



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

CASE NO. 6084/2018

In the matter between:

SAMBUMBU AND ASSOCIATES

Plaintiff

And

INDEPENDENT DEVELOPMENT TRUST

Defendant

JUDGMENT

JOLWANA J

Introduction

[1]

“...The norm-setting constitutional provision on the procurement of goods and services by organs of state is section 217 of the Constitution. This section provides that when an organ of state “contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective¹.”

¹ Minister of Finance Afribusiness NPC 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC) para 97.

The above salutary words of Madlanga J brought to the forefront of our national psyche a stark reminder about the constitutional injunction provided for in section 217 of our Constitution which must be observed by all organs of state in their day to day procurement of goods and services. The controversy in this matter is whether relief can be granted for payment for services procured by an organ of state without following a system which is fair, equitable, transparent, competitive and cost effective. Differently put, whether an organ of state can be held liable and consequently, be ordered to pay a service provider as a just and equitable remedy where services were procured without honouring this constitutional injunction. This is the conundrum that must be resolved in this matter.

Pleadings

[2] Plaintiff instituted action proceedings for the recovery of a payment due for architectural services rendered by it subsequent to the conclusion of an oral agreement between Mr Sambumbu representing the plaintiff and Mr Makupula, the regional general manager of the defendant in his capacity as such. The material terms of the agreement were, *inter alia*, that the plaintiff would assess the building of a new Toli Senior Secondary School in Lusikisiki (the Toli project) and the conceptualisation and production of a report for the development of that school. In compliance with these material terms of its mandate, the plaintiff performed work related to stage 1 by appraising the site, the rights, budgetary constraints, the need for consultants, project programme and methods of contracting.

[3] In respect of stage 2 of the agreement, the plaintiff performed its mandate by finalising the concept design and its viability. In this regard the plaintiff prepared an initial design and advised on the intended space provision and planning

relationships; the proposed materials and intended building services; the technical and functional characteristics of the design; the conformity of the concept design with the rights of use to the land; the review of the anticipated costs of the project and reviewed the project program. All these services were rendered for the benefit of the defendant in accordance with the regulations passed in terms of the Architectural Profession Act, 44 of 2000 (the Act).

[4] A further material term of the agreement was that the defendant would pay the plaintiff in terms of the Act and the regulations promulgated thereunder. The fees charged for the aforesaid architectural services would be as provided for in the Act and regulations which also provide for work stages. Such fees are charged in accordance with the estimated value of the project as per the quantity surveyor's report which was R429 491 401.96 less 18% fees and disbursements. The plaintiff rendered the aforesaid services at the instance of the defendant during the period July 2015 to February 2016 and produced a report and briefed the defendant with the report together with the principal agent. In June 2016 the plaintiff issued an invoice for the amount of R16 776 771.89 for services rendered as aforesaid.

[5] The defendant, in breach of the agreement, adopted the designs and concept of the plaintiff for the construction of Toli Senior Secondary School, but utilized the services of another architect who had not drawn the designs and who had not formulated the concept design. The defendant accordingly repudiated the agreement, and such repudiation was accepted by the plaintiff. As a result of such repudiation the defendant made payment to another architect on designs and concepts that had been formulated by the plaintiff and did not pay the plaintiff for the services rendered.

[6] In the first instance the defendant pleaded non-compliance with section 217 of the Constitution alleging that in procuring plaintiff's services it did not do so in a manner that is fair, equitable, transparent, competitive and cost effective. On that basis, it pleaded that such contract was invalid and therefore it is not liable to pay the plaintiff. In the second instance it denied that it entered into a contract with the plaintiff in the nature and on the terms alleged. It further denied that Mr Makupula who allegedly entered into the contract was authorised to enter into such a contract with the plaintiff on behalf of the defendant. It further denied knowing or appointing MZL007 Quantity Surveyors as its principal agents and alleged that it was MZL007 who appointed the plaintiff. In the final analysis, it denied being aware of the alleged invoice which it alleged, would have been issued to the project manager and not to it and further alleged that in light of the alleged non-existence of the contract and its invalidity, it denied being in breach thereof.

[7] In replication, plaintiff admitted the defendant's non-compliance with section 217 of the Constitution in the procurement of its services. It, however, pleaded that it did render the services in terms of the contract concluded with the defendant from which the defendant benefited. The defendant was accordingly enriched while it was impoverished as a result of the defendant's breach. It therefore pleaded that it is just and equitable that it should be compensated for the services it rendered to the defendant for which it held the defendant liable. It denied that Mr Makupula who represented the defendant had no authority to enter into that contract. It further pleaded that even if Mr Makupula did not have such authority, he represented to the plaintiff that he had the authority to enter into the contract on behalf of the defendant. The defendant never informed the plaintiff about Mr Makupula's lack of authority nor did it object to the plaintiff's performance of the contract on the basis of his alleged

lack of authority to conclude the contract. The plaintiff further pleaded that it bona fide acted on the basis of the defendant's and Mr Makupula's representations. In any event, it was unaware of the defendant's internal arrangements and had no basis to doubt Mr Makupula's representations.

