IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: **19845/2021**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 14 July 2022

SIGNATURE: *JANSE VAN NIEUWENHUIZEN J*

In the matter between:

SIEMENS (PTY) LTD Applicant

(Registration number: 1923/007514/07)

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] This application pertains to a contract entered into between the parties in terms of which the applicant had to install certain hardware for the respondent in respect of signalling at its railway system for a trial process.

[2] The applicant alleges that it performed in terms of the agreement and claims payment in the amount of R 33 993 092, 00 for the services rendered. The respondent opposes the claim on several grounds, which grounds will be dealt with *infra*.

THE APPLICANT'S CLAIM

[3] The parties are and have been involved in various contracts, including the upgrade of the Gauteng railway system and infrastructure which commenced during April 2011 ("Gauteng Upgrade Agreements"). During the course of the project, the parties entered into discussions for the possible implementation of the European Train Control System Level 2 ("ETCS") system as supplied and installed by the applicant.

[4] To this end and on 25 March 2015, the applicant made a proposal to the respondent in respect of the ECTS system. The relevant portion of the offer for present purposes, entails that the applicant will support the respondent by providing and installing a trial ETCS L2 solution at two stations on the Gauteng rail network for the testing of the respondent's new rolling stock. The respondent will offset the cost of the ETCS Trial against any possible penalties that may be due on other contracts. Any price difference will be paid to the applicant in the event that the applicant is not awarded the contract for the Gauteng ETCS rollout.

[5] On 7 May 2015, the respondent represented by Piet Sebola ("Sebola") responded to the proposal in writing. In the introductory paragraph of the letter the respondent stated that it *"herewith wish to record our further understanding of how the Trial ETCS and RBC will be implemented as set out in your offer of 25 March 2015."*

[6] The following is stated in respect of the cost of the project:

"1.4 Siemens is currently installing a signalling system on PRASA's rail network in Gauteng ("the Signalling Project") and wishes to assist PRASA with this trial at no upfront cost to PRASA. The cost of the trial system is an amount of R 39, 000, 000 (thirty-nine million Rand only).

1.5 Siemens has also experienced some milestone delays in the implementation of the Signalling Project which are agreed to have attracted penalties in the amount of R 5, 006, 908 (five million, six thousand, nine hundred and eight Rand only). This penalty amount will be offset against the cost of the Trial System so that the Agreed Cost of the Trial is as follows:

	Offer Price (Excl VAT)
Cost of the Trial System	*R 39, 000, 000*
Less Penalties as at March 2015	*R 5 006 908*
Agreed Cost of the Trial	*R 33, 993, 092*

....

1.8 PRASA will, in due course, issue an open and competitive tender process inviting bidders who have the technical capacity to install the train control system on its network. In the event that Siemens is not appointed in this competitive tender process to install the train control system in the Trial Track and the Trial System is still in working order, PRASA will procure that Siemens is paid the Agreed Cost of the Trial.

1.9 In the event that no competitive tender process has been initiated and/or there is no decision by PRASA on the competitive tender process, the

parties shall agree on the terms of payment of the Agreed Cost of the Trial by no later than 30th September 2016."

[7] In response and on 14 May 2015 the applicant addressed a letter to the respondent recording the following:

"Siemens acknowledges receipt of your letter dated 7 May 2015. We confirm that we shall proceed to implement the RBC trial – agreement in accordance with our 25 March 2015 – offer, and the aforementioned letter."

[8] The applicant stated that it had complied with its obligations in terms of the agreement and that the test project was completed.

[9] The process of finalising the installation, however, took longer than anticipated and the completion date foreshadowed in terms of the agreement was not met. The project was finally signed off on 15 December 2016.

[10] In anticipation of the completion of the project and on 19 May 2016, the respondent published a tender for the automatic train signalling system. The tender period was initially extended and later cancelled on 14 June 2018.

[11] Nothing transpired further until the applicant in a letter dated 13 August 2019 requested the respondent to provide confirmation of the release date of the tender. On 28 August 2019, the respondent indicated that it was preparing to release a new tender.

