IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – GQEBERHA)

Case No: 427/22
Reportable

In the matter between:-

THE MINISTER OF POLICE Applicant

and

COBALT COMMUNICATIONS CC T/A TOP-NOTCH
Registration No. 2[…] First Respondent

JASCO ELECTRONICS HOLDINGS LIMITED t/a
JASCO CONVERGED SOLUTIONS Second Respondent

JUDGMENT

Beyleveld AJ

[1] The Applicant[1] seeks to review certain decisions its functionaries took in relation to quotations submitted by the First and/or Second Respondents.[2]

---

[1] The Minister of Police – for the sake of convenience hereinafter referred to as the "*Minister*"
[2] For the sake of convenience the First Respondent will hereinafter be referred to as "*Cobalt*" whilst the Second Respondent will be referred to as "*Maringo*". The Minister in a supplementary affidavit attaches various written quotations over the period 2013 to 2018. In some of the annexures to the supplementary affidavit the quotation identifies the entity furnishing such a quotation to the Minister as being Maringo Communications (Pty) Ltd t/a Jasco Converged Solutions.

[2] The decisions the Minister seeks to set aside relate to quotations in respect of the supply and installation of PABX Systems[3] and TMS Systems[4].

[3] Such quotations included the installation of cables, the supply of ancillary equipment such as telephone instruments, switchboards, desktop computers and related software.

[4] Self review by an Organ of State, although not an entirely unknown concept at common law, has in our constitutional dispensation, been developed and expanded and is now an acceptable remedy for an Organ of State to utilise, whether by means of direct self review or collateral challenge.[5]

[5] Self reviews have, expanded further by recognising what has become known as a collateral challenge which arises when an Organ of State for instance attempts to force a person or entity to comply with an unlawful act and such unlawfulness is defended on the basis of unlawfulness or, in the context of collateral challenge by an Organ of State itself, where an Organ of State raises a defence to a claim, the substance of such defence being the unlawfulness of the underlying agreement or administrative action by virtue of a failure for instance to comply with proper procurement processes.[6]

[6] Although in this matter the Minister seeks to directly review the contended for decisions, the relevance of a collateral challenge will become apparent from what is set out hereunder, more particularly relating to the preliminary defence raised by Cobalt, namely *lis pendens*.

---

[3] Private Automated Branch Exchange
[4] Telephone Management Systems
[5] See for instance *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC* 2010 (1) SA 356 (SCA); *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA); *Khumalo v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC); *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 481 (CC); *State Information Technology Agency SoC Ltd v Gajima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC). See generally Cora Hoexter and Glenn Penfold *Administrative Law in South Africa* 3rd Edition at 688 and further
[6] Such a challenge was for instance recognized in *Gobela Consulting v Makhado Municipality* [2020] ZASCA 180; *Gobela Consulting CC v Makhado Municipality* [2020] JOL 49209 (SCA) where an action was brough to enforce a contract that was challenged on the basis of non-compliance with Section 217 of the Constitution as being invalid and unlawful (without the necessity to launch a separate counter-application to review). See also Hoexter *supra* at 772 and *Merafong City Local Municipality v AngloGold Ashanti Limited (Merafong)* 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC)

[7] Maringo, is not opposing the application[7].

[8] The quotations referred to above issued by Maringo clearly identify Maringo as set out above. There is no reference in such quotation to the entity described by the Minister in the founding affidavit. [8]

[9] To exacerbate matters, the Minister, in the replying affidavit annexes certain invoices in respect of an earlier period, such invoices identifying the entity as ARC Communications (Pty) Ltd t/a Jasco Converged Solutions.

[10] There seems to be no dispute on the papers that Maringo (or any other entity) supplied the goods and services described above to the Minister for the period October 2013 to June 2015, whereafter such goods and services were supplied by Cobalt.

[11] Prior to the initiation of the present review application by the Minister, Cobalt instituted action against the Minister under case number 136/2021, claiming payment in the sum of R927 070.71 in respect of invoices rendered by Cobalt to the Minister which remain unpaid.

[12] In such particulars[9] it is alleged that Cobalt stepped in the shoes of Maringo in June 2015. In fact, annexed to the application papers is the Minister's Plea in the aforesaid action where the Minister admits that goods and services were supplied by the entity the Minister describes as Jasco and as from June 2015 by Cobalt.