Plaintiff's evidence

[8] Mr Sambumbu testified for the plaintiff. His evidence was that he was a sole member of the plaintiff at the time the contract was concluded. He is a professional architect and practices as such having qualified at the University of Cape Town in 1999. As an architect he designs buildings which he starts by receiving a briefing at an initial stage of the process in which the client's conceptualisation of the building desired is converted into a drawing. His relationship with the defendant started around year 2000. He received instructions in two ways which was either telephonically or by means of a fax or later by email when the latter also became a mode of communication.

[9] Such instructions would, from time to time, come from either the defendant's regional general manager or one of the technical staff members. His relationship with the defendant started by him going to the defendant to see the regional general manager at the time to introduce his company's services. In introducing themselves the plaintiff prepared a profile with all their contact information, and he believes the defendant kept a data of their potential service providers as the plaintiff was not the only architects that provided services to the defendant. At that stage, his company was the only black owned company in the former Transkei area which worked to his advantage. Throughout his company's relationship with the defendant, at no stage was there an advertisement of a bid for projects for which bidders were required to

submit bids. They received either a telephone call or a fax when their services were required. A letter of appointment would be faxed to them, or the instructions would be conveyed telephonically. The letter of appointment would sometimes come first or sometimes while the plaintiff was already doing the work where it would have been instructed telephonically. Some of the letters of appointment would be given to him when he submitted invoices as the work of an architect gets completed when the building itself has been finished or its construction is completed. He would send an invoice according to a stage of the process and would sometimes only then be given a letter of appointment. Some stages would go up to 20 or 30 stages until the building construction is completed.

[10] He also testified in relation to some of the other projects plaintiff had been appointed to do before the Toli project. One of those was in respect of Mpindweni Senior Secondary School in Mzimvubu Municipality. The letter of appointment in respect of that project was dated 12 July 2012. He could not recall the date on which he was given that letter of appointment. Plaintiff never submitted any tender for that project and it was paid for services rendered. He then referred to another letter of appointment from the defendant dated 20 May 2013 which was for Mgqumangwe SPS in Lusikisiki for which plaintiff was also paid by the defendant. It was never invited to submit any bid for that work, and it never submitted any bid. It was the defendant that approached the plaintiff to do the work. He could not remember whether he was asked telephonically or by email to do that project. The work was done and plaintiff was paid for the services rendered. Mr Sambumbu also referred to another project in respect of which the letter of appointment was dated 26 April 2012. This project was in respect of Kwaqonda Special School for which the plaintiff was

also paid by the defendant. Plaintiff was never invited to submit any tender for that project and it never submitted any bid for it.

[11] He testified that these were all just examples of the many projects the plaintiff was asked to do for the defendant in respect of all of which the plaintiff was appointed, did the work and got paid for services rendered. All the appointment letters were signed by Mr Makupula either as the acting regional general manager and later as the regional general manager of the defendant. Plaintiff was paid for all the services it rendered over the years for all the projects it did for the defendant. He testified that in respect of the letter of appointment dated 5 May 2015 he became aware of a bid that had been published by the defendant and submitted a bid in December 2014. That letter of appointment was also signed by the regional general manager of the defendant, Mr Makupula. That project was for the upgrading of the kitchens for the Department of Correctional Services in Cofimvaba, Ngcobo, Dordrecht and Lady Frere Correctional Centres. In respect of all the projects the plaintiff did for the defendant, payment was according to the various stages of each project until a project was completed at which stage keys were handed over to the client department concerned. For each stage they reported to the defendant in terms of what would have been done up to that stage. Reports would be in the form of a presentation meeting with the defendant's officials in which he would take those officials through his written reports.

[12] In respect of the Toli project, Mr Sambumbu testified that plaintiff was appointed to attend to or provide architectural services at Toli Senior Secondary School in Lusikisiki on 27 July 2015. He was asked to assess that school and produce a report. This entailed going to that school and assessing its facilities as well as what needed to be done. He found the school dilapidated with classrooms having cracks

all over. In some classrooms there were no doors with the result that on rainy days animals would use them as shelter. He referred to his detailed assessment report which was annexed to plaintiff's particulars of claim. In respect of that project the client department was the department of education on whose behalf the defendant was doing the project. He submitted his report on 23 November 2015 to the defendant. He had received an email inviting him to come to the defendant's offices to present his report in respect of that project. The defendant's appointed quantity surveyor, Mr Mshunqwana also attended that presentation meeting. It took place at the defendant's boardroom in East London. The email reflected that it was sent by Mr Makupula, the defendant's regional general manager. Present in that presentation meeting were himself, Mr Mshunqwana, Mr Makupula, Mr Sepho Pefole who was the department of education's architect, Mr Mnqanqeni represented the department of education's engineering section, Mr Giqo was one of the defendant's representatives, Mr Gcelu, the technical manager or project manager of the defendant was also in attendance.

