



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

Not reportable

Case no: 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 APPLICANTS
NOTICE OF MOTION**

RESPONDENTS

Bench: MOLITSOANE, J et MAJOSI, AJ

Heard: 29 April 2024

Delivered: 24 January 2025

ORDER

1. The agreements listed as Annexure 2 to the Notice of Motion (the agreements) relating to Cembrick and the decision(s) taken by the Free State Department of Human Settlements to make the payments listed in Annexure 3 relating to Cembrick in the Notice of Motion are declared invalid and unlawful.
2. The agreements and decisions are reviewed and set aside.
3. The order of invalidity referred to above does not have the effect of divesting any of the parties any rights it would have been entitled to under the agreements, but for the declaration of invalidity.
4. The respondent shall pay the costs of the application which costs shall include the costs of two counsels on scale C.

JUDGMENT

MOLITSOANE, J (MAJOSI, AJ concurring)

[1] This application arises from a set of agreements concluded in late 2010 and early 2011 between the Free State Department of Human Settlements and a number of building contractors (the contractors) and suppliers of building materials as well as to payments made by the said Department to the suppliers. The Department, in addition to the relief aforementioned or in the alternative, seeks an order to review and set aside its decision(s) to conclude the agreements, the agreements themselves and its decision(s) to make payments.

[2] The application before us is only against the 65th Respondent, Cem Brick CC

(the respondent), a close corporation duly registered and established in terms of the Close Corporation Act, 69 of 1984 under registration number 2004/075491/23.

[3] The following facts are common cause or are not seriously in dispute as the respondent avers that same do not fall within its knowledge¹: During September 2004, the Cabinet approved what is called the 'Comprehensive Plan for the Development of Sustainable Human Settlements'. This plan was aimed at improving the quality of housing, through the state subsidized housing program. In terms of the Division of Revenue Act 1 of 2010 (DORA 2010), the National Treasury allocated over R1,3 billion to the Free State Province as a "Human Settlements Development Grant" for the 2010/2011 financial year. This allocation was meant for low-cost housing. A further amount of R 119,309,000 was rolled over from the previous financial year thus bringing the total allocation to about R1.42 billion for this program².

[4] Following an application by the affected municipalities in the Free State, the Department prepared a house allocation fund list for each municipality to be funded by the BNG. 21 050 low-cost houses were to be built over the 2010/2011 and 2011/2012 financial years. In 2010, six months into the financial year, the Department had not met their monthly spending targets of the allocated funds. The portion of the funds not spent would become a so-called 'unspent conditional allocation'. The unspent funds would in terms of DORA, revert to the National Revenue Fund. The National Minister of Human Settlements issued a notice to the Free State Department indicating that the Department had spent less than 10% of the allocated funds by the third quarter of the financial year. In order to remedy this underspending, the Department, like other provinces which were under performing like the Free State in terms of DORA, was informed and required to submit a recovery plan showing how it intended improving the expenditure and delivery.

¹ Paragraphs 22-149 of the applicant's founding affidavit deals with the case of the applicant under the following headings; the Department's scheme; the Breaking New Ground low cost housing project; the allocation and the Department's failure to spend it; the department's 'expenditure recovery plan'; the lapse and cancellation of the BNG housing tender; conclusion of the building contracts; conclusion of the material supply agreements; conclusion of material supply cession agreements; the extent of the payments; the consequences; the actions instituted by the Department against material suppliers and contractors. The respondent pleaded, inter alia, on these specific paragraphs as follows: *'...a great many of the facts pleaded in these paragraphs under reply do not fall within the personal and peculiar knowledge of myself/Cembrick. Cembrick is the innocent bystander.'*

² In the founding affidavit the applicant refers to this allocation as the BNG (Breaking New Ground) on page 74 of the paginated record.

[5] In the late 2010, the MEC and the Department's senior officials developed an expenditure recovery plan. The plan set out how the Department intended to ensure that the funding allocation was spent within the financial year. This plan, which the Department implemented, ensured that within a short space of time, an amount of R631 million would be spent over the period 2010 to 2011.

[1] [6] The plan/scheme which was developed, inter alia, entailed the conclusion of three types of agreements. The agreements concluded were (1) building contracts;(ii) material supply contracts;(iii) and material supply cession agreements. The agreements were between the Department and a number of building contractors and suppliers of building materials.

