



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

NOT REPORTABLE
Case No: 134/2013

In the matter between:

THE LOCAL MUNICIPALITY OF MADIBENG

APPELLANT

and

PAPHIRI BUSINESS ENTERPRISE CC

RESPONDENT

Neutral citation: *The Local Municipality of Madibeng v Paphiri Business Enterprise* (134/2013) [2014] ZASCA 77 (29 May 2014)

Coram: Lewis and Leach JJA and Hancke, Swain and Mathopo AJJA

Heard: 20 May 2014

Delivered: 29 May 2014

Summary: Contract – terms thereof common cause – amounts municipality to pay thereunder proved on the probabilities.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Kollapen and Webster JJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Leach JA (Lewis JA and Hancke, Swain and Mathopo AJJA concurring)

[1] This is a case about garbage or, more precisely, about the amount the appellant, a local municipality, owes the respondent for rendering refuse and waste removal services under a contract concluded pursuant to a tender process. A claim by the respondent for payment of an amount it alleged was due and owing was dismissed in a magistrate's court but upheld on appeal to the North Gauteng High Court. This further appeal is with this court's leave. For convenience I intend to refer to the appellant as 'the municipality' and the respondent as 'Paphiri'.

[2] Chaos and confusion have bedevilled the matter from the outset, a position helped neither by the pleadings nor the haphazard presentation of the evidence in the trial court. Sifting the wheat from the chaff, it appears that in February 2003, Paphiri was awarded a contract by the municipality in respect of a tender (S18/2002) to provide waste and refuse removal services in an area situated to the south of the Hartbeespoort Dam. The municipality subsequently informed Paphiri that in fact its services were required not for the area to the south of the dam but to

the east. The matter is made all the more confusing by the fact that, in December 2002, under another tender (S22/2002) the municipality had called for tenders for the rendering of waste and refuse removal services on the western side of the dam although, again, this was a mistake as it too was intended to relate to the area to the east of the dam.

[3] In any event, Paphiri submitted a bid in respect of tender 22/2002 that added to the confusion. The tender document, in itself somewhat confusing, required an itemised tender in relation to monthly charges for specific items of service, namely; a weekly house-to-house collection, the removal of illegally dumped refuse, ‘continuous litter picking and sweeping’, ‘waste transfer station operations’, and the disposal of waste collected at a landfill. In its tender, however, Paphiri quoted a monthly charge of R36.35 per house in respect of ‘house-to-house collection once a week’ and R110 000 as the ‘total cost to render the service per month’, but no specific amounts in respect of the other itemised services. Quite what all of this was intended to convey is by no means clear. Fortunately, whatever Paphiri’s intention in tendering in these terms may or was understood to have been, is unnecessary to decide.

[4] At a meeting of the municipality’s Mayoral Committee held on 10 May 2003, the ‘rectifications of tender S18/2002 — rendering of refuse removal at the southern side of the Hartbeespoort Dam’ was discussed together with Paphiri’s tender. The committee resolved as follows (its resolution was recorded as MC 1300):

‘1. That cognisance be taken that:

1.1 The Mayoral Committee has, per item MC. 1194 of February 2003 appointed Paphiri Business Enterprise CC to render refuse removal at the Southern side of Hartbeespoort Dam at the calculated tender amount of R74 722.60;

1.2 the area allocated for Paphiri Business Enterprise is in fact in the Eastern side of Hartbeespoort Dam and not in the Southern or Western side of Hartbeespoort Dam;

- 1.3 Paphiri Business Enterprise CC has already started rendering service from 01 April 2003 in the Eastern side of Hartbeespoort Dam;
- 1.4 The price ranges between:
 - 1.4.1 R17.00 - R34.23 per house per month (VAT excluded)
 - 1.4.2 R44.00 - R80.17 per business per month (VAT excluded)
 - 1.4.3 R100.00 - R217.65 per service of a 5,5 m³ container
 - 1.4.4 (VAT excluded);
-
2. That the all-inclusive tender amount of R110 000-00 of Paphiri Business Enterprise be accepted.
3. That after the approval of the Mayoral Committee an appointment letter be served to Paphiri Business Enterprise with an adjusted tender amount.
4. That the Municipality enter into a contract with the service provider.'

[5] Following this resolution the municipality addressed a letter to Paphiri on 12 May 2003. Referred to as the 'acceptance letter' it was shown both to a witness and to the magistrate and its contents were referred to in evidence, but it was not handed in as an exhibit and forms no part of the record. Be that as it may, it purported to 'adjust the previous appointment letter which quoted for only household waste removal, street cleaning and removal of illegal waste' and recorded a five year contract effective from 1 April 2003.

