



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO.: 6189/2019

Matter heard on: 22nd, 23rd, 24th, 25th and 26th June 2020

Judgment delivered on: 01 September 2020

In the matters between:

**SIPHOKAZI NDUDANE
SENZENI ZOKWANA**

**First intervening applicant
Second intervening applicant**

And

In re: Rescission Application

**B XULU & PARTNERS INCORPORATED
BARNABAS XULU**

**First Applicant
Second Applicant**

And

**THE DEPARTMENT OF AGRICULTURE, FORESTRY
AND FISHERIES**

First Respondent

**THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS,
FORESTRY AND FISHERIES**

Second Respondent

JUDGMENT

SMITH J:

Introduction

[1] On 30 January 2020, Rogers J delivered a judgment in terms of which he, *inter alia*, declared invalid and set aside a Service Level Agreement (SLA) and a settlement agreement purportedly concluded by the Department of Agriculture, Forestry and Fisheries (the DAFF) and attorneys B Xulu and Partners Incorporated (BXI) on 23 May 2017 and 12 April 2019, respectively. He also set aside an order granted by Steyn J on 6 June 2019, in terms of which the settlement agreement was made an order of court, as well as various warrants of execution issued pursuant to that order. It is perhaps necessary to mention, for completeness' sake, that the parties in that application were the DAFF (the first applicant); The Department of Environmental Affairs, Forestry and Fisheries (the second applicant); BXI (the first respondent); the Sheriff of the High Court for Pretoria (the second respondent), First National Bank of South Africa (third respondent), and the Standard Bank of South Africa (the fourth respondent). The apparent duplication in the citations of the first and second applicants were brought about by the fact that the second applicant had been established as a separate department after a re-organisation of portfolios during May 2019. Mr Barnabus Xulu, a legal practitioner and director of BXI, was also joined as the fifth respondent and a rule nisi issued calling upon him to show cause why he should not be ordered to refund the money attached pursuant to the invalid writs, jointly and severally with BXI. The third and fourth respondents did not oppose the application.

[2] Rogers J's judgment has precipitated a number of related applications, three of which served before me during the week of 22 June 2020; namely the intervention applications brought by Ms Siphokazi Ndudane, the former Deputy Director-General of the DAFF, and Mr Zenzeni Zokwana, the former Minister of the Department. BXI and Mr Xulu have also launched an application for the rescission of Rogers J's judgment on the ground that the DAFF (in particular the deponent to the main affidavit and Director-General of the department, Mr Mlengana) has deliberately and fraudulently withheld from the court crucial and relevant

information which would have had a significant impact on the learned judge's findings. These applications were launched under the same case number and are closely interrelated since in all three the main deponents make extensive cross-references to allegations contained in one another's founding affidavits. I have accordingly decided to deal with all three applications in one judgment in order to avoid unnecessary repetition or prolixity.

[3] There also remains to be heard an application for Rogers J's recusal and, in the event of the rescission application failing, an application for leave to appeal. It is my understanding that he remains seized of those matters.

[4] The events which preceded Rogers J's judgment are the following. The impugned SLA was concluded during May 2017, approximately a month after BXI was placed on the DAFF's supplier data base. Prior to this BXI were rendering legal services to the DAFF by virtue of the former's relationship with Emang Basadi Legal and Forensic Services. While the SLA provided that Ms Ndudane - having been defined as the "delegated authority" - would act as the DAFF's representative in all matters pertaining to the agreement, it ostensibly bore Mr Mlengana's signature. The agreement, *inter alia*, provided that BXI would only accept instructions from Ms Ndudane and, furthermore, that fees would be charged in US dollars.

[5] On 15 August 2018, Mr Mlengana wrote to BXI terminating their services with immediate effect, except in respect of instructions to represent the DAFF in a matter against one Mr Bengis. In the meanwhile BXI had continued to demand that the DAFF pay their fees, which according to them had by March 2019 accumulated to some 2.5 million US dollars.

[6] The National Treasury thereafter became involved, and in an attempt to resolve the impasse, it arranged a meeting on 28 March 2019, which Ms Ndudane and Mr Mlengana also attended. It was at that meeting that the DAFF orally agreed to pay R20 million to BXI

immediately, the balance to be settled once the invoices had been validated. These terms were communicated telephonically to Mr Xulu who accepted them on behalf of BXI. The next day, Mr Mlengana instructed a departmental functionary, one Ms Parker, to settle the account.

[7] On 11 April 2019, however, the DAFF's Chief Director: Financial Management addressed a memorandum to Mr Mlengana expressing the view that BXI's appointment did not comply with applicable supply chain management procedures and that the payment to them would accordingly constitute irregular expenditure.

[8] This memorandum was forwarded to Ms Ndudane on 11 April 2019 who nevertheless, the following day, signed the impugned settlement agreement on behalf of the DAFF. That agreement provided, *inter alia*, that the sum of R20 million was payable immediately and that BXI would approach the Western Cape High Court on an unopposed basis to have the agreement made an order of court.

[9] BXI indeed wasted no time in approaching court to make the agreement an order of court. On the same day that the agreement was signed, they launched the application which initially served before Goliath J. She, however, did not grant the order but instead directed that the papers must be served on the State Attorney and various other organs of state. She also required further affidavits to be filed, amongst others, by the Auditor-General and National Treasury, confirming that they were aware of the application.

[10] BXI, apparently being of the view that the directives issued by Goliath J were unreasonably onerous, then complained to the Judge President. This prompted Goliath J to recuse herself. She instead directed that the application should be enrolled for hearing in the ordinary course in the Third Division. The impugned order was eventually granted by Steyn J on 6 June 2019.

