



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: **A241/2016**

In the Matter between:

**THE MEMBER OF THE EXECUTIVE COUNCIL OF
THE DEPARTMENT OF CO-OPERATIVE GOVERNANCE,
HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS,
FREE STATE PROVINCE**

Applicant

and

**SCENIC ROUTE TRADING 802 CC
AND THE 105 FURTHER RESPONDENTS
LISTED IN ANNEXURE 1 OF THE APPLICANT'S
NOTICE OF MOTION**

1st Respondent

CORAM: LOUBSER, J *et* POHL, AJ

HEARD ON: 26 AUGUST 2019

JUDGMENT BY: POHL, AJ

DELIVERED ON: 26 AUGUST 2019

INTRODUCTION:

- [1] This is a so-called “*self-review*” application. The application arises from a set of agreements concluded in late 2010 and early 2011 between the Free State Department of Human Settlements (“*The Department*”) and a number of building contractors and suppliers of building materials and consequent decisions made by the Department to make payments to these contractors and suppliers.
- [2] In essence, the Department’s case is that the agreements are unlawful for the following reasons: (i) the Department did not follow a proper procurement process before concluding any of them, and (ii) they were concluded and the payments were made as part of a scheme to avoid the provisions of the **Division of Revenue Act**, Act 1 of 2010 (Hereinafter referred to as “*DORA*”), specifically s 15 thereof and also to defraud the fiscus.
- [3] The applicant thus seeks a declaratory order that these agreements and the consequential payments were unlawful. It prays for an order reviewing and setting aside the Department’s decisions to conclude the agreements, the agreements themselves and the decisions to make payments in lieu thereof.

- [4] There are 106 respondents in this application and they are made up of the contractors and suppliers referred to in paragraph 1, supra. Although opposing papers were filed, none of the respondents persisted with the opposition to the main relief and only the 28th respondent was represented by Mr Pienaar when the matter was heard in Court.
- [5] The applicant was represented by Mr Budlender SC, who was assisted by K Reynolds and T H Mayozi.

BACKGROUND:

- [6] For the 2010/2011 financial year, the National Treasury allocated the Free State Province approximately R1.4 billion for low cost housing in terms of the Division of Revenue Act (Dora). In terms of section 20 of Dora, where a conditional allocation, such as this, has not been spent by the end of the financial year, it reverts back and must be repaid to the National Revenue Fund.
- [7] Furthermore and broadly speaking, in terms of section 15 of Dora, this allocation could only be used for that specific purpose. Those funds could not be transferred to any other entity unless there was a payment schedule with that entity, which was approved by the National Treasury. There must also have been a proper procurement process that was followed or in case of advance payments, there must have been good reasons for same which were approved by National Treasury. A transfer prohibited by section 15 of Dora, constitutes unauthorised expenditure as contemplated by the Public Finance Management Act of 1999.

- [8] Section 217 (1) of the Constitution provides that, when an organ of State (such as the Department), contracts for goods and services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective, which elements constitute the threshold requirements of a valid procurement process.
- [9] The Department was not able to spend the funding referred to in paragraph [6] supra, fast enough and within the fiscal year to avoid the situation that most of it would revert back to the National Revenue Fund in terms of Dora. The Department therefore conceived an illegal scheme to facilitate the advance payment of very substantial amounts of money, mainly to suppliers, within the fiscal year, so that the funds would not revert back to the National Treasury Fund. The agreements that form the subject matter of this application, were a key part of this illegal scheme. The agreements were unlawful for two major reasons. They were concluded without any proper procurement process having been followed and the agreements (and the payments made under them), formed part of a fraudulent scheme to avoid the consequences of Dora.
- [10] This illegal scheme was devised to allow the Department to pay material suppliers very significant sums of money over a short period of time: in total more than R630 million over the period 2010 to 2011.

- [11] The said illegal scheme consisted of three types of agreements. Firstly there were the building contracts which were concluded with the various building contractors. As indicated, no procurement process was followed relating to these contracts and they are therefore unlawful for that reason alone. They however obliged the contractor itself to source and fund the materials necessary for the building. The Department would then make payments to such contractors against completion of the different stages.
- [12] The second set of agreements were the material supply agreements. Again, the Department did not follow any procurement process before concluding these agreements. These agreements were therefore unlawful for that reason alone. In essence these agreements were tripartite agreements between the Department, the suppliers and the contractors. In terms of the agreements, the Department as employer, itself procures the construction materials, then pays for same itself. This was of course at variance with the terms of the building contracts.
- [13] Thirdly, there were the material supply cession agreements. The cession agreements purport (i) to give effect to a cession by the contractor(as cedent) of its claim against the Department (as Debtor) to the material supplier (as cessionary); and (ii) to instruct the Department to pay the claim to the material supplier on demand. These cession agreements were then used as part of the documentation to create the farce of legitimacy so as to make the payments look regular and in accordance with the law. As indicated before, it was all done to circumvent the provisions of Dora.

- [14] As against the suppliers, the Department seeks to recover what is paid to them. The basis of the claim is unjust enrichment. However, while the abovementioned agreements still stand, the defence may be raised that the agreements were the *causa* for the payments (and that the payments were therefore not made *sine causa*). In order for the Department to rely on an enrichment claim, it must have the agreements declared unlawful.

