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

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

CASE NO: 2237/2023

In the matter between:

MALUTI-A-PHOFUNG LOCAL MUNICIPALITY	Applicant
And	
KILL CRIME SECURITY SERVICE (PTY) LTD	1st Respondent
FIRST NATIONAL BANK OF SOUTH AFRICA LTD	2nd Respondent
SHERIFF OF PHUTHADITJHABA HIGH COURT	3rd Respondent

HEARD ON: 05 SEPTEMBER 2024

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: 30 JANUARY 2025

Introduction

[1] In this application, the applicant seeks the following relief in terms of Part B of the notice of motion:

> *"1. That the default judgment granted by the Registrar of this Court on 15 March 2024 in the amount of R27 000 000,00 be set-aside and rescinded;*
>
> *2. That the:*

2.1 service level agreement entered into and concluded between the Applicant and the First Respondent on or about 11 August 2020;

2.2. service level agreement entered into and concluded between the Applicant and the First Respondent on or about 8 December 2022; and

2.3. acknowledgment of debt entered into and concluded between the Applicant and the First Respondent on or about 20 February 2023, be declared unconstitutional, invalid, unlawful and void ab initio.

3. That leave be granted to the Applicant to file and deliver its notice of intention to oppose the relief applied for by the First Respondent [as Plaintiff] in the matter under case no. 2237/2023, within a period of 5 days;

4. That the First Respondent be ordered to pay the costs of this application [Part A and Part B] on the scale as between attorney and client, alternatively on the scale as between party and party [Scale C], including the costs consequent the employment of senior counsel; and

5. That such further and/or alternative relief be granted to the Applicant which this Court deems reasonable and appropriate under the prevailing circumstances."

[2] On 20 May 2024, Van Zyl, J granted the following order in respect of Part A of the notice of motion: 1-6

"1. This application is heard as an urgent application in accordance with the provisions of Rule 6(12) and the requirements pertaining to service and time periods are dispensed with.

2. Pending the finalization of Part B of this application, the operation of the writ of execution issued by the Registrar of this Court on 19 April 2024, pursuant to a judgment by default entered into against the applicant, dated 15 March 2024, in the amount of R27 000 000.00, is stayed.

3. The second respondent is ordered to release the funds available in the applicant's bank account, no. 6[…], immediately, so as to allow the applicant to transact on its aforementioned bank account with immediate effect.

4. The third respondent is ordered to return the moveable assets, good and equipment removed from the first respondent's possession on Wednesday, 24 April 2024, as provided for and envisaged in the Notice of Attachment in Execution, annexed hereto marked annexure "A", to the applicant immediately.

5. Permission is granted to serve this order on the respondents electronically at the e-mail addresses referred to and contained in the Notice of Motion.

6. The costs of this Part A of application are costs in Part B of the application."

[3] The applicant stated in its founding affidavit that it is an organ of state as provided for and envisaged in section 217 of the Constitution of the Republic of South Africa, number 108 of 1996, as amended, which specifically provides that when an organ of state in the National, Provincial or Local sphere of Government, or any other institution identified in National Legislation, contracts for goods or services, it must do so following a system which is fair, equitable, transparent, competitive and cost-effective.

[4] The applicant and the first respondent entered into and concluded service level agreements on 11 August 2020 and 8 December 2022. Both agreements were

concluded in violation of section 217 (1)of the Constitution, read together with regulation 19(a) of the Municipal Supply Chain Management Regulations, promulgated following the provisions of section 168 of the local Government Municipal Finance Management Act, number 56 of 2003 (LGMFMA)) as well as section 22 (1)(a) of the applicant's Supply Chain Management Policy which provides that any invitation of competitive bids to prospective service providers must submit the bids using an E-Tender or public advertisement in local or national newspapers on the applicants website or advertisement in the Government Tender Bulletin. Section 19 (a) of the Municipal Supply Chain Management Regulations specifically prescribes that services may only be procured by a municipality through a competitive building process.