[13] He presented the plaintiff's report including drawings which were in a memory stick. He did the presentation through a projector so that everyone in the meeting could see the nature of the work that needed to be done. The defendant was satisfied with his presentation. He left the original documents with the defendant in that meeting and kept copies thereof for his own records. Mr Mshunqwana also presented a report in that same meeting relating to his financial assessment of the project. Mr Mshunqwana's report was based on his report and his drawings and Mr Mshunqwana's report was also given to the defendant. Stages 1 and 2 were already completed when he made the presentation.

[14] After that presentation he waited for the defendant to indicate if any adjustments or changes were deemed necessary by the defendant or areas that needed to be revised. After waiting, he started making follow ups telephonically, but he never received any feedback. He ended up issuing an invoice for services he had rendered up to that point. His invoice was based on gazetted fee scales for architects. He testified that in respect of stage 1, the fees are 5% of the total fees for the project, for stage 2 fees are calculated at 15% of the total fees.

[15] During cross examination Mr Sambumbu confirmed that in 2015 he was aware that the defendant did have a supply chain management policy when he entered into an oral agreement with it in respect of the Toli project. He confirmed the letter dated 13 July 2012 in which he was appointed for the Mpindweni SPS project. He testified that when he was instructed by the defendant to do the Mpindweni SPS project it was not the first time he was given a verbal telephonic instructions to attend to a project and the letter of appointment issued later while already doing the project. He testified that in the Toli project he made his presentation to a group of people from the defendant and the department of education who had been invited to the presentation. Those people included Mr Makupula, the regional general manager of the defendant, the engineer representing the department of education, the quantity surveyor also from the department of education and project manager from the defendant. It was put to Mr Sambumbu that a witness of the defendant would testify that his company was never appointed for the Toli project which he disputed. It was further put to him that the defendant has no record of him being appointed for the Toli project and that there was another professional team that was appointed in 2016 for the Toli project.

[16] He further testified that all the attendees to the presentation meeting were required to sign an attendance register. The defendant's officials also took minutes of the meeting which were to be sent to the attendees afterwards. After requesting to be furnished with the minutes of that meeting to no avail he eventually gave up. He confirmed that the tender for the Toli project was never advertised and there were no bid specifications, no bid evaluation process and there was no bid adjudication process. He testified that he would just receive an appointment letter via email or fax which was still being used at the time. He did not know the process followed by the defendant internally before he received the telephone call to do the work for the Toli project as was the case with the many projects he had done for the defendant.

Defendant's evidence

[17] Mr Somdaka who was called by the defendant testified that he was an employee of the defendant holding the position of a project manager stationed at the defendant's East London office. He was employed at the defendant's Bloemfontein office in 2013 as a project manager before he was seconded to the East London office in the same position in 2021. He was formally transferred to their East London office in October 2023. He testified that the department of education would engage the defendant's senior managers if they wanted to build a school. Normally, the project managers of the defendant would go to that school to engage with stakeholders and members of the community and the school governing body to introduce themselves. The defendant would then engage professional service providers which are the architects, the engineers and quantity surveyors to go and do an assessment of the condition of the existing school and what needs to be done. They would then do a scope assessment and the site development plan. This is a drawing of the layout of the needs of the school, the position of the new buildings as

well as a high-level estimate of the costing of the project. He further testified that they keep records of their projects so that even 10 years down the line the records of a project would still be available.

[18] In respect of the Toli project his evidence was that when he was seconded from the Free State Province to come to East London, he found that the Toli project had been stalled. The reasons for the project being stalled varied from government funding not being available at the time the professional team was appointed as well as land disputes among local communities. When he arrived the department of education said that the project was being revived and that the community issues had been resolved. He was asked to resuscitate the project. He received a file from a client representative in the defendant's office. There was a kick-off meeting for the restart of the project with the department of education and the professional team being present. The architect was IDC Architects, civil and structural engineers were Saunders and Humme. The quantity surveyors were Imvelo Quantity Surveyors. There was also Califro Consulting Engineers. There was no other file involving another professional team. While he was aware that Sambumbu Architects were also architects, they were not employed by the defendant when he joined the East London office. He was not informed that they were involved in the Toli project.