THE QUESTION OF DELAY:

- [15] The issue of the long delay in launching this application, remains. The impugned conduct of the Department took place between 2010 and 2011. This application was only issued in December of 2016. I find this delay to be unreasonable, given the circumstances of this case.
- [16] However, in view of the decision of the Constitutional Court in **Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd**, 2019 JDR 0757 (CC), I am of the view that the interests of justice require this Court to overlook the unreasonable delay. The reasons for this are *inter alia* the following: (i) The respondents received the payments years ago and they do not pursue unpaid claims under the contracts. (ii) The nature of the impugned decisions in question was very serious. The nature of the proceedings illustrate egregious non-compliance with the constitutional requirements of section 217(1) of the Constitution and section 15 of Dora. The applicant himself also came to Court with the aim of rectifying the unlawfulness. (iii) Lastly, in following

the decision of SITA v Gijima, 2018 (2) SA 23 (CC), this Court may, despite the unreasonableness of the delay, nevertheless be constitutionally obliged to declare the applicant's conduct unlawful. This has become known as "The Gijima Rule". In the **Buffalo City**-case, *supra*, the Court held that the Gijima rule should be interpreted narrowly and restrictively, *"the injunction it creates - to declare valid that which is indisputably and clearly inconsistent with the Constitution – must be followed where applicable"*.

CONCLUSION:

[17] In the premises and having regard to the abovementioned authorities and the relevant factual context, I am of the view that the impugned agreements are clearly and indisputably unlawful and the payments made in lieu thereof, must be declared unlawful by this Court. We were informed that the 2nd, 28th, 44th and 65th respondents have reached an agreement with the applicant for the further proceedings in this matter as far as their counter-applications are concerned. These agreements are contained in a draft order presented to us by agreement prior to the hearing of the application. The following order will therefore issue:

ORDER:

"The draft order annexed hereto as annexure "X" is made an order of Court"

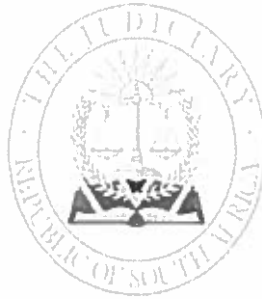
L. LE R. POHL, AJ

I concur,

P. J. LOUBSER, J

On behalf of applicant: Adv. G. M. Budlender SC,
Adv K Reynolds; and
Adv. T. H. Mayozi
Instructed by:
L. E. Companie
Phatshoane Henney
BLOEMFONTEIN

On behalf of the respondents: Adv. C. D. Pienaar, 28th Respondent



Case no: A241/2016

**FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA**

At BLOEMFONTEIN on the 26TH day of AUGUST 2019

Before the Honourable Judges: LOUBSER, J et POHL, AJ

In the matter between:

**THE MEC: DEPARTMENT OF CO-OPERATIVE
GOVERNANCE, HUMAN SETTLEMENTS AND
TRADITIONAL AFFAIRS, FREE STATE**

APPLICANT

AND

**SCENIC ROUTE TRADING 802 CC
105 OTHERS**

**1ST RESPONDENT
RESPONDENTS**

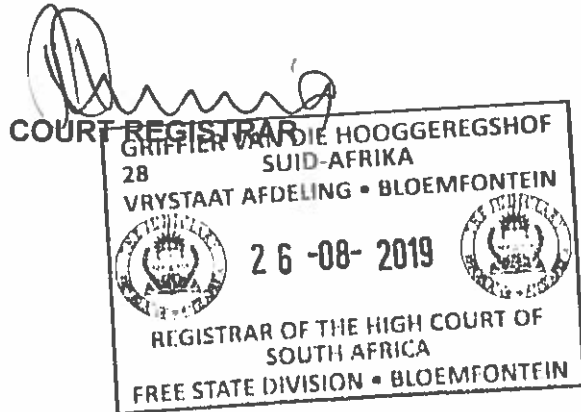
Having considered the Notice of Motion and the other documents filed of record and having heard Counsel for the Applicant and the Respondent

IT IS ORDERED THAT:

1. Subject to paragraphs 2, 3, 4, 5 of this order, it is declared that-
 - 1.1. The agreements listed as annexure 2 to the notice of motion ('the agreements'), and the decision or decisions taken by the Free State Department of Human Settlements ('the Department') to make the payments listed in annexure 3 to the notice of motion ('the decisions'), were and are unlawful;
 - 1.2. The agreements and the decisions are reviewed and set aside.
2. By agreement between the applicant and 28th respondent ('Hardware Mecca'), Hardware Mecca's counter-application is postponed to **2nd December 2019**;
3. The effect that the setting aside of the agreements and the decisions will have on any rights that Hardware Mecca would, but for such setting aside, have been entitled to under the agreements, and on any of the payment it received from the Department, is held over for determination in Hardware Mecca's counter application.
4. Hardware Mecca's counter-application shall be determined either by the members of this court or by members of another court determined by the Judge President.

5. The application as against the 2nd respondent, the 44th respondent and the 65th respondent is postponed to 2nd December 2019.
6. Each party shall pay its own cost.

BY ORDER OF THIS COURT



PHATSHOANE HENNEY INC
CLAUDE REID
MCINTYRE&VAN DER POST
MATLHO ATTORNEYS
MPHAFI KHANG INC
PEYPER ATTORNEYS
SPANGENBURG ZIETSMAN&BLOEM