[7] The building contracts were concluded between the Department and building contractors during the period 12 February 2010 and 18 November 2011. These contracts were mostly concluded after the cancellation of the tender in July 2010. Others were, however, concluded before this cancellation date. What the Department did, was simply to give the contracts to contractors on its databases or to those contractors who had submitted bids for the lapsed and cancelled bids. In concluding the contracts, the Department thus contends that no proper procurement process was followed. The respondent does not dispute that no proper procurement process was followed.

[8] The Department further concluded material supply agreements. The parties to these agreements were the Department, a supplier of material and a building contractor. This building contractor was one of the building contractors as indicated who had concluded a building contract with the Department. Like in the conclusion of the building contracts, the Department also, did not follow any proper procurement process in the conclusion of the material supply agreements.

[9] The Department also concluded material supply cession agreements. In essence, this type of agreement sought to give effect to a cession by the building contractor of its claim as a cedent against the Department as a debtor to the material supplier as a cessionary and to instruct the Department to pay the claim to the supplier upon demand. These material supply cession agreements were used by the Department to make payments to material suppliers.

[10] Over and above the contention that no lawful procurement process was followed, the Department also contend that the building and material supply agreements were tainted by fraud in that they were concluded to facilitate a scheme to spend public monies in contravention of s15(1) and (2) of DORA. It is common cause that the Department has instituted enrichment claims against various contactors and material suppliers which includes the respondent.

[11] It is contended by the Department that when it developed this recovery plan, it knew that the payments based on these agreements were unlawful this because the National Department of Human Settlements had informed it so. The Department contends that the payments were unlawful because : (1) there were no contracts in place with the suppliers; (2) no proper procurement process had been followed; and (3) the payments were not authorized by neither the National Department of Human Settlements nor the Treasury. These notwithstanding the Department continued to make payments to the building contractors and material suppliers.

[12] In essence the issues to be adjudicated upon are the following, which constitute the defences in opposition of the application:

- a) Unreasonable delay in instituting these proceedings;
- b) The failure of the Department to disclose material facts relating to; (i) the Special Investigative Unit and its outcome; (ii) the Zimvo litigation; and (iii) certain default judgments obtained against other parties;
- c) the contention that the respondent has performed and accounted fully in terms of the agreement;
- d) the contention that the respondent was an innocent bystander and any allegation of unlawfulness and/impropriety were not applicable to it;
- e) That the application was bad in law.

Section 217(1) of the Constitution enjoins all organs of state to contract for goods and services in accordance with a system which is fair, equitable, transparent, comparative and cost effective. The Court in *Minister of International Relations and Others v Simeka Group (Pty) Ltd and Others*³ with reference to *Allpay Consolidated Investment Holdings*

³ (610/2021) [2023] ZASCA 98 (14 June 2023).

(Pty) Ltd v Chief Executive Officer of the South African social Security Agency⁴ said the following with regard to deviations from compliance with the threshold contained in s217(1):

"The Constitutional Court went on to observe, with reference to international authority, that 'deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process' The Constitutional Court then proceeded to explain that insistence on compliance with process formalities served a three-fold purpose, viz:

- (a) it ensures fairness to participants in the bid process;
- (b) it enhances the likelihood of efficiency and optimality in the outcome; and
- (c) it serves as a guardian against a process skewed by corrupt influences." (Footnotes omitted)

The delay in bringing the review application

[13] It cannot be argued otherwise that 14 years to bring an application for a legality review is unreasonable having regard to the circumstances of this case. The review is brought by the Department itself. One would expect that at all material times the Department had the necessary information at its disposal to have initiated these proceedings within a reasonable time. That is not what happened in this case. With this in mind, it is apt to refer to the doctrine of *stare decisis* as it finds application in this case.

[14] The Department instituted legality review proceedings against 106 entities seeking in essence, similar relief sought in these proceedings. The factual matrix in those cases is the same as in these proceedings save issues like the amount of material supplied or payments made to the building contractors and the material suppliers. Some of the respondents in those proceedings chose not to oppose the granting of the order sought but agreed with the Department as to what the appropriate order would be. In dealing with those applications this court, however, was obliged to deal with the issue of delay. I quote extensively from the *Member of the Executive Council of the Department of, Human Settlements and Traditional Affairs, Free State province v Scenic Route 802 CC and Further Respondents Listed in Annexure 1 of the Applicant's Notice of Motion*⁵ where the court dealt with delay:

"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.

⁴ 2014(1) SA 604 CC 56.

⁵ (A241/2016) [2019] ZAFHC 147 (26 August 2019).

