REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 238/2015

In the matter between:

GREATER TZANEEN MUNICIPALITY **APPLICANT**

And

BRAVOSPAN 252 CC **RESPONDENT**

JUDGMENT

MOKGOHLOA J

1. The applicant brought an application seeking an order declaring the extension service level agreement entered between the parties on 28 August 2014 null and void; alternatively, that the extended service level agreement be reviewed and set aside.

2. The facts of the matter are to a great extent common cause. On 20 November 2013, the applicant and the respondent entered into a written service level agreement for the rendering of security services. The essential terms of the agreement were, *inter alia*, that the respondent will provide security services to the applicant commencing on 1 November 2013 until 31 October 2014; and the applicant would pay an amount of R 2 757 666-60 for the services rendered over a period of 12 months.

3. On 28 August 2014, the applicant extended the duration of the service level agreement by a period of 24 months until 2016. The terms of the extension were that the agreement would commence on 1 November 2014 until 31 October 2016, and the applicant would pay an amount of R 9 624 000.00 over a period of two years.

4. The applicant submits that the conclusion of the extended service level agreement is not in compliance with the provisions of section 217 of the Constitution of the Republic of South Africa Act,[1] and circular 62 issued in terms of the Municipal Finance Management Act (MFMA).[2]

5. Section 217(1) of the Constitution provides:

   "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-efficient."

6. Section 2 of the MFMA provides:

   "the object of the Act is to secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities by establishing norms and standards and other requirements for-

[1] 108 of 1996
[2] 56 of 2003

(a) Ensuring transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities and municipal entities;
(b) The management of their revenues, expenditures, assets and liabilities and the handling of their financial dealings;
(c) .....
(d) .....
(e) .....
(f) Supply chain management,"

7. Section 111 of the MFMA provides that each municipal entity must have and must implement a supply chain management policy. This policy must comply with the provisions of section 217 (1) of the Constitution.

8. The applicant states the following in its founding affidavit:

"[12] A supply chain management policy and MFMA circular 62 ("the policy"), which are informed by the foregoing statutory provisions is attached hereto and marked as annexure ("GTM and GTM2").

[13] The policy provides that competitive bids must be called for any procurement of goods or services, construction works or consultant services above a transaction value of R 200 000.00 (Vat inclusive) or for any contract exceeding one year in duration.

[14] A competitive bidding process contemplated by the policy entails the preparation of a bid specification and bid documents and ad hoc committee generally referred to as the Bid Specification Committee.

[15] The policy requires that the bid specifications must be drafted in an unbiased manner to allow all potential suppliers to offer their goods or services.

[16] On completion of the bid specification and bid document processes the policy requires the Municipality to publicly invite bids by notice published in the press, in newspapers circulating in the Greater Tzaneen Municipality area, in English and on the Municipality's official website.

[17] The bid notice shall, as soon as possible after the publication contemplated above, be posted on official notice boards designated by the Municipal Manager.

[18] The public notice is to specify:

[18.1] the title of the proposed contract and the bid or contract reference number; such particulars of the contract as the Municipality deems fit;

[18.2] the date, time and location of any site inspection, if applicable; the place where the bid documentation is available for collection and the times between which bids documentation may be collected;

[18.3] that bids may only be submitted on the bid documentation provides by the Municipality; the place where bids must be submitted; the closing date and time for submission of bids,

[19] Upon receipt of bids, a bid evaluation committee is to be constituted for the evaluation bids. The policy requires that functionality must be included as a criterion in the evaluation of a tender that is specialised or technical in nature; in order to ensure the quality of the goods/ or services procured.

[20] The evaluation criteria for measuring functionality and, the weighting attached to each criterion must be listed in the Request for Tender document and minimum threshold of points for functionality must be identified and disclosed in the Request for Tender document.