[19] He testified that if an architect has drawn a site development plan the quantity surveyor would quantify what needs to be done and cost it. The architect does a site development plan and gives it to the appointed quantity surveyor who will cost it. They will both do a formal submission to the defendant. The defendant will take the presentation and scrutinize it after which they will engage the department of education. The site development plan will first be delivered to the project manager. There will be a formal meeting with the architect, the quantity surveyor and

engineers to scrutinize the site development plan and the costs after which if there are any changes that are necessary, they are proposed at that meeting.

[20] Under cross-examination Mr Somdyala testified that he arrived at the defendant's East London office in 2021 and therefore he has no personal knowledge of what happened between 2013 and 2020 in relation to the Toli project. He therefore could not dispute that Mr Sambumbu submitted his assessment report and site development plan to the defendant on 23 November 2015. He could not dispute that Mr Sambumbu did submit his portfolio of work to the principal agent on that date in the meeting. He could also not dispute that Mr Sambumbu submitted an invoice to the defendant for the work he had done and that the defendant did not raise any queries or objections about his portfolio of work. He had met Mr Makupula before in 2017 or 2018. He also met him in the public spaces in the past year or two. While he could not confirm if he was still alive, he had not heard that he had passed on. He knows Mr Gcelu who currently works at the defendant's East London office as his immediate supervisor. He is therefore still employed by the defendant. He did not know Nomvuselelo Baso. He knows Nozibele Leka and that she worked for the defendant in the Eastern Cape, but when he arrived in 2021, she was no longer there. He knows Theunis Booysens and that he worked at the national office of the defendant in Pretoria.

[21] His further evidence was that the only file he was aware of in respect of the Toli project was the one that was handed to him when he arrived in 2021 which was that of IDC Architects. He therefore would not know if there is another file predating the IDC Architects file in their filing room. Therefore, it was not his evidence that no other file for the Toli project exists in their offices. He was just not aware of it as it was not brought to his attention or handed to him.

Analysis

[22] It behoves of me to first point out that there is only one version that was presented which is that of the plaintiff. I say this not because no witness was called at all by the defendant but because the one witness who was called, Mr Somdyala, was, on his own version, not involved in this matter at all at the times relevant to this case. However, his evidence was useful in another respect, that is that of assisting the court to understand the general operations of the defendant when compliance with the relevant legislative prescripts and supply chain management policy of the defendant was being observed. Beyond the procurement process, his evidence was not materially different to that of Mr Sambumbu about what was expected of an appointed architect. It was, however, strange that he could not even provide evidence, even if such evidence would have been based on the perusal of the relevant records at the defendant's offices on anything at all about the Toli project from anytime earlier than when that project was restarted after his arrival in the Eastern Cape. He could not testify even about the many documented instances of a number of other projects that were allocated to the plaintiff for which, on the plaintiff's undisputed evidence, it was paid in full over a number of years having completed those projects. What is more surprising is that being the only witness the defendant elected to call, Mr Somdyala did not even investigate the Toli project internally. In fact, at some stage during his evidence and in response to questions asked by the court, he openly conceded that the Toli project file in respect of the plaintiff's appointment and execution of its mandate may very well be in their storage in their offices. Therefore, it was not a case of him having looked for that file but could not find it. He just never bothered to investigate the plaintiff's allegations in preparation

for the defendant's evidence so as to deal with the plaintiff's pleaded case and its evidence.

[23] Mr Sambumbu's evidence was not in any way controverted. No evidence was presented in respect of material aspects of the defendant's own pleaded case. This is despite the fact that defendant was perfectly placed in a position to rebut the plaintiff's evidence. Mr Somdyala could have looked for those files and acquainted himself with all the documents relating to all the projects that were done by the plaintiff including the Toli project. This is important because there is no evidence that those files from the time of the plaintiff's appointment for all those projects could somehow not be found. Mr Somdyala just never bothered to look for them. He strangely contented himself with the file that had been handed to him when he joined the defendant's Eastern Cape office knowing full well that he had not been called to testify about the appointment of IDC Architects. He was going to testify about the plaintiff's appointment by the defendant which, on the defendant's pleaded case, was being disputed. This was despite his own evidence that the defendant kept records of project files so that even 10 years later the records would still be available.

[24] There is another reason why the defendant's approach in defending this matter is bewildering. It is that during the cross-examination of Mr Somdyala, he was referred to an email invitation of the plaintiff and a number of other people some of whom were the department of education officials which was the defendant's client department while others were the defendant's officials. Furthermore, Mr Somdyala testified that he had seen Mr Makupula in public spaces and that Mr Makupula was no longer working for the defendant. He had seen him in the last year or two and that he had not heard anything suggesting that Mr Makupula was deceased. No evidence was presented of him having been sought but was somehow unavailable or had

refused to testify in these proceedings or why he could not be subpoenaed. He was just ignored.

