



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

Gobela Consulting v Makhado Municipality (Case no 910/19) [2020] ZASCA 180 (22 December 2020)

FROM The Registrar, Supreme Court of Appeal
DATE 22 December 2020
STATUS Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today the Supreme Court of Appeal (SCA) dismissed an appeal with costs from Limpopo Division of the High Court, Polokwane (the high court).

The appeal concerned a dispute arising from a contract concluded by the municipal manager of Makhado municipality (the municipality) with a private company (Gobela Consulting CC), without following a competitive bidding process.

The facts that gave rise to the litigation were largely common cause. On or about 22 February 2011, the appellant, Gobela Consulting CC (Gobela) submitted an unsolicited proposal to the respondent, the municipality. The proposal was entitled 'Proposal to review and Develop the Anti-Corruption Strategy and Capacity Building for Makhado Municipality'. The proposal in question was accepted by the municipal manager in writing on 5 May 2011. On 6 May 2011, the director of Gobela, Mr Mavhandu, sent a letter accepting Gobela's appointment. According to Mr Mavhandu, following that appointment, Gobela started preparing for the training. It drafted and printed manuals for the training; drafted, printed and prepared flyers in relation to the proposal; entered into service level agreements with independent contractors to assist with training; and employed professionals and support staff who would execute the project in accordance with the proposal. However, on the date

on which the training was scheduled to commence, Mr Mavhandu and his staff were informed by an official of the municipality that the training could not proceed, as there were unresolved issues pertaining to the contract. They were requested to wait until the problem was resolved. When Gobela had, after some days, still not been invited to commence the training, Mr Mavhandu released the facilitators who had been appointed to assist with the training. Gobela later issued a letter of demand and a summons, claiming an amount of R5 113 470 as damages for breach of contract. The municipality filed a special plea disputing the municipal manager's authority to enter into the contract in question. In its plea, it denied liability on the basis that the impugned agreement was in contravention of the Local Government Municipal Finance Management Act 56 of 2003 (Municipal Finance Management Act) and the municipality's Supply Chain Management Policy, and therefore invalid and unlawful. Although the municipality had pleaded that the Municipal Manager had no authority to conclude the impugned contract with Gobela, it did not counter-apply for relief setting aside Gobela's appointment.

The matter came before the high court, which found that the appointment of Gobela to review and develop the anti-corruption strategy for the municipality, albeit a good initiative, was in breach of the applicable procurement prescripts which are designed to ensure a transparent, cost effective and competitive tendering process as stipulated in s 217 of the Constitution. The high court dismissed Gobela's claim with costs. Aggrieved by that decision, Gobela obtained leave of the high court to appeal to the SCA.

Before the SCA, the only issue arising for determination was whether the high court was, in the absence of a counter-application seeking the review and setting aside of the contract concluded between Gobela and the municipality, entitled to find that the contract in question was invalid and unlawful.

As a starting point, the SCA emphasised that s 217 of the Constitution and various statutes and supply management policies enjoin organs of state that are contracting for goods and services to do so in accordance with a system that is fair, equitable, transparent, cost effective and competitive. The SCA pointed out that the municipality, as an organ of state, was duty-bound to discharge all its duties and functions in accordance with applicable procurement prescripts. It observed that s 113 of the Municipal Finance Management Act provides that a municipal entity is not obliged to consider an unsolicited bid received outside its normal bidding process; that Regulation 2(3) of Municipal Supply Chain Management Policy Regulations forbids a municipality or municipal entity from acting otherwise than in accordance with its supply chain management policy when procuring goods or services and that Regulation 12 of the same Regulations provides that a competitive bidding process must be followed for procurements above the transaction value of R 200 000. It

was common cause that in this matter, the transaction value was an amount of R5 131 470 and thus far above the threshold stipulated in that regulation. The SCA pointed out that by Gobela's own admission, none of the applicable procurement prescripts had been complied with. The SCA found that in so far as the municipality's acceptance of Gobela's proposal flouted procurement prescripts, it was plainly at variance with the principle of legality. Manifestly, the Municipal Manager had no authority to accept Gobela's unsolicited proposal. It held that the contract concluded between the municipality and Gobela was thus invalid from inception.

The SCA considered whether the high court was entitled to find that that contract was unlawful and invalid notwithstanding that the municipality had not, at any stage, challenged the validity thereof in court proceedings and asked for it to be set aside. The SCA held that by not declaring the contract invalid and unlawful, the untenable result would be that the high court would be giving legal sanction to the very result which s 217 of the Constitution and other all procurement-related prescripts sought to prevent. The SCA remarked that although Gobela had not gone beyond the preparatory steps for its performance of its obligations in terms of the impugned contract, it had impermissibly claimed the full contract fee. It stated that allowing Gobela's claim would yield the untenable result that the municipality would have to pay for a benefit it did not receive despite its budgetary constraint. The SCA concluded that justice required that the court a quo declare the impugned contract invalid and unlawful despite the municipality not having counter-applied for it to be reviewed and set aside. It held that there was no question of impermissible self-help, as the decision that the contract was unlawful and invalid was a decision by a court.

The appeal was dismissed with costs.