

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: GRAHAMSTOWN]**

CASE NO. 2202/2019

In the matter between:

ALGOA BUS COMPANY (PTY) LTD

Plaintiff

and

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY

1st Defendant

SPECTRUM ALERT ITS (PTY) LIMITED

2nd Defendant

ALGOA TAXI ASSOCIATION

3rd Defendant

NORTHERN AREAS TAXI ASSOCIATION

4th Defendant

**MEMBER OF THE EXECUTIVE COUNCIL FOR TRANSPORT
AND PUBLIC WORKS: EASTERN CAPE**

5th Defendant

MINISTER OF TRANSPORT

6th Defendant

JUDGMENT

JOLWANA J

[1] The plaintiff is a bus operator providing scheduled bus services within the area of jurisdiction of the first defendant. The said bus services are provided pursuant to Interim Contract Number IC67/97 which was concluded in terms of the National Land Transport Act No.5 of 2009 (the Act). That interim contract was concluded in March 1997 between the plaintiff and the sixth defendant. The sixth defendant ceded and

assigned all its rights in terms of the said interim contract to the Eastern Cape Provincial Department of Transport. Various addenda were thereafter concluded between the plaintiff and the Eastern Cape Department of Transport since the conclusion of the interim contract in 1997. The latest addendum applicable to this matter is addendum No.11 which was concluded in April 2019 for a two-year period.

[2] The first and second defendants concluded a Vehicle Operating Company Agreement (VOCA) in September 2017 annexed to the plaintiff's particulars of claim as annexure "POC3" and annexure "A" to the first defendant's plea for the operation of starter bus services. It is alleged that the third and fourth defendants are shareholders in the second defendant. The second defendant, acting through the members of the third and fourth defendants provide transport services at certain locations as set out in the VOCA in terms of which it is appointed as an operator. The second defendant is paid service fees and the third and fourth defendants are paid a government subsidy for the provision of transport services including the Cleary Park to Port Elizabeth Central Business District route.

[3] This route, pleads the plaintiff, is in all material respects a duplication of some of the plaintiff's authorised routes and/or sections thereof. The plaintiff pleads that the provision of transport services by the second defendant pursuant to the VOCA has caused the plaintiff to suffer a loss of income in respect of certain identified routes. The plaintiff further pleads that the VOCA is not a negotiated contract as contemplated in section 41 of the Act. In particular, the VOCA is not consequent upon negotiations as contemplated in section 41 of the Act which in terms of section 41(2), must include negotiations with the plaintiff.

[4] The plaintiff pleads that the conclusion of the VOCA, and therefore the payment of service fees to the second defendant and the payment of subsidies to the third and fourth defendants in terms thereof are invalid and fall to be declared as such and set aside in that the VOCA is not an agreement contemplated in section 41 or the one contemplated in section 46 of the Act. Furthermore, the said contract was not put out to tender and accordingly it is not in compliance with section 217 of the Constitution in that it was not in accordance with a system that is fair, equitable, transparent, competitive and cost effective. The conclusion of the VOCA also did not comply with the first defendant's Supply Chain Management Policy contemplated in section 111 of the Local Government: Municipal Finance Management Act 56 of 2003 read with the Municipal Supply Chain Management Regulations published in terms thereof.

[5] On these bases the plaintiff instituted action proceedings seeking, in the main, compensation for damages allegedly suffered by it consequent upon the authorisation of the second defendant to operate outside the confines of the Act thus in breach of the principle of legality and the payment of subsidies to the third and fourth defendants all of which caused the plaintiff to suffer damages in that it lost passengers over the affected routes.

[6] It is common cause that in order for the plaintiff to successfully pursue its damages claim it must first obtain an order reviewing and setting aside the VOCA in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Indeed the plaintiff seeks the said order and also seeks condonation of any delay in launching these proceedings and an extension of the 180-day period envisaged in section 7(1) (b) of PAJA. The said condonation and extension are sought in terms of section 9 of PAJA on the basis that it is in the interests of justice to condone the delay and

extend the 180-day period to at least one day after the service of the summons commencing action on the defendants. This, only in the event that it is found to have instituted this action after the expiry of the 180-day period provided for in section 7(1) (b) which it denies.

[7] No order is sought against the third, fourth, fifth and sixth defendants. They also did not defend the action nor participated in these proceedings. The second defendant initially defended this action and in that regard, filed its plea. However, it later filed a notice of withdrawal of its defence as well as a notice to abide the decision of this Court. Only the first defendant pursues its defence of the action in respect of all the orders sought.

[8] In its plea, the first defendant admits the agreement referred to above as VOCA. It also admits that the second defendant is appointed as an operator as defined in clause 1.73 of the VOCA and that it remunerates the second defendant as agreed between itself and the second defendant. Especially, the first defendant admits the pleaded terms of the VOCA to the extent that they are pleaded consistently with the agreement itself. Most importantly, the first defendant admits that certain routes utilized by the second defendant do in fact overlap with some of the plaintiff's routes to some extent.

