THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 720/2022

In the matter between:

FLEET AFRICA (PTY) LTD **APPELLANT**

and

POLOKWANE LOCAL MUNICIPALITY **RESPONDENT**

Neutral citation: *Fleet Africa (Pty) Limited v Polokwane Local Municipality* (720/2022) [2023] ZASCA 142 (30 October 2023)

Coram: SALDULKER, HUGHES and MATOJANE JJA and KEIGHTLEY and SIWENDU AJJA

Heard: 23 August 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 30 October 2023.

Summary: Contract law – jurisdiction – Superior Courts Act 10 of 2013 – whether the parties explicitly agreed that a particular high court would have exclusive jurisdiction in the event of the relief sought in respect of arbitration proceedings – whether the parties should be kept to the aforesaid agreement based on the principle of *pacta sunt servanda* – whether a court of appeal has jurisdiction to act as a court of first instance to determine the merits of the application where the court a *quo* has made no previous decision on the substantive merits.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Phatudi J, sitting as court of first instance):

1 The appeal is upheld with costs, costs to include those of two counsel.

2 The order of the court below is set aside and substituted with the following order:

‘2.1 The defences raised by the respondent in the pending arbitration between the parties, namely that:

(a) The awarding of the Bid under bid number 49/2012 ('the Bid') by the respondent to the applicant is unlawful due to non-compliance with, inter alia, Regulation 29(2) of the Municipal Supply Chain Management Regulations published under GN 868 in Government Gazette 27636 of 30 May 2005; and

(b) The service level agreement ('SLA') concluded between the parties pursuant to the award of the Bid is null and void and unenforceable;

have no merit and can be disregarded by the Arbitrator in determining and adjudicating the remaining disputes before him in the arbitration between the parties.

2.2 The SLA is binding on the respondent.

2.3 The respondent is to pay the costs of the application on attorney and client scale, such costs to include those occasioned by the employment of two counsel where two counsel have been employed.’

JUDGMENT

Matojane JA (Saldulker and Hughes JJA and Keightley and Siwendu AJJA concurring):

Introduction

[1] This is an appeal against the judgment and order issued by Phatudi J in the Limpopo Division of the High Court, Polokwane (high court). The appellant, Fleet Africa Pty Ltd (Fleet Africa) sought a declaratory order in the high court that certain defences raised by the respondent, the Polokwane Municipality (the Municipality), in the ongoing arbitration process between the parties are without merit and should be ignored by the Arbitrator when resolving the remaining disputes between the two parties. Additionally, Fleet Africa sought a declaration that the Service Level Agreement (SLA) between the parties is binding on the Municipality.

[2] The Municipality’s defences revolve around the argument that Fleet Africa's Bid was unlawfully awarded. As a result, the Municipality contend that the SLA between the two parties, which is the foundation of Fleet Africa's arbitration claim, is irregular and liable to be invalidated.

[3] In the high court the Municipality raised two points *in limine*. Firstly, it argued that the high court had no jurisdiction to hear the matter. Secondly, it contended that the appellant's application was premature because the Arbitrator had only formed a *prima facie* view about his lack of jurisdiction, and no final ruling had been made.

[4] After a full argument on the merits, Phatudi J agreed with the Municipality on the jurisdictional point, holding that the high court did not have jurisdiction to hear the matter. The high court did not delve into the substantive merits of the matter and dismissed the appellant's application. Additionally, Fleet Africa was ordered to pay the costs on an attorney and client scale. Aggrieved with this decision, the appellant appealed with the leave of the high court.

Factual background

[5] In May 2012, Fleet Africa successfully won a tender from the Municipality through Bid Number 49/2012. This tender involved providing fleet vehicles and related services to the Municipality for five years, starting on 1 March 2013 and expiring on 28 February 2018 On 29 August 2012, the chairperson of the bid adjudication committee recommended Fleet Africa for the project, and the municipal manager approved their appointment on 30 August 2012. On 5 December 2012, the Municipality's council formally resolved to appoint Fleet Africa as a service provider. Subsequently, both parties signed the SLA on 25 February 2013. Under the terms of the SLA, the Municipality outsourced its entire motor vehicle fleet to Fleet Africa for a duration of five years, with an estimated cost of R229,163,716.72, excluding variable components.

