IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:36811/2014

13/12/2016.

DELETE WHICHEVER IS NOT APPLICABLE

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

12/12/2016 .....
DATE SIGNATURE

In the matter between:

WAYMARK INFOTECH (PTY) LTD **PLAINTIFF**

and

ROAD TRAFFIC MANAGEMENT CORPORATION DEFENDANT

JUDGMENT

RANCHOD J:

[1] The plaintiff and defendant had entered into a written Service Level Agreement (the SLA) pursuant to a bidding process in terms of which the plaintiff was to render certain services including the replacement of an Enterprise Resource Planning System (ERP) ('the system') for the defendant. The contract price was R33 737 062.00.

[2] The plaintiff says it rendered the services but before they could be completed the defendant asked it to suspend the provision and completion of the services until a formal communication from the defendant to resume them. Plaintiff says the defendant never informed it to resume and complete the services.

[3] The plaintiff issued summons against the defendant under case no 2010/40422 alleging that the suspension of the services by it amounted to an unlawful termination, alternatively, repudiation of the SLA. On 18 October 2013 this court found (per Janse van Nieuwenhuizen J) that the agreement between the parties had not been terminated and granted absolution from the instance against the plaintiff.

[4] The plaintiff thereafter tendered to perform its obligations in terms of the SLA and called upon the defendant to agree to a time table for the defendant to likewise perform its obligations in terms of the agreement. The defendant refused to do so which refusal, says plaintiff, amounts to an unlawful repudiation of the SLA which plaintiff has accepted. Plaintiff accordingly terminated the SLA and instituted the present action for damages for R6 774 750.00.

[5] The defendant raised a special plea of prescription and pleaded over on the merits of the claim. For present purposes, only paragraph 1.1 of the plea is relevant as I will explain presently. The plea in paragraph 1.1 is as follows:

> '1.1 Save for pleading that the conclusion of the agreement was not properly authorised, as dealt with more fully in the defendant's counterclaim, the allegations herein contained are admitted.'

[6] It is necessary to set out the defendant's counter-claim (claim in reconvention) at length. The defendant claims:

> "3. In terms of the Service Level Agreement, the Defendant acquired services from the Plaintiff relating to an Integrated Enterprise Resource Planning System with business intelligence

at a contract sum of R33 337 062.03 (inclusive of VAT), which services would be rendered on or before the delivery due dates set out in schedule "A" to such agreement.

4. Payment terms were set out in schedule "E" to the Service Level Agreement and provided for the following payments to be made on or before the following dates:

   4.1 Software licenses – R10 422 887.00 at the commencement of the project;

   4.2 Hardware – an amount of R5 644 375.00 at the commencement of the project;

   4.3 CRP1 – an amount of R3 534 000.00 at completion of the milestone on 4 May 2009;

   4.4 CRP2 – an amount R3 534 000.00 at completion of the milestone on 15 June 2009;

   4.5 User Acceptance Testing ("UAT") – an amount of R4 417 500.00 on or before 21 September 2009;

   4.6 Go-Live – an amount of R3 534 000.00 on or before 1 November 2009;

   4.7 Production support – an amount of R2 650 500.00 on or before 30 November 2009.

5. In the premises, the agreement was concluded on the basis that future financial commitments were made by the Defendant.

6. At the time of acceptance of the Plaintiff's bid under reference no: RTMC07/2008/09 dated 17 November 2008 and conclusion of the Service Level Agreement:

   6.1 the Defendant was a National Public Entity listed in Part A of Schedule 3 to the Public Finance Management Act 1 of 1999 (hereinafter referred to as "the Act").

   6.2 the Defendant was accordingly at all relevant times a National Public Entity as contemplated in Section 66(3)(c) of the Act, so that it could only have concluded the agreement resulting from the tender and the Service Level Agreement through the Minister of Finance at the time.

7. The tender and the Service Level Agreement were not concluded by the Minister of Finance at the time.

8. In the premises:

   8.1 the tender and the Service Level Agreement are not binding upon the Defendant, as contemplated in Section 68 of the Act;

   8.2 further, the Plaintiff was and is not entitled to enforce or rely upon the Defendant's alleged repudiation of the agreement and its subsequent cancellation of the agreement.

9. The Plaintiff contends that the Service Level Agreement was binding upon the Defendant and that it is entitled to contractual damages.

10. In the premises, the Defendant is entitled to an order declaring that the tender under bid no: RTMC07/2008/09 dated 17 November 2008, its acceptance and the Service Level Agreement dated 31 March 2009 are not binding on the Defendant."