[9] Prior to the commencement of the trial, the plaintiff and the second defendant sought and obtained an order of this Court by agreement, separating the issue of the declaration of invalidity of the VOCA from the rest of the other issues in dispute in the pleadings. There are two other issues that, for obvious reasons, need to be resolved first which have been raised pertinently in the pleadings. These are whether the plaintiff unreasonably delayed in instituting these proceedings. If so the

second related issue is condonation of such delay and the extension of the 180-day period referred to in section 7 of PAJA to at least one day after the service of the summons commencing the action in terms of section 9 of PAJA.

[10] The plaintiff issued the summons commencing action in these proceedings on 22 July 2019 and the summons was served on the first defendant on 24 July 2019. The plaintiff contends, in the first instance, that as a matter of law it is entitled to seek an order setting aside by way of action proceedings or as part thereof, the administrative action on the grounds contemplated in PAJA. The first defendant did not appear to be contesting the plaintiff's right to do so by way of action proceedings as against motion proceedings. This indeed is the correct legal position in my view for the reasons that will become clearer hereinafter.

[11] Section 1 of PAJA defines an "administrative action" as any decision taken or any failure to take a decision, by -

“(a) an organ of state, when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) ...”

[12] The first defendant admits that in entering into the VOCA it did so as provided for in section 41 of the Act and therefore it was performing a public function. While it is more common than otherwise that litigants would institute motion proceedings when seeking to set aside an administrative action, section 6 of PAJA specifically refers to any person instituting proceedings in a court or tribunal for judicial review of an administrative action. The word “proceedings” when not prefixed by the word

“action” or “motion” refers to both action and motion proceedings. Therefore, it would be perfectly in order for a litigant to institute action proceedings, if so minded, and not motion proceedings when seeking an order for the review and setting aside of an administrative action.

[13] In its pleadings the plaintiff has given some explanation of the circumstances in which the action was only instituted in July 2019 and not earlier. The plaintiff’s central contention in that regard is that it instituted the action without unreasonable delay and in any event, not later than the 180-day period referred to in section 7(1) of PAJA. Section 7 (1) provides thus:

“Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date -

- (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or
- (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.”

[14] In its particulars of claim the plaintiff annexed the VOCA as annexure “POC3”. That document is the exact replica of annexure “A” to the first defendant’s consequentially amended plea. However, it is the plaintiff’s contention in its consequentially amended replication that it was made aware of the agreement on delivery of the first defendant’s consequential plea being the agreement signed by both parties which was annexed thereto. The plaintiff therefore denies having instituted the action outside of the time constraints imposed by section 7 (1). However, even in the original plea, the first defendant never proffered any disavowal of “POC3” which was signed only on behalf of the first defendant and not the other party thereto which is the second defendant. In fact, if anything the first defendant

confirmed the authenticity of “POC3” only pointing out that it was in possession of a copy signed by both parties.

[15] The plaintiff’s contentions with respect to “POC3” – on which it in any event relied for the institution of this action about the fact that it was signed only by the first defendant are clearly untenable. This is so for a number of reasons. First, the action was instituted long before April 2021 when the plaintiff claims to have had sight of annexure “A” signed by both parties for the first time. No better information could have been gleaned from annexure “A” which was not part of or contained in “POC3”. There is no evidence that the first defendant ever distanced itself or attempted to disavow or dispute the authenticity of “POC3”.

[16] The evidence of Mr Brink, one of the plaintiff’s directors and its only witness, included the narration that after the 2010 soccer world cup for which certain commuter transportation arrangements were made by the first defendant including the acquisition of 24 articulated buses, the first defendant embarked on a process to formalise the taxi industry. This was done in preparation for integrated transport services as envisaged in section 41 of the Act. This section 41 process, properly undertaken should include the plaintiff, the taxi industry and other smaller bus operators in Port Elizabeth. In or about 2013 the plaintiff decided to assist the plaintiff in that pilot project for about a year. From 2014-2017 the first defendant worked on operational plans until the plaintiff saw some buses operating in 2018. They had, for a while been writing letters and making numerous attempts to engage the first defendant asking for their inclusion in what they understood to be a section 41 process and in which they should ordinarily be included. In a letter dated 23 March 2018 the first defendant’s municipal manager assured the plaintiff that their apparently lucrative route, Cleary Park – CBD route would not be duplicated by the

starter bus service. They were also assured that should it be determined that there was compensation due to the plaintiff because of the starter bus service, the plaintiff would be compensated. In May 2018 the plaintiff not only became aware of the starter bus service operating in its area but also it became aware of its impact on its income-generating capacity because of the starter bus service overlapping on the Cleary Park route. I do feel that to the extent that the plaintiff felt that it did not have enough information – that should have been enough for the plaintiff to take legal action to force the recalcitrant first defendant to make a full disclosure of what was going on especially any underlying agreement that was in place at the time. This could have been in addition to interdicting the process if it chose to do so as the plaintiff's attitude was that what was going on was not a proper section 41 process.

[17] I do not understand why the attempts to engage the first defendant had to be numerous while the negative impact on its profits was manifest and the first defendant was at the same time not playing open cards with the plaintiff or appeared to be unwilling to do so as it alleged. While it is plausible that the plaintiff might not have been aware of the content of any agreement between the first and second defendants either in September 2017 when the said agreement was concluded or May 2018 when it felt the impact on its income as a result of the introduction of the starter bus service, it had enough to demand reasons for the operation of the starter bus service. The plaintiff could have used anyone of the many mechanisms provided for in the legal framework including section 5 of PAJA to demand to be furnished with reasons and any underlying agreement for the starter bus service. Section 5 (1) of PAJA reads:

“Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within

90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.”