[6] The Municipality had the option to extend the SLA with Fleet Africa by providing a 90-day notice before the termination date. However, on 21 November 2017, the Municipality decided not to extend the SLA. They resolved not to continue the agreement beyond its original expiration date, indicating their intention to let it expire as initially planned.

[7] Clause 23 of the SLA stipulated that any disputes arising out of the SLA, such as those concerning its implementation, interpretation, application, validity, or enforceability, should be referred to a dispute resolution process outlined within that same clause. Clause 25 of the SLA imposed an obligation on the Municipality to pay the residual purchase price for the leased vehicles to Fleet Africa upon the termination of the SLA. This clause also included a 'put and call' provision, which allowed both parties, in the event of the SLA's termination for any reason, to exercise the following options: Fleet Africa could require the Municipality to buy the leased vehicles from them. In contrast, the Municipality could require Fleet Africa to sell the vehicles to them, all in accordance with the terms outlined in that specific clause.

[8] On 16 February 2018, Fleet Africa invoked Clause 25 of the SLA by exercising its contractual put and call option, which required the Municipality to purchase all the leased motor vehicles from Fleet Africa. Fleet Africa claimed that the total purchase price for these vehicles was R53.9 million, representing the remaining value of the fleet. However, the Municipality did not make the payment within the 15-day period following the SLA's termination on 28 February 2018. Instead, the Municipality passed a resolution disputing the payment of the residual purchase price and aimed to retain possession and ownership of the fleet without paying the amount demanded by Fleet Africa upon the SLA's expiration.

[9] As of 6 March 2018, the Municipality claimed that it had overpaid Fleet Africa by R147,406,350 and raised concerns about the application of the National Credit Act 34 of 2005 to their SLA. Importantly, at this point, there were no allegations made regarding the irregularity of the Municipality's tender process. The Municipality then referred the dispute to arbitration. Initially, it refused to participate in the arbitration process it had initiated. On 28 May 2018, Fleet Africa submitted

its statement of claim, seeking payment for the outstanding amount related to the fleet of motor vehicles leased to the Municipality and other unpaid sums as outlined in the SLA.

Jurisdiction

[10] The high court dismissed Fleet Africa's application for a declarator solely on the basis that it did not have jurisdiction to hear the matter. Section 21(1) of the Superior Courts Act 10 of 2013 (the Act) provides that a 'division has jurisdiction over all persons residing or being in and in relation to all causes arising and of all offences triable within its area of jurisdiction…'. Although it was not established at the time the SLA was entered into, the high court is a court of competent jurisdiction.

[11] All key aspects of this case, such as the Municipality, the tender award, the SLA, and the services provided by Fleet Africa, are within the court's jurisdiction. Fleet Africa's cause of action also arose within the court's jurisdiction. However, during the high court hearing, the Municipality argued *in limine* that, according to the SLA, both parties had agreed to exclude the court's jurisdiction and instead granted exclusive jurisdiction to the Gauteng Division of the High Court, Johannesburg (Johannesburg high court) to decide on this matter.

[12] The high court upheld the point *in limine*, finding that in terms of clause 33.10 of the SLA, the parties had the mutual intention that any dispute arising between them would be subject to the exclusive jurisdiction of the Johannesburg High Court and would not be justiciable in its jurisdiction. Clause 33.10 of the SLA reads as follows:

'Subject to clause 23, the parties hereto hereby consent and submit to the jurisdiction of such High Court of South Africa or division thereof, which has its seat in Johannesburg, in any dispute arising from or in connection with this agreement.'