[13] In the Particulars of Claim, which relate to defined contended for contracts for the supply of the goods referred to above, extend over the period April 2019 to July

---

[7] It was initially opposed but thereafter the opposition was limited to Cobalt only. Maringo is described by the Minister as Jasco Electronic Holdings Limited t/a Jasco Converged Solutions being a public company with its registered address at the corner of Alexander Avenue and Second Street, Midrand, Johannesburg

[8] As indicated the Maringo is therein described as Jasco Electronics Holdings Limited t/a Jasco Converge Solutions

[9] Which is confirmed in the answering affidavit and applying *Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* 1984 (3) SA 623 (A) these allegations must be accepted as correct

2020.

[14] In the Plea filed on behalf of the Minister it is contended that the acceptance of the quotations which are relied upon by Cobalt, are unlawful and invalid by virtue of non-compliance with a range of statutory and regulatory procedures.[10]

[15] In the present application the Minister seeks to set aside the quotations issued by Cobalt during June 2017 and June 2018.[11]

[16] In the Particulars of Claim, reference is also made to the quotations referred to above.

[17] The Minister consistently effected payments of all invoices rendered pursuant to the various quotations until April 2018. The contracts relied upon by Cobalt were according to its version[12] not terminated by the Minister as notice of termination had not been given and the equipment retained by the Minister.

[18] Cobalt contended that in July 2020 it cancelled the contracts with the Minister, by virtue of the Minister's repudiation.

[19] In response to the Minister's review application[13] Cobalt raises as a particular defence, the defence known as *lis alibi pendens*.

[20] As alluded to above, the Minister in this review application seeks to set aside the various quotations for lack of compliance with the regulatory frameworks referred to previously.[14]

---

[10] For instance Section 217 of the Constitution; Section 38 of the Public Finance Management Act No. 1 of 1999; Regulation 16A of the Treasury Regulations 2005 and the Supply Chain Management Regulations of the South African Police Services

[11] The quotations in respect of Maringo sought to be set aside are for the period August to June 2015

[12] Which version must be accepted

[13] Which is based on the principle of legality

[14] In addition to what is pleaded in the action, reliance is also placed in the review application on the provisions of the Preferential Procurement Policy Framework Act 5 of 2000. The Regulations promulgated under such act have of course been declared unlawful – *Afribusiness v Minister of Finance* [2020] ZASCA 140; see also *Minister of Finance v Afribusiness MPC* 2022 (4) SA 362 (CC)

[21] Relying on the statutory framework identified above, the Minister in the review application contends that the transactions are all unlawful as the procurement processes were neither fair, equitable, transparent and cost-effective and in particular it is contended that the Minister's officials:

[21.1.] Failed and/or neglected to estimate the transaction value of the goods and services prior to procuring the goods and services.

[21.2.] Failed to choose the correct procurement method commensurate with the transaction value of the goods and services.

[21.3.] Failed to evaluate quotations according to price and preference as required by the PPFA.

[21.4.] Obtained quotations from a sole supplier without recording the reasons for deviating from the prescribed procurement methods and without requesting prior approval of the accounting officer of the SAPS.

[21.5.] Split transactions into items of smaller value thereby avoiding compliance with the prescribed procurement methods.

[21.6.] Failed to independently determine the reasonable value of the goods and services prior to sourcing a quotation from a sole supplier.

[21.7.] Failed to conclude a contract in accordance with the general conditions of contract issued by National Treasury.

[22] The Minister, in the action, pleads unlawfulness of the quotations and accordingly any contract and specifically pleads the same grounds relied upon in the review application as enumerated above.

[23] A defence of *lis alibi pendens* is of course the mirror image and related to a defence of *res iudicata*.[15]

[15] Harms *Amlers Precedents of Pleadings* 9th Edition at 250

[24] It is beyond debate that a plea of *lis alibi pendens* is based on the proposition that the dispute[16] between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in a court in which the plea was raised.[17]

[25] The requisites for a successful raise of a *lis pendens* defence are:

[25.1.] Pending litigation.

[25.2.] Between the same parties or their privies.

[25.3.] Based on the same cause of action.

