IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MTHATHA]

Case No: 4807/2023

In the matter between:

ALFRED NZO DISTRICT MUNICIPALITY Applicant

and

UMSO CONSTRUCTION (PTY) LTD Respondent

JUDGMENT

MHAMBI AJ

[1] This is application brought by the applicant, "the Municipality" in the form of review. The Municipality seeks to review and set aside its decision appointing the respondent to construct and repair water works at Mbobeni Village in MT Ayliff, "the decision". The municipality seeks that the decision be declared as of no force and effect and whereafter seeks for costs order against the respondent.

[2] As precursor to its self-review application, the respondent was appointed through the municipality tender process, initiated by the municipality, to contract a water treatment works known as Mt Ayliff Water Treatment Works. The Applicant has alleged in its founding papers that the appointment of the respondent was signed by it's municipal manager, Mr. Skhundla

[3] Surprisingly, the deponent to the counter application filed by the municipality alleges that the appointment letter of the respondent was signed by the acting municipal manger, Mr. Diko. It is alleged by Mr. Diko that whilst the respondent was still executing it's services in terms of the appointment aforesaid, it received information that there had been a pipe burst due to vandalism at Mbobeni Location, Mt Ayliff and that there was no water supply in the area.

[4] Consequently, the municipality issued a quotation to a service provider, a company known as CO-Valve and Piping Pty (Ltd), which then submitted its quotation to the municipality. It is not clear in the papers, how the quote by the Co-Valve PTY Ltd was done, the municipality only mentions that its water and maintenance did not have enough funds to cover for the repairs. The municipality further alleges that, Mr. Xolani Msiza, who is the municipality senior manager in infrastructure department requested the project unit, to request a quote from the respondent, this was on the basis that, the respondent was already dealing with the Mount Ayliff water treatment works.

[5] In response to the municipality quote, the respondent submitted a quote in the sum of **R5,223 674.65 (Five Million two hundred and twenty-three six hundred and twenty-four cents).** This quote was accepted and signed by Mr. Dlokweni on behalf of Mr.Msiza . A contract is attached to this effect in the applicant's founding affidavit.

[6] The papers reveal that series of meetings were held between the parties, this was after respondent, was not paid, the municipality as appearing *ex facie* the papers agreed to pay the respondents funds through variation issued from the treatment contract funds.

[7] It is common cause that the respondent had concluded the repairs and has not been paid, despite it having rendered its services, conclusively, it can be said that the respondent performed and satisfied the contract terms agreed upon with the applicant. In the result of its non-payment, the respondent had issued summons for a civil suit against the municipality, I was advised by counsel for both parties that the civil suit is still pending, and it was instituted in 2019.

[8] The municipality argues that one of the basis of this self-review application is that it was unlawful for it to procure services of the respondent, as the respondent was not on its panel of service providers for that financial year end.

[9] In the same breath the applicant, argues that the contract between the parties is irregular and unlawful because it was concluded in contravention of the provisions of section 112 (1) read together with section 116 of the MFMA and supply Chain Management Regulations and the policy of the applicant, so argues the applicant.

[10] Then this court has to determine whether the applicant has made a substantial basis for the grant of its self-review application, in my view, that has to be balanced with the fact that the respondent has rendered its services and performed in terms of the contract it concluded with the applicant, and it has until now not been paid.

[11] I agree with the applicant as far as how the financial affairs of the municipality has to be conducted. There is vast authority on this point, as I will demonstrate hereunder.[1]

[12] In order to control the financial management of the municipality s 217 (3) of the Constitution[2] requires that the legislature to take legislative measures to give effect to 217 (1) of the Constitution. Resultant to that is creation of Public Finance Management Act[3] and the second one being Preferential Procurement Policy Framework Act[4].

