Department to

submit a proposal to that RFQ 2008 which proposal SITA accepted and issued a letter of award in March 2008.

9. When Computek lodged its claims for payment, it did so under the RFQ of 2008 and backdated some of the time sheets to January 2008 to cover the period before the 2008 award was made. SITA objects to the claim for any work done prior to the issuing of the letter of award of March 2008. Computek on the other hand through Chakala contends that the work done from January 2008 was covered by the 2007 letter of award.
10. SITA replicates by stating that, that letter of award of 2007 was invalid as at that time SITA had not called for any request for quotation and Computek is unable to produce any documentation to prove that it submitted a request for quotation to SITA which would then have led to the alleged award of 2007.

APPLICATION FOR ABSOLUTION

11. After the Court heard the evidence of Chakala, Computek closed its case. SITA then applied for absolution on the following grounds:
 - (i) Against the Rules of pleading, Computek lodged a claim in terms of the award and purchase order of 2008 in its

application proceedings but then changed to plead the contract of 2007 as a basis for the claim in its action proceedings;

(ii) Computek has failed to present any documentation that proves that there was a contract in 2007 between itself and SITA which led to the alleged letter of 2007. The letter of 2007 was issued unlawfully and therefore the Court cannot give effect to an unlawful contract;

(iii) Chakala, in his evidence under oath confirmed that the claim against SITA is based on the 2007 contract, which contract it had with the Department and not with SITA.

12. In response, counsel for Computek argued that SITA is simply a clerical institution which is supposed to make payments as instructed. It is not a principal contracting party and therefore cannot be party to a contract.

13. I find this submission by Computek's counsel rather bizarre. If he contends that SITA does not have capacity to contract but simply to effect payment, then there was no basis for Computek to issue summons against SITA in the first place. More so that Chakala as well as counsel for Computek himself argued that Computek had a *contract with the Department* in 2007, and not

with SITA. On this ground alone, I have no doubt in my mind that Computek instituted proceedings against the wrong party in trying to recover its claim.

14. I am also of the view that there is merit in SITA's contention that the discrepancy in the pleading of Computek's case, put paid to any prospects of its success. When Computek instituted application proceedings, it based its claim on the contract with SITA arising out of RFQ of 2008. Paragraph 6.1 of the Founding Affidavit attest to this fact. This in my view makes sense as there was a contract concluded in 2008, which SITA does not dispute. However, when the parties decided to come by way of action, Computek changed course and sued on the basis of the letter of award of 2007. This appears in paragraph 4.1 of Computek's Declaration.
15. Computek, which bears the *onus* to prove its case, failed to place before the Court the RFQ of 2007 and the acceptance thereof by SITA. The importance of this RFQ 2007 is that it should contain the terms and conditions of the contract to which the letter of award of 2007 would be based. Without these documents, Computek is simply armed with a letter of award that has no content.

16. Under cross-examination, Chakala confirmed that the claim is based on the letter of award of 2007, basically and materially changing his evidence under oath, as deposed to in the Founding Affidavit filed in the application proceedings. In other words, Chakala made two conflicting versions under oath: one version in the Founding Affidavit and the other different version in Court as a witness. It seems to me that this contradiction is a material discrepancy that cannot even be cured by any form of amendment.
17. It is indeed correct, as contended by counsel for SITA, that even if the Court were to accept the letter of award of 2007 as binding on both SITA and Computek, the issuing of that letter did not follow the prescripts of the law relating to procurement as well as the standing procedures that needs to be observed.
18. The contention by counsel for Computek to the effect that SITA does not have powers to make any regulations as a body performing clerical functions fails to take into account the provisions of Section 23 of the SITA Act 88 of 1998 which is the basis upon which the Regulations were issued. The Regulations therefore have legal standing, are valid and are binding on all parties transacting business with SITA. These Regulations were

published under notice R904 of Government Gazette No. 28221 of 23 September 2005.

19. As counsel for SITA submitted, the whole procurement legal framework which is provided for in Section 217 of the Constitution of the Republic of South Africa 1996, the provisions of the Public Finance Management Act, 1 of 1999, the provisions of SITA Act, 88 of 1998 as well as Regulations promulgated thereunder, read with the standing regulations of SITA all constitutes the legal framework within which SITA conducts its business. Non-compliance with these legal prescripts renders the ultimate contract void. It is on this basis that the Court cannot enforce an unlawful contract. See in this regard ***Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC 2010 (1) SA 356 SCA***
20. The test for absolution has been outlined in ***Gordon Lloyd Page and Associates v Riveira and Another [2000] 4 All SA 241 (A)*** where the Court stated that the question to be asked by the Court is whether there is evidence upon which the Court could or might reasonably find for the Plaintiff. In other words, has the Plaintiff made out a *prima facie* case?

21. Having regard to the reasons outlined above, I am of the view that Computek as Plaintiff in this case has not succeeded to make a case on which a Court might reasonably find in its favour.

22. In the premises I make the following order:

Absolution from the instance is granted with costs.



Judge S P Mothle
The High Court of South Africa
Gauteng Division, Pretoria.

Date of hearing: 18-21 February 2014

Date of Judgment: 2 April 2014

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