[12] A new tender was not forthcoming and on 23 October 2019 the applicant addressed a letter to the respondent in respect of payment for work done. The relevant portion of the letter reads as follows:

"It was further agreed between the parties ...that in the event that Siemens is not appointed in PRASA's competitive tender process for the PICS tender – which Siemens accepts will have to comply with all prevailing procurement laws on a fair and transparent basis- then PRASA will procure and pay Siemens the Agreed Cost of the Trial to the value of R 33, 993, 092 plus the VAT.

In circumstances where the parties have not yet met and agreed on the payment terms, we will appreciate your proposal in that regard, alternatively, provide Siemens with the necessary Purchase Order for the amount ....to enable us to invoice accordingly, accepting that the amount will be payable within 30 days."

[13] The letter was not met with a positive response and was followed up by a letter dated 17 March 2020 to which an invoice was attached, a further letter of demand dated 13 August 2020 and a final letter of demand dated 20 December 2020 followed.

[14] Payment was still not forthcoming which led to the launching of the present application.

THE RESPONDENT'S RESPONSE

[15] The respondent opposes the relief claimed by the applicant and launched a counter application in which it prays for the agreement (the counter offer dated 7 May 2015) to be declared unlawful and for the agreement to be reviewed and set aside.

[16] The respondent did not take issue with the factual allegations of the applicant's claim. The defences raised by the respondent were all points of law, to wit:

***In limine:* Prescription**

[17] The respondent contends that the claim has prescribed, i.e that the right to claim within the three-year period prescribed in section 11(d) of the Prescription Act 68 of 1969, has lapsed, in the following circumstances:

17.1 because the project was finally signed off on 15 December 2016, the applicant knew or ought to have reasonably known in December 2016 that the respondent owed the amount claimed herein;

17.2 although the debt became due and payable on 15 December 2016, as there were no terms of payment allowing for the delay of payment of the due amount, the present proceedings were only launched on or about 20 April 2021, more than four years after the due date.

Inchoate agreement

[18] In the alternative, the respondent maintains that the agreement between the parties was an agreement to further agree and as a result the agreement is void and unenforceable.

The agreement is invalid on the ground of legality

[19] The respondent maintains that the purported agreement relied upon by the applicant does not comply with the constitutional and statutory prescripts applicable to procurement of goods and services by an organ of state.

[20] Furthermore and according to the respondent, the procurement of the ETCS system does not comply with the Supply Chain Management Policy of the

respondent. Sebola was not authorised to negotiate, approve and conclude an agreement outside the supply chain management process.

CONTENTIONS ON BEHALF OF THE PARTIES AND DISCUSSION

Prescription

[21] In answer to the prescription claim, the applicant contends that the parties were to agree to the terms of payment by 30 September 2016. This agreement was, however, reached on the basis that the test project will be completed as per the agreed date, being 31 January 2016.

[22] As the test project was not completed by the intended completion date, extensions were agreed upon by the parties, which resulted in the final handover date of 15 December 2016.

[23] The tender was published on 19 May 2016 and finally withdrawn on 14 June 2018. The date on which the applicant realised that it would not be awarded the tender was therefore 14 June 2018 and the application was launched on 20 April 2021, being a date within the three-year period.

[24] The agreement between the parties postulated two scenarios pertaining to payment:

24.1 in the event that Siemens is not appointed in the competitive tender process, PRASA will procure that Siemens is paid the Agreed Cost of the Trial; and

24.2 in the event that no competitive tender process has been initiated and/or there is no decision by PRASA on the competitive tender process, the

parties shall agree on the terms of payment of the Agreed Cost of the Trial by no later than 30th September 2016.

[25] The first scenario did not eventuate.

[26] The second scenario did. On 30 September 2016 there was no decision by the respondent on the competitive tender process. The fact that the parties agreed on the extension of the contract period does not impact on the clear wording of the terms of payment.

[27] The parties did not agree on the terms of payment on 30 September 2016, which entail that the amount payable in terms of the contract became due on completion of performance by the applicant, i.e 15 December 2016.

[28] To enforce payment the applicant had to demand (interpellation) payment by a specific date within the three year period.

[29] In the result, I agree with the respondent that the applicant's claim has prescribed and the point *in limine* must succeed.

[30] Should I, however, be wrong in the aforesaid finding, I proceed to consider the remainder of the defences and the counter claim.

Inchoate agreement

[31] This defence is directed at the second scenario discussed *supra*, to wit:

"in the event that no competitive tender process has been initiated and/or there is no decision by PRASA on the competitive tender process, the parties shall agree on the terms of payment of the Agreed Cost of the Trial by no later

than 30th September 2016.