[25.4.] In respect of the same subject matter.[18]

[26] Strict compliance with the requirements for *lis pendens*[19] have in recent years been somewhat relaxed and extended.[20]

[27] In this regard Scott JA in *Smith v Porritt supra* stated as follows:[21]

> "*[10] Following the decision in Boshoff v Union Government 1932 TPD 345 the ambit of the exceptio rei judicata has over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action be the same (eadem res and eadem petendi causa) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (idem actor) and that the same*

---

[16] *Lis*
[17] *Caesarstone Sedot-Yan Ltd v World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA) at [2]
[18] Harms *supra* at 251; *Caesarstone supra* and *Aon South Africa (Pty) Ltd v Van den Heever NO and Others* 2018 (6) SA 38 (SCA). See also *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA)
[19] Or for that case *res iudicata*
[20] *Smith v Porritt and Others* 2008 (6) SA 303 (SCA); *Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA)
[21] At [10]

issue (eadem quaestio) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of res judicata is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in Kommissaris van Binnelandse Inkomste v Absa Bank BPK 1995 (1) SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of res judicata. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case by case basis. (KBI v Absa Bank supra at 670E-F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in Bertram v Wood 10 SC 177 at 180, 'unless carefully circumscribed, [the defence of res judicata] is capable of producing great hardship and even positive injustice to individuals'."

[28] In the present instance, the commonality between what is raised in the review application and raised as a collateral challenge in the action is self-evident and obvious.

[29] Insofar as Cobalt and the Minister are concerned, they are the same parties and the same subject matter or cause of action is dealt with.

[30] Insofar as Maringo is concerned, it is for obvious reasons not a party to the action as the quotations it issued were issued and paid for long before the action was instituted and long before Cobalt took over the supply of the equipment as alluded to above.

[31] I am accordingly satisfied that the defence of *lis alibi pendens* is well-founded and there exists nothing on the papers to justify me in exercising my discretion to

refuse a stay.[22]

[32] Under the circumstances the application should be stayed pending final determination of the action under case number 136/2021. There exists no reason to deprive Cobalt of its costs in respect of this application.

[33] Maringo is not before court.

[34] The question that arises is whether or not I am entitled to make an order against Maringo as cited by the Minister in these proceedings.

[35] Besides the description of the Second Respondent as identified above, I do not believe, in any event, that it would be appropriate to make an order against the Second Respondent.[23]

[36] Having regard to my finding in respect of the special dilatory plea raised by Cobalt, it is not necessary for me to analyse the merits of the review or the collateral challenge raised in the action.

[37] Under the circumstances I make the following order:

> [37.1.] The application as against the First Respondent is stayed pending final determination of the action under case number 136/2021.

---

[22] In any event, I have an overriding discretion to order a stay even if all the elements are not present – *Caesarstone supra*. Furthermore, the trial court may decide not to set aside the agreement – *Buffalo City v Asla* at [105].

[23] Insofar as the Second Respondent is concerned, the equipment was delivered and payment made therefor. One must also not lose sight of the fact that the delay in launching the review is inordinately long and it is unlikely that a court would condone such delay. This being a legality review the review does not have to be brought within a fixed time but the yardstick remains reasonableness. The test to be applied has been set out in various decisions most recently in *Altech Radio Holdings v Tshwane City* 2021 (3) SA 25 (SCA). See also *Valor IT v Premier, North West Province and Others 2021 (1) SA 42 (SCA) and Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) and *Aurecon South Africa (Pty) Ltd v Cape Town City* 2016 (2) SA 199 (SCA). On these papers, the duty incumbent on the Minister to provide a full explanation covering the entire period of the delay was lacking and "… *for the most part, he is, superficial and unconvincing*" – *Altech Radio Holdings supra* at [22]. Lastly, the Minister has known of the particular transactions for many years and cannot state as it does that it was unaware because some of the officials' knowledge could not be imputed to it. This argument was raised in *Aurecon* in both the SCA and the CC and rejected – see *Aurecon supra* (SCA) at [16] to [18] and *Aurecon supra* (CC) at [38].

[37.2.] No order is made in respect of the application as against the Second Respondent.

[37.3.] The Applicant is directed to pay the First Respondent's costs of the application.

_____

A BEYLEVELD

Acting Judge of the High Court of South Africa

Appearances:

For Applicant:	Adv G Appels acting for The State Attorney
For First Respondent:	Adv JG Richards acting for PBK Attorneys

Date heard:	15th June 2023
Date Delivered:	15th June 2023