



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 2021/61622

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHERS JUDGES: YES

(3) REVISED: NO

24/10/20

In the matter between:

SAND SHIFTERS AFRICA (PTY) LTD

SAND SHIFTERS (PTY) LTD

SAND SHIFTERS LOGISTICS HOLDINGS (PTY) LTD

MARISIMO BEE PROFESSIONAL

SERVICES (PTY) LTD)

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

FOURTH APPLICANT

and

COMMISSIONER: BROAD-BASED BLACK

ECONOMIC EMPOERMENT COMMISSION

MINISTER OF TRADE AND INDUSTRY

FIRST RESPONDENT

SECOND RESPONDENT

JUDGMENT

MOTHA J

Introduction

[1] Fronting is a weapon used by erstwhile oppressors to stymie and reverse the gains of the democratic project. They know that a hungry stomach knows no principles and greed knows no bounds. From the Pied Piper of Hamelin, one learns the lesson that the one who pays the piper calls the tune.

[2] This is a review application to set aside the findings made by the Commission of the Broad-Based Black Economic Empowerment Commission ("the Commission") on 9 June 2021. The first to third applicants are private companies and part of the Sand Shifters Group companies specializing in supplying sand, filling, and bricks to the construction industry as well as providing aggregates. The fourth applicant was a B-BEE verification agency. Ms. Colman is the sole director of the first, second and third applicants.

[3] By agreement between the parties, this court's role has been truncated to solely adjudicate three issues, to wit:

3.1 Whether the first respondent is entitled to challenge the authority of the applicants' deponents, Ms. Colman, in the absence of compliance with Rule 7(1) of the Uniform Rules of Court;

3.2 If the authority challenge is before court, whether there is sufficient evidence to satisfy the court that they are duly authorized; and;

3.3 Whether the first respondent is time-barred in terms of regulation 15(4)(g) of the Broad-Based Black Economic Empowerment Regulations published in *Government Gazette* 40053, dated 6 June 2016.¹

Parties

[4] In describing the parties, it is worth noting that the dispute between the fourth applicant and the respondents has been dealt with in terms of the order dated 27 July 2023. Therefore, the only *dramatis personae* are the first, second and third applicants and the respondents.

¹ Order dated 27/07/2023.

[5] The first applicant is Sand Shifters Africa (Pty) Ltd (SS Africa), a private company established and incorporated in terms of the company laws of the Republic of South Africa, with the registration number: 2017/060197/07.

[6] The second applicant is Sand Shifters (Pty) Ltd (SS), a private company established and incorporated in terms of company laws of the Republic of South Africa, with the registration number: 2019/487644/07 (previously 2007/166133/23).

[7] The third applicant is Sand Shifters Logistics Holdings (Pty) Ltd (SS Logistics), a private company established and incorporated in terms of the company laws of the Republic of South Africa, with the registration number: 2015/086505/07.

[8] The fourth applicant is Marisimo BEE Professional Services (Pty) Ltd, a private company established and incorporated in terms of the company laws of the Republic of South Africa, with the registration number: 2007/019859/07.

[9] The first respondent is the Broad-Based Black Economic Empowerment Commission, an entity created by section 13B of the Broad-Based Black Economic Empowerment Amendment Act 46 of 2013 ("the Act").

[10] The second respondent is the Minister of Trade and Industry who is cited in his official capacity as a member of the cabinet vested with public authority and duty to oversee the implementation of the Act.

Facts in brief

[11] On 26 June 2019, Mr Sipho Lesly Mahlangu lodged a complaint of fronting, on behalf of the "Ekurhuleni Business Forum", against the Sand Shifters (Pty) Ltd (the three applicants). The complaint was received and acknowledged by the Commission on the same day, which day marked the beginning of the computation of time limit in terms of Regulation 15(4)(g) of the Broad-Based Black Economic Empowerment Regulations.

[12] On 20 September 2019, the Commission informed Sand Shifters that a complaint had been lodged by Mr Mahlangu. On 9 October 2019, SS Africa provided

documents requested by the Commission on 20 September 2019. Further documents were provided by SS Africa on 17 October 2019.