[32] The respondent contends that this portion of the agreement contains an agreement to agree on the terms of payment and the agreement is as a result not enforceable.

[33] The principle that an agreement to conclude another agreement is unenforceable was confirmed in *Free State and others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at para [35]:

"*...An agreement that the parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree.*"

[34] This is, however, not the position in *casu*. The parties only agreed to reach agreement on one aspect of the contract, to wit; the terms of payment.

[35] The first enquiry in determining whether the contract between the parties is valid in the circumstances, is whether the parties have agreed on the essential terms of a *locatio conductio operis.* [See: *Southernport Developments (Pty) Ltd v Transnet Ltd* [2005] All SA 16 (SCA)]

[36] The essential terms of a *locatio conduction operis* are:

36.1 the work to be performed;

36.2 the renumeration payable; and

36.3 the time for performance.

[See: *Group Five Building Ltd v Minister of Community Development* 1993 (3) SA 629 (A)].

[37] The agreement between the parties provides for:

37.1 the scope of work to be performed;

37.2 the contract amount payable;

37.3 the completion date of the project.

[38] Once these essentials for a valid contract have been agreed upon between the parties, failure to agree on the terms of payment does not invalidate the contract. [See: *Southernport Developments (Pty) Ltd v Transnet Ltd, supra* para [6]]. In the result, this point must fail.

The illegality of the agreement

[39] A contract concluded between parties is invalid if one of the parties to the contract did not have, by virtue of a statutory provision, the necessary power to enter into the contract. [See: *Municipal Manger: Qaukeni Local Municipality and Another v FV General Trading CC* 2010 (1) SA 356 SCA par [16]; *Premier Free Stae and Others v Firechem Free State (Pty)* 2000 (4) SCA par [30]]

[40] In *Provincial Government of the Eastern Cape and Others v Contractprops 25 (Pty) Ltd* [2001] 4 All SA 273 (A), the Department of Education, Culture and Sport in the Eastern Cape Province ("the Department") entered into two lease agreements with Contractprops 25 (Pty) Ltd ("Contractprops"). The Department decided after three years to terminate the lease agreements on three months' notice. When Contractprops challenged the termination, the Department submitted that the lease agreements are invalid because it entered into the leases without the Tender Board established by the Tender Board Act (Eastern Cape), 2 of 1994 having arranged the hiring of the premises in terms of section 4(1) of the Act.

[41] The supreme Court of Appeal upheld the challenge and the lease agreements were declared invalid.

[42] In *casu* the respondents rely on the following legislative instruments in challenging the validity of the agreement:

42.1 section 217 (1), (2) and (3) of the Constitution;

42.2 section (2), 45(a) and 51(1) of the Public Finance Management Act, 1 of 1999 ("PFMA") ;

42.3 National Treasury Regulations on procurement of goods and services;

42.4 National Treasury Procurement Guidelines; and

42.5 The respondent's Supply Chain Management Policy.

[43] Section 217(1) provides that when the respondent contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Section 217 (2) and (3) are not applicable to the facts in *casu*.

[44] It is common cause that the PMFA is binding on the respondent.

[45] Section 45 is applicable to other officials and provides that *"An official in a department, trading entity or constitutional institution –*

(a) must ensure that the system of financial management and interim control established for that department, trading entity or constitutional institution is carried out within the area of responsibility of that official:"

[46] Section 51(1) provides for the general responsibility of accounting authorities. The relevant portion reads as follows:

"Section 51(1) - An accounting authority of a public entity-

(a) must ensure that the public entity has and maintains-

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;"

(e) must take effective and appropriate disciplinary steps against any employee of the public entity who-

(i) contravenes or fails to comply with a provision of the Act

(ii) commits an act which undermines the financial management and internal control system of the public entity; or

(iii) makes or permits an irregular expenditure or a fruitless and wasteful expenditure:" Section 2 5(1) relied upon by the respondents, establishes a National Treasury that consists of the Minister of Finance, as the head of Treasury and the national department or departments responsible for financial and fiscal matters

[47] I pause to mention that section 86 of the PMFA provides for offences by and penalties to be imposed on accounting officers who do not comply with the provisions of the Act. Whether the non-compliance with the aforesaid sections of the PMFA renders a contract entered into, in conflict with the sections, questionable.