[7] At the commencement of the trial the parties applied in terms of Rule 33(4) for an order separating the issues about the merits of plaintiff's claim and the special plea of prescription from that of the counter-claim and that only the latter should be determined at this stage. The reasoning was that if I found in defendant's favour in the counter-claim it would dispose of the entire matter. I agreed and the plaintiff's claim and the determination of the special plea were postponed *sine die*. The matter then proceeded only in respect of the counter-claim.

[8] It is common cause that after a tender process the parties entered into a SLA dated 31 March 2009. It is also common cause that the Minister of Finance did not award the tender or conclude the SLA.

[9] As is apparent from the counter-claim, the defendant alleges that the payment terms set out in schedule "E" to the SLA and the provision of payments to be made on the completion of various stages of the project constituted 'future financial commitments' by the defendant. This, it argued, falls foul of the provisions of s66 of the Public Finance Management Act 1 of

1999 (the PFMA) and, in terms of s68 the SLA is not binding on the defendant.

[10] The pre-amble to the PFMA provides as follow:

'To regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith.'

[11] Sections 66 and 68 fall under chapter 8 of the PFMA under the heading "Loans, Guarantees and Other Commitments".

[12] Section 66 provides-

"66 Restrictions on borrowing, guarantees and other commitments

(1) An institution to which this Act applies may not borrow money or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that institution or the Revenue Fund to any future financial commitment, unless such borrowing, guarantee, indemnity, security or other transaction-

(a) is authorised by this Act;

(b) in the case of public entities, is also authorised by other legislation not in conflict with this Act; and

(c) ...

(2) ...

(3) Public entities may only through the following persons borrow money, or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that public entity to any future financial commitment:

(a) ...

(b) ...

(c) Any other national public entity: The Minister or, in the case of the issue of a guarantee, indemnity or security, the Cabinet

member who is the executive authority responsible for that public entity, acting with the concurrence of the Minister in terms of section 70."

[13] In terms of s1 of the PFMA a public entity "means a national or provincial public entity" and a national public entity means –

(a) a national government business enterprise; or

(b) a board, commission, company, corporation, fund or other entity (other than a national government business enterprise).

[14] It is not in dispute that the defendant is a National Public Entity listed in Part A of Schedule 3 to the PFMA.

[15] Section 68 of the PFMA provides:

"68. Consequences of unauthorised transactions

If a person, otherwise than in accordance with section 66, lends money to an institution to which this Act applies or purports to issue on behalf of such an institution a guarantee, indemnity or security, or enters into any other transaction which purports to bind such an institution to any future financial commitment, the state and that institution is not bound by the lending contract or the guarantee, indemnity, security or other transaction.'

[16] As is apparent from the counter-claim, the defendant relies on s66(3)(c) read with s68 of the PFMA in that the Minister of Finance (the Minister) did not award the tender or conclude the SLA. That the Minister did not do so is not in dispute. The plaintiff contends that while the SLA commits the defendant to future financial obligations they are not those contemplated in s66 of the PFMA. It says the SLA concerns the procurement of goods and services for which a budget has been provided. Whilst the defendant is a public entity as contemplated in s66(3)(c) the section does not apply to transactions for the procurement of goods and services.

[17] The normal procurement of goods and services is provided for in s217 of the Constitution. The section provides –

> '217. Procurement – (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...' (Italicised for emphasis).

[18] Section 217 of the Constitution finds expression in s51 of the PFMA in relation to public entities. It provides –

> '51. **General responsibilities of accounting authorities**
>
> (1) An accounting authority for a public entity-
>
> (a) must ensure that that public entity has and maintains-
>
> (i) ...
>
> (ii) ...
>
> (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;
>
> ....'

It is not in dispute that the contract *in casu* is a procurement contract.

[19] Annexure "PL1" to plaintiff's plea to the defendant's counterclaim is an internal document of the defendant addressed to its Chief Executive Officer requesting approval for the acquisition of the Integrated Enterprise Resource Planning System. It has been signed by a number of the defendant's functionaries, including its Chief Information Officer and the Chief Financial Officer, who supported the planned acquisition. The Chief Executive Officer of the defendant approved it on 29 September 2008. In the document, under the heading 'Financial Implications' it is stated that –

> 'The funds *budgeted* for this project during this financial year amounts to R15 000 000.00. The actual cost of the system will only be determined once the successful contractor has been appointed.' (My emphasis).

[20] A request for bids was duly advertised and eventually the plaintiff was selected as the successful bidder for the project. The details are set out in a submission (Annexure 'PL2' to plaintiff's plea) dated 11 March 2009 prepared by the Chairperson of the Bid Evaluation Committee and addressed to the Chairperson of the Finance and Risk Committee of the defendant wherein it is stated –

> 'The purpose of this submission is to submit recommendations by the bid evaluation committee to the bid adjudication committee for consideration.'