[13] The Constitutional Court in *Fedsure Life Assurance*[5] held thus:

> "It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they are may exercise no power and perform no function beyond that conferred upon from by law".[6]

[14]. In *Fedsure*, the court went further and said:

> "…[L]ocal government may only act within powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions. In The *Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada* the Supreme Court of Canada held that:
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> "Simply put, the Constitutionalism principle requires that the governmental action comply the Constitution. The rule of law requires that all government action must comply not the law, including Constitution. This court has noted on several occasions that with all adaptation of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one

[1] *Minister of International Relations and Corporation and others v Simeka Group (Pty) Ltd and others* [2023] 3 All SA 323 (SCA).
[2] Constitution of the Republic of South Africa, 1996.
[3] Act 1 of 1999.
[4] Act 5 0f 2000.
[5] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC).
[6] Ibid at para 58.

of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc v The Queen* [1985] 1 SCR 441 at 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source".

[15] When it comes to the principle of legality, Ngcobo J held in *Pharmaceutical Manufacturers Associations of South Africa and Another: re ex- Parte President of South Africa and Others*[7], the Constitutional Court explained the principle of legality is an incident of the rule of law, which is founding value of the Constitutions itself. Ngcobo J further clarified the principle of legality in *Affordable Medicines Trust and Others v Minister of Health and Others*[8].

[16] Section 217 of the Constitution goes further to state that:

"1. When an organ of state in national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with system a which is fair, equitable, transparent, competitive and cost-effective.

2. Subsection (1) does not prevent the organ of state or institutions referred to in that subsection from implementing a procurement policy providing for—

a) categories of preference in the allocation of contracts; and

b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

3. National legislation must prescribe a framework within which policy referred to in subsection (2) must be implemented."

[17] The facts of this case reminds me of what Ponnan JA remarked and said in *Altech Radio Holdings (Pty) Ltd and others v Tshwane City*[9] herein after I refer thereto as "*Altech*":

[7] 2000 (2) SA 674 (CC).
[8] 2006(3) SA 247 (CC).
[9] 2021 (3) SA 25 (SCA) at para 1.

> "State self-review is a novel, but burgeoning, species of judicial review that has occupied the attention of our courts in a number of recent decisions. Although it seems axiomatic that unlawful must be undone, to borrow from Dr Seuss, 'simple it's not'. Particularly worrisome are public procurement cases, where, as here, an organ of State seeks to undo its own prior decisions'.

[18] It is apposite for me to summarize the Altech facts, which are as follows:

The SCA dealt with an appeal by *Altech*, *Thobela* and *Abs*a, with leave from Baqwa J. Their case was that the City delayed in launching the review application, in a manner that is egregiously unreasonable that it cannot be overlooked or condoned. That, so the argument goes, is dispositive of the appeal in their favor. In the alternative, it was contended that if the delay falls to be condoned, and if of the grounds by the City are upheld, then it would not be just and equitable for the BOT agreements to be set aside and that in the exercise of the courts discretion under section 172 of the Constitution, the SCA was invited to decline to do so. (own emphasis added), (see para 15 and the footnotes therein, of the *Altech*).

[19] In this case, one of the issues argued extensively by the respondent, is that, whether the inordinate delay by the applicant in instituting this self-review application is just and bares no prejudice to the respondent. This was also the case in Altech. In Altech the court goes on and said in para 16:

"The delay rule is a principle that flows directly from the rule of law and its requirement for certainty".

[20] On the same issue of delay, the court in *Altech*:

> "…[T]here is strong public interest in both certainty and finality". The test for assessing undue delay in the bringing of a legality review application is: first, it must be determined whether the delay is unreasonable or undue (this is a factual enquiry upon which a value judgment is made, having regard to the circumstances of the matter); and, second, if the

delay is unreasonable, whether the court's discretion should nevertheless be exercised to overlook the delay and entertain the application." [10]

[21] In order for this Court to overlook the delay, in the exercise of it's discretion, and entertain the application, it is important to have regard to what the SCA said in *Valor IT v Premier North West Province and Others*[11] this judgment is also referred to in *Altech*:

> "Whether a delay is unreasonable is a factual issue that involves the making of a value judgment. Whether, in the event of the delay being found to be unreasonable, condonation should be granted, involves a 'factual, multi-factor and context sensitive', enquiry in which a range of factors - the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits - are all considered and weighed before the discretion is exercised one way or other".

[22] I understand, that in this case, the applicant has not prayed for condonation for the late filing of its legality review, however, the basis and explanation for the delay are raised in the founding affidavit, and it is a point or issue argued extensively by the respondent, which the applicant has had an opportunity to address this Court, during hearing of this matter.