[49] The respondent did not refer to any specific provision/s on which it relies in the National Treasury Regulations on procurement of goods and services and the National Treasury Procurement Guidelines.

[50] Insofar as the respondent relies on its Supply Chain Management Policy ("the Policy"), clause 11.3.3 is applicable, to wit:

"Unsolicited bids are generally prohibited unless approved for consideration by the GCEO. In approving their consideration, the GCEO shall take the following into account:

- *That the unsolicited bid is a unique concept or offering*
- *That the offering of the bid cannot be provided efficiently through competitive bidding process*
- *That there are no suppliers in the market that can provide a similar offering without copying from the unsolicited bid."*

[51] The acronym *GCEO* stands for the Group Chief Executive Officer. It is common cause that Sebola was not the GCEO when he accepted the applicant's unsolicited bid and entered into the agreement.

[52] In view of the aforesaid, the respondent contends that the agreement was concluded outside the respondent's policy in contravention of the Constitution, legal and regulatory prescripts regulating procurement of goods or services by a public entity and an organ of State and is in the result, unlawful and invalid *ab initio.*

[53] It is clear from the aforesaid, that Sebola did not have the power to enter into the agreement on behalf of PRASA. In doing so Sebola acted *ultra vires* the

legislative framework pertaining to the procurement of services and the agreement is as a result, invalid.

[54] The applicant did not seriously dispute the aforesaid submissions by the respondent, but in answer relied on estoppel.

[55] Estoppel, however, does not assist the applicant. This much is clear from *Provincial Government of the Eastern Cape and Others v Contractprops 25 (Pty) Ltd, supra* at para [11] –[13]:

"[11] .....It remains to consider an alternative contention advanced by counsel for respondent: estoppel. There are formidable obstacles in the way of a successful invocation of estoppel. However, even if it be assumed in favour of respondent that estoppel was pertinently raised in the papers (the matter came before the court a quo by way of motion proceedings) and that all the necessary factual requirements for the doctrine to be applicable were canvassed, this is not a case in which it can be allowed to operate. It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel. (See Trust Bank van Afrika Bpk v Eksteen 1964 (3) SA 402 AD at 411 H – 412 B.)

[12] This is such a case. It was not the Tender Board which conducted itself in a manner which led respondent to act to its detriment by concluding invalid leases of property specially purchased and altered at considerable expense to suit the requirements of the Department. It was the Department. If the leases are, in effect, "validated" by allowing estoppel to operate, the Tender Board will have been deprived of the opportunity of exercising the powers conferred upon it in the interests of the taxpaying public at large. Here again the very mischief which the Act was enacted to prevent would be perpetuated. (Cf Strydom v Die Land-en Landboubank van SA 1972 (1) SA 801 (AD) at 815 E – F.)

[13] This is not a case in which "innocent" third parties are involved. It is a case between the immediate parties to leases which one of them had no power in law to conclude and had been

deprived of that power (if it ever had it) in the public interest. The fact that respondent was misled into believing that the Department had the power to conclude the agreements is regrettable and its indignation at the stance now taken by the Department is understandable. Unfortunately for it, those considerations cannot alter the fact that leases were concluded which were ultra vires the powers of the Department and they cannot be allowed to stand as if they were intra vires. "

[56] The respondent's defence of illegality must, therefore, succeed.

COUNTER APPLICATION

[57] The counter claim is not in the alternative, but a substantial application for a declarator and a review.

[58] The subject matter of the dispute between the parties, however, falls within the law of contract and not within the realm of administrative law.

[59] In view of the finding that the contract is, due to illegality, unenforceable, a further declarator in the same terms is, in my view, untenable and stands to be dismissed with costs.

ORDER

In the premises, the following order is issued:

1. The application is dismissed with costs, which include the costs of two counsel.
2. The counter application is dismissed with costs, which include the costs of two counsel.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:

29 April 2022 (Virtual hearing)

DATE DELIVERED PER COVID19 DIRECTIVES:

15 July 2022

APPEARANCES

For the Applicant:	Adv A E Bham SC & Adv I L Posthumus
Instructed by:	ENSafrica
Counsel for the First Respondent:	Adv G Badela
Instructed by:	MJS inc. Pretoria