



IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST PROVINCIAL DIVISION, MAHIKENG

CASE NO: M425/15

In the matter between:

NGAKA MODIRI MOLEMA DISTRICT MUNICIPALITY

APPLICANT

and

MOTO-TECH

1ST RESPONDENT

R G NAIR N.O

2ND RESPONDENT

JUDGMENT

Landman J:

Introduction

[1] The Ngaka Modiri Molema District Municipality, the applicant (hereafter the Municipality) seeks an order that the decision of Mr R G Nair, at one time an Administrator of the municipality, the second respondent (hereafter the Administrator) and the procedures followed to appoint Moto-Tech Services (the first respondent) for the supply of services to the Municipality under contract number NMMDM 14/15/37 TS be declared unlawful. The Municipality also seeks consequential relief.

Background

[2] The applicant is the District Municipality for, *inter alia*, the following local municipalities: Lehurutshe, Kgopane, Dinokana, Lichtenburg, Sannieshof, Delareyville and Kraaipan.

[3] During July 2014 the North West Provincial Government placed the Municipality under administration as envisaged in section 139 of the Constitution of the Republic of South Africa of 1996 (the Constitution). However, this step was set aside. But in September 2014 the Municipality was again placed under administration. The second respondent was appointed the Administrator of the

Municipality in terms of section 139(1)(c) of the Constitution with effect from 3 September 2014 until 31 March 2015. The appointment of the Administrator was challenged but the challenge was unsuccessful.

[4] Shortly after his appointment the Administrator appointed Moto-Tech Services as a service provider concerning the supply of parts and services for water and sanitation services. A written contract, a three year service level contract, was concluded between the Municipality and Moto-Tech Services on 10 October 2014.

The Municipalities case

[5] The Municipality's case is put forward by the current acting municipal manager. However, it is not clear whether or how the deponent has personal knowledge of all the facts to which he deposes. But he submits that:

- (a) The Administrator was bound to comply with all the legal requirements relating to the procurement of goods and services.
- (b) The Administrator purported to justify his decision and the conclusion of the three year contract on the basis of an emergency that consisted of a three weeks strike by the Municipality's employees. But this did not constitute an emergency.
- (c) The Administrator did not comply with the procurement laws and regulations.
- (d) The result was a duplication of services.

- (e) The decision and the resultant contract was unlawful.
- (f) The Municipality was duty bound to apply to set the illegality aside.

Administrator's response

[6] The Administrator's responded as follows:

- (a) The letter appointing the Administrator required him to prioritize, amongst other tasks, the following:

'Improve service delivery in Ngaka Modiri Molema District Municipality, prioritise rising water and sanitation services. This should include facilitation of new projects, unblocking of all projects, maintenance of infrastructure, cleaning etc.'

- (b) The municipal council was dissolved. Former councilors and municipal employees protested outside the office of the Administrator. The Municipality was not rendering services or rendered poor services to residents. Several communities began to strike/protest, including Lehurutshe, Kgopane, Dinokana, Lichtenburg, Sannieshof, Delareyville and Kraaipan. These protests began more or less at the same time in September 2014. The protestors demanded municipal services; mainly water and sanitation services. The protests were quite violent and central government

buildings, water and sanitation service plants and roads were damaged. Passing motorists also sustained damages.

(c) The Administrator and his intervention team conducted inspections. They were escorted for their protection by members of the South African Police Service. The Administrator's assistant, at the time, Mr Rajah took photographs of the damage to water and sanitation plant and equipment. They are attached to the answering affidavit.

(d) The Administrator formed the impression that there was a real and imminent threat that the water crisis in the rural areas would become more desperate. He believed that the health of the residents in those areas was seriously under threat due to the lack of potable water, water for cooking and water for washing. He believed that the protests would continue and become even more violent should no water and sanitation services be rendered.

(e) The Administrator called in the Municipality's duly appointed service delivery agents who dealt with water and sanitation. None of the agents, that he could get hold of, were willing and/or able to go to the rural areas, where there were protests, to attend to the installation, repair and/or construction of water and sanitation services. It was, at the time, a risk to life and limb for them to enter these areas. In addition, these service

providers had not been paid and had withdrawn their services pending payment of the outstanding fees owed by the Municipality.