[11] BXI thereafter wrote to Mr Mlengana on the same day, demanding payment of some R39 million, which they claimed was outstanding, and warning that if the money was not paid by the following day, execution would be levied.

[12] Mr Mlengana became aware of that letter when he was at the airport, about to depart on an overseas holiday. He then telephoned Mr Xulu, reminded him about his undertaking to pay and requested him not to proceed with the execution.

[13] The writ of execution was nonetheless issued on 11 June 2019, and on 14 June 2019, after Mr Mlengana had returned from holiday, Mr Xulu again called him to discuss the issue of payment. Mr Mlengana again asked him to wait until the following Monday. When Mr Mlengana failed to contact Mr Xulu as agreed, BXI proceeded to execute the writs.

[14] On 19 June 2019, some R2.5 million in the DAFF Standard Bank account was attached. That sum, less the sheriff charges, was transferred to the BXI trust account on 2 July 2019. A second writ was executed on 17 July 2019 and some R17, 6 million was attached in the DAFF Standard Bank account and paid to BXI by the sheriff on 1 August 2019. It is common cause that most of those funds were transferred from BXI's trust account, and by 6 August 2019 only the sum of R121 000 remained in their business account.

[15] A third writ was issued on 13 July 2019, and on 17 July 2019 a sum of R11. 4 million was attached in a different DAFF account. Those funds had, however, not been transferred to the BXI trust account.

[16] When the State Attorney, acting on behalf of the DAFF, was unable to extract an undertaking from Mr Xulu to the effect that the funds transferred to them would be retained in the BXI trust account pending the resolution of the dispute, the DAFF launched the urgent

application on 5 August 2019. The application was argued before Rogers J on 12 and 13 December 2019, and as I have mentioned earlier, judgment was handed down on 30 January 2020. Also of significance is the fact that both Ms Ndudane and Mr Zokwana had filed affidavits in support of the BXI's case. I deal with the contents and relevance of those affidavits below.

Rogers J's findings

[17] In all three applications the parties have criticised Rogers J's reasoning and findings with unnecessary stridency and rancour, and on grounds which, in my view, are demonstrably unsustainable. Ms Ndudane and Mr Zokwana in their intervention applications, in particular, use overly robust and acerbic language to attack those findings which they claim impugn their good names and integrity. It is indeed on the basis of those assertions that they contend they have substantial and direct interests in the matter. In order to determine whether there is any merit in these contentions, it was accordingly necessary for me to consider the learned judge's reasoning and findings with a degree of exactitude usually reserved only for judgments on appeal. The following then is my understanding of Rogers J's reasoning and findings.

[18] The DAFF assailed the validity of the SLA on two grounds namely that:

- (a) it had not been duly signed on behalf of the DAFF. Although it apparently bore Mr Mlengana's signature, he denied that he knowingly signed the document. While admitting that he was in Cape Town when the document was signed, he had no recollection thereof, and speculated that the last page (which was the only page that bore his signature) must have been placed before him as part of another document; and
- (b) BXI had not been appointed in terms of a valid procurement procedure pursuant to Section 217 of the Constitution and other applicable legislation.

[19] In respect of the first ground Rogers J, although having some reservations about Mr Mlengana's version, found that it accorded with the probabilities. He found that since Mr Xulu and his witnesses were not present (and thus unable to dispute Mr Mlengana's version), and did not apply for leave to cross-examine Mr Mlengana, he was constrained to accept the latter's version.

[20] Regarding the second point, he found that BXI has neither been appointed pursuant to a public procurement process, nor has there been compliance with Treasury Regulations permitting deviations or emergency procurement. He accordingly found that the DAFF's conclusion of the SLA was unlawful.

[21] Regarding the applicants' contention that other mandates given to BXI by Mr Zokwana in his capacity as Minister were also unlawful because they were also not issued pursuant to a proper procurement procedure, Rogers J was of the view that such relief had not been foreshadowed in the notice of motion, and he was accordingly precluded from pronouncing on that issue.

[22] The applicants challenged the settlement agreement on the following grounds:

- (a) Ms Ndudane did not have the requisite authority to conclude the agreement on behalf of the DAFF. The nature of the contract did not fall within the ambit of her delegated powers, and even if the oral agreement concluded on 28 March 2019 gave rise to a binding agreement, the parties did not agree to the conclusion of the settlement agreement. Furthermore, the settlement agreement, in any event, contained terms which had not been envisaged by the oral agreement and which had not been approved by the Director-General; and

(b) if the SLA were invalid for any one or more of the reasons advanced by the DAFF, then the settlement agreement would *ipso facto* also be unlawful since it purported to acknowledge that BXI were owed money in terms of an invalid agreement.

[23] Rogers J upheld the first point and found that Ms Ndudane's purported conclusion of the agreement was *ultra vires* and unlawful.

[24] Regarding the second point, he found that since he was precluded from ruling on the validity of additional mandates given to BXI by Mr Zokwana, he was also unable to conclude that there were no valid mandates that could have been the subject of a settlement agreement.

[25] The applicants also sought an order rescinding Steyn J's order on the following grounds:

(a) the settlement agreement was invalid and could hence not be made an order of court; and

(b) BXI was in any event not entitled to have the settlement agreement made an order of court since there was no *lis* between the parties. In this regard reliance was placed on *Eke v Parsons* 2016 (3) SA 37 (CC), at para. 25, where the Constitutional Court held that parties contracting outside of the context of litigation are not entitled to apply for such an agreement to be made an order of court.