[18] Even if the plaintiff felt that it did not, at that stage, have enough information for this action, it clearly had enough to insist, through legal action if necessary, on being furnished with the reasons and the underlying agreement. It did not. On the evidence of Mr Brink the plaintiff at some stage in 2018 felt a reduction in passengers in the Northern areas including the Cleary Park route. They, as directors of the plaintiff, raised a huge concern and instructed their lawyers to write letters on a continuous basis asking for more information and at some stage sent invoices for loss of income due to the starter bus service operation in line with an undertaking for compensation which had been made in March 2018. Even on the basis of this evidence it is not clear why no legal process was embarked upon to force the first defendant to place them in possession of any relevant documents because, at least on the plaintiff’s contentions, the starter bus service was an illegal operation. This could easily have included an interdict stopping the illegal operation to arrest the loss of income which was already evident.

[19] Mr Brink testified that in October 2018 the plaintiff was furnished with a copy of the VOCA annexed to the particulars of claim as “POC3”. This document was handed to Mr Brink’s fellow director, Mr Duze by Mr Gaushe who, on Mr Brink’s evidence, was intimately involved with the starter bus service project as an official of the first defendant. Even though “POC3” was not signed by the other contracting party, it did place the plaintiff in an even better position of knowing who the other contracting party was and what were the terms of the agreement. I am of the view that in order to interdict an unlawful conduct like the operation of the starter bus service the plaintiff did not need to be in possession of that agreement especially

because it believed the said operation to be illegal and in contravention of section 41.

[20] The requirements imposed by section 7 (1) (b) are three fold. The first one is that the person concerned must have been informed of the administrative action or somehow become aware of it. The second, which is linked to the first one is that of awareness of the reasons for the administrative action or a position in which it reasonably, might have been expected to have become aware of the action and the reasons for it. Whatever else happened before October 2018 at the very least – and a lot did happen during that period which ought to have spurred the plaintiff into meaningful action, the receipt of “POC3” by the plaintiff in October 2018 should have given the plaintiff even more information than the minimum it needed and caused it to act more decisively. Therefore, nothing prevented it from immediately approaching this Court. I agree with the first defendant’s contention that rule 53 was just one of the many legal processes that were easily at the plaintiff’s disposal if it wanted to act without unreasonable delay.

[21] When asked under cross examination about the specific time when the plaintiff became aware that the starter bus service was in fact operating, Mr Brink became less than clear, at times merely referring to sometime in 2018 and not being more specific. This is strange in light of the consequentially amended replication which clearly states that in May 2018 the plaintiff became aware that a starter bus service was operating and impacting on its income generating capacity because it was overlapping on the Cleary Park route. I do not think that it should have been difficult for the plaintiff’s witness to be more exact and its difficulty in that regard is incomprehensible. This is more so that the impact of what they considered to be an illegal operation was acted upon with invoices being issued. Issuing invoices was a

choice made, I would assume, carefully, regardless of the fact that it could lead to the prescribed timelines for the institution of review proceedings being at the risk of not being observed. This is also irreconcilable with some of Mr Brink's evidence at some point during cross examination in which he testified that in November 2018, December 2018 and January 2019 the starter bus service *"was already implemented, it was running for six months when the MOA was done"*.

[22] In October 2018 the plaintiff was placed in possession of POC3 which contained details of the agreement on the basis of which the starter bus service was being operated. Still no legal action was instituted but the plaintiff continued with the engagements despite not being paid even after having presented some invoices for loss of income. These invoices were presented inordinately even though they were not being paid until July 2019. It is not clear to me why from October 2018 legal action was still not instituted until about 10 months later in July 2019 when summons was issued. The plaintiff, which was, throughout, represented by attorneys, could not have been oblivious to the time limits prescribed in section 7(1) to institute review proceedings within 180 days. It is difficult to avoid the conclusion that the plaintiff was at the very least prepared to allow the starter bus service to continue if it was being compensated for its loss of income. This is very concerning and not in line the plaintiff's belief that the starter bus service did not comply with the legal prescripts especially section 41 and/or the procurement processes provided for in section 217 of the Constitution and was therefore tainted with illegality.

[23] At the very latest, the plaintiff would have become fully aware of everything they needed to know in October 2018, when POC3 was handed to Mr Duze by Mr Gaushe. I pause now to point out that even that is being generous to the plaintiff because on the objective analysis of its own evidence, it reasonably ought to have

become aware that there was an agreement on the basis of which the second and/or third and fourth defendants were allowed to operate on its routes and impacting on its income even long before October 2018. After all, on Mr Brink's evidence, there were good relations between Mr Duze and Mr Gaushe. If the relations were as good as to make it possible for Mr Gaushe to give the agreement to Mr Duze, I simply do not understand that Mr Gaushe would have been reticent about what was going on. This is besides legal action that could have been taken not only to stop the illegal conduct as soon as the buses started operating but also to get more information about what was happening to the extent that the plaintiff believed that it needed more information. The only reason they took almost a year to institute legal proceedings from October 2018, it seems to me, was not because they were looking for a signed document but must have been because they were prepared to allow the starter bus service to continue if they were compensated. This is irreconcilable with the plaintiff's stated position that the VOCA or POC3 should be reviewed and set aside on the basis of illegality.