[13] The 26th of June 2020 marked the end of one (1) year, as contemplated in regulation 15(4)(g). On 15 July 2020, the Commission advised that it had concluded its assessment of the matter and had reached a conclusion that there were merits in investigating SS Africa's, SS' and SS logistics' alleged misrepresentation of the B-BBEE status and fronting practices including the creation of an opportunistic intermediary for B-BBEE compliance.

[14] Documents requested by the commission were emailed on 28 July 2020. On 6 August 2020 the Commission requested further information and clarification from SS Africa. This information was provided on 7 August 2020. On 10 December 2020, the commissioner addressed a letter to "Mr. GG Volsoo" headed "Findings: Sipho Mahlangu// Sand Shifters Africa (Pty) Ltd and Others." Mr. Vosloo responded to this letter on 20 December 2020. On 29 January 2021, the SS applicants replied to the preliminary findings. The final finding was issued to Sand Shifters on 9 June 2021.

Authority challenge

[15] In the answering affidavit, the respondents challenge the authority of Ms. Colman, the deponent to the founding affidavit, to launch this application. The argument is articulated in following terms:

"The current legal proceedings are purportedly instituted on behalf of Sand Shifters Africa (Pty) Ltd; Sand Shifters (Pty) Ltd; Sand Shifters Logistics Holdings (Pty) Ltd and Marisimo BEE Professional Services (Pty) Ltd. All four mentioned entities are juristic persons with separate legal identity.

Notwithstanding that the current proceedings are purported to be instituted on behalf of juristic persons, the deponent to the founding affidavit, Ms. Colman, fails to allege that she is authorized to institute the proceedings on behalf of the four companies. In addition, she fails to annex company resolutions authorizing her to institute the current proceedings on behalf of the four entities."²

² Answering affidavit at para 8 to 9.

[16] Responding to this challenge in her replying affidavit, Ms Colman avers that:

"I am advised that the appropriate way to challenge my authority is by way of notice in terms of Rule 7 of the Uniform Rules of Court, which the first and second respondents elected not to do. The point is accordingly badly taken and without merit and should be rejected on this basis alone.

As indicated in the founding papers, I am the sole director of the first to third applicants. However, Mr. Matona could argue that I am not representing the first to third applicants is also not clear. As a matter of fact, I am duly authorized to depose to both the founding and replying affidavits."³

[17] On the one hand, the applicants contend that the respondents failed to bring this challenge in terms of Rule 7. Therefore, the matter is not properly before this court. On the other hand, the respondents submit that Rule 7 only applies to the Power of attorney challenge. Therefore, it does not extend to a challenge to the authority to act on behalf of a juristic person.

[18] Following the amendment in 1987, Rule 7(1) now reads:

"Power of attorney

Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorized so to act, and to enable him to do so the court may postpone the hearing of the action or application."

³ Replying affidavit paragraphs 27 to 28.

[19] This Rule applies to both action and application proceedings. The Supreme Court of Appeal, in the matter of *Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys and Others*⁴, held the following:

“[21] Since then, the issue of authority has been dealt with in a number of decisions of this Court. The position is now established that the manner to challenge the authority of a litigant is to utilise rule 7(1) of the Uniform Rules of Court. The original understanding of rule 7(1) was that it only applied to the mandate provided to attorneys. However, this Court in *Unlawful Occupiers, School Site v City of Johannesburg (Unlawful Occupiers)*, citing *Eskom v Soweto City Council* and *Ganes and Another v Telecom Namibia Ltd*, held that the remedy for a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is provided for in rule 7(1).”⁵

[20] Indeed, the correct approach to challenge the issue of authority is by way of Rule 7(1). However, as stated in Erasmus: “This sub-rule does not lay down the procedure to be followed by the party challenging the authority of a person acting for a party. It would seem that the challenge, which may be brought at any time before judgment, may be raised in a variety of ways:

- (a) In appropriate circumstances, by notice, with or without supporting evidence;
- (b) in the defendant's plea or special plea;
- (c) in an answering affidavit;
- (d) orally at the trial.”⁶

[21] The respondents raise the challenge in the answering affidavit. They are perfectly within their rights to raise the point in the manner they do. To insist that they should have mentioned Rule 7 is tantamount to elevating form over substance. Having said that, this court is of the view that the respondents' point is unmeritorious. Firstly, Ms. Colman is the sole director of the first, second and third applicants. As such, she alone makes up “the board of directors”.