[26] Regarding the first point, Rogers J held that since the DAFF was not represented in court when the order was granted and Ms Ndudane did not have the requisite authority to represent the DAFF, the order may be rescinded in terms of Uniform Court Rule 42(1) (a).

[27] The learned judge also upheld the second point. While accepting that the dictum in *Eke* was obiter since that case did not deal with a settlement agreement concluded outside of litigation, he surveyed a plethora of cases where the same principle was confirmed. He accordingly found that the order also fell within the ambit of Rule 42(1) (a), since the court lacked the necessary legal competence to grant it.

[28] BXI also asked Rogers J to exercise his just and equitable discretion in terms of section 172 (1) (b) of the constitution not to set aside the agreements in the event of him finding that they had not been validly concluded. In terms of that section a court has a discretion not to set aside conduct which it found to be unconstitutional but, in appropriate circumstances, to make any order which is just and equitable. In this regard they relied on the Constitutional Court judgments in *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC). In considering whether to grant the type of equitable relief fashioned by the Constitutional Court in those cases, the learned judge took into account that in *Gijima* the service provider was at pains to extract an assurance from the State Information Technology Agency to the effect that proper procedures had been followed, and in *Buffalo City* the same official who had granted an extension of the contract later reneged on it and purported to terminate the contract on the basis of its contended unlawfulness. The learned judge then distinguished the facts of those cases and found that BXI was the author of their own misfortune since they did not make any attempt to ascertain whether proper procurement procedures had been followed in their appointment. In refusing the type of relief granted in the abovementioned cases, Rogers J also considered that BXI may have a claim based on unjust enrichment, that he could not exclude the possibility that the latter may well be able to assert an oral settlement agreement, and that the DAFF had agreed to a process of verification and appeared to be open to the possibility that BXI may have rendered services of value and for which they may be entitled to payment.

[29] Although he found that Mr Mlengana did not wittingly conclude the SLA, he criticised him for having vacillated regarding the question of payment to BXI and for not taking any action immediately after becoming aware of the conclusion of the settlement agreement and the application to make it an order of court.

Application to strike out

[30] The DAFF has delivered notices in terms of Rule 23 (2) to strike out the following portions of the applicants' affidavits;

- (a) reliance by Ms Ndudane on the factual and legal findings of the Public Service Commission (PSC) in its report of 7 November 2019, contained in paragraphs 39; 40; 41; 45; 46; 48; 53; 54 and 55 of her affidavit, on the basis that it amounts to inadmissible hearsay evidence;
- (b) Mr Zokwana's reliance on the PSC report contained in paragraphs 12; 35; 119 to 120; 144; 149 to 150; 153; 161; 173 to 177; 179; 183 to 185; 187 to 190; 262 and 265;
- (c) Vexatious, scandalous and irrelevant matter contained in paragraphs 219 to 236 of Mr Zokwana's affidavit, the first sentences of paragraphs 267 and 268, paragraphs 247 and 248, 260, 263 and 265 to 266, to the extent that unwarranted references are made to Minister Creecy; and
- (d) Mr Xulu's further "Supplementary affidavit", dated 5 June 2020 in its entirety, alternatively all offensive and irrelevant references to Mr Creecy.

[31] Regarding the PSC report, the DAFF contended that its contents do not constitute evidence in court, neither are the findings contained therein binding on a court of law. It therefore constitutes inadmissible opinion evidence of another tribunal. (*Hollington v Hewthorn and Co Ltd* [1943] 2 All ER 35; *Hassim v Incorporated Law Society of Natal* 1977 (2) SA 575 (A), at 764E-765E; and *Prophet v National Director, Public Prosecutions* 2007 (6) SA 169 (CC), at para. [42])

[32] The legal principle enunciated in the aforementioned cases is to the effect that any findings of another court, tribunal or commission cannot be used in subsequent civil proceedings because they amount to hearsay and opinion evidence. The DAFF contends that all references to the PSC report in Ms Ndudane's and Mr Zokwana's affidavits consequently amount to inadmissible hearsay and opinion evidence and fall to be struck out as such.

[33] Mr *Joseph* SC, who together, with Mr *Bawa* SC and Ms *Williams*, appeared on behalf of the DAFF, argued that since the PSC is a Chapter 10 as supposed to Chapter 9 institution, its findings were not binding on the court. He submitted that the report is in any event subject to review proceedings in the Pretoria High Court.

[34] The PSC report was put up by Ms Ndudane and Mr Zokwana because they believed that the factual findings contained therein were binding on Rogers J. Thus if he had regard to the contents of the report before writing his judgment - so it was contended - it would have had a substantial impact on certain of his crucial findings. Mr *Masuku* SC, who appeared on their behalf, has, however, not been able to cite any authority in support of this contention.

[35] I agree with Mr *Joseph*'s submission that the findings of the PSC report were not binding on Rogers J, and that those findings consequently constitute no more than evidence of the opinion of a different tribunal. They thus amount to inadmissible opinion and hearsay evidence.

[36] The applicants have also made no attempt to show that the admission of the report will be in the interests of justice notwithstanding the fact that it amounts to hearsay evidence.

[37] The report, and any reliance placed on it in either Ms Ndudane's or Mr Zokwana's affidavits, accordingly fall to be struck out.