[16] However, in view of the decision of the Constitutional Court in **Buffalo City Metropolitan Municipality v Asia 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"*.

[15] *HR Hahlo and E Khan* in their book⁶ explain the doctrine of *stare decisis* as follows:

"In the legal systems the calls of Justice are paramount. The maintenance of certainty of the law and the equality before it, the satisfaction of legitimate expectation, entail a general duty on judges to follow the legal rulings in previous judicial decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same. The authority given to past judgments is called the doctrine of precedent..."

This observation by the learned authors fits like a glove to the situation before us. While the above-mentioned decision is not necessarily binding upon us, it being the decision of two Judges of the same standing as us, it remains persuasive. We can only depart from it if we find that the court was clearly wrong in the exercise of its discretion or the application of the law. One can imagine how confused the Department would be if in matters of similar facts, the one court grants an indulgence to pursue the legality review and with the same breath, another court of the same standing in the same Division of the High Court refuses it. It would correctly feel "unjustly treated" by the justice system. That cannot be countenanced. I accordingly align myself with the sentiments expressed the judgment aforesaid. Condonation for the late bringing of this application is granted."

⁶ The South African Legal Systems and its Background (Cape Town: Juta 1968) at page 244.

The failure of the Department to disclose material facts and the contention that the respondent is an innocent bystander.

[16] The evidence reveal that the SIU was commissioned to investigate the affairs of the respondent with the Department. This related to alleged irregular payments of money received by the respondent from the Department. The respondent admits having received an amount of R69 353 074.26 from the Department. The contention of the respondent as allegedly informed by an official of the SIU is that : (i) there exist no irregularity on the part of the respondent; (ii) the respondent complied fully with its end of the agreement. Simply put, the respondent contends that it had lawfully performed in terms of the agreement and was justly paid as per the terms of the agreement.

[17] Over and above this, the respondent pleads that it was an innocent bystander. It contends that its agreement to supply material was above board.

[18] The respondent further contends that the Department has failed to disclose the litigation between itself, the Department and Zimvo (Pty) Ltd. It seems that the respondent instituted an action against Zimvo and the Department as defendants. The respondent avers that the Department, in its plea. Did not raise any issues of the irregularity as alleged in these proceedings. According to the respondent, all the defences raised by the Department differ markedly from the case of the Department in this application.

[19] The respondent further contends that it is an innocent bystander. It thus holds the view that it performed duly in terms of the agreement. The fact that the Department did not disclose the results of the investigation by the SIU takes this matter nowhere. The evidence by the respondent reveal that the investigation was not commissioned by the Department. On the contrary, the evidence reveal that the mandate of the SIU arose in terms of Proclamation 7 of 2007. All the reports of the investigation were sent to the office of the President Zuma. The Department had nothing to do with this investigation and was not part of it. There is the dispute between what the mandate of the SIU was between the respondent and the Department. That dispute takes this matter nowhere as the investigation was not mandated by the Department.

[20] The Department does not deny that what is alleged in the plea filed in the Zimvo

matter might be different from the allegations in this application. Although the Department does not give a clear answer to the discrepancy, it hints on the possibility that such may be as a result of the Department using two sets of legal representatives. The fact of the matter is that the Department does not have an explanation why the difference in the pleadings. While I take note of the discrepancies, I also have to allude to the fact that those differences may boil down to questions of credibility which have no bearing on these proceedings. I say this because the case of the Department is that this review application is founded on the fact that the agreements and payments made were done in breach of the procurement law and that the agreements formed part of a fraud. The issue about the default judgments granted should suffer the same fate as it only talks to credibility.

[21] The fact that the respondent contends that it is an innocent bystander and has performed in terms of the agreement, also, takes this matter nowhere. The respondent might be an innocent bystander and contend that its agreement lawful. What the respondent misses is the fact that no lawful process was followed in granting the 'tender' to it for supplying the material supplier to the building contractor. The undisputed evidence is that the agreement between the building contractors and the Department was unlawful for the two main reasons set out above.

The application is bad in law

[22] There is a dispute between the Department and the respondent pertaining to the material supply agreement. Apart from the issue of no procurement process and the material supply and cession agreements, the Department contends that it had made advance payments to the respondent in contravention of DORA without the necessary authority from the National Department or the Treasury. My understanding of this contention is that according to the Department, it and the respondent were in *pari delicto*. Before *Jajbhay v Cassim*⁷ the general rule was that the plaintiff was precluded to recover any money paid or property handed over if such handing over occurred pursuant to an unlawful agreement.