[13] Clause 33.10 must be read together with Clause 23.15. It provides, among others, that any dispute between the parties regarding the validity, enforceability, ratification, termination, or cancellation of the SLA or any matter that impacts the parties' interests under the agreement must be resolved in accordance with Clause 23 of the SLA unless the SLA specifies otherwise.

[14] Two further sub-clauses record the parties' consent to the jurisdiction of a second court, namely the Gauteng Division of the High Court, Pretoria (the Pretoria High Court), for specific legal proceedings. The first is clause 23.5, which preserves for parties the right to obtain urgent relief through motion proceedings in the Pretoria High Court. The second is clause 23.15, which records that the parties consent to the jurisdiction of the Pretoria High Court for any application to make the decision of the Arbitrator an order of court.

[15] The high court reasoned that clause 23.5 did not apply as the proceedings before it was not urgent. Nor did clause 23.15 apply. Accordingly, it found that only clause 33.10 had application, and in terms of this clause, the parties had agreed to the exclusive jurisdiction of the Johannesburg High Court.

[16] The high court erred in this regard. Clause 33.10 of the SLA, read together with clause 23, does not establish exclusive jurisdiction to the Johannesburg High Court, nor does it exclude the jurisdiction of the high court. In the first place, it does not use the term 'exclusive jurisdiction', which one would expect if the intent of the

parties had been to limit jurisdiction to the Johannesburg High Court. It simply records, in express terms, a consent to that court's jurisdiction. That the parties had in mind that more than one court could have jurisdiction by consent is demonstrated by the fact that in clause 23, they consented to the jurisdiction of the Pretoria High Court.

[17] Clause 33.10 does not state that all legal disputes arising from the agreement must be resolved exclusively in the Johannesburg High Court. What the clause was designed to do was to permit the parties to choose from different courts, depending on the nature of the dispute. For disputes falling within clause 33.10, an opposing party would be bound by its consent and would be prohibited from objecting to the jurisdiction of the Johannesburg High Court.

[18] The Municipality argued that the principle of *pacta sunt servanda*[1] applies in this case because the parties explicitly selected and agreed to be subject to the jurisdiction of the South Gauteng and North Gauteng Divisions of the High Court, effectively excluding the Limpopo Division's jurisdiction. This submission is unsound. In the first place, as noted earlier, it is difficult to understand how the parties could have agreed to exclude the jurisdiction of a court that was not yet even in existence. There is a second reason why the submission is unsound. Our law is clear that when a party consents to a court's jurisdiction, it does not oust the jurisdiction of another competent court. Rather, it designates a specific court as the appropriate one to adjudicate the dispute. It is now established that parties cannot completely exclude a court's jurisdiction through their mutual agreement.

[1] The principle of *pacta sunt servanda* is a cornerstone of South African contractual law in terms of which an obligation created in an agreement must be honoured as it reflects the parties' intention at the time of the conclusion of the agreement.

[19] In *Foize Africa v Foize Beheer,*[2] the Court clarified that contractual clauses requiring disputes to be resolved in a foreign court don't necessarily prevent South African courts from adjudicating disputes arising from them. This case involved a licensing agreement between a South African and a Dutch entity, which mandated arbitration in the Netherlands and the application of Dutch law to dispute resolution. When the Dutch entity breached the agreement, the South African party sought legal protection from the Pretoria High Court. The Dutch company argued that the foreign jurisdiction clause barred South African courts from hearing the case.