[38] Regarding the references to Minister Creecy in Mr Zokwane's and Ms Ndudane's affidavits, I agree with Ms *Joseph* that these are vexatious, scandalous and disparaging of Ms Creecy. They are little more than gratuitous insults directed at Ms Creecy's competence and work ethic. The impugned portions of the affidavits are too numerous for me to mention them all. Suffice it to say that I have considered all of them and I am satisfied that there can be little doubt that those comments, made in the context of peripheral issues, are manifestly scandalous and vexatious and fall to be struck out as such.

[39] However, the application to strike out Mr Xulu's further supplementary affidavit cannot be upheld. Mr *Bridgman*, who together with Ms *Smart* appeared on Mr Xulu's and BXI's behalf, has pointed out that the affidavit was filed in response to the intervention applications and was not intended as a further affidavit in the BXI rescission application. I understood Mr *Joseph* to have accepted that BXI was indeed entitled to file the affidavit in respect of the intervention application. That affidavit must accordingly be allowed to stand. However, all references to Ms Creecy in that affidavit of the nature that I have described above must be struck out for the same reasons.

The intervention applications

[40] Ms Ndudane and Mr Zokwana both seek orders allowing them to join in the main application and rescinding and setting aside Rogers J's judgment. The affidavits filed in

support of their applications are quite lengthy, that of Ms Ndudane some 62 pages and that of Mr Zokwana more than 120 pages.

[41] Their founding affidavits make for difficult reading, not so much because of their prolixity, but rather because of their ponderous and argumentative tone. In addition, they are littered with extensive and unnecessary references to, and quotations from case law. In my view this practice must be discouraged. Affidavits are supposed to contain factual allegations only, and in the limited instances where it may be necessary to refer to statutory provisions or decided cases, it should be kept to an absolute minimum, and certainly not to the extent that it takes the place of heads of argument. I was rather surprised that the respondents did not make more out of this issue, but one can perhaps understand that when a litigant has been swamped by an avalanche of disputations regarding peripheral issues, battle weariness must inevitably set in and the desire simply “to get on with it” may dominate.

[42] Nevertheless, needs must, and I was consequently constrained to wade through mountains of unnecessary (and often toxic) verbiage to discern the relevant contentions. The following then is my understanding of the alleged factual bases on which the relief is sought.

[43] Ms Ndudane asserts that she was suspended because she deposed to an affidavit in the main application confirming that a valid and binding decision had been taken to pay BXI.

[44] She also contends that the adverse findings in Rogers J’s judgment caused her prospective employer, namely the Department of Rural Development and Agrarian Reform, Eastern Cape, to withdraw an offer of employment. The judgment makes far-reaching and serious findings against her, without her having been heard. Her constitutional rights have thus been prejudiced. The judgment has also not been based on the true facts, which she now seeks to put before court.

[45] She contends furthermore that if she had been cited as a party in the proceedings (as opposed merely to being a witness), she would have been able to “give the matter adequate attention by giving the court the incontrovertible evidence” regarding the transactions in dispute. When she first deposed to her initial affidavit, she had mistakenly believed that the contents were “sufficient to address the issue of authority and lawfulness” of her actions. She claims that Mr Mlengana has deliberately withheld relevant information from the court and that her suspension was a ploy to prevent her from further supplementing her initial affidavit. The reason for her intended intervention is thus to place correct information before the court.

[46] In respect of her contention that Mr Mlengana had deliberately withheld documents from the court which contradict averments made in his affidavit, she intends to introduce voice recordings, emails and transcripts of discussions, which she claims further expose false representations made by Mr Mlengana.

[47] Regarding her interest in the proceedings, she states that as a government official whose integrity had been questioned by the court “based on demonstrable falsehoods”, she has a direct and substantial interest both in the order granted by Rogers J, as well as his reasoning. Her dignity, good name, reputation, and ability to obtain employment, are substantial and legally recognisable interests, worthy of constitutional protection. These interests have been compromised as a result of findings made by Rogers J, which in turn were based on the false evidence presented by Mr Mlengana.

[48] Ms Ndudane avers that Mr Mlengana has deliberately and fraudulently withheld the following evidence from the court:

- (a) a bundle of documents which include his application and motivation for a deviation in respect of the appointment of Emang Basadi to provide legal and other related

services to the DAFF. These documents were relevant to the issue as to whether proper procurement procedures had been followed. She contends that the court may well have found differently if those documents had been placed before it;

(b) the report of the PSC dated 7 November 2019. This report, Ms Ndudane contends, evinces that Rogers J's finding regarding the issue of the procurement process was erroneous since the PSC had found that the National Treasury had granted approval for the deviation to appoint Emang Basadi. The report also lends credence to Mr Zokwana's reservations about the efficacy of the State Attorney. She furthermore contends that the findings of the PSC are binding on the court and Rogers J should have taken judicial notice of it. The fact that the court did not have the PSC report before it meant that it overlooked the fact that Mlengana was "personally conflicted" and implicated in malfeasance and improper conduct which had been investigated by BXI, the PSC and the National Prosecuting Authority. She claims that those findings lend credence to her contention that Mr Mlengana deliberately withheld documents and had contrived to mislead the court;

(c) audio recordings of conversations between her and Mr Mlengana, which clearly show that he had instructed her regarding the contents of the document she drafted on 16 April 2019 (the settlement agreement), and that he had accepted that the DAFF was obligated to pay BXI. She claims that the recordings provide incontrovertible evidence that she had carried out Mr Mlengana's instructions in negotiating with BXI, as well as in respect of the subsequent conclusion of the settlement agreement; and

(d) proof that Mr Mlengana had been aware of the engagement of BXI, including the conclusion of the settlement agreement and had dictated the terms of the

settlement agreement to her after considering a draft. He also dictated a specific term to the effect that BXI should be required to pay back any overpayments within 30 days.