[22] If she avers, as she does, under oath that she is authorized to act, there can be no persuasive justification for rejecting that averment. Therefore, it is rather an

⁴ [2023] ZASCA 112 (26 July 2023).

⁵ Supra para 21.

⁶ Erasmus volume 2 at D1-96A.

unavailing attempt to ask for proof. When all is said and done, this is a factual question. With that said, the jury is out on whether or not this argument serves to fortify the respondents' case of alleged misrepresentation of the B-BBEE status and fronting practices.

[23] Focusing on the issue of authority, the court in the matter of *Eskom v Soweto City Council*⁷ held:

"However, even if the authority of Rossouw is to be assessed, respondent is on safe ground. In the absence of a prescribed mode of proof, it is a factual question whether a particular person holds a specific authority. It may be proved in the same way as any other fact. Adjudication involves consideration of what the credible evidence means and the extent of quality of and sometimes the absence of contradiction or other reason to remain unconvinced. There are several decisions wherein this approach is evident."⁸

[24] Secondly, Ms. Colman's evidence remains uncontroverted, since the respondents have not put forward any evidence suggesting otherwise. This view finds resonance with the court in the matter of *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk*⁹, in which it held:

"That being so, there is no reason to think that the applicant did not pass a proper resolution authorizing the institution of proceedings against the respondent and that the present proceedings are those of the applicant. The respondent has put before the court no evidence whatsoever to suggest that this is not the case, and in the circumstances, I am prepared to hold that the applicant has put sufficient before the court."¹⁰

[25] For the aforementioned reasons, the respondents' application stands to be dismissed.

The Time-barring challenge

[26] To fully appreciate this submission, it is important to sketch out the regulatory framework. The point of departure is regulations 4, which reads:

⁷ 1992 (2) SA 703 (W).

⁸ Supra at 706.

⁹ 1957 (2) [C.P.D].

¹⁰ Supra at 352 para H.

“Condonation of time limits. – (1) On good cause shown, the commissioner may condone late performance of an act or conduct in respect of which these Regulations prescribe a time limit, other than a time limit that is binding on the Commission itself.”

[27] Thereafter, a proper reflection should be accorded to regulation 15(4)(g) and sub-regulations (8) and (15) which read:

“(4) The Commission must within one (1) year of receipt of the complaint –

...

(g) make a finding, with or without recommendations.

...

(8) Where the Commission initiates an investigation on its own, the Commission shall initiate an investigation by issuing a notice to investigate in the prescribed Form B-BBEE 10 and follow the process in sub-regulation 4(d)-(f) above.

...

(15) If the Commission is of the view that more time is warranted to conclude its process in respect of an investigation as contemplated in sub-regulation (8), the Commission must inform the complainant of the need to extend the time, the circumstances warranting a longer period, and the exact period required as an extension.”

[28] It is common cause that the Commissioner made its final findings outside the prescribed time limit. I pause to recap, the complaint was lodged on 26 June 2019 and the finding was due on 26 June 2020. The eventual finding was made on 9 June 2021. The Commission failed to ask for an extension of time as contemplated in regulation 15(15). The applicants are bringing a review challenge in terms of section 6(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The kernel of the attack is that the Commission failed to comply with the empowering provision which required the findings to be made within a year.

