THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 199/10

In the matter between:

GAUTENG MEC FOR HEALTH **Appellant**

and

3P CONSULTING (PTY) LTD **Respondent**

Neutral Citation: *Gauteng MEC for Health v 3P Consulting (Pty) Ltd* (199/10) [2010] ZASCA 156 (1 December 2010)

Coram: Heher, Van Heerden, Mhlantla, Tshiqi JJA and Bertelsmann AJA

Heard: 12 November 2010

Delivered: 1 December 2010

Summary: *Services agreement between provincial department and private company – renewal thereof – whether original services agreement and/or renewed services agreement void for want of legality and/or authority, alternatively void on the application of private law principles – whether order for specific performance of renewed services agreement appropriate remedy*

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Lamont J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

VAN HEERDEN JA (HEHER, MHLANTLA, TSHIQI JJA AND BERTELSMANN AJA concurring):

Introduction

[1] In 2007, the respondent, 3P Consulting (Pty) Ltd ('3P Consulting'), a management consulting company specialising in providing public sector reform solutions, allegedly entered into a services agreement with the appellant, the Gauteng Department of Health ('the Department'), for an initial period of two years, renewable for a further period of two years. In 2009, the parties allegedly agreed to extend the services agreement for a period of three years to 31 May 2012. In July 2009, the Department repudiated the services agreement as extended.

[2] On application by 3P Consulting to the South Gauteng High Court, Lamont J granted a declaratory order to the effect that the services agreement between the parties had been duly renewed by agreement

between the parties for a further period of three years. The high court also ordered the Department to implement the renewed services agreement and to allow 3P Consulting to do so. Hence this appeal by the Department, which serves before us with the leave of the court below.

Factual background

[3] Towards the end of April/beginning of May 2007, the Department published advertisements calling for proposals by service providers to draft and facilitate the implementation of a so-called 'turnaround strategy' for the Department. The terms of reference for this strategy did not stipulate the expected duration of the proposed agreement.

[4] On 25 May 2007, 3P Consulting submitted its proposal to the Department. This proposal was for a project duration of an initial period of two years, renewable for a further period of two years. According to the proposal, the renewable element was 'to ensure the optimum skill transfer, protection of intellectual property and to ensure continuity'. The proposal continued –

'It is anticipated that the entire team . . . will reduce on an annual basis by approximately 20% per annum as the capacity support programmes enable the GDoH [Gauteng Department of Health] internal staff to be trained to sufficient levels. It is therefore a major objective for the PMU [Project Management Unit] to undertake extensive capacity support.'

[5] Accordingly, the term of the Project Management Unit ('PMU') proposed by 3P Consulting was an effective four years. That this was understood by the Departmental Acquisition Council ('DAC'), the procurement decision-making body of the Department, is clear from the

Minutes of the DAC meeting held on 4 June 2007, during which the DAC considered the '[r]equest of the GSSC [Gauteng Shared Services Centre] for Health DAC approval of the award [to 3P Consulting] in respect of the request for proposal for the establishment of a Project Management Unit for a period of two years'. Notwithstanding the reference to a period of two years, the DAC, in approving the request, commented (as it put it, 'for clarity') that –

'The planned Health Agency will function in managing high cost assets/resources and leveraging funding sources. Core high level staff will be transferred from the PMU; gradually escalating migration of staff with a view of changing the structure *over 4 years* from predominantly external to internal staff.' (Emphasis added.)

[6] On 5 June 2007, the Department informed 3P Consulting that its proposal 'for the establishment of a Project Management Unit for a period of 2 years has been approved, *subject to the signing of a service level agreement*'. (Emphasis added.) On 2 July 2007, the Director-General of the Department, who is also the Chair of the DAC and the accounting officer of the Department, and Mr Richard Payne, the Managing Director of 3P Consulting, signed the services agreement. The relevant clauses of this agreement read as follows:

'2.2 Notwithstanding the date of signature, the Agreement shall commence on 5th June 2007 and shall terminate on 4 June 2009, unless extended as contemplated in 2.3 . . . below.