[49] She also makes reference to a matter involving the World Wildlife Fund in which Mr Mlengana is alleged to have filed an affidavit by a newly appointed functionary with no direct knowledge of the matter after her suspension. He subsequently ordered her to attend a consultation with counsel in respect of that matter, but had imposed unreasonable conditions which had made it virtually impossible for her to comply with that order. Mr Mlengana had also declared that she would remain on suspension and denied her access to official documents. This resulted in adverse comments regarding her willingness to be of assistance.

[50] Mr Zokwana wishes to intervene in the proceedings because he feels duty bound to expose the misrepresentations and “outright lies” which formed the bases on which the order was granted. He thus wants to “set the record straight” since the judgment was based on a false factual premise casting “unfortunate and unjustified” aspersions on him, and on “the basis of a one sided version” proffered by Mr Mlengana. This was done without any regard for his basic rights to due process and to be treated fairly.

[51] He contends that as a former Minister whose decisions and conduct were the subject matter of court proceedings, he was entitled to be joined as a party. He says furthermore that the court was not entitled (in his absence) to make conclusions that impugn decisions taken by him in his capacity as Minister. His good name, reputation, and ability to obtain employment have been adversely affected by Mr Mlengana’s false statements and the adverse findings made by the Rogers J on the basis of those statements. He also avers that his rights have been infringed by Mr Mlengana who deliberately withheld the information mentioned by Ms

Ndudane in her affidavit. That evidence was pertinent to issues which fell for determination in the case.

[52] Mr Zokwana also claims that Mr Mlengana has portrayed him as a participant in corrupt activities and of promoting factionalism and enrichment schemes for individuals, in particular Mr Xulu. He is aggrieved by the court's "unjustified findings", including findings that he is corrupt, that he was guilty of favouritism, and had retaliated against senior officials for doing their jobs. All these "serious and adverse findings" were made without giving him an opportunity to be heard. If he had been given the opportunity, he would have apprised the court of Mr Xulu's specialist skills and experience as a lawyer, as well as the circumstances of his appointment.

[53] As I have mentioned earlier, Ms Ndudane and Mr Zokwana both filed affidavits in support of BXI's case in the main application. Ms Ndudane's affidavit was quite comprehensive, comprising some 16 pages and 54 paragraphs dealing, *inter alia*, with the circumstances of BXI's appointment, Mr Mlengana's alleged knowledge of the settlement agreement, and the former's entitlement to payment.

[54] In his supporting affidavit Mr Zokwana stated that he was aware of the "unfounded allegations" which attacked his integrity as former Minister. He also reserved his right to deal with those allegations in the appropriate forum. He furthermore explained his understanding of the events that led to the dispute regarding payments due to BXI and the mandates which he had given to BXI in respect of various matters.

[55] What is undeniably evident from those affidavits is that both Ms Ndudane and Mr Zokwana were aware of the factual bases on which DAFF contended that the SLA and settlement agreement were invalid, as well as the supporting facts averred by Mr Mlengana.

Their affidavits were not the usual terse confirmations of allegations contained in the founding affidavit, but rather detailed traversals of averments in the affidavits filed by the DAFF and with which they had joined issue.

The legal principles

[56] In terms of Uniform Court Rule 12, a person wishing to intervene in legal proceedings must show that his or her rights are likely to be adversely affected by the order sought, and that he or she consequently has a direct and substantial interest in the matter. The test being whether he or she has a legal interest “which may be affected prejudicially by the judgment of the court in the proceedings concerned”, in the sense that the order cannot be given effect to without “profoundly and substantially affecting his or her rights”. (*Gordon v The Department of Health, Kwazulu Natal* 2008 (6) SA 522 (SCA), at para. 9)

[57] It is not sufficient for a party to show that the reasoning in the judgment casts aspersions on his or her character. What must be shown is a direct and substantial interest in the outcome of the litigation. In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), the Supreme Court of Appeal, while accepting that the applicants had ample cause to be aggrieved by reasons in the judgment which cast aspersions on them, it was not sufficient to clothe them with the requisite direct and substantial interest, since their interest was only in the reasoning and not in the order. The court found that they were consequently “in the position of a witness whose evidence has been rejected or on whose demeanour an unfavourable finding has been expressed” and that, “[S]uch a person has no ready remedy, especially not by means of intervention. To be able to intervene in an appeal, which is by its nature directed at a wrong order and not at incorrect reasoning, an applicant must have an interest in the order under appeal”.

Discussion: Intervention applications

[58] As must no doubt have been evident from the above, the applicants' main purpose for their desire to intervene in the proceedings is that their dignities, good names, professional standings, and employment prospects have been negatively impacted by Rogers J's findings.

[59] They consequently contended that the learned judge has made serious and far-reaching findings that they were complicit in malfeasance, corruption and promotion of factionalism within the department. They assert that it is accordingly imperative that they be allowed to intervene in order "to set the record straight".

[60] They say that they will do so by introducing new evidence which Mr Mlengana has deliberately and fraudulently withheld from the court. This evidence, they contend, if it had been before Rogers J, would have had a major impact on his findings, in particular relating to the validity of the SLA and the settlement agreement.

[61] The insurmountable difficulty that they face, however, is that those issues, namely the validity of the settlement agreement and SLA, are no longer part of the *lis* between the DAFF and BXI.

[62] In his heads of argument in the rescission application, Mr *Bridgman* made it clear that BXI and Mr Xulu concede that proper procurement procedures had not been followed and that the former's purported appointment.

