THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 910/19

In the matter between:

GOBELA CONSULTING CC **APPELLANT**

and

MAKHADO MUNICIPALITY **RESPONDENT**

Neutral citation: *Gobela Consulting v Makhado Municipality* (Case no 910/19) [2020] ZASCA 180 (22 December 2020)

Coram: WALLIS, MBHA, MOLEMELA and DLODLO JJA and POYO-DLWATI AJA

Heard: No oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 22 December 2020.

Summary: Contract awarded for the provision of services to organ of state – no open tender followed – action brought to enforce impugned contract – collateral challenge – whether court entitled to declare contract invalid and unlawful despite organ of state not having launched counter-application to review and set aside that contract.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Mokgohloa, DJP, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Molemela JA (Wallis, Mbha and Dlodlo JJA and Poyo-Dlwati AJA concurring)

[1] This appeal concerns a dispute arising from a contract concluded by the municipal manager of Makhado municipality with a private company without the necessary authorisation.

[2] The facts that gave rise to the litigation are largely common cause.[1] On or about 22 February 2011, the appellant, Gobela Consulting CC (Gobela) submitted an unsolicited proposal to the respondent, the Makhado Municipality (the municipality). The proposal had the title, 'Proposal to review and Develop the Anti-Corruption Strategy and Capacity Building for Makhado Municipality.'

[3] By letter dated 5 May 2011, signed by the Municipal Manager, the municipality accepted Gobela's offer in the following terms:

'Makhado Municipality hereby appoint[s] your company to conduct training on anti-corruption and fraud for all officials and councillors. The programme will run from May to November 2011. As the Municipality we will be conducting assessment after every training session and orders will be issued every week after assessment has been done at an amount of R7 500 per person. The Municipality is expected to have at least trained a total of 745 incumbents by the end of November 2011 (Both Councillors and Officials). You are therefore requested to make contact with our Municipality to start with training arrangements immediately.'

[1] Although the transcript of the record of the proceedings at the court a quo does not incorporate the oral evidence adduced on behalf of the appellant and is thus incomplete, the appellant's version can be gleaned from the pleadings, documentary evidence and the submissions of the parties in their heads of argument. Neither party suggested that the absence of the evidence affected this Court's ability to resolve the issues between them.

[4] On 6 May 2011, Gobela's director, Mr Mavhandu, sent a letter of acceptance to the municipality. According to Mr Mavhandu, he subsequently had a meeting with a certain official of the municipality, Ms Ndou, who explained to him that the program was to be rolled out in stages and that the trainees would be divided into four groups. The respondent would provide the venue for the training.

[5] Mr Mavhandu testified that in preparation for Gobela's performance in terms of the agreement, Gobela drafted and printed manuals for training; drafted, printed and prepared flyers in relation to the proposal; entered into service level agreements with independent contractors to assist with training; and employed professionals and support staff who would execute the project in accordance with the proposal. On the date on which the training was scheduled to commence, Mr Mavhandu and facilitator's employed by Gobela to conduct the training arrived at the agreed venue, only to be informed by an official of the municipality that the training could not proceed as there were unresolved issues between the mayor and the African National Congress Youth League (ANCYL). They were requested to wait until the problem was resolved. They left the venue. When Gobela had, after some days, still not been invited to commence the training, Mr Mavhandu released the facilitators.

[6] Gobela subsequently issued the municipality with an invoice dated 27 January 2012, for payment of an amount of R6 369 750, ostensibly being in respect of 'training on anti-corruption and fraud for all staff members and councillors.' The invoice was soon followed by the issuance of a letter of demand.

[7] The letter of demand evidently elicited an exchange of correspondence in terms of which the municipality enquired about the basis for its alleged indebtedness to Gobela. It appears from that correspondence that the municipality had, during August 2011, invited tenders for 'Training on Anti-Corruption and Fraud.' However, that tender was subsequently withdrawn by the municipality, ostensibly on account of the fact that there was no available budget for it, among other reasons. Of significance is that on Gobela's own version, the contract concluded between Gobela and the municipality emanated from an unsolicited proposal made to the municipality outside its normal bidding process and accepted by the erstwhile municipal manager without authorisation.