[21]Thereafter, only qualifying bids must be evaluated in terms of the 90/10 or 80/20 preference point system, where 90/80 points are allocated for price only and 10/20 points are allocated for HDI ownership and achieving the prescribed RDP goals, in accordance with the Preference Points Claim Form. The bidder submitting the lowest quote in terms of amount will score 90/80 points for price.

[22] The Bid Evaluation Committee is to be comprised of at least three Municipality officials, an appointed Chairperson (who may be the same person as the Chairperson of the Bid Specification Committee), a responsible official and at least one SCM Practitioner of the Municipality.

[23] Where appropriate, a representative of Internal Audit and/or Legal Services may form part of this committee, which may also include other internal specialists/experts as necessary. External specialists/experts may advise the Bid Evaluation Committee, as required.

[24] The Municipal Manager or his delegated authority is to take into account 117 of the MFMA, when appointing members of the Bid Revaluation Committees. Evaluation of bids must be done during the evaluation committee meetings.

[25] After the Bid Evaluation Committee completes it works, the bids are referred to the Bid Adjudication Committee which shall comprise at least four senior managers, sand shall include: Chief Financial Officer or a Manager designated by him.

[26] At least one senior Supply Chain Management practitioner of the Municipality and a technical expert in the relevant field who is an official of the Municipality, if the Municipality has such an expert.

[27] The Municipal Manager appoints the members and chairperson of the Bid Adjudication Committee. If the chairperson is absent from a meeting, the members of the committee who are present shall elect one of the committee members to preside at the meeting.

[28] Neither a members of a Bid Specification Committee, Bid Evaluation committee, nor an advisor or person assisting such committees, may be a member of a Bid Adjudication Committee.

[29] The Bid Adjudication Committee shall consider the report and recommendations of the Bid Evaluation Committee and make a final award or make another recommendation to the Municipal Manager on how to proceed with the relevant procurement.

[30] The Bid Adjudication Committee may make an award to a preferred bidder, subject to the Municipal Manager negotiating with the preferred bidder in terms of clause 231 of the policy."

9. The applicant submits that the extension of the service level agreement is illegal and unlawful in that all the processes and procedures contained in the Municipality's Supply Chain Management Policy were not complied with. It submits further that the conduct of extending the agreement is in contravention

of Circular 62 which provides that 'contracts may be expanded or varied by not more than 20% for construction related goods and contracts may be expanded or varied by not more than 20% for construction related goods and contracts for services and/or infrastructure projects may not be expanded or varied by not more than 15%.

10. The respondent opposes the application and filed a counter application for the payment of R 2 005 000.00 for services rendered to the applicant for the period of November 2014 to end of March 2015. I will revert to the counter application in due course.

11. In its opposing affidavit, the respondent raised a *point in limine* referring to some clauses of the service level agreement which read:

Clause 14

"Any dispute between the parties arising out of the interpretation or implementation of this agreement shall be settled amicably through consultation or negotiation between them".

Clause 15

"Any dispute arising in connection with this agreement, which cannot be resolved by the parties in terms of this agreement, shall be settled by arbitration in accordance with the clause.

The parties agreed to comply with the rewards resulting from arbitration and waive their rights to any form of appeal Insofar as such waiver can validity be made".

12. As regards the merits the respondent stated the following:

"[11] The Applicant did not make a case to have the service level agreement be declared null and void nor did the Applicant satisfy the requirements of a review and setting aside.

[15.1] In clause 5 of the service level agreement under the heading Value of Tender it was agreed that the value of the contract shall be R 2 757 666.60 for a period of 12 months and should the Applicant wishes to extend the service, written agreement must be negotiated and signed by the two parties, especially on prices. [It is emphasised that this is a very important clause in the service level agreement for the current application];

[16] The need arose for the Applicant to continue the services of the Respondent and therefore the addendum to the service level agreement was properly negotiated, agreed upon, entered into and signed and is valid and binding agreement, not capable of being declared null and void nor being reviewed and set aside.

[23] The additional inclusion to the original scope of work under the extension to the level agreement increased the contract price, but it was negotiated and agreed to between the parties.