(f) The status of water and sanitation services in the rural areas were almost non-existent. This included limited, if any, access to water, including potable water, water for cooking and washing. The rural areas were comprised of thousands of people, including children, the elderly and the sick.

(g) The Administrator convened an emergency meeting with his intervention team. They decided to approach a private entity to assist with the problem.

(h) It was not possible to follow the normal route for procuring service providers. If this route was followed, there would be the loss of life. The Municipal employees were still striking at this stage. Creditors of the applicant had not been paid. The communities were protesting. The second respondent had received several threats to such an extent that he had four bodyguards for his personal protection.

(i) After making enquiries, the Administrator approached an entity known as Moto-Tech for assistance. The prevailing situation was discussed with Mr Maharaj, the sole proprietor of Moto-Tech. They informed Mr Maharaj what services were required and that the services would be rendered under

quite dangerous circumstances due to the protests in the rural areas where the work was to be done. Mr Maharaj was willing to accept the appointment. He was told that his appointment would have to be confirmed by the Municipality's Bid Adjudication Committee. Prior to the confirmation of his appointment by the Bid Adjudication Committee he would have to work on a risk basis. Mr Maharaj indicated his willingness to deliver the services to the Municipality and said that he had the capacity to do so. As a result the Administrator appointed Moto-Tech as a service provider.

(j) The working environment in the rural areas was quite dangerous. Moto-Tech's employees had to be escorted to the sites either by the police or private security services. Additional security was hired to protect newly repaired and/or constructed water and sanitation plants and to prevent protestors from damaging them.

(k) In the appointing of Moto-Tech the Administrator says he acted in accordance with regulation 36 of the Municipal Supply Chain Management Regulations. After the appointment was made, a written agreement was drafted and signed by all the parties. The appointment was later approved by the Municipality's Bid Adjudication Committee at a meeting held on 4 November 2014. The Committee ruled and Moto-Tech agreed that the contract be reviewed bi-annually.

(l) The appointment of Moto-Tech did not cause a duplication of services because the Municipality's appointed service providers were only paid for work done as and when requested. They did not do any work which Moto-Tech did, and *vice versa*.

(m) The Administrator complied with the emergency regulation by noting the reasons for his action in the contract and convening, in November 2014, the Bid Adjudication Committee which considered the contract and adopted it.

[7] Mr Mokoena SC, with him Mr Mathopo, who appeared for the Municipality, accepted that the application must be decided on the respondent's facts.

Non-joinder

[8] The first order of business is to supply reasons for granting the applicant's application for an amendment and dismissing the point in *limine* of 'non-joinder' raised in the Administrator's answering affidavit. It was pointed out that Moto-Tech was a firm and that Mr Maharaj was the sole proprietor. Mr Maharaj has filed a supporting affidavit. A day or two before the hearing the Municipality filed a notice in terms of Rule 28 to amend the notice of motion and founding affidavit by substituting 'Moto-Tech Services' for Moto-Tech (Pty) Ltd. The second respondent has objected to the notice. Mr Maharaj was, at one stage, present in court during the hearing.

[9] Of course the affidavits cannot be amended but in this case the Municipality intended to launch the application against the entity that was party to the contract NMMDM 14/15/37 TS. The entity with whom the contract was signed was Moto-Tech (also referred to as Moto-Tech Services). The application was served at Moto-Tech's place of business. Mr Maharaj, the proprietor of Moto-Tech, pointed out the error and filed an affidavit in support of the Administrator.

[10] Mr Klopper, who appeared for the Administrator, raised several objection to the application. The first objection is that the Municipality had not served a substantive application on Mr Maharaj for his joinder as a party to these proceedings. He submitted that it was not possible to substitute a party for a non-existing party. The Municipality clearly made a mistake in its citation of the party to the service level agreement. I do not think that an extensive explanation is called for nor, given the circumstances, is a substantive application necessary. There is no prejudice to Moto-Tech.