[8] As the correspondence between the parties did not yield any payment, Gobela subsequently issued a summons against the municipality, in terms of which an amount of R5 131 470 was claimed from the municipality as damages for alleged breach of contract. The particulars of claim included an assertion that 'in breach of its obligations in terms of the agreement embodied in the proposal and/or letter of appointment, [the municipality] ha[d] . . . refused and/or neglected to allow [Gobela] to perform its obligations in terms of the proposal.'

[9] The municipality filed a special plea disputing the municipal manager's authority to enter into the contract in question. In its plea, it denied liability on the basis that the impugned agreement was in contravention of the Local Government Municipal Finance Management Act 56 of 2003 (Municipal Finance Management Act) and the municipality's Supply Chain Management Policy, and therefore invalid and unlawful. Although the municipality had pleaded that the Municipal Manager had no authority to conclude the impugned contract with Gobela, it did not counter-apply for relief setting aside Gobela's appointment.

[10] The matter came before Mokgohloa DJP (the court a quo), who dismissed Gobela's claim with costs. The court a quo found that the appointment of Gobela to review and develop the anti-corruption strategy for the municipality, albeit a good initiative, was in breach of the applicable procurement prescripts which are designed to ensure a transparent, cost effective and competitive tendering process as stipulated in s 217 of the Constitution and the provisions of the Municipal Finance Management Act. It accordingly dismissed Gobela's claim on the basis that the contract that had been concluded by the parties was invalid and unlawful. Aggrieved by that decision, Gobela sought leave to appeal against the court a quo's decision. This appeal is with leave of the court a quo.

[11] There were no oral arguments presented before this Court, as both parties agreed that the appeal could be dealt with on the basis of oral submissions as

contemplated in s 19*(a)* of the Superior Courts Act.[2] The essence of Gobela's heads of argument was that even though it was conceded that the contract was invalid, the appeal had to be allowed on the basis that the court a quo had erred by using its finding that the municipality had not complied with procurement prescripts as a basis to declare the contract invalid and unlawful and to dismiss Gobela's claim, despite there being no counter-application to review and set aside the impugned contract. Relying on the majority judgment in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*[3] (*Kirland*), it was submitted that since the municipality had not specifically applied for the impugned contract to be set aside, it was not open to the court a quo to sanction the municipality's collateral challenge to the validity of the contract by declaring the parties' contract invalid and unlawful. Thus, so the argument went, the court a quo ought to have found in favour of Gobela.

[12] The crisp issue which this court has to decide is whether the court a quo was, in the absence of a counter-application seeking the review and setting aside of the contract concluded between Gobela and the municipality, entitled to find that the contract in question was invalid and unlawful.

[13] Section 217 of the Constitution provides as follows:

'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.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –

(a) categories of preference in allocation of contracts; and

(b) the protection and advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in section (2) must be implemented.'

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[2] The respondent's application for its late submission of the heads of argument to be condoned was not opposed. Condonation was duly granted, as the requirements for the granting thereof had been met.

[3] *MEC for Health, Eastern Cape and Another v Kirland Investments (PTY) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC).

[14] There are various statutes, such as the Municipal Finance Management Act, subordinate legislation made under that Act, such as the Treasury Regulations, as well as supply chain management policies[4] that have to be applied by organs of state in order to give effect to the constitutional injunction enunciated in s 217. All those procurement prescripts serve a dual purpose: to prevent patronage and corruption, on the one hand, and to promote fairness and impartiality, on the other.[5]

[15] Section 113 of the Municipal Finance Management Act provides that a municipal entity is not obliged to consider an unsolicited bid received outside its normal bidding process; it may do so only in accordance with a prescribed framework. Regulation 2(3) of Municipal Supply Chain Management Policy Regulations[6] provides that no municipality or municipal entity may act otherwise than in accordance with its supply chain management policy when procuring goods or services. Regulation 12 of the same Regulations stipulates that subject to Regulation 11 (2), a competitive bidding process must be followed for procurements above the transaction value of R 200 000 and in respect of long-term contracts (ie contracts with a duration period exceeding one year). The municipality, as an organ of state, was duty-bound to discharge all its duties and functions in accordance with those procurement prescripts.