2.3 The Department agrees to renew this Agreement for a further period of two years on substantially the same terms as this Agreement, it being agreed that 6 (six) months prior to 5th June 2009, the parties shall have afforded each other an opportunity to negotiate any matters relating to the renewal referred to herein *(except for the renewal itself).'* (Emphasis added.)

[7] 3P Consulting duly discharged its obligations in terms of the services agreement.

[8] In about October/November 2008, 3P Consulting and the Department entered into negotiations for the renewal of the services agreement, as foreshadowed in clause 2.3 of the agreement. On about 4 December 2008, 3P Consulting submitted a proposal to the Department, in which it motivated an extension of the services agreement (of the 'operational mandate' of the PMU) for a period of three years to 2012. This was followed by a letter dated 12 February 2009, addressed to the Chair of the DAC by Mr Payne, in which 'the reason for requesting the extra year' was stated to be that several specified PMU projects required the support and expertise of 3P Consulting over the course of the next three years. This letter was accompanied by a final proposal for such extension dated 23 January 2009.

[9] After various internal Departmental procedures had been followed, Mr Ramaano, the Director of Supply Chain Management in the Department, in his capacity as Head of Procurement, wrote to 3P Consulting on 23 March 2009 as follows:

'The Gauteng Department of Health hereby informs 3P Consulting that your proposal for the extension of the renewal of the PMU contract has been approved by the Department for a period of three years ending 31st May 2012 for the contract value of R273 366 500.

Please contact the Project Management Office for further information.'

[10] After the April 2009 general elections, a new Member of the Executive Council ('MEC') for Health was appointed for Gauteng. During

June 2009, the Department began refusing to allow 3P Consulting's employees and sub-contractors access to its premises to perform their work under the renewed services agreement. When 3P Consulting addressed letters to the Department to highlight these breaches, the Department simply failed to respond.

[11] Eventually, on 1 July 2009, the Department wrote to 3P Consulting and informed it that 'the Department will no longer perform in terms of the purported extension of the contract'. The reason given for this stance was that –

'[W]hen the tender was initially advertised, it was indicated that the contract would be for a period of 2 years . . . .

However, in implementing the award of the tender to your company, the Department signed a contract in terms of which it bound itself to renew the contract for a further period of 2 years. On or about 17 February 2009, the DAC approved a period of 3 years for the extension of the contract.

. . . .

The tender document indicated to would-be tenderers that the tender was for a period of two years which the Department could not vary after the award of the tender.

Accordingly, when the Department took the decision to extend the contract for a further period of 3 years, it acted arbitrarily and failed to take into account relevant considerations like the provisions of the law and the expectations of other potential service providers.

From a point of view of administrative justice and the public, the Department's decision to extend the contract was wrongful and irregular. It is clearly reviewable by [a] Court of competent jurisdiction.'

When 3P Consulting instituted proceedings against the Department, however, the Department back-tracked from its previous position and

admitted that the original tender document did not in fact limit the project to a two year period.

Discussion

[12] The Department contended that both the original and the renewed services agreements were void for want of legality and/or authority. It relied on certain irregularities which had allegedly occurred in the tender process both prior to and after the conclusion of the original services agreement with 3P Consulting. The Department also sought to impugn the validity of the renewal agreement on certain private law grounds, which – with one exception – it had not raised in its answering affidavit.

[13] As regards the validity of the agreements on public law principles, 3P Consulting countered the contentions of the Department by arguing that the Department's decisions to enter into the original services agreement with 3P Consulting and to renew the agreement in March 2009 constituted administrative action on the part of the Department. Accordingly, in order for the Department to avoid the consequences of these agreements, it had to apply to court to review and set aside the decisions. Furthermore, any review application by the Department, being made more than two years since the original services agreement was concluded and more than 180 days after the renewed services agreement was concluded, would be grossly out of time, in breach of the requirements of ss 7 and 9 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') and highly prejudicial to 3P Consulting.

[14] In the light of the view that I take in respect of the validity of both the original services agreement and the renewed services agreement, it is

not necessary to canvass the arguments relating to review of administrative action.