[6] Subsequent to this haphazard and confused process, the parties concluded a written memorandum of agreement. Signed by Paphiri on 6 August 2003 and by the municipality ten days later, it incorporated the terms set out in the letter of acceptance of 12 May 2003 and appointed Paphiri for a period of five years to render a complete refuse removal service on the eastern side of the Hartbeespoort Dam. No mention was made of the all-inclusive fee of R110 000 per month accepted by way of resolution MC 1300 on 10 May 2003. Instead, clause 2 thereof recorded that the monthly service fee payable for rendering of the service would be R36.35 per house, R45 per business and R120 for every 5,5 cubic meter container

used. The amount in respect of the house service was slightly higher than the upper limit of the range of fees set out in MC 1300 whilst the other amounts fell within the range approved in that resolution. How that came about one does not know and the municipality led no evidence to explain it. But notwithstanding whatever the Mayoral Committee's original intention may have been, both sides ultimately did not agree to Paphiri being paid for its services by way of an all-inclusive monthly fee.

[7] Two further terms of the written agreement should be mentioned. First, it was agreed that the service fees payable to Paphiri would escalate annually in accordance with the consumer price index. Second, clause 2.2 provided:

‘Counts shall be performed every six months during the contract period by the Manager, Department of Land, Housing, Environment, Solid Waste, Parks, Streets & Cemeteries after which the fee paid to Paphiri for rendering the different refuse removal services may be adapted.’

[8] Flowing from these negotiations, and effectively from 1 April 2003, Paphiri carried out the refuse and waste removal services it had undertaken to perform and for which the municipality paid it monthly. But the confusion continued. As I have mentioned, the all-inclusive fee of R110 000 per month recommended by the Mayoral Committee in resolution MC 1300 in May 2003 formed no part of the written agreement concluded in August 2003. Despite this, instead of paying a sum determined with reference to the number of houses, businesses and containers being serviced as set out in the written agreement, the municipality paid R110 000 per month throughout the period to which Paphiri's claim relates.

[9] Although the municipality persisted in paying the all-inclusive fee on the one hand, it appears from correspondence that, on the other, it also accepted being obliged to have regard to the number of houses, businesses and containers being serviced under the written agreement. Unfortunately, notwithstanding the provisions

of clause 2.2 of that agreement, it failed to perform a count every six months as it had undertaken to do and it is common cause that it was agreed consequently that Paphiri would carry out those counts.

[10] Consequently, on 13 November 2003, Paphiri wrote to the municipal manager stating that it had counted the houses, businesses and containers it was servicing and giving the numbers as at the end of October 2003. This count showed an increase in the numbers over those that had been agreed when the contract commenced. Every six months thereafter Paphiri submitted similar letters to the municipality giving updated numbers. These letters were attached to its summons marked as annexures C1 to C7.

[11] It was the municipality's persistence in paying no more than R110 000 per month, which Paphiri calculated was less than it was entitled to be paid, that led to it instituting action in the magistrate's court. Unfortunately, in preparing the particulars of claim, its attorney added to the confusion by claiming an amount calculated in an itemised schedule that was riddled with errors. Amounts were claimed for the services referred to in the resolution MC 1300 but not mentioned in the written agreement of August 2003. More importantly, the schedule was based on the fundamental error that Paphiri had been entitled to the maximum amount of the various rates reflected in MC 1300 rather than the tariffs contained in the written agreement. In addition, although the numbers of houses, businesses and containers reflected in C1 to C7 were used in most instances, there were discrepancies, some substantial, between the figures therein contained and those in the schedule. All of this resulted in the amount claimed in the schedule being substantially in excess of what Paphiri ultimately accepted it was entitled to have received.

[12] The confusion was further exacerbated when the matter came to trial. Paphiri's legal representatives appear not to have come to grips with the true issues

and the evidence was led haphazardly and inconsequently. Matters were not helped by the municipality's sole witness not having been in its employ when the contract between the parties was concluded. The magistrate appears to have been drawn into the confusion. Faced with the tariffs contained in resolution MC 1300 on the one hand as opposed to those in the written agreement of August 2003 on the other, the magistrate held that Paphiri had failed to prove that those used in preparing the schedule to its particulars of claim were applicable, and dismissed the claim. In doing so, the magistrate lost sight of the fact that the municipality had by then abandoned reliance upon an all-inclusive tariff of R110 000 per month and that, on the provisions of the written agreement upon which it then relied, had still not paid the amount for which it had become liable.