[16] The transaction value in this matter was far above the R200 000 threshold. Gobela's own admission that its proposal was unsolicited loudly attested to the fact that no public tendering process preceded Gobela's appointment. The fact that the municipality invited public tenders for the same service a mere three months after precluding Gobela from commencing with the training suggests that the municipality had no justification for deviating from the competitive bidding process contemplated in Regulation 12 of the applicable Supply Management Policy when it accepted Gobela's proposal. No evidence was adduced to show otherwise. It therefore cannot be gainsaid that the municipality's acceptance of Gobela's proposal flouted procurement

[4] Section 112 of the Municipal Finance Management Act provides that each municipal entity must have and implement a Supply Chain Management Policy that complies with the provisions of s 217 of the Constitution.
[5] *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62; 2020 All SA 397 (SCA) para 40.
[6] Municipal Supply Chain Management Regulations, GN 868 GG 40553, 30 May 2005.

prescripts and was plainly at variance with the principle of legality. Manifestly, the Municipal Manager had no authority to do this.

[17] In *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC*,[7] this Court held that a public procurement contract concluded in breach of the legal provisions designed to ensure a transparent, cost effective and competitive tendering process is invalid. The contract concluded between the municipality and Gobela was thus invalid from inception. The question is whether the court a quo was entitled to find that that contract was unlawful and invalid notwithstanding that the municipality had not, at any stage, challenged the validity thereof in court proceedings and asked for it to be set aside. Expressed differently, the question is whether the municipality could bring a collateral challenge[8], relying on the invalidity of the impugned contract, in proceedings brought to coerce its compliance with that contract.

[18] The law relating to collateral challenges was settled by the Constitutional Court in *Merafong City Local Municipality v AngloGold Ashanti Limited (Merafong)*. Having surveyed the pre-constitutional case-law, the majority judgment found that South African law has always allowed a degree of flexibility in reactive challenges to administrative action. Having considered the impact of the Constitution on that body of law, it re-asserted that the import of *Oudekraal* was that the government institution cannot simply ignore an apparently binding ruling or decision on the basis that it was patently unlawful, as that would undermine the rule of law; rather, it has to test the validity of that decision in appropriate proceedings. The decision remains binding until set aside. That court expressed some guidelines for assessing the competence of a collateral challenge. With specific reference to *Kirland*, it stated as follows:

'But it is important to note what *Kirland* did not do. It did not fossilise possibly unlawful – and constitutionally invalid – administrative action as indefinitely effective. It expressly recognised that the *Oudekraal* principle puts a provisional brake on determining invalidity. The brake is

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[7] *Qaukeni Local Municipality and Another v FV General Trading CC*, [2009] ZASCA 66; 2010(1) SA 356 (SCA) para 16.

[8] In *Merafong City Local Municipality v AngloGold Ashanti Limited* (*Merafong*) [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) para 23, the Court described a collateral challenge as follows:

'Relying on the invalidity of an administrative act as a defence against its enforcement, while it has not been set aside, has been dubbed a collateral challenge – "collateral" because it is raised in proceedings that are not in themselves designed to impeach the validity of the act in question. While the object of the proceedings is directed elsewhere, invalidity is raised as a defence to them.'

imposed for rule of law reasons and for good administration. It does not bring the process to an irreversible halt. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule of law reasons, the decision stands.