Validity of the original services agreement

[15] In arguing that the original services agreement was void, the Department relied on various statutory provisions. First, s 217(1) of the Constitution and s 38(1)*(a)*(iii) of the Public Finance Management Act 1 of 1999 ('the PFMA'), both of which provide that, when an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Second, in terms of s 76(4)*(c)* of the PFMA –

'(4) The National Treasury may make regulations or issue instructions applicable to all institutions to which this Act applies [including provincial departments – see s 3 of the PFMA, read with the definition of 'department' in s 1 of the Act] concerning –

. . . .

(c) the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.'

[16] Pursuant to s 76(4)*(c)* of the PFMA, a Framework for Supply Chain Management was promulgated in *Government Gazette* No 25767 of 5 December 2003 as Treasury Regulations. In accordance with this Framework, the National Treasury is required and authorised to issue instructions to accounting officers/authorities in respect of the appointment of consultants. This it does by way of practice notes. In this regard, National Treasury Supply Chain Management Practice Note No SCM 3 of 2003 provides that –

'Consultants should be appointed by means of competitive bidding processes, whenever possible.

. . . .

1.3 For the purpose of this practice note, the term *consultant* includes, among others, consulting firms . . . .'

[17] Relying on *Municipal Manager: Qaukeni Local Municipality & another v FV General Trading CC* [1] and *Eastern Cape Provincial Government & others v Contractprops 25 (Pty) Ltd*, [2] the Department argued that failure to comply with any of the abovementioned constitutional and legislative provisions renders any contract concluded in contravention thereof void *ab initio*. The court does not, so the argument went, have a discretion whether or not to enforce a contract which does not comply with the prescribed procedures.[3]

[18] With reference to various documents, the Department contended that, despite the fact that 3P Consulting's proposal was for a contract duration of two years renewable for a further period of two years, the Department had, after a due and proper tender process, given approval for a two year contract only. Thus, according to the Department, any attempt by the parties to circumvent that approval by concluding a contract for a longer period was unlawful.

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[1] 2010 (1) SA 356 (SCA) para 16.

[2] 2001 (4) SA 142 (SCA) paras 8 and 9.

[3] *Municipal Manager: Qaukeni Local Government v FV Trading CC* para 14.

[19] As pointed out by counsel for 3P Consulting, however, the Department conveniently ignores certain parts of those documents and, in any event, fails to put them in their proper context. It is common cause that the DAC is the supreme procurement decision-making body of the Department. It is therefore documents emanating from the DAC which must be scrutinised to determine the ambit of the approval given by it. It is clear from the Minutes of the DAC meeting held on 4 June 2007, that the DAC was fully aware of the fact that the term of the PMU proposed by 3P Consulting was an effective period of four years – the Minutes expressly record that the project would require a gradually escalating migration of staff over a period of four years. The Director-General of the Department signed the DAC Submission Approval Form accompanying these Minutes in her capacity as Chair of the DAC.

[20] The subsequent appointment letter dated 5 June 2007 made the approval of 3P Consulting's 'proposal for the establishment of a Project Management Unit for a period of two years'[4] *subject to the signing of a service level agreement*. This condition was fulfilled by the conclusion on 2 July 2007 of the services agreement, signed on behalf of the Department by the Chair of the DAC. The services agreement reflected the parties' understanding – as this appeared from the proposal itself and the abovementioned comment by the DAC in approving the proposal – by providing for an initial contract period of two years and a renewal for a

[4] As stated above, the proposal by 3P Consulting was in fact for a project duration of an initial period of two years, renewable for a further period of two years: see para 4 above.

further period of two years subject to any amendment the parties might agree to make.[5] That agreement contains an 'entire agreement' clause.[6] Thus, the period for which the DAC approved the contract depends on what the written agreement says and, by application of the parole evidence rule, any extrinsic evidence on the meaning of the relevant clause of the agreement would be precluded.[7]

[21] The Department also submitted that, as the contract which the Department was authorised to conclude with 3P Consulting was for two years only, the Department's Director-General and Chair of the DAC who signed the services agreement on behalf of the Department lacked the authority to do so. Not only was this denial of authority not raised at all in the Department's answering affidavit, but it is also untenable given the facts set out above.