[24] The plaintiff's own evidence shows that the plaintiff had, for a significant period of time, been aware of the first defendant's intentions about starting a process that was intended to culminate in a section 41 process. Mr Brink's evidence was that the plaintiff even participated and/or assisted the first defendant because of its vast experience and resources in the transport sector. It is so that they wrote numerous letters, through their lawyers and also held numerous meetings in which the issue of the integrated transport service was raised or would have been discussed and including the starter bus service that was to be introduced. They had throughout maintained that what the first defendant was doing was not a proper section 41 process to which they were entitled to be involved. Mr Brink's evidence was that

they had reservations in being involved in the starter bus service on the basis that section 41 allows only one opportunity to participate in negotiations. The plaintiff feared that if it participated in the negotiations about the starter bus service they might jeopardise their participation in an all-inclusive section 41 process in the future. This, in my view, is all the more reason why the plaintiff should have interdicted the process since it considered it to be an illegal operation. Its explanation that it did not do so because of the fear of damage to its buses or endangering the lives of passengers is clearly an afterthought to explain its failure to take legal action not later than 180 days. It is not without significance that even in these proceedings one of the prayers the plaintiff seeks is to interdict the operation of the starter bus service. This begs the question, will its buses and passengers be safe if the interdict were to be granted and if so why? This is not explained or dealt with by the plaintiff.

[25] As far back as March 2018 there appears to have been an undertaking for compensation of the plaintiff's losses should it be deemed and agreed that compensation was due to the plaintiff. On the basis of such an undertaking, which was itself made subject to an agreement that compensation was due to the plaintiff it elected not to interdict the starter bus service. The undertaking was not in the form of an agreement signed by both parties. It was contained in a letter with no clear terms or criteria for the determination of when compensation would be due and a clear legal basis and computation of such compensation. It is worrisome that the plaintiff, as a corporate citizen, was clearly prepared to allow and acquiesce to what they deemed to be an illegal process to continue if compensation was paid to them if its evidence relating to the undertaking is anything to go by. I am of the view that no valid undertaking could be made on the strength of an illegal starter bus service based on an allegedly unlawful agreement, the VOCA.

[26] There was also evidence of a legal opinion having been sought and obtained from advocate Pienaar SC by the first defendant about whether or not the introduction of the starter bus service complied with section 41 of the Act. If there ever was a time during which the plaintiff had some uncertainty about the correctness of its understanding of section 41 and the alleged unlawfulness of the starter bus service that the first defendant had commenced with, the opinion of advocate Pienaar SC must have cleared that uncertainty. The plaintiff accepted that opinion which was in any event along the same lines as its own view that the starter bus service could not be done outside of section 41 of the Act or used to circumvent the Act. The plaintiff must have received that opinion at the latest in July or August 2018 from the first defendant. The plaintiff still did not interdict the unlawful process and elected to continue writing letters to the plaintiff, through its attorneys and engaging with the first defendant while the second defendant's buses continued to operate. Those engagements included an exchange of MOAs the last of which was in September 2018. The first defendant never showed any tangible commitment to those engagements.

[27] It is worth noting that one of the main reasons given by the plaintiff for not instituting the action before October 2018 was because it did not have the contract. Therefore, it did not have the information contained therein, the terms thereof including the identity of the other party to the contract. It is difficult to understand why the plaintiff did not institute the action soon after being placed in possession of the contract by Mr Gaushe. Even after getting the contract the plaintiff delayed for almost a year from October 2018 when it received a copy of the contract to the 22 July 2019 when it eventually issued the summons. This delay has not been fully and sufficiently explained. The plaintiff has not cogently explained why from October

2018 no legal action of whatever nature or form was instituted for about nine months until July 2019 beyond the endless engagements in meetings and writing of letters.

[28] All this delay happened in circumstances in which the plaintiff's erstwhile attorneys were involved in assisting the plaintiff and did provide legal advice and support. It is therefore safe to conclude that both the plaintiff and its attorneys did not act promptly and timeously for some other reasons. The requirements in section 7 (1) (b) of PAJA are that the application for the review of the administrative action must be instituted, in the first instance without unreasonable delay, and in any event not later than 180 days from the date of being aware of the administrative action and the reasons therefor. It is also concerning that the plaintiff's attorneys at the time, agreed to act for it while they were also in the first defendant's panel of attorneys and were also involved in the issue of the integrated public transport service on behalf of the first defendant. In that way they were advising both the plaintiff and the first defendant on that issue despite their divergent views on the implementation of section 41. However, the plaintiff has stayed clear of even alluding to this as having contributed or played a role in how the prescribed time limits in PAJA were not observed. This also possibly explains this unquenchable desire for an amicable resolution of the issues which Mr Brink alluded to in his testimony. Whether this is the case or not remains unclear but it is a concern at least from the ethical point of view.