[24] The additional services to be rendered in terms of the negotiated extended service level agreement amounts to a cost of R 101 233.34 per month. When the calculation is properly made, the per month charge is R401 000.00 X 12 amounting to R4 812 000.00 for the 12 month period and that calculation is made for the period of 24 months as per the time in the extension for the service level agreements, the total amount is R9 624 000.00.

[26.1] At no stage whatsoever, during negotiations or elsewhere, was the Respondent informed of a requirement that the Municipal Council must condone the extension of the service level agreement;
[26.2] Indicative of the fact that the content of the application amounts to a falsity, the Applicant did not issue this current application earlier, but allowed the Respondent to fulfil its obligations for some time in terms of the service level agreement and the extension thereof and having received the benefit of the Respondent's services, now for no justifiable reason, approaches the Court. The Applicant's relief should not be granted and the contract should be allowed to run its course and the Respondent remunerated therefore.

[27] Even more pressing is the fact that the current acting Municipal Manager was the Chief Financial Officer of the Applicant when both the service level agreement and the addendum to the service level agreement was signed and she should have ensured that the supply chain procedures be properly followed insofar as it has any bearing on the Respondent, which the Respondent humbly states it does not. The Respondent is not a party to the Applicant's internal processes and procedures the Applicant must follow and when the Respondent entered into the service level agreement and the extension thereof, there was no indication of internal processes not being followed and the Respondent entered into the said agreements on the basis that all was in order."

13. Dealing with the same argument, the Supreme Court of Appeal stated in Municipal Manager: Quakeni Local Municipality and Another v F V General Trading CC;[3]

"[23] This argument cannot be upheld. This court has on several occasions stated that, depending on the legislation involved and the nature and functions of the body concerned, a public body may not only be entitled but also duty-bound to approach a court to set aside its own irregular administrative act: see *Pepcor Retirement Fund and Another v Financial Services Board and Another 2003* (6) SA 38 (SCA) ([2003] 3 All SA 21) at para 10. Consequently, in *Rajah & Rajah (Pty) Ltd and Others v Ventersdorp Municipality and Others* 1961 (4) SA 402 (A) at 407D-E it held that the interest a municipality had to act on behalf of the public entitled it to approach a court to have its own act in granting a certificate to obtain a trading licence declared a nullity. Similarly, in *Transair (Pty) Ltd v National Transport Commission and Another* 1977 (3) SA 784 (A) at 792H-793G this court held that an administrative body, which held wide powers of supervision over air services to be exercised in the public interest, had the necessary *locus standi* to ask a court to set aside a licence it had irregularly issued. Finally, in *Premier, Free State and Others v Fishrechem Free State (Pty)*, supra, Schultz JA concluded in giving the unanimous judgment of this court that 'the province [the appellant] was under a duty not to submit itself to an unlawful contract and [was] entitled, indeed obliged, to ignore the delivery contract and to resist [the respondent's] attempts at enforcement."

[3] 2010 (1) SA 356 CC

14. I fully agree with the honourable Judge of Appeal. Any Municipal service contract concluded in breach of a statutory provision is invalid and cannot be enforced. Regarding the points *in limine*, I find that the applicant was entitled and also duty bound to raise the invalidity of the contract and to approach the court to seek to have the contract set aside.

15. This brings me to the respondent's counter-application. The counter-application is based on the settlement negotiations held between the applicant and the respondent. According to the respondent, this matter was initially set down for hearing on 9 June 2015. During the first week of June 2015, the applicant requested the respondent to agree to a postponement of the matter to enable the applicant to file a replying affidavit and heads of argument. The respondent agreed to such request.

16. The matter was reinstated for the 18 August 2015. On 17 August 2015, the applicant requested another postponement for 30 days to enable its counsel to consider the settlement proposals as negotiated by the parties on 8 July 2015 wherein the applicant offered to pay the respondent an amount of R 389 000.00. The attorney for the applicant confirmed this discussion in a letter dated 17 August 2015. The respondent once again acceded to the request on condition that it was a final proposal.

