

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION (MAIN SEAT)**

Case Number: 3411/2020

- | | |
|----|-------------------------------------|
| 1. | REPORTABLE: YES/ NO |
| 2. | OF INTEREST TO OTHER JUDGES: YES/NO |
| 3. | REVISED. |

7 September 2021

[SIGNED]

DATE

SIGNATURE

In the matter between:

MERIDIAN HYGIENE (PTY) LTD

Plaintiff/Applicant

and

**THE HEAD OF THE DEPARTMENT OF HEALTH,
MPUMALANGA**

First
Defendant/Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR THE DEPARTMENT OF HEALTH,
MPUMALANGA**

Second
Defendant/Respondent

This judgment will be delivered over the Zoom platform, distributed to the parties in electronic form and published on the SAFLII website.

JUDGMENT

Roelofse AJ:

[1] The plaintiff/applicant (“*Meridian*”) applies for summary judgment against the first and second defendants/respondents (“*the department*”) on the strength of a verbal agreement allegedly entered between Meridian and the department in terms of which Meridian undertook to, during the period April 2020 to June 2020, sell and deliver goods to the department (“*the agreement*”). Meridian pleads that it has performed all its obligations arising from the agreement and that the department is indebted to Meridian in the amount R 41 500 000-00 and that despite demand, the department has failed to pay.

[2] The department delivered a plea. Save for admitting that the court has jurisdiction, the department neither admits nor denies the further allegations in Meridian's particulars of claim.

[3] In its affidavit in support of the summary judgment application, Meridian alleges that it undertook to sell and deliver household sanitizer stored in 20-liter buckets including transport, labour and personal protective equipment for all volunteers who distributed the sanitizer. Meridian alleges that the main aim of the campaign was to distribute buckets of sanitizer to residents in rural communities to help curb the spread of the COVID-19 virus. The buckets in which the sanitizer was distributed, according to Meridian, were specially designed to encompass directions and/or instructions for use in writing in various official languages. Meridian alleges that by the end of May 2020 goods to the value of R 41 500 000-00 had been sold and delivered to the department and an invoice was issued.

In paragraph 27 of the affidavit in support of the summary judgment application, Meridian says as follows:

“Notwithstanding the Applicant's [Meridian's] numerous attempts at engaging with various role players with whom it dealt throughout the duration of the agreement, the respondents [the department] wanted nothing to do with the applicant.”

[4] In respect of the department's plea, Meridian states that the department has not set out a *bona fide* defense and that, should the matter go to trial as the papers stand, the respondents would not be able to lead evidence on any issue. Therefore, the department's plea did not raise any issue for trial.

[5] In paragraphs 7 and 17 of the department's answering affidavit, the department's acting director legal services says the following:

“Public procurement is often linked to allegations of impropriety and irregularity. For that reason public procurement is strictly regulated by a framework set out in the Constitution of the Republic of South Africa, the Public Finance Management Act, 1999, the Treasury Regulations and treasury notes.....”

“I am advised and submit that in terms of the above-regulatory framework the Respondents and or the Department would never conclude and enter into an oral agreement. If such an agreement is concluded it would be void at a [sic] void ab initio because the agreement would have concluded in contravention of the Regulatory Framework.”

[6] In addition, the department raises a point of law that Meridian has not complied with the requirements for the granting of summary judgment. The department alleges that meridian's claim cannot be classified as a liquidated amount because the terms and conditions of the alleged oral agreement were not set out in the particulars of claim including the amount of the alleged appointment.

Evaluation

[7] It is trite that public procurement concluded in breach of the prescribed processes relating to procurement of public goods and services are invalid.¹

[8] The department places both the existence and the validity of the alleged verbal agreement in dispute. There is therefore a real triable issue being the existence and the validity of the agreement. I echo what was set out in Maharaj v Barclays National Bank Ltd² when I evaluate the department's answering affidavit against the particulars of claim:

“Viewing the affidavit as a whole, in the context of the claim set forth in plaintiff's summons, I am of the view that it does appear to raise a bona fide defence and that it has disclosed this defence and the material facts upon which it is founded with just - and only just - sufficient particularity and completeness in order to comply with Rule 32 (3) (b).”

[9] In his argument, Mr. Ferreira SC, who appeared for Meridian, relied upon the dictum in Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others³ for the principle that an administrative act stands until it is set aside.

[10] This is what the Constitutional Court in Department of Transport and Others v Tasima (Pty) Limited⁴ said about Oudekraal:

“[87] The Supreme Court of Appeal's reliance on Oudekraal here was mistaken. Nowhere does Oudekraal say that an administrative action performed in violation of the Constitution should be treated as valid until set aside. Much worse, that its unlawfulness does not matter as long as it is not set aside and that a delay in

¹ See: Municipal Manager: Qaukeni and Others v F V General Trading CC 2010 (1) SA 356 (SCA); [2009] 4 All SA 231 (SCA).

² 1976 (1) SA 418 (A) at 428C.

³ 2010 (1) SA 333 (SCA).

⁴ [2016] ZACC 39.

challenging it validates the action concerned. As mentioned, this proposition turns the supremacy of the Constitution principle on its head.

[88] On the contrary Oudekraal lays down a narrower principle that applies in specific circumstances only. That principle draws its force from the distinction between what exists in law and what exists in fact. An invalid administrative act that does not exist in law cannot itself have legal force and effect. Yet the act may still exist in fact, for example an administrative act performed without legal power. It exists in fact until set aside on review. However, since the act does not exist in law, it can have no binding effect.”

[11] What will have to be eventually decided in the action is both fact and law – does the alleged agreement exist and, if it does, does it comply with the law.

[12] In granting or refusing summary judgment, the court exercises a discretion.

“It is indeed trite that a court has a discretion as to whether to grant or refuse an application for summary judgment. Although Breitenbach v Fiat SA (Edms) Bpk has made it plain that a court should exercise a discretion against granting such an order where it appears that there exists ‘a reasonable possibility that an injustice may be done if summary judgment is granted’, the context in which that was said indicates that this precaution applies in situations where the court is not persuaded that the plaintiff has an unanswerable case.”⁵

[13] In my view, if the department at trial succeeds in establishing that there was indeed a breach of prescribed processes relating to the alleged procurement from Meridian, Meridian would not be entitled to payment in terms of the verbal agreement. Its remedy, if the goods and services were indeed rendered lies somewhere else, possibly in a claim for enrichment. I therefore exercise my discretion in favour of the department.

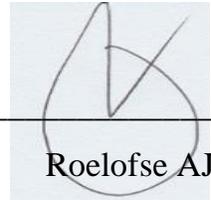
Costs

[14] I can think of no reason why costs should not follow the result.

⁵ Jili v Firstrand Bank Ltd (763/13) [2014] ZASCA 183 at para. 13.

[15] In the premises, the following order is made:

- (a) Summary judgment is refused;
- (b) The first and second defendants are granted leave to defend the action;
- (c) The applicant shall pay the respondents' costs.

A handwritten signature in blue ink, appearing to be 'Roelofse AJ', is written over a light blue rectangular background. The signature is stylized and somewhat abstract.

Acting Judge of the High Court

DATE OF HEARING: 3 September 2021

DATE OF JUDGMENT: 7 September 2021

APPEARANCES

FOR THE APPLICANT: Adv E Ferreira SC

INSTRUCTED BY: Bouwer Cardona Inc.

FOR THE RESPONDENTS: Adv L Zwane

INSTRUCTED BY: Makwakwa M.R. Attorneys Inc.