[25] This is despite Mr Sambumbu's evidence that Mr Makupula, as he had done so many times before, even in this instance, had instructed the plaintiff to attend to the Toli project on behalf of the defendant. On the face of it, it was Mr Makupula's email invitation that convened the presentation meeting of the 23 November 2015 inviting all those attendees some of whom in fact attended the meeting at the defendant's offices. There was an issue raised by defendant's counsel the effect of which was whether ordinarily in such a presentation meeting there would not be minutes of such a meeting and an attendance register. The difficulty with this issue being raised with the plaintiff is that one would have expected the defendant to be the one with such minutes and the attendance register. The defendant convened that meeting in its own offices and therefore keeping minutes of the meeting and the attendance register would be a matter within its own province. Besides, Mr Sambumbu's evidence was that he had asked for those minutes after the date of the meeting but were not furnished to him. If the suggestion was that it ought to have been the invitee, in this instance, Mr Sambumbu who prepared and produced the attendance register and took minutes of that meeting, that does not make logical sense in as much as it would go against the norm for an invitee to a meeting to prepare minutes and see to the attendance register. In any event, no evidence was presented by the defendant that no such meeting took place at the defendant's offices on that date.

[26] The issue of Mr Makupula not being called by the defendant to testify also goes for Mr Mshunqwana. On Mr Sambumbu's evidence, Mr Mshunqwana was appointed by the defendant as its quantity surveyor. He also attended that meeting and made a presentation relating to the costing of the Toli project based on the plaintiff's report.

He was also not called nor was it indicated why he was not being called. The same goes for a few other employees of the defendant who could have been called but were not called despite being mentioned by name by Mr Sambumbu in his evidence. One of those employees was Mr Gcelu who, on Mr Somdyala's evidence, not only is he still in the employ of the defendant but also is Mr Somdyala's current direct supervisor. He was the project manager of the defendant in respect of the Toli project on Mr Sambumbu's evidence. He attended the meeting of the 23 November 2015. He could easily have been called but was just not called for no reason at all, at least none that was given by the defendant. He was involved in this project and through him, the defendant could have easily refuted Mr Sambumbu's evidence if the defendant wanted to do so. Instead, the defendant elected to rely on bland generalisations, bald and therefore unsubstantiated denials it pleaded about which no witness was called to give evidence. Lastly, even the witnesses whom it was indicated during cross examination of Mr Sambumbu by defendant's counsel, would be called were inexplicably not called. The suspicion that the defendant deliberately withheld evidence that it could have given to substantiate its case and was therefore not being candid with the court is difficult to resist.

[27] In *Kalil*², which perforce, applies to the facts in this matter, it was held that:

“(W)here, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance.”

[28] The defendant's failure to call relevant witnesses is not without implications. In this regard our jurisprudence is clear. The inference to be drawn from a party's

² *Kalil NO and Others v Mangaung Metropolitan Municipality and Others* 2014 (5) SA 123 (SCA) para 30.

failure to call a witness who is available to testify in his/her favour as the defendant has done is that that party fears that that witness's evidence would have been unfavourable to that party or his/her evidence may not pass the credibility test. Counsel for the plaintiff submitted that the plaintiff did not have an equal opportunity to call the witnesses the defendant could have called in that they were either current or former employees of the defendant. Therefore, plaintiff did not have an equal opportunity to call them. Besides, plaintiff was not aware during trial that the defendant was not going to call them until the defendant closed its case.

[29] In making this argument which was completely ignored by the defendant in its written submissions, counsel for the plaintiff relied on *Raliphaswa*³ which is an authority on this point in which the Supreme Court of Appeal stated the legal position as follows:

“In this court the respondents persisted with the argument that the court below was justified in drawing an adverse inference against the appellant from the failure to present the evidence of the sympathetic reservist who berated the respondents. The appellant's uncontradicted evidence was that he did not know the identity of this reservist and, despite his request, the police refused to disclose it to him. The appellant took a grave risk to allege that this reservist berated the respondents as they were colleagues and could easily have called him to contradict the appellant. The question may well be asked why they did not. When a witness is equally available to both parties, but not called to give evidence, it is logically possible to draw an adverse inference against both. The party on whom onus rests has no greater obligation to call a witness, but may find that a failure to call a witness creates the risk of the onus proving decisive. In the present matter the appellant did not have an opportunity equal to the respondents to call this witness. The adverse inference drawn by the trial court against the appellant was unjustified in the circumstances. An adverse inference in any event does not operate to destroy a case otherwise proved, which is what appellant managed to do.”