[22] It follows from the above that there was no failure by the Department to comply with the constitutional and legislative provisions

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[5] The renewal itself was non-negotiable – see clause 2.3 of the services agreement, as quoted in para 6 above.

[6] Clause 17.2 which provides that '[t]his agreement contains all the express provisions agreed upon by the Parties with regard to the subject-matter of the Agreement and the Parties waive the right to rely upon any alleged express provision not contained in the Agreement'.

[7] See *Johnston v Leal* 1980 (3) SA 927 (A) at 942H-943C. See further Schalk van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* 3ed (2007) pp 173-176 and the other authorities there cited.

relied on by the Department[8] and that its attack on the validity of the original services agreement must fail.

The validity of the renewal of the services agreement

[23] The Department contended that the purported renewal of the services agreement for three years (one year longer than previously agreed) and at increased contract values per annum[9] occurred without following a public bidding process and in a manner which could not be said to be 'fair, equitable, transparent, competitive and cost-effective'. Hence the approval by the DAC purporting to extend the period and to increase the value of the services agreement, as well as any contract which might have flowed from this approval, was unlawful and invalid. Once again, the Department relied for this contention on s 217(1) of the Constitution and s 38(1)*(a)*(iii) of the PFMA.

[24] In dealing with this contention, the High Court relied on Regulation 16A6.4 of the Treasury Regulations published under s 76 of the PFMA in *Government Gazette* No 27388 dated 15 March 2005 (GN R225), which expressly provides for an exemption from the competitive bid requirement which must usually accompany appointments of consultants[10] in cases where it is impractical to engage in a competitive tendering process.

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[8] See paras 15 and 16 above.

[9] The initial contract was for R60 million per annum (excluding VAT). The renewal was approved at a contract value of R273 366 500 for three years (including VAT), thus an average of more than R90 million per annum (including VAT).

[10] See National Treasury Supply Chain Management Practice Note No SCM 3 of 2003, the relevant part of which is quoted in para 16 above.

Lamont J held that ‘the only person reasonably possible to perform the works is the applicant [3P Consulting], which was integrally involved with the completion of the project, having been engaged in it for the initial period of two years.’ Thus, according to the learned judge, the three year renewal of the services agreement fell squarely within the ambit of this regulation.

[25] Before this court, counsel for 3P Consulting also relied on this regulation, despite the fact that it had not been mentioned in their papers. It is, however, not give any further consideration to this finding of the court below. It is clear that the renewal of the services agreement did not give rise to a *new* services agreement; it simply extended the duration of the services agreement for a period of three years. Properly interpreted, clause 2.3 of the agreement provides for a renewal for a period of two years on the same terms as before subject only to such amendments as may be negotiated and agreed between the parties. The negotiations between the parties in late 2008 ultimately gave rise to an agreement that the services agreement would be renewed for a period of three years, instead of the two years provided for in clause 2.3, and that the contract value for each of the remaining three years would be increased. The increases were described by both the Department’s Programme Management Office and by the Department’s Director of Supply Chain Management as ‘being ‘marginal increases only allowing for inflation, and also taking cognisance of the strategy to empower developing service providers in the body shop’. It is clear that these increases properly flowed from the negotiations contemplated in clause 2.3 of the services agreement. As there was no *new* services agreement, there was no *new* procurement of goods or services and

it was therefore in my view not necessary to follow a competitive public bidding process in this regard.

[26] It follows from the above that the Department's attack on the validity of the renewal of the services agreement on public law grounds is without merit.

[27] In its Heads of Argument and in argument before us, the Department sought to rely on a number of private law grounds for the invalidity of the renewal of the services agreement. With one exception, none of these grounds was raised by the Department in its answering affidavit, but appeared for the first time in the Department's Heads of Argument.

[28] As was stated by Joffe J in *Swissborough Diamond Mines (Pty) Ltd & others v Government of the Republic of South Africa & others*:[11]

'It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.

. . . .

An applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it seeks to discharge the onus of proof resting on it in respect

[11] 1999 (2) SA 279 (T) at 323F-G.

thereof. As was held in *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 849B in regard to a constitutional issue:

"Dit is myns insiens vir die behoorlike ordening van die praktyk absoluut noodsaaklik dat konstitusionele punte nie deur advokate as laaste debatspunt uit die mou geskud word maar pertinent in die stukke as geskilpunt geopper word sodat dit volledig uitgepluis kan word deur die partye ten einde die Hof in staat te stel on dit behoorlik te bereg."

The *dictum* is not only of application to constitutional issues – it applies to all issues. Nor is the *dictum* only of application in the context of a founding affidavit – it applies equally to answering affidavits and replying affidavits.'[12]

While it is so that a party in motion proceedings may advance legal arguments in support of the relief or defence claimed by it even where such arguments are not specifically raised in the papers, provided that all relevant facts are before the court,[13] this will not be allowed if it causes prejudice to the other party.[14]

[29] The only 'private law grounds' relied on by the Department which can conceivably be said to raise legal issues are its contentions that clause 2.3 of the services agreement was either no more than an agreement to negotiate between the parties and thus unenforceable, or that the said clause constituted an option to renew the services agreement and was not exercised timeously.

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[12] See also *Government of the Province of KwaZulu-Natal & another v Ngwane* 1996 (4) SA 943 (A) at 949B-D; *Eskom Holdings Ltd & another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 17.

[13] See, for example, *Cabinet for the Territory of South West Africa v Chikane & another* 1989 (1) SA 349 (A) at 360G-H.

[30] As I have already stated,[15] it is clear from the initial proposal by 3P Consulting [16] and the comment made by the DAC in approving the proposal[17] that clause 2.2 of the services agreement provided for an initial contract period of two years, while clause 2.3 provided for an automatic renewal for a period of two years subject only to such amendments as might be negotiated and agreed upon between the parties. On this construction, clause 2.3 constitutes neither an agreement to negotiate nor an option to renew.

[31] From the above, it follows that the Department's attempt to impugn the validity of the renewal of the services agreement using private law principles is unsustainable.

Relief

[32] As indicated above, the high court ordered the Department to implement the renewed services agreement and to allow 3P Consulting to do so. The Department contended that the services agreement and any renewal thereof involved the rendering of consulting and personal services, the quality of the performance of which would be impossible to gauge or police. For this reason, submitted the Department, even if the renewal of the services agreement was valid, the court below ought to have exercised its discretion to refuse specific performance of such agreement.

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[14] See *Minister van Wet en Order v Matshoba* 1990 (1) SA 280 (A) at 285E-I.

[15] See para 25 above.

[16] See para 4 above.

[33] Once again, this is a contention which is conspicuously absent from the papers. I agree with the submission made by counsel for 3P Consulting that this omission is fatal to the Department's contentions in this regard. It has been stated by this court that the party seeking to avoid an order of specific performance bears the onus of proving that there is an impediment to the grant of specific performance: it is not 'incumbent on a plaintiff who claims specific performance, the grant or refusal of which is in the final result in the discretion of the Court, to anticipate in his declaration the possible grounds which a defendant may advance to induce the Court to exercise its discretion against the grant of specific performance'.[18] The Department made no attempt in its papers to put up evidence to discharge this onus. Moreover, there is in any event nothing in the papers to suggest that the obligations of 3P Consulting are vague or imprecise or that, as submitted by counsel for the Department, 'lengthy disputes are likely to occur in regard to whether the contract is in future being properly performed'. The order for specific performance made by the court below must therefore stand.

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[17] See para 5 above.

[18] See *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 442H-443B.

Conclusion

[34] Accordingly the appeal is dismissed with costs, including the costs of two counsel.

B J VAN HEERDEN
JUDGE OF APPEAL

APPEARANCES

APPELLANT:	A GAUTSCHI SC (with him S GUMEDE) Instructed by Biccari Bollo Mariano Inc, Johannesburg; Van der Merwe & Sorour, Bloemfontein.
RESPONDENT:	G MARCUS SC (with him K HOFMEYR) Instructed by Eversheds, Johannesburg; Matsepes, Bloemfontein.