[29] In *Kirkland Investments*¹ Cameron J expressed the following sentiments about the state which are, in my view, apposite herein in relevant respects. He said:

¹ *MEC for Health Eastern Cape and Another v Kirkland Investments (Pty) Ltd t/a EYE & Lazer Institute* 2014 (3) SA 481 (CC) para 82-83.

“... PAJA requires that the government respondents should have applied to set aside the approval, by way of formal counter-application. They must do the same even if PAJA does not apply. To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right and it must do it properly.

Counsel for the department told this court, as he told the Supreme Court of Appeal, that, if the department had to bring a counter-application under PAJA, it would face the 180-day rule. Well, precisely. An explanation for the delay is a strong reason for requiring a counter application. But, even outside PAJA, the position is the same. This court recently confirmed in *Khumalo* that litigants, including public functionaries, are bound by statutory and common-law time limits and may not circumvent them using procedural tricks. The same is true here.”

[30] If the rule of law is to be restored and maintained in this country all citizen including corporate citizens like the plaintiff cannot turn a blind eye to an illegality while they pursue their financial interests. This is more so if in the process of pursuing financial interests or even an amicable resolution of the dispute, they allow the time limits prescribed in legislation such as PAJA to elapse. The higher duty on the state to which Cameron J referred to in *Kirkland* to respect the law and to fulfil procedural requirements is, in my view, equally applicable to corporate citizens. They are not in the same position as ordinary citizens most of whom might not afford legal services. Corporate citizens have a duty higher in my view than that of ordinary citizens for the simple reason that compliance with the legal and regulatory framework is in their business interests. They generally have the wherewithal including the legal and financial resources to ensure that they comply with the legal framework in which their businesses operate. They are in a position akin to that of

government. They are not *“indigent or bewildered litigants, adrift on a sea of litigious uncertainty, to whom courts must extend a procedure-circumventing lifeline.”* Mr Brink testified that the plaintiff operates about 400 buses. It is clearly not a small player in the transport sector and has been, on Mr Brink’s evidence, in operation for more than a century. Mr Brink should agree with this assessment. Part of his evidence was that *“if something does not sit within the NLTA – we are a bus company for more than 100 years, we operate strictly within the boundaries of legislation.”*

[31] I am by no means suggesting that the requirements to comply with prescribed time limits should be lesser for ordinary citizens some of whom may be poor. I am merely stating the obvious, which is that for corporate citizens compliance with the law is their life sustaining blood and for them it should be easier than for most South Africans. The plaintiff could and should have given a better and fuller explanation instead of relying on endless engagements that did not go anywhere. This is more so that the invoices were not being paid, the MOAs which had been exchanged in the engagements were not being concluded despite numerous attempts by the plaintiff to conclude the matter.

[32] Part of the plaintiff’s case is that because of the undertaking for compensation, the plaintiff did not take legal action in the face of what they considered to be an illegal operation in the form of the starter bus service which operated in contravention of the provisions of section 41. It is clear that the attempt to get compensation played a huge role in causing the plaintiff not to institute these proceedings timeously and in any event within the 180-day period provided for in PAJA. It must be remembered that the main reason for this action is the recovery of damages allegedly suffered by the plaintiff because of the introduction of the second

defendant's buses in terms of the VOCA. Undertakings of compensation cannot excuse the plaintiff from basically turning a blind eye as it seems to have done, to procedural irregularities or illegalities that it was aware of.

[33] This kind of conduct could easily undermine the constitutional framework and the rule of law that the plaintiff claims to be upholding by seeking to set aside the VOCA. It also shows that the plaintiff was not interested in procedural rectitude and observance of the legal prescripts but it superimposed its short-term benefits of getting compensation over legal requirements. I have serious reservations about the legal basis for the payment of the invoices which the plaintiff presented. It is troubling, to say the least, that had the first defendant paid those invoices, it would essentially have paid both the plaintiff and the second defendant for duplicated services in a manner that would have been simply absurd. I feel that such payment would have been in exchange for the plaintiff not interdicting what they deemed to be an illegal process. It might even have been in exchange for the unlawful introduction of the second defendant's buses or taxis, if the plaintiff's contention that they ought not to have been allowed on the road is to be accepted in the circumstances especially outside the section 41 framework. I therefore conclude that the plaintiff unreasonably delayed in instituting this action.

[34] The plaintiff contends that if it is found that it delayed unreasonably in instituting this action for review, such delay should be condoned in terms of section 9 of PAJA in the interests of justice. It also seeks an order that the 180-day period be extended in terms of section 9 from October 2018, alternatively from May 2018, alternatively from March 2018 to one day after the date of service of the summons commencing action. The plaintiff has not explained, pleaded nor given evidence of what the interests of justice are in its view which will be served by the extension of the 180-

day period. There is also no explanation of what interests of justice would be negatively affected if the period is not extended beyond it suffering financial losses. It is so that section 9 imposes a condition for the extension of the 180-day period. That condition is that the interests of justice must require that the period be extended. The plaintiff has not shown how the interests of justice, whatever they are, require an extension. A litigant may not just apply for the extension without frontally dealing with how it will be in the interests of justice to do so and expect the court to make up its mind about that.