³ *Raliphaswa v Mugivhi and Others* 2008 (4) SA 154 (SCA) para 15:

[30] As I said earlier, the possible witnesses were Mr Makupula, the defendant's former regional general manager, Mr Gcelu who was the project manager in respect of the Toli project when the plaintiff did that project. He was also present in the presentation meeting of the 23 November 2015 in which both Mr Sambumbu and Mr Mshunqwana made presentations. These witnesses were not called. Mr Booysens was also a potential witness as he was alleged to have also been present in the meeting and was, according to Mr Somdyala's evidence, still in the employ of the defendant now based in its Pretoria office. The question that screams quite loudly is why did the defendant not call any of these witnesses to contradict the evidence of the plaintiff in support of its pleaded denials of liability. No explanation was made by the defendant at all in this regard. It seems to me that the only logical reason, absent a proper explanation to the contrary which was not proffered, is that if any of these witnesses had been called, their evidence would have been unfavourable to the defendant.

[31] With all of this having been said and the plaintiff's evidence largely being uncontradicted, it follows that the plaintiff has, on a balance of probabilities, proved that it was appointed by the defendant to render architectural services for the Toli project which it did. It has also proved that it rendered its services in respect of stages 1 and 2 in respect of which it was, again on its uncontradicted evidence, ordinarily entitled to be paid the amount claimed. However, there is another issue of significance. That is the common cause fact that the services of the plaintiff in respect of the Toli project were procured contrary to the process envisaged in section 217⁴ of the Constitution. That being the case the question is whether the

⁴ Section 217 of the Constitution of the Republic of South Africa, 1996 reads:

plaintiff is entitled to the payment of the amount claimed for services rendered in circumstances in which it was appointed without following the proper procurement processes. Before I deal with this issue, I consider it convenient to first deal with the defendant's plea relating to Mr Makupula's lack of authority to enter into that contract on behalf of the defendant. It is to this issue that I now turn.

Mr Makupula's authority

[32] The defendant's special plea in this regard is that while it is so that Mr Makupula was its regional general manager, he had no authority to bind the defendant to the contract. Regrettably, the basis for this contention is not pleaded nor was any evidence on it led. In its replication, the plaintiff pleads a denial that Mr Makupula had no authority to bind the defendant. It further pleads that in any event, Mr Makupula represented to it that he had authority to contract on behalf of the defendant. Furthermore, it was never informed by the defendant about Mr Makupula's lack of authority and the defendant never objected to the plaintiff's performance in terms of the contract. Plaintiff therefore bona fide acted on the basis of the defendant's representations it being unaware of its internal arrangements and had no basis to doubt Mr Mapukula's representations.

[33] Plaintiff's written submissions are to the effect that it has provided evidence which is undisputed of more than three other contracts which were concluded by Mr Makupula on behalf of the defendant. It is so that not only was that evidence not

(1) 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 in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

controverted but also its evidence that in respect of all those contracts it was paid for the services it rendered was not challenged. No evidence was given by the defendant to the effect that Mr Makupula had no authority to conclude the contract in respect of the Toli project nor was any basis set out why he would lack authority to bind the defendant in respect of the Toli project which he apparently did not lack for the other projects. The conduct of the defendant in respect of all the contracts concluded by Mr Makupula on its behalf suggests that Mr Makupula did in fact have the necessary authority to conclude those contracts with service providers. If he lacked such authority, he was allowed to represent, for many years, that he had such authority as the evidence relating to the many other projects he had concluded with the plaintiff on behalf of the defendant was not challenged.

[34] In positing this submission, counsel the plaintiff relied on *Makate*⁵ in which the Constitutional Court, explaining actual and ostensible or apparent authority said:

“Actual authority and ostensible or apparent authority are the opposite sides of the same coin. If an agent wishes to perform a juristic act on behalf of a principal, the agent requires authority to do so for the act to bind the principal. If the principal had conferred the necessary authority either expressly or impliedly, the agent is taken to have actual authority. But if the principal were to deny that she had conferred the authority, the third party who concluded the juristic act with the agent may plead estoppel in replication. In this context, estoppel is not a form of authority but a rule to the effect that if the principal had conducted herself in a manner that misled the third party into believing the agent had authority, the principal is precluded from denying that the agent had authority.

The same misrepresentation may also lead to an appearance that the agent has the power to act on behalf of the principal. This is known as ostensible or apparent authority in our law. While this kind of authority may not have been conferred by the principal, it is still taken to be the authority of the agent as it appears to others. It is distinguishable from estoppel which is not authority at all. Moreover, estoppel and

⁵ *Makate v Vodacom Ltd* 2016 (4) SA 121 at 138 (CC) paras 45 – 46.

apparent authority have different elements, barring one that is common to both. The common element is the representation which may take the form of words or conduct.”