[21] Under the heading 'Availability of Funds and Financial Implications' in paragraph 6 of the submission it is stated –

> '6.1 The project manager, ... confirmed that the project will be implemented in a phase-in approach within the 2009/2010; 2010/2011 *budget as provided for in the business plan* of the Corporation for the 2008/2009 financial year.
>
> 6.2 An amount of R15 000 000.00 has been allocated in the business and financial plan for the budget of 2008/2009 for this project.' (My emphasis).

[22] Mr Tsatsawane, for the plaintiff, submitted, as I understood the argument, that for what is essentially an ordinary procurement contract, which includes a 'future financial commitment', to fall within the provisions of s66(3) there must be something 'fiscally exceptional' about the financial commitment. In *casu*, the agreement was an ordinary procurement contract which had been budgeted for and any future commitment was not fiscally exceptional. The future financial commitment i.e. to pay at specified stages during the provision of the goods and services is the normal consequence of almost any such contract and does not for that reason make it fiscally exceptional.

[23] Mr Tsatsawane submitted further, as did counsel for the City of Cape Town in *Cape Town v Sanral 2015(6) SA 535 WCC* at *639 para 269*, that "the meaning in s66(3) of the PFMA of the words '(a)ny future financial commitment' is not easy to determine but they cannot mean every transaction

that commits the entity to make payment in the future. In *City of Cape Town v Sanral at 640* the Full Court had to consider an argument in support of the restrictive interpretation of section 66 of the Act in the context of the word "*guarantee*". The argument was that the word "*guarantee*" could not apply to every undertaking to make payment because an absurdity would follow, namely that the words "*any future financial commitment*" could not mean every transaction that committed to entity to make payment in future, such as, for instance travel and accommodation bookings, salary contracts and the hiring of premises. Counsel argued that there had to be something fiscally exceptional about the financial commitment in order to bring it within the ambit of the provisions requiring approval in terms of section 66(3). The court, in rejecting the submissions, held that the word "*guarantee*" should be defined widely, and that the contract was therefore subject to the provisions of section 66 of the Act (at 639G-J).

[24] The PFMA was enacted to regulate financial management in the national and provincial governments and to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively. (See the preamble and s2 of the PFMA).

[25] The PFMA does not contain a definition of "*any future financial commitment.*" In the absence of a statutory definition, the words must be given their ordinary grammatical meaning taking into account the context in which they are used and the purpose of the legislation. The inevitable point of departure is the language of the provision itself. (*Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA) at 603-4*).In *Cool Ideas 1186 CC v Hubbard and Another 2014(4) SA 474 (CC)* the Constitutional Court said the following about statutory interpretation[1]

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

[1] Paragraph 28 on page 484.

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)".

[26] The purpose of the PFMA is to regulate public financial management. Its purpose is to ensure that Organs of the State to which it applies do not spend money which they do not have, thereby committing the national revenue fund to unplanned expenditure.

[27] Upon a proper interpretation of the words used in section 66 of the Act, in my view it is clear that *any* future financial commitment is contemplated and the entering into *any* other transaction that binds or *may* bind that institution. The words should be widely interpreted and the limitation sought to be imported by the plaintiff means that further words have to be read into the section, so that section 66(3) should, on the plaintiff's postulate, read "enter into any other similar transaction that binds or may bind that public entity to any similar future financial commitment in respect of which no budget was prepared".

[28] When regard is had to the purpose of the PFMA and the context of section 66, it necessarily follows that "*future financial commitment*" must refer to an undertaking to commit expenditure in the future for which a budget has not yet been approved. Plaintiff's counsel submitted that 'future' financial commitment must be read to mean 'substantial' future financial commitment. I do not agree. The phrase must be given its usual, ordinary grammatical meaning.

[29] Plaintiff's reliance on the two memoranda dated 29 September 2008 and 11 March 2009 respectively to show that the funds for the project had

been budgeted for is in my view misplaced. R15 000 000.00 was *allocated* in the budget for 2008/2009 for the project. However, there is nothing to indicate that there was a similar or any *allocation* for the project in the subsequent financial years. All that is said in the memorandum in paragraph 6.1 is that 'the project will be implemented in a phase-in approach within the 2009/2010; 2010/2011 budget as provided for in the business plan of the Corporation for the 2008/2009 financial year.' It was done in the form of a submission to the bid adjudication committee the purpose of which was to 'submit *recommendations* ... for *consideration*'.