[5] On 20 February 2023, the applicant, represented by its municipal manager, and the first respondent entered into and concluded an acknowledgment of debt for the payment of the capital sum of R27 000 000.00 based on the two service level agreements. According to the applicant, the municipal manager was not authorised to conclude the acknowledgment of debt as he was grossly conflicted at the time because he and Mr Sekhosana, the first respondent's co-director, are cousins as their mothers are sisters. Mr Sekhosana represented the first respondent and was the co-signatory of the acknowledgment of debt. Summons was issued against the applicant on 9 May 2023 and served on 11 May 2023. A default judgment was granted on 15 March 2024, and a writ was issued on 19 April 2024.

[6] The applicant blames Mr Makhubo for its failure to enter an appearance to defend the action. It stated in its founding papers that he intentionally and deliberately failed and omitted to instruct the applicant's legal department to file a notice of intention to defend the first respondent's action. The failure to oppose the action paved the way for the first respondent to apply for the default judgment in the applicant's absence. It was a premeditated and orchestrated plan to exploit the applicant and cause money that was not due to be paid to

the first respondent. Both Makhubo and Sekhosana had "captured" the applicant.

[7] The first respondent stated in its answering affidavit that the applicant always followed the procurement policy when contracting with itself. The applicant did not dispute deriving a benefit from the services rendered even though the impugned service level agreements were no longer in force, having been terminated by effluxion of time. There are, therefore, no agreements to declare invalid. The first respondent will be prejudiced.

[8] The applicant and the first respondent concluded a service level agreement in December 2017 for 12 months to provide security services. On its termination, the then-acting municipal manager approved and extended the agreement for three months. This process continued until it was extended to August 2019 on 30 May 2019. In the meantime, the applicant invited suitable service providers to submit proposals to provide security services. The closing date of the bid was 29 November 2019. The applicant subsequently cancelled the bid. The first respondent's appointment was kept alive through a series of extensions of three months each, allegedly under the emergency regime of the MAP Policy.

[9] On 19 May 2020, the applicant served the first respondent with a letter extending the service level agreement for three months on the proviso that the duration of the project would be three months after signing the service level agreement. The applicant signed the service level agreement on 19 May 2020, and the first respondent on 11 August 2020. It was recorded in the agreement that the first respondent was appointed for security services subject to terms and conditions contained in the appointment letter dated 19 May 2020.

[10] According to the first respondent, the applicant must file a review application based on legality to have its procurement decision declared invalid. The process invoked by the applicant denies the court the benefit of inspecting and addressing the decision to procure its services. The decision to procure remains intact and continues to produce consequences as long as it has not been reviewed and set aside by the court.

[11] In reply, the applicant pointed out that the first respondent failed to deny or rebut its allegations in paragraph 24 of the 2founding affidavit. These referred to the service level agreements not having been subjected to a competitive bidding process as provided in section 217 of the Constitution. As the first respondent failed and or chose not to answer the specific allegations and averments contained in the founding affidavit ad seriatim, the court should accept the factual and legal basis upon which the relief contained in and provided for in Part B is premised.

[12] The Acting Municipal Manager (in December 2018) had no right, entitlement, or authority to extend the service level agreement, which was terminated by expiration of time. The same was true of the position of Acting Municipal Manager in May 2019. It is impossible to extend a service level agreement that did not exist. The service level agreements were, therefore, not validly or legally extended. The first respondent's reliance on the appointment letter of 19 May 2020, which was attached to the answering affidavit, was opportunistic, ill-founded, and irrational, and the service level agreement upon which it relied was not subjected to a competitive bidding process. Neither the Constitution nor any other applicable legislation provides for a "*deviation regime*" upon which the first respondent relied.[1]

[1] Replying Affidavit, para 31.

[13] The applicant contended that the first respondent admitted and conceded that it was appointed without compliance with the provisions of section 217 of the Constitution, which should bring this matter to an end. The first respondent was at liberty to preserve its accrued rights as provided in section 172 (1)(b) of the Constitution. The acknowledgment of debt was procured according to the conclusion of the service level agreements, which were entered into and concluded illegally, unlawfully, and in violation of section 217 of the Constitution. It is, therefore, tainted with irregularity.