[63] Relying on Ms Ndudane and Mr Zokwana's affidavits in the intervention application, Mr *Bridgman* submitted that Mr Mlengana's fraudulent concealment of the evidence nevertheless means that no reliance can be placed on his evidence and that the matter should be referred for oral evidence. He argued that despite the abovementioned concession, the concealed

evidence would still have been relevant to the exercise of Rogers J's just and equitable jurisdiction and that if the new evidence mentioned by Ms Ndudane and Mr Zokwana had been placed before Rogers J, he may well have had a different view regarding that issue.

[64] During the course of argument I have invited *Mr Bridgman* to confirm that the concession meant that BXI accepts that the SLA and settlement agreement were invalid. He confirmed that that was indeed the case, but was at pains to state that BXI and Mr Xulu did not also concede that mandates given to them by Mr Zokwana were similarly unlawful. As mentioned earlier, Rogers J did in any event not make any findings regarding the validity of those mandates.

[65] The upshot of this concession by BXI and Mr Xulu is that regardless of whether they succeed with the rescission application or the matter goes on appeal, the only issue that will remain extant is the question as to whether Rogers J properly exercised his just and equitable discretion. And it is not clear on what conceivable basis Ms Ndudane and Mr Zokwana contend that they have direct and substantial interests in the outcome of the latter dispute.

[66] In essence then Ms Ndudane and Mr Zokwana wish to intervene in order to introduce new evidence regarding issues which no longer form part of the *lis* between the parties in the main application. The effect of allowing them to intervene on this basis would entail that either the court *a quo* (if the judgment is rescinded) or the court of appeal, will be required to resolve factual disputes for no other reason than to vindicate their good names and dignities. It is manifest that, regard being had to the principles enunciated in the abovementioned cases, this does not constitute a direct and substantial interest in the matter.

[67] In the event, in my view their contentions regarding imputations of corruption and malfeasance are mainly based on allegations contained in Mr Mlengana's affidavits. A closer

scrutiny of those portions of the judgment which appeared to have aroused their ire, evinces that the contended construction is simply not justified, and one scours the judgment in vain for any findings of corruption or malfeasance against either of them. I need to mention only a few of the alleged offensive comments to demonstrate the soundness of this observation.

[68] In paragraph 11 of his judgment Rogers J said the following: “In the meanwhile Minister Zokwana was promoting BXI’s engagement to assist in the DAFF’s litigation against Arnold Bengis and others”. This statement was pounced upon by Mr Zokwana and held out as an example of a finding that he had irregularly advanced BXI’s case at the expense of the State Attorney’s Office.

[69] Mr *Masuku* was, however, unable to explain why that statement should be accorded a pejorative construction of the nature contended for by Mr Zokwana, especially in the light of the fact that Mr Zokwana had, by his own admission, praised the exceptional legal skills of Mr Xulu and explained very eloquently why he regarded the State Attorney’s Office as unfit to represent the DAFF in the relevant matters. He has done so in both his supporting affidavit filed in the main application, as well as in his founding affidavit in this application. Thus, apart from the fact that the statement simply does not lend itself to the contended construction, it was also, in the context of the evidence before Rogers J, a warranted observation.

[70] In paragraph 36 of his judgment Rogers J, when dealing with the issue of Mr Mlengana’s suspension, said the following: “Mr Mlengana’s view is that they were trumped up [the charges against him] because he intended to take action against Ms Ndudane.” This statement was also held out by the applicants as an example of the court finding that they unlawfully conspired against Mr Mlengana and had abused their powers. There can, however, be little doubt that Rogers J did no more than summarise Mr Mlengana’s allegations. Since this was a peripheral

issue there was no need for the learned judge to make a finding in that regard, and in the event, there is no indication in the judgment that he did in fact make such a finding.

[71] Similarly, when dealing with the circumstances of Ms Ndudane's suspension and the alleged role of Mr Zokwana, the learned judge did no more than summarise the respective versions of the parties. Ms Ndudane and Mr Zokwana have nevertheless also unfairly latched onto those portions of the judgment as examples of findings impacting negatively on their good names and dignities.

[72] I do not intend to deal with each and every contended cause of complaint raised by Ms Ndudane and Mr Zokwana, for indeed they are too numerous. Suffice it to say that I have traversed the judgment and have been unable to find any justification for their complaint that Rogers J has made unsubstantiated findings of corruption or malfeasance against them.

[73] Properly analysed then, Ms Ndudane and Mr Zokwana's fight is really with Mr Mlengana, insofar as he may have made any such allegations in his affidavits. Viewed through this prism, their purpose for intervention does not relate to the issues which form part of the *lis* between the parties in the main application, neither to findings made by Rogers J, nor for that matter, to his reasoning.

[74] They both also seek an order rescinding the judgment on the basis that Mr Mlengana has fraudulently withheld or concealed evidence. Although it is strictly speaking not necessary for me to deal with these contentions in the light of my finding that they had been unable to establish a direct and substantial interest in the litigation, I nevertheless choose to do so since these issues are closely related to contentions advanced by BXI and Mr Xulu in their rescission application.

[75] Ms *Bawa* has meticulously, and with reference to the papers in the main application, demonstrated that most, if not all, of the issues raised by them were in fact before Rogers J.

[76] She correctly referred to the fact that both Mr Zokwana and Ms Ndudane have filed comprehensive supporting affidavits in the main application, and that Ms Ndudane, in particular, has mentioned in her supporting affidavit that she was in possession of the audio tapes and had offered to make them available to the court.