[35] The defendant not only pleaded a bare denial that Mr Makupula had authority to contract with the plaintiff on its behalf but also failed to call any witness at all on that issue. As if that was not mind boggling enough, the defendant’s written submissions do not frontally deal with this issue at least not cogently even though it is not only extensively pleaded by the plaintiff but also the plaintiff also dealt with it in its evidence. The defendant’s denial of Mr Makupula’s actual and/or apparent authority is therefore unsustainable as there is no basis for not accepting plaintiff’s uncontradicted evidence in this regard. Not only is the plaintiff’s evidence regarding the defendant’s representations unchallenged but also the basis on which in respect of the Toli project which, like the many other projects before it were done without following the process set out in section 217 of the Constitution, the defendant elected not to call any relevant witness regarding the Toli project. It contented itself with calling a witness whose only evidence related to what should or would happen when its supply chain management policy was observed, something that was not in issue at all as the plaintiff never contended that its appointment followed the defendant’s supply chain management policy.

Section 217 of the Constitution

[36] Plaintiff made a two-pronged submission detailed in its written submissions on this point. First, the plaintiff contended that the fact that the procurement of its services for the Toli project did not follow the process envisaged in section 217 of the Constitution did not, without more, mean that it is not entitled to be paid. It further submitted that this is more so that there was no allegation of any wrongdoing or corruption on its part or that it was somehow complicit in any wrongdoing or

corruption. Second, plaintiff contended that it is undisputed that it was not the author of the unconstitutionality complained of in relation to the procurement of its services. It further contended that on its undisputed evidence, the defendant would appoint service providers either orally or in writing during the period between 2005 and 2016. The defendant simply did not follow any tender process when it appointed service providers at that time as it demonstrated with a number of examples. Plaintiff's evidence in this regard is also uncontradicted.

[37] I must say that for reasons best known to it and to it alone, the defendant chose not to tender any evidence in rebuttal of the plaintiff's evidence about how the plaintiff was appointed for various projects over many years which it completed and for which it was paid in almost all of which the section 217 tender process was not followed, the same way that it was not followed in respect of the Toli project. Furthermore, the defendant did not take the opportunity that was available to it of calling any of the witnesses it could have called especially Mr Gcelu who, on the plaintiff's evidence, was involved in the Toli project. This is more so that not only was Mr Gcelu, on the undisputed evidence of the plaintiff, involved in the project but he was also present in the presentation meeting of the 23 November 2015. The need to call Mr Gcelu and the ease with which he could have been called becomes even more apparent considering that he was, on Mr Somdyala's own evidence, still in the employ of the defendant.

[38] In bolstering its submission that it must be paid for the services it rendered in respect of the Toli project, non-compliance with section 217 of the Constitution

notwithstanding, the plaintiff also relied on *Bravospan*⁶. In that case the Supreme Court of Appeal not so long ago expressed itself thusly:

“Bravospan was not responsible for the unconstitutionality of the extension agreement. On the contrary, the municipality in this regard allayed its concerns. The municipality had the benefit of Bravospan’s services for the full period from 1 November 2014 to 31 October 2016. Even after the municipality had launched its review application on 9 February 2015, it persuaded Bravospan to continue to perform services in terms of the extension agreement. At some stage, Bravospan sent invoices to the municipality for services rendered and the municipality, in a letter dated 8 July 2015, undertook to make payment of those invoices. The municipality also sought and obtained legal opinion from its own attorneys that stated that the municipality had been enriched at the expense of Bravospan and that the municipality should pay. Given the role played by the municipality in the breach of the Constitution, Bravospan should be afforded compensation for the services it rendered as a just and equitable remedy under section 172 (1)(b).”

[39] Section 172 (1) of the Constitution reads:

“When deciding a constitutional matter within its power, a court –

- (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 an 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.”

[40] It is common ground that the awarding of the contract to the plaintiff by the defendant without following the process prescribed in section 217 of the Constitution was invalid. However, setting that contract aside is an impossibility and would amount to no more than a *brutum fulmen* as that contract is no longer in existence, it having obviously run its course as it was awarded more than 10 years ago. On the

⁶ Greater Tzaneen Municipality v Bravospan 252 CC (Case no. 428/2021) [2022] ZASCA 155 (7 November 2022) para 22.

undisputed evidence of the plaintiff, the Toli project did not go beyond stage 2 as the defendant inexplicably failed to respond to any communication from the plaintiff and also failed to pay the plaintiff's invoice for services that had been rendered up to that point. Even if the contract had not run its course, it would only be in an exceptionally justifiable situation for the parties to be allowed to continue with their invalid contract. Here, the plaintiff does not seek to hold the defendant to the terms of the contract beyond the services that had already been rendered. It is simply seeking payment in respect of the services it had already rendered which was for stages 1 and 2.