[29] The time-bar attack is launched in the founding affidavit. At paragraph 90, the applicants state the following:

“The Regulations also further regulate the manner in which the Commission conducts its investigatory functions. Part 4, regulation 15 provides that:

90.1 within 1 year of receiving the complaint, including self-initiated complaint, investigate the complaint, notify the respondent of the complaint, hold a formal hearing in terms of section 13J(2) of the act, as may be necessary, in accordance with the procedures of the Commission and make a finding, with or without recommendation;”

[30] Responding to the challenge at paragraph 88 of the answering affidavit, the respondents state:

“88.1 I admit the allegations set out in this paragraph. The completion of the investigation within 1 period was hindered by Covid-19 pandemic and lockdown. As soon as the lockdown regulations were relaxed, the Commission proceeded to investigate the matter, including communicating with Sand Shifters. Sand Shifters cooperated with the Commission outside of 1 year and did not at no stage object to the continuation of the investigation until they received the preliminary findings on or about December 2020.

88.2 I wish further to point out that it was an oversight on the part of the Commission not to inform the applicant of the need to extend the investigation period.

.....

90.1 I admit the allegation, however I confirm that the investigation was completed within a reasonable time.

90.2 The investigation was affected by COVID-19 restrictions which resulted in halting operations and later remote operation. Furthermore, it was in this period that the Commission also relocated offices from 420 Witch-Hazel Avenue, Eco-Park, Centurion to 77 Mentjies, the DTIC campus, Sunnyside, Pretoria in August 2020.”

Submissions

[31] Since the sub-regulation (15) deals with a complainant-initiated investigation, the respondents’ counsel submits that the regulation is contradictory to the extent it refers to sub-regulation (8), which deals with a self-initiated investigation.

[32] Due to this contradiction, the argument goes, the court must resort to the case of *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd*.¹¹ I am uncertain whether this submission offers any aid to the respondents’ cause. Since, whether an investigation ensues following a complaint or is self-initiated, the

¹¹ 2021 (3) SA (1) (CC).

Commission is enjoined to make a finding within one (1) year, save where regulation 15(15) is complied with.

[33] In *Pickfords Removals*, the court dealt with section 67(1) of the Competition Act 89 of 1998 (the Competition Act), which reads: “A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased.” The court held:

“[32] As I have said, this aspect is interlinked with the question of condonation, but I find it convenient to discuss these aspects separately. In this Court, the Commission abandoned its argument that the knowledge requirement in section 12(3) of the Prescription Act should be read into section 67(1) of the Competition Act. It argued instead, that the provision merely provides a useful comparison. It further argued that section 67(1) of the Competition Act is open to two possible interpretations:

(a) first, it is a substantive time-bar, i.e., a prescription provision proper, which places an absolute prohibition on the initiation of a complaint in respect of a prohibited practice more than three years after the cessation of that practice; or

(b) second, it is merely a procedural time-bar, which can be condoned by the Tribunal in terms of its powers in section 58(1)(c)(ii) of the Competition Act, provided that good cause is shown.”¹²

[34] Counsel submits that regulation 15(4) should be viewed as a procedural time-bar, which can be condoned by the Commission. Contrary to the Competition Act which contains section 58(1)(c)(ii), the B-BBEE’s regulation 4 contemplates condonation of time limits on good cause shown, save where the time limit is binding on the Commission itself.

[35] In rebuttal, counsel for the applicants refers to the matter of *Sasol Oil Limited v The B-BEE Commission and others*.¹³ My brother Baqwa J was confronted with the same time-barring challenge. Notwithstanding that the Commission had notified the complainant of the need for more time, unlike in this case, the court held: “...the Commission’s findings are reviewable in terms of section 6(2) of PAJA in that a mandatory and material condition prescribed by the empowering provision was not

¹² Supra para 32.

¹³ [2022] ZAGPPHC 431.

complied with within the meaning of section 6(2)(b) and that the findings themselves contravened regulation 15(4) of the BEE Regulations within the meaning of section 6(2)(f)(i)."

[36] The court upheld the time-barring point because, *inter alia*, the Commission failed to provide the circumstances warranting a longer period. Secondly, it sought a two months extension to September 2018, yet it made its final findings in October 2019.¹⁴ In *casu*, the Commission failed to communicate to the complainant the need for an extension of time, nor give the circumstances warranting a longer extension period. It also failed to state the exact extension period required.