[13] Common sense eventually prevailed when the matter came on appeal before Kollapen and Webster JJ in the North Gauteng High Court. Counsel who appeared for Paphiri on appeal conceded, quite correctly, that the contractual relationship between the parties was governed by the written agreement of August 2003 as had been pleaded by the municipality and that the applicable tariffs were those set out in that agreement and not in resolution MC 1300. That this was the correct approach was accepted by both sides. By then it was also not in dispute that the tariffs in the written agreement were to be adjusted by way of the consumer price index upon which the parties were further agreed. Because in August 2006 the municipality had taken its own count of the houses, businesses and containers being serviced which, in large measure, coincided with counts undertaken by Paphiri at that time, the high court expressed the view that the appellant's counts reflected in C1 to C7 would serve as a proper basis to determine the extent of the municipality's liability.

[14] The court therefore requested the parties to prepare a schedule based on those figures, taking account of the tariffs in the written agreement as adjusted from time

to time by the consumer price index. This was a sensible and practical solution and counsel for Paphiri undertook to prepare such a schedule. Once to hand, it was forwarded to counsel for the municipality for comment together with an invitation to make any submissions in respect thereof. No such submissions were forthcoming and, consequently, the schedule was adopted by the high court as reflecting the amount established on a balance of probabilities as being due. It showed that Paphiri had been underpaid by R865 591.44 during the relevant period and the high court ordered the municipality to pay that sum. It is against this decision that the municipality now appeals.

[15] The first issue raised by the municipality on appeal was that absolution from the instance ought to have been granted as Paphiri had failed to prove the terms of the agreement on which it sued. This was an astounding contention. The history of the negotiations that I set out above shows conclusively that parties were bound by the written agreement of August 2003 which contained the material terms of their contract. As mentioned above, the municipality relied in its plea on that agreement and specifically alleged that the tariffs contained therein in respect of the different services had been agreed, all of which was common cause before the high court. In the light of this, the contention that the terms of the agreement that bound the parties were not established is spurious and can be rejected without further ado.

[16] The second issue argued by the municipality in this court was that Paphiri had failed to adequately prove that the municipality had paid less than it ought to have done. On this issue, the appellant's argument was simply this: There are differences between the numbers of houses, businesses and containers serviced by Paphiri set out in the schedule annexed to the particulars of claim, on the one hand, as opposed to those reflected in C1 to C7 on which the schedule relied upon by the high court was based; there was no adequate explanation for these differences; and there was therefore a measure of doubt about the figures in the schedule accepted by the high

court. Thus, so it was argued, the municipality should have been absolved from the instance in that Paphiri had failed to prove that it ought to have been paid more than the R110 000 per month that it was paid during the period to which its claim relates.

[17] Again, this is an issue which may be dealt with swiftly. The municipality's case is, essentially, that Paphiri failed to prove on a balance of probabilities that the numbers reflected in C1 to C7 were correct. However the numbers reflected in those annexures were confirmed by Mr Molebatsi, a member of Paphiri, who had been responsible for the counting process and for collating the numbers of the houses, businesses and containers being serviced from time to time and who confirmed that the figures set out in C1 to C7 were accurate. Those figures were not challenged when submitted to the municipality. Indeed in a letter the municipality addressed to Paphiri on 29 September 2006, the numbers it provided were not dissimilar from those Paphiri had submitted. Moreover, the municipality failed to allege or prove what the numbers were from time to time, presumably as it had no information in that regard other than that which had been forthcoming from Paphiri itself. And, as I have already mentioned, when the schedule relied upon by the high court was prepared, the municipality's legal representatives failed to make any representations in regard to its correctness or otherwise. The fact that certain of the numbers in annexures C1 to C7 differ from the schedule attached to the particulars of claim is, in my view, neither here nor there. That schedule was riddled with errors and inconsistencies, and certain of the discrepancies may well have been the product of an incorrect transcription from documents used in its preparation.

[18] The simple fact remains that C1 to C7 provide the best contemporaneous record of the numbers of houses, businesses and containers being serviced by Paphiri at the relevant times and their contents have not been challenged by any evidence led on behalf of the municipality. In all these circumstances I am satisfied

that the numbers therein contained, used to prepare the schedule relied upon by the high court, can be accepted as being probably correct.

[19] Counsel for the municipality did not dispute the arithmetic set out in that schedule, and conceded that if the figures relating to housing, businesses and containers recorded therein were found to be acceptable, the appeal must fail.

[20] The appeal is dismissed, with costs.

L E Leach
Judge of Appeal

Appearances:

For the Appellant: R P A Ramawele (with him K F Magano)
Instructed by:
Malatji Mohosh & Pooe Attorneys, Pretoria
Horn & Van Rensburg Attorneys, Bloemfontein

For the Respondent: B Pieters SC
Instructed by:
Ehlers Fakude Incorporated, Pretoria
Hanno Bekker Attorneys, Bloemfontein