[20] Regarding the issue of whether parties to a contract can mutually exclude the jurisdiction of South African courts, Leach JA stated the following:

'. . . It can now be regarded as well settled that a foreign jurisdiction or arbitration clause does not exclude the court's jurisdiction. Parties to a contract cannot exclude the jurisdiction of a court by their own agreement, and where a party wishes to invoke the protection of a foreign jurisdiction or arbitration clause, it should do so by way of a special or dilatory plea seeking a stay of the proceedings. That having been done, the court will then be called on to exercise its discretion whether or not to enforce the clause in question ─ see eg *Commissioner for Inland Revenue and another v Isaacs* NO 1960 (1) SA 126 (A) at 134B-H, *Yorigami Maritime Construction Co Ltd v Nissho- Iwai Co Ltd* 1977 (4) SA 682 (C), *Butler v Banimar Shipping Co SA* 1978 (4) SA 753 (SE) and *Universiteit van Stellenbosch v J A Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 333G-H.'[3]

[21] In *Standard Bank of SA Ltd and Others v Thobejane and Others*,[4] Sutherland AJA held that a court is obliged by law to hear any matter that falls within its jurisdiction and has no power to exercise a discretion to decline to hear such a matter on the ground that another court, the magistrate's court in that instance, had

---

[2] *Foize Africa (Pty) Ltd v Foize Beheer BV and Others* [2012] ZASCA 123; [2012] 4 All SA 387 (SCA); 2013 (3) SA 91 (SCA).
[3] Ibid para 21.
[4] *Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of SA Ltd v Gqirana N O and Another* [2021] ZASCA 92; [2021] 3 All SA 812 (SCA); 2021 (6) SA 403 (SCA).

concurrent jurisdiction unless there is an abuse of process.[5] Sutherland AJA affirmed that the British legal doctrine of *forum non conveniens*[6] does not apply in South African law except within admiralty jurisdiction. Consequently, the high court does not have the authority to refuse to hear cases appropriately brought before them within their jurisdiction.

[22] Applying the same reasoning, when parties have jointly agreed to settle a dispute in a different jurisdiction, this agreement does not inherently remove the concurrent jurisdiction enjoyed by another competent court. Once the Polokwane High Court was established, it had concurrent jurisdiction to consider disputes arising out of the SLA. Thus, Fleet Africa had the option to initiate legal proceedings either in the Johannesburg or the Polokwane high court. It opted for the latter.

[23] Accordingly, the high court did not have the discretion to decline to hear the matter as its jurisdiction was based on the location where all jurisdictional facts occurred. The appeal falls to be upheld on this ground alone. We were asked to exercise our discretionary powers in terms of s 19 (*a*) or (*d*) of the Act to declare that the SLA is binding on the Municipality as the high court did not make a decision despite the merits being fully argued before the court. We were urged to do so because the necessary facts are before this Court and in view of the delays already encountered in finalizing the matter.

[5] Ibid paras 27 and 59.
[6] 'Forum non conveniens' is a Latin legal term that translates to 'inconvenient forum' in English. It is a legal doctrine used in civil litigation to allow a court to dismiss a case when it determines that another court, typically in a different jurisdiction, would be a more appropriate and convenient forum for the case to be heard.

The alleged irregularity

[24] As outlined in its statement of defence, the Municipality's defence is that the procurement process leading to the SLA did not meet the mandatory requirements specified in regulation 29(2) of the Municipal Supply Chain Management Regulations, GN 868 in *GG* 27636, 30 May 2005. The Municipality contended that the Bid Adjudication Committee was not properly constituted according to regulation 29(2). It argued that certain key senior managers, including the chief financial officer, a senior supply chain management practitioner, and a technical expert in the relevant field, who were mandated to be present, were conspicuously absent during the meeting.

[25] Regulation 29, inter alia, provides:

'(1) a bid adjudication committee must-

(a) consider the report and recommendations of the bid evaluation committee and

(b) either-

(i) depending on its delegations, make a final award or a recommendation to the accounting officer to make a final award or

(ii) make another recommendation to the accounting officer on how to proceed with the relevant procurement.

(2) A bid adjudication committee must consist of at least four senior managers of the Municipality or the municipal entity, which must include-

(i) the chief financial officer or, *if the chief financial officer is not available, another manager in the budget and treasury office reporting directly to the chief financial officer and designated by the chief financial officer*;

(ii) at least one senior supply chain management practitioner who is an official of the Municipality or municipal entity and

(iii) a technical expert in the relevant field who is an official of the Municipality or municipal entity, *if the municipality or municipal entity has such an expert*.' (My emphasis.)