Discussion

[37] In interpreting regulation 15(4) of the B-BBEE Act, this court's first port of call is the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*.¹⁵ In dealing with the issue of interpretation, the court held:

"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible, or businesslike for the words actually used."¹⁶

¹⁴ Supra paras 60 and 61.

¹⁵ 2012 (4) SA 593 (SCA).

¹⁶ Supra para 18.

[38] Furthermore, in *Kubanya v Standard Bank of South Africa Ltd*¹⁷ the court held the following:

“It is well established that statutes must be interpreted with due regard to their purpose and within their context. This general principle is buttressed by s 2(1) of the Act, which expressly requires a purposive approach to the statute's construction. Furthermore, legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms. However, that does not mean that ordinary meaning and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament.”¹⁸

[39] When interpreting any legislation, this court must be mindful of section 39(2) of the Constitution. This section provides that: “when interpreting any legislation and when developing common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” Therefore, this court is bound to follow *Pickfords Removals* and conclude that regulation 15(4) is a procedural time-bar. However, in the absence of compliance with regulation 15(15) can this court condone the Commissioner's delay using regulation 4?

[40] For condonation to be granted in terms of regulation 4, the Commission stands and falls on good cause shown. Therefore, condonation is not there for the taking nor is it a mere formality. It can hardly be said that moving offices is a reason worthy of the court's consideration when examining condonation for a delay of almost a year. With reasons such as these and statements such as “it was an oversight on the part of the Commission not to inform the applicant of the need to extend the investigation period,” this court cannot help but wonder whether this is due to negligence combined with incompetence or a well-orchestrated stratagem to frustrate the mandate of the Act. Regardless of the reasons, this is tantamount to disregarding the enormous sacrifice of South Africans who paid the ultimate price for this constitutional democracy.

¹⁷ 2014 (3) SA 56 (CC).

¹⁸ *Supra* para 18.

[41] Under apartheid a dark complexion was an anathema. Hence, black South Africans were hated, prevented from accessing the means of production and deprived of possession of advanced skills. In fact, it is a misnomer to label black people as the previously disadvantaged, as is a common parlance of the government and business. Nothing could be further from the truth, black people are the previously discriminated against and presently disadvantaged. It is not by chance that black people are landless, poverty-stricken, unemployed *en mass*, and visited by all kinds of social and economic ills.

[42] The Commission was enacted with this background in mind; and to establish a legislative framework for the promotion of black economic empowerment, to transform the economic landscape and to promote the economic unity of the nation by promoting equal opportunity and equal access to government services.

[43] Therefore, the work of the Commission is of paramount importance. It is truly disheartening when its work is dealt with lackadaisically, as is the case in this instance. With access to State coffers and top lawyers, the Commission should not put a foot wrong in enforcing its own legislation. Regulation 15(4) is etched in peremptory terms, which cannot be escaped without invoking the provisions of regulation 15(15). How could a conscientious Commissioner, who comprehends how pernicious and poisonous apartheid was to black people, fall foul of regulation 15 (15)?

[44] In the absence of compliance with regulation 15(15) the Commission cannot be saved by regulation 4. As stated in *Pickfords Removals* “Condonation is not a mere formality – good cause must be shown. The concept of “good cause” is well-known in our law.”

[45] In the matter of *eTV (Pty) Ltd and Others v Judicial Service Commission and Others*¹⁹ the court held:

“it was accepted that the test had to be objective. In other words, it is not sufficient that “good cause” should exist purely in the mind of the decision-maker: the decision must, in addition, be objectively justifiable or survive objective scrutiny. Put differently, “good

¹⁹ 2010 (1) SA 537 (GSJ).

cause" in the mind of the decision-maker alone is simply not "good" enough. If questions such as the one in issue were to be interpreted purely against a subjective test, we might as well begin to put out the lights for any role for the courts as protectors and defenders of our constitutional order. "Justifiable" is not, however, synonymous with "agreeable to the court."²⁰

[46] The reason that the work of the Commission was affected by Covid-19 lockdown is the closest it comes to a reason worthy of the court's consideration. However, Covid 19 lockdown cannot account for the delay of almost a year. In its answering affidavit, the Commission states that: "As soon as the lockdown regulations were relaxed, the Commission proceeded to investigate the matter including communicating with Sand Shifters."²¹ Indeed, on 15 July 2020, the Commission advised SS Africa, SS and SS Logistics that they were merits in investigating them. Again, on 6 August 2020, the Commission requested further information and clarification from SS Africa, which was provided on 7 August 2020.