[41] *Bravospan* was taken on appeal to the Constitutional Court. In its second iteration which was now before the Constitutional Court it was held that:

“[49] Unfortunately, the circumstances of this case are not unique. As Navsa ADP stated in *Goven Mbeki*:

‘This case is part of an ever growing, and frankly disturbing, long line of cases where municipalities and organs of state seek to have their own decisions, upon which contracts with service providers are predicated, reviewed and overturned, for want of legality, more often than not after contracts have run their course and services have been rendered thereunder.’”⁷

[42] This is exactly what happened in this case. The defendant, in its written submissions, contended that this Court should review and set aside the contract between the plaintiff and the defendant under PAJA. The defendant's alternative submission was that the court should review the contract's legality under the provisions of section 217 of the Constitution. It went on to submit that it was not required to initiate a formal review application as the matter is already before this Court. This submission was made to buttress the defendant's submission that it should not be ordered to pay for the services which, on the evidence before this

⁷ Greater Tzaneen Municipality v Bravospan 2025 (1) SA 577 (CC) para 49.

Court, were rendered and were not paid for. The defendant does not properly address the question of a just and equitable remedy in light of the services having been rendered by the plaintiff in circumstances in which there is no evidence of malfeasance or impropriety on the plaintiff's part in that whole section 217 constitutional non-compliance. The fact that there was non-compliance with section 217 of the Constitution without more in the plaintiff's appointment, is not an answer at all to the question of a just and equitable remedy.

[43] In *Bravospan*⁸, Chaskalson AJ, writing for the majority, said:

"The judgment of the Supreme Court of Appeal will ensure that, after close to a decade of waiting, Bravospan will finally receive just and equitable compensation for the services that it has provided to the Municipality. That is plainly in the interests of justice. To grant leave to appeal would delay compensation further. That would be contrary to the interests of justice. Therefore, leave should be refused.

There are additional reasons why the interests of justice support the dismissal of the application for leave to appeal on this narrow basis. First, such an approach will send a clear message to the Municipality and other organs of state that they must pay for services that are provided to them by an innocent contractor. This is not a case where there is any pleaded allegation still less evidence of corruption or other wrongdoing on the part of Bravospan that would justify the Municipality's refusal to pay it. Instead, the Municipality is opportunistically raising its own irregular conduct to avoid paying Bravospan. As is clear from [49] of the first judgment, the Municipality's unconscionable conduct in the present case is part of a broader phenomenon of organs of state seeking to rely on their own unlawful conduct to avoid compensating innocent contractors for services that those contractors have provided to them. This court must make it clear that conduct of this sort will not be tolerated."

Conclusion

⁸ Note 6 supra at para 59-60

[44] On the undisputed evidence of the plaintiff having rendered services in respect of the Toli project up to stage 2 and having presented evidence of the work it had done up to stage 2 in a formal presentation meeting at the defendant's offices attended by all the necessary stakeholders including the defendant's appointed quantity surveyor who costed the plaintiff's work and also made his own presentation, the logical conclusion is that plaintiff must be paid. There is also no issue about the basis of the invoiced amount and the plaintiff's uncontested evidence on how architectural services are charged for in similar projects. It was not suggested that the amount claimed was not an equivalent of the amount that should ordinarily be charged for such amount of work. This Court, while taking a very dim view of the unconstitutional award of the contract, it must, on the facts of this case, grant a just and equitable remedy in terms of section 172(1)(b) of the Constitution by directing the defendant to pay for the services rendered in respect of the Toli project. It follows that the plaintiff must succeed in its claim against the defendant. There is no reason why costs should not follow the event.

Results

[45] In the result, the following order is issued:

1. Judgment is granted in favour of the plaintiff against the defendant for the amount claimed in the sum of R16 776 771.89.
2. Defendant shall pay interest on the aforesaid amount at the legal rate from the date of this judgment to date of payment.
3. Defendant shall pay plaintiff's costs of suit on scale B which costs shall include the costs of senior counsel whose costs shall be on scale C.

4. The defendant shall pay interests in respect of costs at the prescribed legal rate from a date fourteen (14) days from the date of the *allocatur* to date of payment.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the plaintiff : Z.Z. Matebese

Instructed by : WT Mnqandi & Associates

Mthatha

Counsel for the defendant : J. Mnisi

Instructed by : Ntabeni Attorneys

c/o Adrew Ngxola Attorneys

Mthatha

Date heard : 05 December 2025

Date delivered : 05 May 2026