Oudekraal and *Kirland* did not impose an absolute obligation on private citizens to take the initiative to strike down invalid administrative decisions affecting them. Both decisions recognised that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down. Neither decision expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid. As important, they did not imply or entail that, unless they bring court proceedings to challenge an administrative decision, public authorities are obliged to accept it as valid. And neither imposed an absolute duty of proactivity on public authorities*. It all depends on the circumstances*.

. . . .

Against this background, the question is whether, when AngloGold sought an order enforcing the Minister's decision, Merafong was entitled to react by raising the invalidity of her ruling as a defence.

. . . .

A reactive challenge should be available where justice requires it to be. That will depend, in each case, on the facts.'[9] (Emphasis added.)

[19] Furthermore, in *Department of Transport and Others v Tasima (Pty) Limited*,[10] the majority judgment observed that allowing state organs to challenge the lawfulness of the exercise of public power by way of a reactive challenge, in appropriate circumstances, was a logical and pragmatic consequence of the development of the jurisprudence flowing from the *Merafong* judgment. The permissibility of a reactive challenge to the lawfulness of the exercise of public power depends on a variety of factors and it was logical and pragmatic to allow it in appropriate circumstances. The question is whether allowing the municipality to raise a collateral challenge in the circumstances of this case served justice.

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[9] *Merafong* fn 4 above para 43-45.

[10] *Department of Transport and Others v Tasima (PTY) Limited* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) para 140.

[20] The invalidity of Gobela's proposal and subsequent appointment was canvassed as follows in the municipality's plea:

'The defendant pleads that the request did not abide by the Municipal Finance Management Act 2003 and the defendant's Supply Chain Management Policy and such request is invalid and unlawful.

…

'The defendant pleads that the letter of appointment dated 5 May 2011 is invalid and unlawful. In amplification of its plea the defendant pleads that its ex-employee acted outside his delegated powers and authority in terms of the National Treasury's regulations, Municipal Finance Management Act and the supply chain management policy. The defendant denies liability.'

[21] It is clear from the court a quo's judgment that it took into account that despite the absence of a frontal challenge in the form of a counter-application, the validity and lawfulness of Gobela's appointment were squarely raised in the pleadings. Another important consideration in considering whether the court a quo was justified in entertaining the municipality's collateral challenge is that by not declaring the contract invalid and unlawful, the untenable result would be that the court would be giving legal sanction to the very result which s 217 of the Constitution and other all procurement-related prescripts sought to prevent.[11] Moreover, a finding in favour of Gobela would have the equally untenable result that the municipality would essentially be paying for a benefit it did not receive, notwithstanding the undisputed assertion that it had budgetary constraints.

[22] Notably, despite the fact that the appointment letter pertinently stated that there would be an assessment after finalisation of every phase and that Gobela had not gone beyond the preparatory steps for its performance of its obligations in terms of the contract, it impermissibly claimed the full contract fee. Allowing the claim would thus be tantamount to enforcing an unperformed obligation. For all these reasons, I conclude that justice required that the court a quo declare the impugned contract invalid and unlawful despite the municipality not having counter-applied for it to be

[11] *Pottie v Kotze* [1954] (3) SA 719 (A) at 726H-727A; *ABSA Insurance Brokers (Pty) Ltd v Luttig and Another NNO* [1997] (4) SA 229 (SCA) at 239H-I.

reviewed and set aside. There is no question here of impermissible self-help. The decision that the contract was unlawful and invalid was a decision by a court. It follows that the appeal has to fail. As regards costs, there is no reason to depart from the general rule that the costs must follow the result. The case was not of such complexity as to warrant the employment of two counsel.

[23] In the result, the following order is made:

The appeal is dismissed with costs.

M B MOLEMELA

JUDGE OF APPEAL

Appearances

For appellants:	N Ralikhuvhana
Instructed by:	Katlego Ralikhuvhana Attorneys, Johannesburg
	Matsepes Attorneys, Bloemfontein
For respondent:	M S Mphahlele SC (with him T G Ramatsekisa)
Instructed by:	Wisani Baloyi Inc, Thohoyandou
	Maduba Attorneys, Bloemfontein.