[14] The first respondent contended in its heads of argument that the appropriate order the applicant should have sought in part B was to stay the warrant of execution pending an application for the rescission of the default judgment, with the view to defending the main action in which the issues relating to the service level agreements and the acknowledgment of debt would be ventilated. The application should be dismissed, and the applicant should be directed to file its rescission application in terms of Uniform Rule 31. In its supplementary heads of argument, the first respondent contended that there was no self-review application based on legality before the court as envisaged in Rule 53 of the Uniform Rules of Court.

[15] The question arises: is the application before the court a legality review? In Municipal Manager: *Qaukeni Local Municipality And Another V Fv General Trading CC* 2010 (1) SA 356 (SCA), it was stated that

"If the second appellant's procurement of municipal services through its contract with the respondent was unlawful, it is invalid, and this is a case in which the appellants were duty bound not to submit to an unlawful contract, but to oppose the respondent's attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application. In doing so it raised the question of the legality of the contract fairly and squarely, just as it would have done in a formal review. In these circumstances, substance must triumph over form. And while my observations should not be

construed as a finding that a review of the award of the contract to the respondent could not have been brought by an interested party, the appellants' failure to bring formal review proceedings under PAJA is no reason to deny them relief."

[16] In *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd,*[2] Navsa JA confirmed that "*It is now firmly established that self-reviews by organs of state are not reviews in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), but rather are legality reviews*." In *State Information Technology Agency Soc Ltd V Gijima Holdings (PTY) LTD,*[3] it was said that the exercise of public power, which is at variance with the principle of legality, is inconsistent with the Constitution and, therefore, invalid. The principle of legality may thus be a vehicle for its review.

[17] In *Buffalo City Metropolitan Municipality V ASLA Construction (PTY) LTD*,[4] it was said that following this court's decision in *Gijima*, it is now settled that an organ of state seeking to review its own decision must do so under the principle of legality and cannot rely on PAJA. It is, therefore, clear that the application before this court is a legality review.

[18] On the powers of the courts in constitutional matters, section 172 of the Constitution provides as follows:

"(1) When deciding a constitutional matter within its power, a court-

[2] 2021 (4) SA 436 (SCA) at para 34.
[3] 2018 (2) SA 23 (CC) para 40.
[4] 2019 (4) SA 331 (CC).

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[19] In its heads of argument, the applicant contended that the first respondent failed to initiate a counter-application for preserving its accrued rights, as provided in section 172(1)(b) of the constitution. On my reading of the particular section and the use of the conjunctive word between sub-sections (a) and (b), I am of the view that the court can *mero motu* implement the provisions of section 172 (1)(b) of the Constitution. Consequently, justice dictates that the applicant should not benefit unduly as it allowed the respondent to proceed to perform in terms of the contract. In the circumstances, an order is necessary to declare the agreement invalid but not set it aside to preserve the rights to which the respondent might have been entitled. It should be noted that such an award preserves rights that the first respondent has already accrued but does not permit a party to obtain further rights under the invalid agreement.[5]

[5] Buffalo, supra, para 105.

[20] I, therefore, make the following order:

ORDER:

1. The default judgment granted by the Registrar of this Court on 15 March 2024 in the amount of R27 000.00 is rescinded.

2. The service level agreements:

   2.1 entered into and concluded between the Applicant and the First Respondent on or about 11 August 2020;

   2.2. entered into and concluded between the Applicant and the First Respondent on or about 8 December 2022; and

   2.3. the acknowledgment of debt entered into and concluded between the Applicant and the First Respondent on or about 20 February 2023, are declared constitutionally invalid.

3. Leave is granted to the Applicant to file and deliver its notice of intention to oppose the relief applied for by the First Respondent [as Plaintiff] in the matter under case no. 2237/2023, within a period of 5 days.

4. The First respondent is ordered to pay costs of this application (Part A and Part B) on the scale as between party and party (Scale C) including the costs of employing senior counsel.

MHLAMBI, J

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