[23] The chronology of events, as appearing, *ex facie* the papers, is as follows:

The contract that is the subject matter in this legality review was concluded by the applicant and the respondent during 15 May 2018. During 21 November 2018, the respondent had already rendered its services and submitted its payment certificate to the applicant for payment. The respondent, having not been paid, on 5 December 2019, issued civil suit before this Court, claiming its payment for the amount agreed upon, with interest at a prescribed *mora rate*. The civil suit is defended by the applicant, as such its plea to the respondent

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[10] Ibid paras 16 & 19.

[11] 2021 (1) SA 42 (SCA) at para 30.

civil suit was filed on 13 March 2020. During 24 May 2023, the respondent filed an application for summary judgment against the applicant.

[24] The applicant in the founding affidavit acknowledges that, after the application for summary judgment filed by the respondent, it was advised by its attorneys that it should bring the legality review application. Having considered the applicant's acknowledgement, however, the fact remains that the applicant filed this legality review application six months after the summary judgment application was filed by the respondent, and five years after the conclusion of the agreement between the parties. This application was filed on 27 November 2023.

[25] The deponent to the founding affidavit is clear to say, this legality review application was an advice by applicant's attorneys as an option available for the applicant to escape its submission to the contract the applicant signed with the respondent. This then casts doubts on the reasonableness and genuineness of the applicant in its legality review application.

[26] Gleaned from the facts of this case, the length of the delay, five years after the respondent has already performed in terms of the impugned contract, the prejudice caused by the delay to the respondent, the scanty explanation proffered by the applicant, cumulatively weighed, all suggests to one proposition that, this legality review fails to pass the two stage approach the SCA held in *Khumalo*, and in *Valor* matters or judgments.

[27] It is the duty of the Government to respect the law, and not act in a mala fides manner that affects the rights of other litigants. In this regard this Court is bound by the words of Cameron J in *Kirland*:

> "… [T]here 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

> procedural circumventing lifeline. It is the Constitution's primary agent. It must do right, and must do so properly."[12]

In *Khumalo*, it was explained that the standard against which a State litigant's conduct is measured is high and ought to accord with prescripts of the law.[13]

[28] I am bound by the plethora of authorities cited hereabove, as not following previous decisions would undermine the rule of law and invite chaos, as Moseneke J, explained in *Daniels v Campbell NO and Others*[14]:

> "The doctrine of precedent is an incident of the rule of law. Its primary purpose is to advance justice by ensuring certainty of the law, equality and equal treatment and fairness before it. To that end, the doctrine imposes a general obligation on a court to follow legal rulings in previous judicial decisions".

[29] I disagree with the argument by counsel for the applicant, Mr. Maliwa, he argued that gleaned from the facts of this case or objective factors, which he did not elaborate, the delay by applicant was not a willful one, I find the delay by the applicant as unreasonable one and that the applicant simply *mala fides* instituted these proceedings simply to escape liability from the contract it concluded with the respondent.

[30] The public interests do not favor the applicant, its legality review has been instituted five years after the conclusion of the contract with the respondent; the respondent has already performed its services in terms of the contract, and therefore the respondent has decided to enforce its payment by issuing a civil suit, it is only after the debt and payment enforcement that the applicant realized, according to it, that the contract was in any way wrongly concluded, something never raised before the respondent enforced payment of the amount it is owed by the applicant.

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[12] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) at para 82.
[13] Ibid at para 83.
[14] 2004 (5) SA 331 (CC) at para 94.

[31] The circumstances of this case are identical to a certain extent to those in *Buffalo City Municipality v Asla Construction (Pty) Ltd*[15]. Theron J, held that, *"[in] these circumstances, justice and equity dictate that the Municipality should not benefit from its own undue delay and in allowing the respondent to proceed to perform in terms of the contract*". That is exactly what has happened in this case.

[32] There seems not to be a challenge from the respondent in the manner in which this application has been brought, the applicant states clear in its founding affidavit that this application is brought under prescripts of the principle of legality and not PAJA. I agree with that since the Constitutional Court's decision in the matter of *State Information Technology Agency SOC Limited v Gijima Holdngs (Pty) Ltd*.[16] *Gijima* makes it clear that the self-review application is brought in terms of the principle of legality.