[47] Furthermore, the respondents submit that the applicants cannot be heard to be crying foul when they never sounded an alarm but "cooperated with the Commission outside of one (1) year and did not at no stage object to the continuation of the investigation until they received the preliminary findings on or about December 2020."²² This submission is fallacious because it is the commission that is required to comply with regulation 15(4)(g), not the applicants. The applicants could not have known that the respondents had sought an extension from the complainant, Mr Mahlangu. Therefore, it was prudent for the applicants to wait for the completion of the investigation before objecting.

[48] Ultimately, this court must ask itself if it is in the interest of justice to grant condonation, notwithstanding the delay of almost a year and paucity of reasons. Let me hasten to mention that before this court there is no application for condonation.

Dealing with the issue of condonation, Mokgoro J in *Bertie Van Zyl v Minister for Safety and Security*,²³ held the following:

²⁰ Supra para 544H-I.

²¹ Answering affidavit para 88.

²² Supra.

²³ 2010 (2) SA 181 (CC).

“However, in determining whether condonation may be granted, lateness is not the only consideration. The test for condonation is whether it is in the interest of justice to grant condonation.”²⁴

[49] Besides the issue of lateness, indeed, there are other germane factors to consider, such as the cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the issues to be raised in the matter, and the prospects of success.²⁵ Certainly, this list is not a *numerus clausus*.

[50] Still on condonation, Moseneke ACJ in *Ferris v Firstrand Bank*²⁶ held the following:

“As the interest of justice test is a requirement for condonation and granting leave to appeal, there's an overlap between these enquiries. For both inquiries, an applicant's prospects of success and the importance of the issue to be determined are relevant factors.”²⁷

[51] At a risk of repeating myself, save for the Covid 19 lockdown, this court is not favored with reasons for the delay, much less with reasonable explanation thereof. To my mind the delay of one year is not only unreasonable but also borders on the dereliction of duty. Most certainly there are weighty issues to be raised. Since the parties did not ventilate the merits, this court is not in a position to make a sound comment on the prospects of success.

[52] When all is said and done, the Commissioner failed to comply with the empowering provisions. In determining the interest of justice a court must have regard to, and carefully weigh, all relevant circumstances and factors.²⁸ Having examined the reasons for the delay and all relevant factors, I do not think it is in the interest of justice

²⁴ Supra para 14.

²⁵ *Pickfords Removals* at 37 para 54.

²⁶ 2014 (3) SA 39 (CC).

²⁷ Supra para 10.

²⁸ *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) SA 325 (CC) para 51.

to grant condonation. Therefore, the Commission is time-barred. As it was stated in *Pickfords Removals*, prescription is aimed at penalizing negligent inaction not the inability to act.

[53] I am also mindful of the need to tread carefully around the principle of separation of powers. The legislature deemed it meet to include the proviso “other than a time limit that is binding on the Commission itself” in regulation 4. The comity of the separation of powers is sacrosanct. Mogoeng CJ’s words reverberates in this court’s mind:

“Ours is a constitutional democracy, not a judiciocracy. And in consonance with the principle of separation of powers, the national legislative authority of the Republic is vested in Parliament[1] whereas the judicial and the executive authority of the Republic repose in the Judiciary[2] and the Executive[3] respectively. Each arm enjoys functional independence in the exercise of its powers. Alive to this arrangement, all three must always caution themselves against intruding into the constitutionally-assigned operational space of the others, save where the encroachment is unavoidable and constitutionally permissible.”²⁹

[54] For all the reasons mentioned above, the Commission contravened regulation 15(4)(g) of the B-BBEE. Therefore has fallen foul of section 6(2) of PAJA. In terms of section 8(1) the court must grant a just and equitable order.