[23] *Jajbhay v Cassim* relaxed the rule. The court held that "... [W]here public policy is not foreseeably affected by a grant or refusal of the relief claimed, a court of law might decide on doing justice between the individuals concerned and so prevent unjust

⁷ 1939 AD 537.

enrichment.” I take it, that it is for this reason that the Department's end goal is not necessarily a declaration of invalidity but to inter alia pursue a claim of unjustified enrichment.

[24] The respondent contends that the Department, while its claim lies in administrative law, the relief it seeks in these proceedings, is grounded on the cause of action based in private law. It is contended on behalf of the respondent that the case for administrative law invalidity ought to be made with reference to the process of taking an administrative action or the terms of the agreement.

[25] It is further contended that the manner of implementation is a different thing. To this end, the respondent contends that the Department complains about implementation. It is submitted on behalf of the respondent that post the awarding of a contract through an administrative process, the relationship between the parties is governed in contract.⁸ The respondent contends that the relationship on the part of the Department and the respondent was contractual. According to the respondent, it was the contractor who would ultimately remain liable to the respondent for payment of the material supplied. This contention superficially deals with the contractual liability of the Department. The contention ignores the undisputed existence of the material cession agreement. The litigation by the respondent in the Zimvo case illustrates the issue of the cession agreements and the incorrectness of the submission of the respondent. If the contention of the respondent is that only the contractor would be liable to it for material supply, one then wonders why the respondent instituted an action against both Zimvo and the Department.

[26] Much as it is submitted that the case of the Department is grounded on the private law of contract, I do not agree. The case of the applicants is simply that proper procurement processes were not followed in the conclusion of the tripartite agreements with the building contractors and material suppliers like the respondent. I take note that during the hearing, counsel for the applicant beseeched this court to only declare the agreements and the subsequent payments unlawful. In matters of the State, if a contract is unlawful for want of compliance with the rules of administrative law, the court must

⁸ Respondent's Heads of Argument page 13.

declare it unlawful.⁹

[27] The next step is that the court must invalidate the agreement. It has in this regard no discretion. It is not in dispute that the tripartite agreements herein were not concluded by the Department following due processes of procurement. All the contracts were concluded without any regard to section 217 of the Constitution. Not a single imperative of s217 was considered and/or followed by the Department. The evidence tendered, which the respondent did not dispute, point to the end goal of fraud. The scheme designed by the Department was not only illegal but was unlawfully crafted to spend a lot of money in a very short space of time. It boggles one's mind why the Department would simply pick and choose the actors in these illegal contracts from its data base and giving them contracts. It is the finding of this court that the decision(s) of the Department which gave rise to the tripartite agreement(s) as well as the agreement(s) between it and the respondent are invalid as they are unlawful. They are accordingly set aside.

[28] Having declared the impugned agreements invalid is not the end of the exercise. Section 172(1)(b) of the Constitution gives this court a wide discretion to make any order that is just and equitable. In my view, the contention of the respondent is that it has performed in terms of the agreement. It will be remiss of this court to make any order which will not consider the views of the respondent. The Department has already initiated action proceedings against the respondent. Some of the issues, like the contention that the respondent has performed in terms of the agreement, would be better traversed in those proceedings. A just and equitable remedy must take that factor into account. When it comes to costs, there is no reason why the costs should not follow the cause. I accordingly make this order:

ORDER

1. The agreements listed as Annexure 2 to the Notice of Motion (the agreements) relating to Cembrick and the decision(s) taken by the Free State Department of Human Settlements to make the payments listed in Annexure 3 relating to Cembrick in the Notice of Motion are declared invalid and unlawful.

2. The agreements and decisions are reviewed and set aside.

⁹ Allpay (ibid) para 56; s172(1)(a) of the Constitution; s8 of the Promotion of Administrative Act 30 of 2000.

3. The order of invalidity referred to above does not have the effect of divesting any of the parties any rights it would have been entitled to under the agreements, but for the declaration of invalidity.

4. The respondent shall pay the costs of the application which costs shall include the costs of two counsels on scale C.



MOLITSOANE, J

I concur



MAJOSI, AJ

Appearances

For the Applicant: Adv. N Snellenberg SC with
JMC Johnson and I Macakati
Instructed by: Phatshoane Henney Attorneys
Bloemfontein

For the Respondents: Adv. S Grobler SC
Instructed by: Rossouws Attorneys
Bloemfontein