[30] Where a contract is concluded as a result of an exercise of an organ of state's constitutional or statutory powers, this must be done within the confines of such powers. In other words, the conclusion of a contract must be a valid exercise of powers; if not, it will be *ultra vires* and invalid. (*The Law of Government Procurement in South Africa – Bolton, 2007, 74*). Unlike private parties who generally have freedom of contract, organs of state do not have such freedom. A number of limitations are placed on the power of organs of state to enter into contracts.

[31] Plaintiff further contends that the defendant's counterclaim should also fail on the basis that the defendant seeks to challenge its own decision to accept the plaintiff's bid yet it has not instituted judicial review proceedings to have it set aside. The challenge on the basis of s66(3) of the PFMA is wrong, says plaintiff, as it should have been raised in judicial review proceedings instituted by the defendant itself. The defendant has not done so. In *Millenium Waste Management (Pty) Ltd v The Chairperson of the Tender Board: Limpopo Province and Others 2008(2) SA 481 (SCA) at 483 para 4* it was held that –

> '... as the decision to award a tender constitutes administrative action, it follows that the provisions of the Promotion of Administrative Justice Act apply to the process.'

[32] Mr Preiss SC, for the defendant, contended that the effect of a transaction in contravention of sections 66 and 68 of the Act is simply that the public institution *is not bound* by the transaction and, accordingly, that the agreement between the parties cannot be enforced. Therefore, there is no need for an application for judicial review and setting aside of the transaction. Hence the counter-claim seeking merely that the defendant is not bound by the transaction. *Panamo Properties 103 (Pty) Ltd v The Land and Agricultural Development Bank of South Africa 2016(1) SA 204 (SCA)* at 208 C-E it was held at paragraph 22-

> '22 While not every contravention of a statute results in invalidity of the contravening act or contract, where its recognition would defeat the purpose of the statute, the act or contract will be void.... But it is not necessary in this matter to consider whether the Act [the Land and Agricultural Development Bank Act 15 of 2002] intended to render the transaction invalid as the issue is determined by the PMFA. Sections 66 and 68 of that Act provide that where a public institution, as the Bank is, enters into a transaction that is not authorized by legislation governing the institution, it will not be bound by the transaction.'

[33] In *TEB Properties CC vs The MEC for Department of Health & Social Development North-West [2012] 1 ALL SA 479 (SCA)* at paragraph 26 it was held –

'Counsel for the appellant also called in aid the decision of this court in Oudekraal Estates (Pty) Ltd v City of Cape Town & others 2004 (6) SA 222 (SCA) paras 27 – 31 in support of the proposition that the decision taken by Kgasi to hire office accommodation from the appellant amounts to administrative action, and as such ought to be given effect until it has been set aside, which the respondent did not do. I do not think that the appellant's reliance on Oudekraal avails it in the context of this case. In my view, that the respondent filed a counter-application in the court below to have the lease declared unenforceable, is a clear indication that it sought to prevent the implementation of the administrative action concerned on the ground that it was unlawful. Thus the practical effect of the declarator granted by the court

below is that the administrative action preceding the conclusion of the lease was of no force and effect. Accordingly it is, under those circumstances, illogical to speak of administrative action that is extant as though the declarator issued in relation to the juridical act flowing from the administration action concerned counts for nothing. In the circumstances there is, to my mind, much to be said for the view that where an organ of state seeks to have a contract, concluded pursuant to administrative action, declared invalid a declaration of invalidity must have the effect of nullifying the administrative action that is the *fons et origo* of the contract concerned.'

[34] Similarly, in *Municipal Manager: Quakeni Local Municipality & Another v FV General Trading 2010 (1) SA 356 (SCA)* at 365E-H declaratory relief by way of counter-claim was permitted.

[35] It is therefore clear that a declaration of invalidity is not required by virtue of the express wording of s68 of the PFMA. The defendant does not have to apply to court to have the transaction in contravention of 66(3)(c) set aside as the State and the institution concerned (*in casu* the defendant) are not bound to an agreement which has been concluded without compliance with the provisions of s66 of the PFMA.

[36] In all the circumstances I make the following order:

1. The counter-claim is upheld with costs including costs of senior counsel where so employed.
2. The tender under bid number RTMC07/2008/09 dated 17 November 2008, its acceptance and the Service Level Agreement dated 31 March 2009 are declared not binding on the defendant (the plaintiff in reconvention).

RANCHOD J
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Plaintiff	: Adv K. Tsatsawane
	Adv Marule
Instructed by	: Gildenhuys Malatji Inc
Counsel on behalf of Defendant	: Adv D.A Preis (SC)
Instructed by	: Adams & Adams
Date heard	: 24 May 2016
Date delivered	: 13 December 2016