17. In City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd,[4] Ponnan JA made a distinction between two categories of cases. These are, an act beyond or in excess of the legal powers of a public authority (the first category) and the irregular or informal exercise of power granted (the second category). The honourable Judge of Appeal stated

> "[12] in the second category, persons contracting in good faith with a statutory body or its agents are not bound, in the absence of knowledge to the contrary, to enquire whether the relevant internal arrangements or formalities have been satisfied, but are entitled to assume that all the necessary arrangements or formalities have indeed been

[4] 2008 (3) SA (1) SCA

complied with (see for example *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A); *Potchefstroom se Stadsraad v Kotze* 1960 (3) SA 616 (A). Such persons may then rely on estoppel if the defence raised is that relevant internal arrangements or formalities were not complied with.

[13] As to the first category: failure by a statutory body to comply with provisions which the legislature has prescribed for the *validity* of a specified transaction cannot be remedied by estoppel because that would give validity to a transaction which is unlawful and therefore ultra vires. (See for example *Strydom v Die Land- en Landboubank van Suid-Afrika* 1972 (1) SA 801 (A); *Abrahamse v Connock's Pension Fund* 1963 (2) SA 76 (w); and *Houptfleish v Caledon Division Council* 1963 (4) SA 53 (C.)

[16] There are formidable obstacles to the plaintiff's reliance upon the doctrinal device of estoppel. Assuming in the plaintiff's favour that all of the requirements for its successful invocation have been established, 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 (*Trust Bank van Africa Bpk v Eksteen* 1964 (3) SA 402 (A) at 411H-412B), for to do so would be to compel the defendant to do something that the statute does not allow it to do. In effect therefore it would be compelled to commit an illegality (*Hoisain v Town Clerk, Wynberg* 1916 AD 236).

[17]. . . .The effect of allowing estoppel to operate would be to breathe life into that which has yet to come into being. If the amendment were to be 'validated' by the operation of estoppel, the defendant would be precluded from exercising the powers specifically conferred upon it for the protection of the public interest.

[18] The fact that the plaintiff was misled into believing that the defendant's employees were authorised to vary an agreement that had earlier been lawfully concluded with it can hardly operate to deprive the defendant of that power which had been bestowed upon it by the legislature. To do so would be to deprive the ultra vires doctrine of any meaningful effect"

18. The present case falls into the first category for the simple reason that the applicant's authority to extend the service level agreement must be sought in

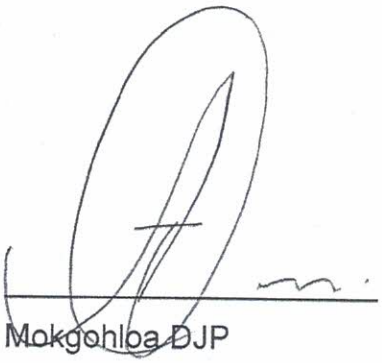
the provisions of the statute. Section 217 of the Constitution requires contracts for goods or services by an organ of state such as the applicant, to be in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Therefore, failure by the applicant to comply with the provisions of section 217, renders the extension of the service level agreement unlawful. Consequently, an unlawful transaction cannot be remedied by estoppel 'because that would give validity to a transaction which is unlawful and therefore *ultra vires.*

19. Having stated the above, the following order shall issue:

1. The extension of a service level agreement concluded between the applicant and the respondent is declared null and void.

2. The counter application is dismissed with costs.

3. The respondent is ordered to pay the costs of the application on an attorney and client scale.



Mokgohloa DJP

REPRESENTATIONS:

1.	Counsel for the Applicant	: Adv Manala
	Instructed by	: Mahowa Incorporated
2.	Counsel for the Respondent	: Adv Bresler
	Instructed by	: Weyer, Jansen Van Rensberg Inc
3.	Date of hearing	: 29 April 2016
4.	Date handed down	: 19 August 2016