[26] The Regulation allows a representative authorized by the chief financial officer to act on their behalf. A technical expert is required only if the Municipality has one. Despite the Municipality's complaints about the composition of the BAC, it has not provided copies of the attendance register and the written recommendations from the BAC meeting in its answering affidavit to support its claim of non-compliance with the regulations. Additionally, the Municipality has not disclosed the identities and roles of the individuals involved in the BAC decision-making process. The Municipality argues that whether it complied with Regulation 29.2 is a factual question to be determined by the Arbitrator, and it intends to submit further evidence and documents before the Arbitrator to support its claim of non-compliance. Notably, the Municipality has not included any of these purported documents demonstrating irregularities in the tender process in its answering affidavit.

[27] The Municipality raised its defence, for the first time, in the statement of defence submitted to the Arbitrator. This happened eight years after the Bid was initially awarded and two years after the formal expiration of the SLA in February 2018. The Arbitrator informed the parties that the Municipality's argument about its failure to comply with the provisions of the Local Government: Municipal Finance Management Act, 56 of 2003 and the Municipal Supply Chain Management Regulations raised a constitutional issue that might not fall under his jurisdiction.

[28] The Arbitrator enquired whether the Municipality planned to review its own decision or if Fleet Africa intended to seek a court declaration that the Municipality must honour the SLA agreement. In either case, the matter would need to be taken to the high court. Importantly, the Municipality never responded to the Arbitrator's question and has not initiated a self-review of its decision so far.

[29] The legality of the Municipality's tender decision is primarily within the jurisdiction of the high court. Therefore, The Municipality's argument that Fleet Africa should have first sought a ruling from the Arbitrator on jurisdiction before approaching the high court has no merit because the Arbitrator cannot rule on the self-review issue. Additionally, the Municipality did not file a cross-appeal arguing that even if the court erred in the first point, the second point should still be upheld.

[30] The arbitration process has stalled due to the Arbitrator's inability to address the question of self-review. This prolonged delay is causing a significant impact on Fleet Africa's contractual right to a timely resolution of the dispute as stipulated in the SLA. Instead of submitting its statement of defence and counterclaim, the Municipality initially pursued a series of unsuccessful interlocutory applications, including three unsuccessful urgent applications and two failed applications for leave to appeal in the Johannesburg High Court. This was followed by two unsuccessful applications for leave to appeal to this Court and its President for reconsideration. The Municipality also sought leave to appeal to the Constitutional Court, which was also dismissed with costs. Importantly, none of these applications mentioned the allegation that the Municipality’s appointment of Fleet Africa might have been irregular.

[31] The principle of legality necessitates that parties initiate review proceedings within a reasonable time frame. Cameron JA in *Merafong City Local Municipality v AngloGold Ashanti Limited*[7] emphasized that the rule against delaying the initiation of a review prevents potential harm caused by prolonged uncertainty about the legality of a decision. He held that:

[7] *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC).

'The rule against delay in instituting review exists for a good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.'[8]

[32] In *Department of Transport and Others v Tasima (Pty) Limited*,[9] the Constitutional Court explained that while a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power, it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should, therefore, exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise.

[33] Throughout the legal proceedings, the Municipality acknowledges that Fleet Africa's selection as the preferred service provider was the outcome of a comprehensive bidding process, which involved multiple rounds of negotiations and presentations. The Municipality explicitly affirmed the validity and legality of Fleet Africa's appointment in a letter dated 7 September 2020 addressed to Fleet Africa. Additionally, on 21 September 2012, the Municipal Manager issued a public notice in accordance with s 33 of the Municipal Finance Management Act 56 of 2003 (MFMA), confirming that the process of awarding the fleet management contract

[8] Ibid para 73.
[9] *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) para 142.

had been completed, with Fleet Africa as the successful bidder for a five-year contract.