PAJA Analysis

[55] In summarizing what constitutes an administrative action, Nugent JA, in the matter of *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*,³⁰ held:

“Administrative action means any decision of an administrative nature made...under an empowering provision [and] taken... by an organ of state, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of state, when exercising a public power or performing a

²⁹ *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* 2017 (9) BCLR 1108 (CC).

³⁰ (2005) 3 ALL SA 33 (SCA).

public function in terms of an empowering provision, which adversely effects the rights of any person and which has a direct external legal effect”.³¹

[56] In the matter of *Minister of Defence and Military Veterans v Motau and Others*³² the court held:

“[33] The concept of “administrative action”, as defined in section 1(i) of PAJA, is the threshold for engaging in administrative-law review. The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.[37] In the present matter there are two elements in dispute: whether the Minister’s decision under section 8(c) of the Armscor Act is of an administrative nature (element (a)) and whether it falls under any of the listed exclusions (element (g)). Both can be answered by interrogating the nature of the power.”

[57] All the criteria for an administrative action are fulfilled in that the first respondent, being an organ of state, took an administrative decision under an empowering provision which is not specifically excluded by PAJA, which decision adversely affected the rights of the applicants and has a direct and external effect.

Costs

[58] It is trite that costs follow the action. Indeed, it would not be in keeping with the values of *ubuntu*³³ to decide otherwise. Referring to this important African legal concept, the court in *S v Makwanyane and Another*³⁴ held:

“The concept carries in it the ideas of humaneness, social justice and fairness.”³⁵

³¹ Supra para 21.

³² 2014 (5) SA 69 (CC).

³³ It promotes restorative justice and it's a community centric ethos. The essence of Ubuntu is I am because we are. Kenyan writer or scholar James Ogude, a professor of African literature and cultures, believes Ubuntu might serve as a counterweight to the rampant individualism that's so pervasive in the contemporary world. “Ubuntu is rooted in what I call a relational form of personhood, basically meaning that you are because of the others. He was speaking at Addis Ababa in Ethiopia.

³⁴ 1995 (3) SA 391.

³⁵ Supra para 237.

[59] Chaskalson CJ had the presence of mind to recognize the role this African legal concept plays, albeit in a different setting. This court is of the view that one of the values of *Ubuntu* implicates the issues of costs. Costs are a matter of fairness to both sides.³⁶ *Ubuntu's* role needs to be dusted off, magnified and elevated to its rightful place in our jurisprudence. *Umuntu ngumuntu ngabantu or motho ke motho ka batho or munhu i munhu hivanwani vanhu* is one of the many values engraved in *Ubuntu*, besides humanity, social justice and fairness mentioned *supra*. In my limited understanding of the English language, this means: "you are because we are". Unfortunately, a lot is lost in that translation.

[60] Deeply embedded in that concept is fairness, the assertion that one (the applicants) should not be out of pocket as a result of another person's (respondents') conduct or for merely enforcing one's rights. Therefore, *Ubuntu* is also an instrument to address and redress the wrongs in order to protect the vulnerable. Consequently, *Ubuntu* fits snugly in the issues of costs as well. *Ubuntu* is not a feeble philosophy, it is firm albeit empathetic. In exercising my judicial discretion on costs, I view the facts through the prism of *Ubuntu*, especially the *umuntu ngumuntu ngabantu* value. I conclude that the applicants are entitled to the cost of this action.

Order

In the result, I make the following order:

1. The respondents' application is dismissed
2. The final findings issued against the first, second and third applicants on 9 June 2021 are hereby reviewed and set aside.
3. The first respondent is ordered to pay the costs of this application.

³⁶ *Geerdts v Multichoice Africa (Pty) Ltd* (JA88/97) [1998] ZALAC 10 (29 June 1998) para 48.



M.P. JUDGE MOTHA
JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 27 July 2023

Date of judgement: 24 October 2023

APPEARANCES

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