[77] The fact that certain aspects of the dispute had been referred to the PSC had also been disclosed, and Rogers J made fleeting reference thereto in his judgment. The final PSC report, on which they have placed heavy reliance, only became available during November 2019, before the matter was argued. There was no explanation as to why, if BXI were of the view that it was germane to the issues before Rogers J, they did not take any steps to bring it to his attention.

[78] Ms *Bawa* has also correctly submitted that the so-called new evidence relating to the lawfulness of the Emang Basadi appointment has no relevance in the determination of the validity of the SLA and the settlement agreement concluded between BXI and the DAFF. There can be little doubt that the appointment of Emang Basadi was raised in the papers merely by way of background, since it preceded BXI's appointment. Rogers J was accordingly not called upon to pronounce on the validity of that appointment.

[79] Ms *Bawa* also pointed out that the letter from the National Treasury, dated 29 August 2016, on which Ms Ndudane has placed some considerable reliance, was also referred to extensively in the report of the Auditor-General which was annexed to an affidavit filed by Mr Mlengana in the main application. It accordingly does not constitute new evidence and there can be no question of Mr Mlengana having deliberately withheld the information. In the event,

if there were any further related documents in either Ms Ndudane or Mr Xulu's possession which they considered to be relevant, they were at liberty to introduce them into evidence. The DAFF and Mr Mlengana were constrained to put documentary evidence before the court which in their view were relevant to the issues falling for decision. The fact that there may have been other related documents which they regarded as irrelevant cannot on its own give rise to an inference that they have deliberately and fraudulently concealed them from the court.

[80] In addition, other issues raised by Mr Zokwana namely, *inter alia*, his reliance on Section 64 of the Public Finance Management Act, No. 1 of 1999, the details of his relationship with Mr Mlengana, the allegations relating to attempts to prevent him from taking steps against Ms Ndudane, as well as the allegations of insubordination on the part of Mr Mlengana, were all before Rogers J.

[81] I am accordingly of the view that Ms Ndudane and Mr Zokwana have failed to establish direct and substantial interests in the proceedings. They also failed to establish that the DAFF or Mr Mlengana has deliberately and fraudulently withheld relevant evidence with the intention of misleading the court. Their applications accordingly fall to be dismissed with costs.

[82] Ms Bawa has asked for a punitive costs order, including the costs occasioned by the employment of three counsel. I am, however, of the view that there are insufficient grounds for a punitive costs order. Although I am of the view that the applications were ill-advised, I am not convinced that they were frivolous. However, in the light of the considerable volume of paper filed of record and the complicated nature of the issues which fell for decision, I am satisfied that the employment of three counsel was fully justified.

The BXI rescission application

[83] BXI and Mr Xulu seek an order rescinding Rogers J's judgment on grounds of fraud, misrepresentation, failure to disclose material facts, and non-disclosure of a complete record.

[84] For these assertions they rely on the allegations contained in the affidavits of Ms Ndudane and Mr Zokwana filed in their applications for intervention. They also contend that the new evidence mentioned in those affidavits were deliberately and fraudulently withheld and concealed by Mr Mlengana, with the intention of misleading the court. They assert that the new evidence, if Rogers J had been aware of it, would have impacted significantly on his findings.

[85] Ms *Bawa* criticized Mr Xulu's founding affidavit for merely purporting to incorporate Ms Ndudane's affidavit by reference without specifying which portions of the affidavit he relied upon. I do not think that this criticism is entirely justified. I am satisfied that on a reasonable and proper reading of Mr Xulu's affidavit, it is sufficiently clear which portions of Ms Ndudane's affidavit he relied upon.

[86] Since BXI and Mr Xulu conceded that the former's appointment had not been effected in accordance with fair and transparent procurement procedures, and that Rogers J's findings regarding the validity of the SLA and the settlement agreements thus remain undisturbed, they contend that the new evidence would have been relevant for the exercise of his discretion regarding a just equitable remedy.

[87] They also support Ms Ndudane's and Mr Zokwana's contentions that the matter should be referred for oral evidence. They assert that since Rogers J's judgment is premised on "a seemingly corrupt relationship between Ms Ndudane and BXI" the new evidence disclosed in the intervention applications establishes that that was an incorrect finding and that Mr

Mlengana was in fact the corrupt one. They say, furthermore, that the factual disputes regarding the award of a contract to Willjaro (Pty) Ltd to sell confiscated abalone, can also only be resolved through the hearing of oral evidence.

[88] They assert that documents introduced by Ms Ndudane and Mr Zokwana in the intervention applications establish, *inter alia*, that DAFF did in fact not have any confidence in the office of the State Attorney to represent them adequately in the relevant matters. If this information had been placed before Rogers J, he would not have found that “the Zokwana faction” undermined the State Attorney’s office “so as to enable private firms to extract excessive fees from the Department.” This assertion is, however, manifestly misplaced since Rogers J made that comment in respect of the Memorandum of Understanding in terms of which Emang Basadi was appointed and, in any event, stated unequivocally that the contention was proffered by the DAFF’s.

[89] They claim furthermore that the new evidence also establishes that authorisation for a deviation in respect of Emang Basadi’s appointment had in fact been sought and obtained by Mr Mlengana. The latter has, however, failed to put this evidence before court.