Evaluation

The law relating to procurement and emergencies

[11] A Municipality that contracts for goods or services is obliged to do so in accordance with a system which is fair, equitable, transparent, competitive and costs-effective. See section 217(1) of the Constitution. As required by law the

Municipality has adopted and implemented a Supply Chain Management Policy and a Code of Conduct. The Local Government: Municipal Structures Act 7 of 2011 is also applicable. So is the Local Government: Municipal Finance Management Act 56 of 2003 and the Municipal Supply Chain Management Regulations (GN 868 in Government Gazette 27636 dated 30 May 2005).

[12] A municipality and in particular the accounting officer is required to ensure adherence to these laws and take the necessary steps to recover unauthorized, irregular or fruitless and wasteful expenditure. See **Municipal Manager: Quakeni Local Municipality and Another v FV General Tracing CC 2010 (1) SA 356 (SCA)**.

[13] An Administrator appointed for a municipality in terms of section 139 (1)(c) of the Constitution is of course bound by the law applicable to the procurement of goods and services.

[14] Regulation 36 of the Municipal Supply Chain Management Regulations regulates, *inter alia*, deviations from procurement processes.

‘(1) A supply chain management policy may allow the accounting officer—

(a) to dispense with the official procurement processes established by the policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only—

(i) in an emergency;...

(2) The accounting officer must record the reasons for any deviations in terms of subregulation (1)(a) and (b) and report them to the next meeting of the council.... and include as a note to the annual financial statements.'

[15] The regulations do not define an emergency. P Bolton 'Grounds for Dispensing with Public Tender Procedures in Government Contracting' **PER/PELJ** 2006 9 (2) submits that:

'The Green Paper on Public Sector Procurement Reform may be used as a guideline when interpreting procurement legislation that deals with emergencies. It provides that emergency situations may include, for example –

...[t]he possibility of human injury or death; [t]he prevalence of human suffering or deprivation of rights; [t]he possibility of damage to property, or suffering and death of livestock and animals; [t]he interruption of essential services, including transportation and communication facilities; [t]he possibility that the security of the State could be compromised; [t]he possibility of serious damage occurring to

the natural environment; [and/or] [t]he possibility that failure to take necessary action may result in the State not being able to render an essential community service.

*The prevailing situation or imminent danger should, however, –
...be of such a scale and nature that it could not readily be alleviated by interim measures, in order to allow time for normal procurement systems to be used.'*

[16] However, it is not necessary to rely on this as clause 22(3) of the Municipality's own Supply Chain Management Policy (the SCM policy) permits the dispensation of normal procurement process in an emergency that should include the existence of one or more of the following:

- '(a) the possibility of human injury or death;*
- (b) the prevalence of human suffering or deprivation of rights;*
- (c) the possibility of damage to property, or suffering and death of livestock and animals;*
- (d) the interruption of essential services, including transportation and communication facilities or support services critical to the effective functioning of the Municipality as a whole;*
- (e) the possibility of serious damage occurring to the natural environment;*

*(f) the possibility that failure to take necessary action may result in the Municipality not being able to render an essential community service;
and
(g) the possibility that the security of the state could be compromised.'*

[17] Clause 22.4 of the Municipality's SCM policy directs that the prevailing situation, or imminent danger, should be of such a scale and nature that it could not readily be alleviated by interim measures, in order to allow time for the formal procurement process.

Was there an emergency?

[18] Although the focus of the factual inquiry is whether there existed in September 2014 an emergency in the sense referred to above, it must be borne in mind that in the view of the North West Provincial Government the Municipality had ceased to function to such a degree that the intervention of the provincial government was called for. It is fair to say that in the view of the provincial government there was a major problem regarding the ability of the Municipality to render services; particularly water and sanitation services. The Administrator was instructed to address this aspect as a matter of priority.

[19] One of the problems at the time was that the Municipality had defaulted in the payment of service provider who supplied goods and services relating to the provision of water and sanitation. Also when the Administrator took office he was

immediately faced with opposition by members of the disbanded municipal council and a strike by municipal employees.

[20] The failure to provide satisfactory municipal services, mainly water and sanitation services, led to protest in six local municipalities by residents. The protests were quite violent and damage was done to buildings, water and sanitation service plants and roads regardless of the fact that these were essential for rendering the services. The violence spilled over to embrace other people who were not responsible for service delivery. The provision of even temporary water and sanitation services lies beyond the competence of ordinary residents and particularly affects the vulnerable members of the communities.