[33] In *Altech*, the court stressed that the objective of the self-review should be to promote open, responsive and accountable government. In *KwaZulu-Natal Joint Liaison Committee v MEC for the Department of Education, KwaZulu-Natal and Others* 2013 (4) SA 262 (CC) at paras 57 and 63, the court emphasized that the Municipality, in that matter, the court referred to the Municipality as the City, has a duty to act in a manner that promotes reliance, accountability and rationality and that is not legally and constitutionally unconscionable. In this case, it cannot be said that the Municipality has acted in that manner, in this instance legality review has been brought in order for the applicant to evade its contractual duty to pay the respondent.

[15] 2019 (4) SA 331 (CC) at para 105.
[16] 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC).

[34] I now turn to deal with consequences of setting aside against not setting aside the impugned contract. The applicant has in its notice of motion prayed, in the main, that the agreement it had concluded with the respondent be reviewed, set aside, and declared to be of no force and effect. The applicant, in my view, turned a blind eye on the catastrophic consequences, this might have to the respondent and the community that falls within its jurisdiction who, in fact had enjoined benefit from the impugned contract; water is a basic need, and the everyone has a constitutional right of access to water not only for nutritional benefit but also for sanitation benefit.

[35] That then, compels this Court to weigh-up the consequences of setting aside, against not setting aside, the impugned contract. In *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others*[17]:

> "The difficulty that is presented by invalid administrative acts, as pointed out by this court in *Oudekraal Estates*, is that they often have acted upon by the time they are brought under review. That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable".

[36] By the reason of the undue delay as I have tabulated above, this court is not inclined to review the impugned contract as prayed by the applicant. Further to that, the plethora of authorities as I have cited point to one direction that it will not be just and equitable to set aside the impugned contract. That leaves me with one option, that is simple to dismiss this application, and or this application ought to fail with costs.

[17] 2008 (2) SA 481 (SCA) at para 23.

[37] In an attempt to ensure it's payment for the services rendered to the applicant, the respondent has filed a counter application, in which it seeks, in main, for a declaratory order that the applicant be declared to be liable for the services it has rendered to it in terms of the impugned contract, other reliefs the respondent seeks in the counter-application are ancillary to this main relief. I am satisfied that the respondent has made a proper case to establish that it has an existing contingent and future right, and therefore satisfies the requirements for the grant of a declaratory order. During the gearing of this matter, Mr. Gwala sc, who appeared for the respondent, argued extensively that in the event this court is inclined to grant the reliefs sought by the applicant, the authorities I have cited above, are clear that in the end, it would not be appropriate for this court to set aside the contract, even though it may be declared to be invalid. I agree. Even if this court were to grant the prayers the applicant sought, it would not set aside the impugned contract, that would not be in the interests of justice for the innocent respondent. In any event, the main application has failed, therefore this court will exercise it's discretion in terms of section 172 of the Constitution and issue a just and equitable order.

[38] In the circumstances, the counter application ought to succeed. I see no reason to depart from the main principle that costs follow the result in both the main and the counter-application.

[39] In the result the following order is issued:

ORDER:

1. The main application is dismissed with costs on scale "B", such costs to include costs consequent to the employment of senior counsel and the Junior counsel.

2. It is declared that the applicant is liable to compensate the respondent for services rendered to it, by the respondent, in respect of the emergency repair of the existing water scheme in Mombeni Village, Mt Ayliff.

3. The contract entered into and between the applicant and the respondent, concluded during May 2018, is declared to be valid.

4. The applicant is directed and ordered to compensate the respondent an amount of **R5,390,143.13,** which is due and payable to the respondent, consequent to the services it has rendered to the applicant, as a result of the contract mentioned in paragraphs 2 and 3 above.

5. The applicant is directed to pay costs in respect of the counter-application on scale "B', and such costs to include the costs incurred for the employment of senior and junior counsel.

M. MHAMBI

JUDGE OF THE HIGH COURT (ACTING)

APPEARANCES:

Counsel for the Applicant,

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Date of hearing	: 07 August 2025
Date of delivery	: 23 October 2025