[35] The plaintiff's conduct as gleaned from its pleaded case and evidence is in some ways, clearly not about the validity or otherwise of the first defendant's implementation of section 41 or non-compliance therewith. This is also shown by the fact that at some stage it was prepared to allow the non-compliance complained of if it was paid compensation. In other words, it was prepared to turn a blind eye to what it now calls a violation of the constitutional principle of legality if it was indemnified against losses as a result thereof. This is troubling because the Constitution is very clear that law or conduct in violation of the Constitution is invalid. This cannot and should not be countenanced as it makes the constitutional principle of legality subject to financial considerations such as compensation. That must surely also mean, in context, that the compensation which was promised or undertaken to be paid by the first defendant in its letter dated 23 March 2018 would also have been invalid. It would also mean that it is possible to sacrifice the fundamental principle of legality in lieu of payment be it in the form of compensation or for some other reason. This is besides the fact that payment of the said compensation would have been prejudicial to the rate payers of the first defendant who would be paying fees and subsidies to both the plaintiff and the second and/or third and fourth defendants. This

approach to constitutionalism in general and to the principle of legality in particular would, in my view, wreak havoc to our nascent democratic fibre were it to be countenanced. I am of the view that financial interests cannot be allowed to lead to nor should they be used to justify non-compliance with the law unless there is a sound legal basis for doing so.

[36] The other issue that the plaintiff raised in its pleadings is the facilitative role that Mr De Villiers, the erstwhile attorney of the plaintiff played on the overlapping of routes and other issues. The question of whether or not section 41 was complied with is not and was not related to or even interlinked with whether or not routes overlapped in my view. The overlapping of routes could be related to compensation. In fact, it was for the reason of the possibly overlapping routes that the question of compensation arose. The issue before me at least at this stage is not whether or not the plaintiff is entitled to compensation, but whether or not the 180-day period provided for in section 7 of PAJA should be extended in terms of section 9. If the period is extended the next question is whether POC3 or VOCA should be declared invalid. Again the latter question is unrelated to whether or not compensation is due to the plaintiff but whether or not in concluding and implementing the VOCA section 41 was complied with. If I am correct in this analysis, it follows that the overlapping of routes and the discussions related thereto and the time it might have taken to seek agreement about those issues cannot possibly be used to explain the delay and therefore to make a case for condonation and the extension of the 180-day period. It has not been explained why all those engagements including the facilitative role of Mr De Villiers could not have been embarked upon but still observe the 180-day period.

[37] I do think that to an extent the plaintiff might have misconstrued the relevant case it needed to make and pleaded its case and gave some of its evidence as if had compensation been paid it could justifiably have been entitled to delay in instituting the review proceedings. Alternatively, it would have been correct to allow the starter bus service to continue and not challenge its legality or compliance with section 41 as long as the first defendant continued paying its invoices so that what it considered to be an unlawful process would continue. This puts into doubt the plaintiff's fidelity to the rule of law. Unlawful conduct is just that, unlawful conduct and therefore unconstitutional. Parties may not agree to pay compensation to one another and on that basis a crucial decision is not sought to be reviewed and set aside timeously. Therefore, contrary to what the plaintiff seeks to do by asking this Court to extend the 180-day period in the interest of justice, I am of the view that it would not be in the interest of justice to extend the period where legislation such as PAJA was ignored while the plaintiff pursued its financial compensation. If it is indeed so that section 41 was not complied with as plaintiff contends and the plaintiff allowed the timelines prescribed in PAJA to elapse hoping to be paid compensation, it clearly was prepared to accept the contravention of section 41 as long as it was paid. I fail to see how, among other considerations, in those circumstances, it could correctly be said that the extension of the 180-day period is in the interests of justice. Financial interests do not equate to interests of justice without more where, on the facts of this case, compliance with legislation was basically ignored.

[38] The plaintiff's case as pleaded is not without other difficulties in relation to the merits, even if it was so that section 41 had been contravened. In its particulars of claim the plaintiff in part, pleads as follows:

“38. By virtue of the first defendant’s failure to comply with the provisions of the Act and in breach of the principle of legality by authorising the Second Defendant to operate outside the confines of the Act (and to unlawfully and in breach of the principle of legality subsidize the third and fourth defendants) the plaintiff has suffered damages in that it has lost passengers over the affected routes.

39. Such loss of passengers is directly caused by the unlawful actions on the part of the first, second, third and fourth defendants by virtue of the transport of passengers by the second defendant over the Clearly Park CBD / Booyens Park / CBD / routes and by the third and fourth defendants to and from the pick-up locations on the affected routes. The transport of passengers by the third and fourth defendants overlap the affected routes.

40. By virtue of the diminution in passengers on the affected routes, the plaintiff has sustained losses in revenue in respect of fees payable for the services rendered in terms of Interim Contract Number IC67/97 as amplified by the latest addendum, Addendum 11.”