[34] There is no indication of fraud, dishonesty, or corruption in awarding the contract. Fleet Africa entered into the contract with the Municipality in good faith. The defence raised by the Municipality that its award of the tender was *ultra vires* because of the absence of certain officials who were required to be present is unsubstantiated. It was the high court, and not the Arbitrator, with jurisdiction to determine whether the SLA complied with the principle of legality. Consequently, the burden fell on the Municipality to tender sufficient evidence in the high court proceedings to succeed in its defence. It failed to do so. It follows that the defence must fail.

[35] There is a further reason for the Municipality's defence on the merits to fail. It goes to the question of whether the asserted irregularity even engages the legality issue. If not, the question is whether the Municipality should be estopped from raising the contract's invalidity as a defence. In *City of Tshwane Metropolitan Municipality v RPM Bricks Proprietary Ltd*,[10] Ponnan JA stressed that whether the doctrine of estoppel can be applied depends on whether the public authority's actions fall within its legal powers or involve irregular or informal exercises of power, with estoppel being more likely to be invoked in the latter scenario. At best for the Municipality, its defence that the award of the tender was irregular due to the non-attendance of specific individuals at the BAC involves an irregular exercise of public power as described above, and therefore, the doctrine of estoppel is available to Fleet Africa in this case. Fleet Africa was not obligated, without knowledge to the

[10] *City of Tshwane Metropolitan Municipality v RPM Bricks Proprietary Ltd.* [2007] ZASCA 28; [2007] SCA 28 (RSA); 2008 (3) SA 1 (SCA) paras 11 and 12.

contrary, to investigate whether all internal processes or formalities had been fulfilled. It was entitled to assume that all necessary arrangements and formalities have been properly met.

[36] Fleet Africa is asking the court to make a final determination on the merits of their application, substituting the order of the high court with that sought in the notice of motion. Fleet Africa has already fulfilled its obligations under the SLA by providing all the required services and goods to the Municipality. Further, more than ten years have passed since the alleged irregular decision was made, and the Municipality has not taken any steps to challenge the decision through a self-review application despite being encouraged to do so by the Arbitrator. Given the excessive delay, the absence of a reasonable and satisfactory explanation for the delay, and the unconscionable and highly prejudicial conduct of the Municipality, it would be in the interest of justice for this Court to allow Fleet Africa to proceed to enforce its rights by way of the arbitration proceedings.

[37] In the result, I make the following order:

1 The appeal is upheld with costs, costs to include those of two counsel.

2 The order of the court below is set aside and substituted with the following order:

‘2.1 The defences raised by the respondent in the pending arbitration between the parties, namely that:

(a) The awarding of the Bid under bid number 49/2012 ('the Bid') by the respondent to the applicant is unlawful due to non-compliance with, inter alia, Regulation 29(2) of the Municipal Supply Chain Management Regulations published under GN 868 in Government Gazette 27636 of 30 May 2005; and

(b) The service level agreement ('SLA') concluded between the parties pursuant to the award of the Bid is null and void and unenforceable;

have no merit and can be disregarded by the Arbitrator in determining and adjudicating the remaining disputes before him in the arbitration between the parties.

2.2 The SLA is binding on the respondent.

2.3 The respondent is to pay the costs of the application on attorney and client scale, such costs to include those occasioned by the employment of two counsel where two counsel have been employed.'

_____

K E MATOJANE

JUDGE OF APPEAL

Appearances

For the appellant:	I Miltz SC with V.J Heideman
Instructed by:	Fluxmans Incorporated, Johannesburg
	Lovius Block Attorneys, Bloemfontein
For the respondent:	G Shakoane SC with J.A.L Pretorius
Instructed by:	Mohale Incorporated, Polokwane
	Honey Attorneys, Bloemfontein