[90] They also contend that Mr Mlengana’s assertion that he could not remember signing the SLA and his intimation that his signature could only have been fraudulently obtained, has now been put into different perspective by Mr Zokwana’s disclosure that he, based on Mr Mlengana’s advice, had assured parliament that BXI had been validly appointed and had been duly paid for all services rendered. If this fact had been placed before Rogers J, he would not have been inclined to accept Mr Mlengana’s version regarding the circumstances under which the SLA was signed. BXI and Mr Xulu did not know about this evidence. Mr Mlengana on the other hand, was fully aware of it at all relevant times, yet deposed to an affidavit which contained allegations incompatible with it. Mr Mlengana’s evidence can thus not be relied

upon, and the only way in which the court can arrive at a judicially defensible finding in this regard is through *viva voce* evidence.

[91] They contend that the evidence which Mr Mlengana has fraudulently contrived to conceal from the court would have had a significant impact on the manner in which Rogers J exercised his discretion in terms of Section 172 (1) (b) of the Constitution. Furthermore, the concealed evidence may well also have impacted on the learned judge's decision regarding the contended delay on the part of the DAFF in bringing the application proceedings to set aside the SLA.

Discussion: BXI rescission application

[92] It is a fundamental principle of our law that a final judgment is *res judicata* and will not lightly be set aside. Thus in order to succeed with the application for rescission of the judgment on the ground of fraud, BXI and Mr Xulu must show that: (a) the application is not frivolous; (b) the allegations on which they rely constitute a *prima facie* defence; (c) DAFF or Mr Mlengana was party to the fraudulent withholding of evidence and documents with the intention of misleading the court; (d) the allegations contained in Mr Mlengana's affidavits were false and were presented with the intent to mislead the court; and (e) if the true facts had been before Rogers J, he would have found differently. (*Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In re Sizwe Development v Flagstaff Municipality* 1991 (1) 677 (TK) 678-679)

[93] Ms Bawa has correctly submitted that it is not clear from Mr Xulu's affidavit exactly what fraudulent conduct is complained of. It appears that at best for BXI and Mr Xulu, it can be accepted that the contention is that the non-disclosure of the new evidence mentioned by Ms Mdudane and Mr Zokwana, warrants the inference that he did so deliberately and fraudulently and with the intention to mislead the court. Yet, it is manifest that the contended new evidence

was in any event not relevant to the core issues which Rogers J was called upon to decide, namely the validity of the SLA and the settlement agreement. This is incontrovertibly evident from the fact that they have conceded that those transactions were vitiated by a failure to comply with the applicable procurement procedures.

[94] Insofar as BXI and Mr Xulu contend that the new evidence would have been relevant to the exercise of Rogers J's just and equitable discretion, it was incumbent on them to ensure that all relevant facts were placed before the court. As mentioned earlier, both Ms Ndudane and Mr Zokwana have filed relatively comprehensive affidavits in the main application. There have not been acceptable explanations from either of them why the contended new evidence could not have been placed before the court at the appropriate time. They have also failed to establish that DAFF or Mr Mlengana has deliberately and fraudulently withheld relevant evidence from Rogers J and that the contended new evidence, if it had been before Rogers J, would have made any difference to his reasoning.

[95] And as I have mentioned earlier, most, if not all, of the contended new evidence was before Rogers J, in any event. I am also not convinced that Ms Ndudane's and Mr Zokana's contentions in respect of the purported new evidence would have made any difference to Rogers J's reasoning or findings in the exercise of his just and equitable discretion. The learned judge gave extensive reasons for his decision in respect of this issue, and it is evident from his judgment that he was not uncritical of Mr Mlengana's conduct. As mentioned earlier, he criticised the former for failing to take immediate steps to challenge the validity of the impugned agreements and for his equivocal conduct regarding the issue of payment to BXI. He nevertheless found that those considerations did not impact the issues which fell for decision. I have no doubt that BXI and Mr Xulu will in due course endeavour to persuade Rogers J that there are reasonable prospects of another court finding that he did not accord

those factors sufficient weight in the exercise of his just and equitable discretion. But that is a matter for another time and place, and one that does not concern me here.

[96] Properly considered then, all the points raised by BXI and Mr Xulu in the rescission applications are issues which should be the subject of an appeal. If they are indeed of the view that there is additional evidence that may be relevant for the exercise of a just and equitable discretion in terms of section 172 of the Constitution, they are at liberty to apply in due course for leave to introduce such new evidence in the event of the matter going on appeal.

[97] I am therefore of the view that they have failed to establish a proper case for rescission, and that application must accordingly also fail.

Orders

[98] In the result the following orders issue:

(a) **Ms Ndudane's intervention application**

The application is dismissed with costs, including the costs of three counsel.

(b) **Mr Zokwana's intervention application**

The application is dismissed with costs, including the costs of three counsel.

(c) **The BXI rescission application**

The application is dismissed with costs, including the costs of three counsel.

(d) **The application to strike out**

- (i) The report of the Public Service Commission annexed to the affidavit of Ms Ndudane, as well as all references thereto in Ms Ndudane's and Mr Zokwana's affidavits, mentioned in the Rule 23 (2) Notice filed by the Department of Agriculture, Forestry and Fisheries, are struck out with costs, including the costs of three counsel.

- (ii) The vexatious and irrelevant matter regarding Ms Creechy contained in the affidavits of Mr Zokwana and Mr Xulu, and mentioned in the Rule 23 (2) Notice filed by the Department of Agriculture, Forestry and Fisheries, are struck out with costs, including the costs of three counsel.
- (iii) The application brought by the Department of Agriculture, Forestry and Fisheries to strike out Mr Xulu's further affidavit, dated 5 June 2020, is dismissed, with costs.

J.E SMITH

JUDGE OF THE HIGH COURT

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