[39] There is no clearly pleaded basis for the damages claimed. The plaintiff’s case is not based on contract or breach thereof nor is it alleged that there was some non-compliance with IC67/97 leading to the loss claimed. The claim is also not based on some form of negligence on the part of the first defendant or the duty of care allegedly owed to it that was breached. None of that is pleaded. The damages claimed are also not based on any of the provisions of PAJA. It was contended on behalf of the first defendant that while section 41 of the Act is the section the plaintiff alleges the first defendant breached, section 41 does not contemplate a claim for compensation for damages in the event of a breach thereof. It has not been pleaded nor was it contended that that section 41 envisages compensation in the event that it is not complied with. In fact, even a reading of section 41 does not lend itself to such interpretation.

[40] Section 41 reads:

- “(1) Contracting authorities may enter into negotiated contracts with operators in their areas, once only, with a view to –
- (a) integrating services forming part of integrated public transport networks in terms of their integrated transport plans;
 - (b) promoting the economic empowerment of small business or persons previously disadvantaged by unfair discrimination; or
 - (c) facilitating the restructuring of a parastatal or municipal transport operator to discourage monopolies.
- (2) The negotiations envisaged by subsections (1) and (2) must where appropriate include operators in the area subject to interim contracts, subsidised service contracts, commercial service contracts, existing negotiated contracts and operators of unscheduled services and non-contracted services.
- (3) A negotiated contract contemplated in subsection (1) or (2) shall be for a period of not longer than 12 years.
- (4) The contracts contemplated in subsection (1) shall not preclude a contracting authority from inviting tenders for services forming part of the relevant network.
- (5) Contracting authorities must take appropriate steps on a timeous basis before expiry of such negotiated contract to ensure that the services are put out to tender in terms of section 42 in such a way as to ensure unbroken service delivery to passengers.”

[41] I do not understand any of these provisions to envisage a possible claim for damages in the event of the breach of any of its provisions. Besides the broad reference to section 41 and the alleged non-compliance therewith it is difficult to understand the basis for the claim. A breach of a legislative provision does not, in my view, without more, result in a claim for compensation in the event of a breach. The plaintiff’s claim for damages is at best speculative with no clear legal basis. This speaks to the prospects of success which are part of the overall consideration of whether an unreasonable delay should be condoned.

[42] In *Aurecon*² the Constitutional Court stated the relevant legal principles as follows:

“Nonetheless, due regard must also be given to the importance of the issue that is raised and the prospects of success. In this case that means that considering the significance of the alleged procedural irregularities that were raised in the Ernst & Young report. It should be borne in mind that, when carrying out a legal evaluation a court must, where appropriate, ‘take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision’.

The SCA held that the procedural irregularities as alleged were not in fact irregularities at all and, before this court, the City did little to assuage that finding. If the irregularities raised in the report had unearthed manifestations of corruption, collusion or fraud in the tender process, this court might look less askance in condoning the delay. The interests of clean governance would require judicial intervention. However, this is not such a case and a weighing of factors leans decidedly against granting condonation.”

[43] The plaintiff’s supine approach has not been sufficiently explained and that militates against the granting of condonation if regard is had to the first defendant’s argument that the plaintiff waited until the agreement had run half its course before instituting these proceedings. The agreement has now run its full course and has expired by effluxion of time. It is not in dispute that over the period the second defendant and other relevant parties have been paid based on the agreement. If the delay is condoned and the agreement is declared unlawful, it follows that all payments made consequent thereto will also become unlawful. The plaintiff has not dealt with this eventuality. All of this could have been avoided by the plaintiff acting promptly and not allowing what it considered to be unlawful conduct to continue in the hope of claiming compensation that would have accumulated over the period. Precisely because of this, whilst the second defendant and/or the third and fourth

² Cape Town City v Aurecon SA (Pty) Ltd 2017 (4) SA 223 (CC) at 240 paras 49-50

defendants have been paid, the plaintiff also seeks to be paid for what it calls the duplicated routes and the loss of income attendant thereto.

[44] What the plaintiff seems to be suggesting is that because the first defendant breached the provisions of section 41 it is entitled to be paid compensation for damages in the form of loss of income. I do not understand section 41 to be capable of an interpretation that on its mere breach any damages that might have been suffered as a result of such breach are recoverable from the transport authority such as the first defendant. This is besides the fact that the legal basis on which such liability should be imposed in the event of it being found that the first defendant did not comply with section 41, seems to be bereft of any legal basis. This casts further doubt as to the prospects of success in my view and as such weakens the plaintiff's case on condonation quite significantly.

[45] In *Odinfin*³ the court said:

“The fact that PAJA does not afford a delictual remedy for damages does not necessarily mean that unjust administrative action will not be delictually wrongful if there was a breach of the statute pursuant to which the administrative action was taken and if such statute on a proper interpretation confers a delictual remedy. In the instant matter, however, Reynecke does not allege that there was a breach of the FAIS Act. And even if there had been a breach of s 14 of the FAIS Act, I do not consider that the FAIS Act envisages a delictual claim for damages. The primary aim of s 14 is not to protect the interests of employed representatives such as Reynecke but to advance the public good. Odinfin had no option but to debar Reynecke once it found him lacking honesty and integrity. The imposition of liability for damages would have a ‘chilling effect’ on the performance by FSPs of their statutory duty imposed by s 14 and on the administration of the FAIS Act. There is no difficulty in imposing liability where the decision-maker acts dishonestly or corruptly but our courts have been slow to find that statutes accord delictual remedies for mere negligence. Here Reynecke wanted the court a quo to go even further and impose strict liability.”