[21] I have no doubt that there existed an emergency as envisaged by regulation 36 and the Municipality's own SMC policy as the prevailing circumstances embraces 5 out of the 7 listed elements. In my view the situation that prevailed and the imminent danger was such that it could not readily be alleviated by interim measures, in order to allow time for the formal procurement process. The decision of the Administrator to take a decision to address the issue was a legitimate and lawful one. I am also convinced that while the Administrator was required to comply with the law, the actions of the Administrator must not be viewed from an armchair perspective.

The duration of the contract

[22] I now turn to consider the service level contract itself. The service level contract concluded with Moto-Tech was for a period of three years. It may have been a standard format in use at the time but this has not been recorded. *Prima facie* the duration of the contract with Moto-Tech was too long. But it would not do to be fixated on the term and secondly there is a resolution by the Bid Adjudication Committee regarding its duration.

[23] The contract is for three years but the duration of the contract is in effect limited and regulated by the nature of the obligations of the Moto-Tech and the rights retained by the Municipality. Although the contract was to endure for three years it operated on the basis that the Municipality was entitled to source parts and use the services of Moto-Tech at fixed rates and prices but only when the Municipality deemed it necessary to do so. This has three effects. First Moto-Tech was to render services only at the behest of the Municipality. Secondly this meant that the Municipality was entitled, without penalty, to refrain from using the services of Moto-Tech when the emergency had passed. Thirdly there was no room for the duplication of expenditure because the service level contracts of the existing service providers operated on the base basis.

[24] The services of Moto-Tech were engaged. But there is no evidence to show when the emergency passed, whether services were engaged by the Administrator after the emergency had passed at least until his recall in February

2015, and whether the Municipality under new management continued to use the services of Moto-Tech after the departure of the Administrator. No details of any alleged duplication of expenditure has been supplied.

To what extent was there a deviation from the rules and was it reported?

[25] The Administrator did not follow a competitive bidding process when he appointed Moto-Tech as a service provider. Clause 22.7 of the SCM policy requires that where possible, in an emergency situation, three quotes, in accordance with general acquisition management principles, should be obtained and a report submitted to the Municipal Manager for approval. Where however, time is of the essence, the emergency must be immediately addressed, and the process formalized in a report to the Municipal Manager as soon as possible thereafter. The Administrator has explained why he acted as he did. He acted in the face of an emergency. He has explained that a competitive bidding process could not be followed and nor could existing service providers be instructed to do the work. I accept this.

[26] Regulation 36(2) requires the accounting officer to record the reasons for any deviation and report on it to the next meeting of the council. So does clause 22.2 of the SCM policy. The SCM policy also stipulates the reasons must be included as a note to the annual financial statements. The Administrator recorded the reasons for the deviation in the contract that he concluded with Moto-Tech. These reasons record the reasons mentioned above but also deal

with other reasons why Moto-Tech was chosen to do the work including its capacity to rewire electrical motors itself rather than send the motors away which would delay the provision of water. There is no evidence whether the annual financial statements included such a note. But there is no specific complaint that this was not done. It also may be that Administrator's terms of office lapsed before the annual financial statements were prepared.

[27] The contract with Moto-Tech served before the Bid Adjudication Committee. This committee:

- adopted the founding document for the establishment and functionality of the emergency SCM Bid Adjudication Committee;
- adopted the implementation of the rural water supply programme;
- adopted and approved the appointment of service providers and contractors concerning, *inter alia*, the implementation of the repairs and maintenance programme on all water and sewer installations;
- decided that there should be a time limit to the provisions of services from the contracted service providers; and
- undertook to review the work of the service provider on a bi-annually basis.

[28] Did the Administrator report the deviation to the Municipal Council? It may be accepted that this was not done at the time because there was no council in place.

[29] In the result the application falls to be dismissed.

Costs

[30] There is no reason why costs should not follow the result.

Order

[31] I make the following order:

The application is dismissed with costs.

A A Landman

Judge of the High Court

Appearances

Date of hearing: 23 June 2016

Date of Judgment: 30 June 2016

For the Applicant: Adv Mokoena SC and Adv Mathopo instructed by
Motshabi & Modiboa Attorneys

For the Respondent: Adv Kloppe instructed by Maree and Maree
Attorneys