³ *Odinfin v Reynecke* 2018 (1) SA 153 (SCA) at 160 para 21.

[46] I am not satisfied with the plaintiff's explanation for the failure to institute the review proceedings without unreasonable delay and not later than within 180 days. The prospects of success in claiming damages against the first defendant also militate against the condonation of the delay. The broader interests of justice in declaring invalid a contract that was allowed to run its full course without the prompt and appropriate action being taken do not, in my view support the plaintiff's case that it would be in the interest of justice to condone the unreasonable delay. In fact, doing so would, in my view, possibly undermine the provisions and purpose of section 7 and could lead to the abuse of section 9 of PAJA. Therefore, the plaintiff's condonation application must fail.

[47] In terms of the separation order the separated issue of the plaintiff's entitlement to an order declaring unlawful, invalid and setting aside the VOCA (POC3 to the particulars of claim) was to be dealt with. However, I see no point in doing so in circumstances where this matter has, for all intents and purposes, been disposed of on the issue of condonation in light of this Court's finding that the plaintiff unreasonably delayed and therefore did not comply with section 7(1)(b) of PAJA. I have also found that the plaintiff has not made out a proper case for condonation of its unreasonable delay in terms of section 9 of PAJA and the extension of the 180-day period. I am fortified in this view by the approach adopted by the court in *Aurecon*⁴ where Mbha AJ, writing for the full court expressed himself as follows:

"Given that this matter is disposed of on the basis that the City was out of time and failed to make out a proper case for condonation in terms of s 9 of PAJA, it is not necessary to venture into the arguable point of law raised, namely the prior involvement of a prospective tenderer. Although the applicant and CESA implored this court to pronounce on the proper meaning of 'involved with' as contained in reg

⁴ *Aurecon* (note 2 above) at paragraph 54.

27 (4) of the SCM Regulations and clause 95 of the SCMP, the general principle as set out by this court in *National Coalition* is that this court does not pronounce on issues which are moot (which essentially would equate to providing an advisory opinion). The question of 'involved with' becomes moot by virtue of the fact that the City failed to make a case for condonation."

[48] By party of reasoning, this matter having been disposed of on the issue of condonation, I see no reason why I should go beyond it and look into whether or not the first defendant has complied with section 41 of the Act in entering into and implementing the agreement with the second defendant. To the extent that the first defendant might have failed to comply with section 41 I do not think that their non-compliance would have been so egregious such that it must be set aside even though the agreement has run its course. On the contrary, it might very well be that at worst the first defendant went about the wrong way in addressing the purposes of section 41 alluded to in subsection 1 (b) of the Act. Subsection 1 (b) provides that "[c]ontracting authorities may enter into negotiated contracts with operators in their areas, once only, with a view to – promoting the economic empowerment of small business or of persons previously disadvantaged by unfair discrimination... ."

[49] Whatever reasons the first defendant had in acting in the manner it did it was certainly not motivated by dishonesty or worse, corruption. In those circumstances it might have been necessary to declare invalid the expired contract even if it would mean invalidating payments made consequent thereto. I might add that in those circumstances it might have been necessary to approach and decide the matter differently. In his evidence, Mr Brink testified that his opinion was that "*the Municipality was looking for a system to formalise the informal taxi industry into an organised entity that they can negotiate with once we enter the s 41 of the NLTA*".

That does sound like a noble basis for what might very well prove to be a misguided implementation of section 41.

[50] I am by no means suggesting that the first defendant complied with the Act. I have declined to decide that issue. I am commenting as I do, if only to point out that not in all cases where it will be imperative that once raised, an issue of legislative non-compliance must be dealt with. The facts of each matter and in particular, the motivation for and the effect of non-compliance, more particularly to the affected parties including whether or not such non-compliance was of such an egregious nature that it must be dealt with at all costs must also be considered. Considerations of whether the contract is still in force and has not expired by effluxion of time are also important in the judicious exercise of the court's discretion. All those issues and others that may be relevant are part of what the court may consider and even declare invalid and set aside a contract even if it has run its course in the interests of justice. This is not such a case. Going forward, the first defendant would do well to seriously consider whether indeed it complied with section 41 in light of the fact that the VOCA (annexure "POC3" to the particulars of claim and annexure "A" to the consequentially amended plea) has in any event expired by effluxion of time. As Cameron J observed in *Kirkland* it is after all, the Constitution's primary agent and therefore it must be careful like all organs of state to ensure that it applies legislation correctly. In the result, the plaintiff's action must fail.

[51] The following order will issue:

1. The plaintiff's application for condonation of its non-compliance with section 7(1) of PAJA is dismissed.

2. The plaintiff's action is dismissed with costs including costs of two counsel where so employed.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the plaintiff: A. BEYLEVELD SC

Instructed by: WHEELDON RUSHMERE & COLE INC.

GRAHAMSTOWN

Counsel for the defendant: O.H. RONAASEN SC with L.N. NTSEPE

Instructed by: MACI INCORPORATED c/o MQEKE ATTORNEYS

GRAHAMSTOWN

Date heard : 29 October 2021

Delivered on : 15 February 2022