CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 54/22

In the matter between:

AFROCENTRICS PROJECTS AND SERVICES (PTY) LIMITED t/a INNOVATIVE DISTRIBUTION	Applicant

and

STATE INFORMATION TECHNOLOGY AGENCY (SITA) SOC LIMITED	First Respondent
MICRO FOCUS SOFTWARE (IRELAND) LIMITED	Second Respondent
AXIZ (PTY) LIMITED	Third Respondent
XUMA TECHNOLOGIES t/a X TELECOMS	Fourth Respondent
DEPUTY MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES	Fifth Respondent
MINISTER OF FINANCE	Sixth Respondent
DIRECTOR-GENERAL DEPARTMENT OF NATIONAL TREASURY	Seventh Respondent

Neutral citation:	*Afrocentrics Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency (SITA) SOC Ltd and Others* [2023] ZACC 2
Coram:	Zondo CJ, Maya DCJ, Baqwa AJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mbatha AJ, Mhlantla J, Rogers J and Tshiqi J

Judgment: Kollapen J (unanimous)

Decided on: 24 January 2023

Summary: Uniform Rules of Court — rule 30 — court orders in irregular proceedings —— court order must provide certainty and finality — competency of court order

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ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria, the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside.
4. The High Court order of 29 January 2021 is set aside.
5. The matter is remitted to the High Court for the determination of the rule 30 application.
6. There is no order as to costs, both in the Supreme Court of Appeal and in this Court.

JUDGMENT

KOLLAPEN J (Zondo CJ, Maya DCJ, Baqwa AJ, Madlanga J, Majiedt J, Mathopo J, Mbatha AJ, Mhlantla J, Rogers J and Tshiqi J concurring):

Introduction

> "A court order must bring finality to the dispute, or part of it, to which it applies. The order must be framed in unambiguous terms and must be capable of being enforced, in the event of non-compliance."[1]

[1] This is an application for leave to appeal against a judgment and order granted by the High Court of South Africa, Gauteng Division, Pretoria on 29 January 2021 (High Court order). The judgment relates to the interpretation and application of rule 30 of the Uniform Rules of Court. It is the competency of the High Court order that is the subject of this judgment.

Parties

[2] The applicant is Afrocentrics Projects and Services (Pty) Limited t/a Innovative Distribution (Afrocentrics), a private company. The first respondent is the State Information Technology Agency (SITA), a state-owned company in the Republic of South Africa. The second respondent is Micro Focus Software (Ireland) Limited. The third respondent is Axiz (Pty) Limited, a private company. The fourth respondent is Xuma Technologies t/a Telecoms (Pty) Limited, a private company. The fifth respondent is the Deputy Minister of Communications and Digital Technologies. The sixth respondent is the Minister of Finance. The seventh respondent is the Director–General of National Treasury.

Factual background

[3] On 1 November 2017 the first and second respondents concluded a procurement agreement (SITA agreement) with the purpose of procuring information and communications technology software and related services for organs of state.

[1] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 73.

[4] The third respondent was, in terms of the SITA agreement, appointed as a Fulfilment Agent. The mandate of the Fulfilment Agent was to assist organs of state with their administration, orders, and payments. The second respondent was entitled, in terms of the SITA agreement, to appoint additional Fulfilment Agents and, accordingly, appointed the applicant as such. The applicant's appointment was governed by the terms of a Fulfilment Agent agreement. In order for the applicant to have access to the relevant information in the terms of the SITA agreement, a Partner agreement was entered into between the applicant and the second respondent.

[5] On 3 July 2019, the second respondent terminated both the Fulfilment Agent agreement and the Partner agreement with the applicant. The applicant launched an application in the High Court seeking an order setting aside the purported termination of the Fulfilment Agent agreement, as well as the Partner agreement.

[6] The merits of the review application are not dealt with, as this would not have been required to be determined in the rule 30 application proceedings before the High Court. They are not before this Court for determination either. A summary of the relief in the main application is therefore provided merely as background information.

[7] In Part A of the applicant's main application, declaratory relief was sought by way of having the SITA agreement suspended pending the outcome of the relief sought in Part B of the main application. The relief sought in Part A was as follows:

> "Pending the finalisation of the application contemplated in Part B of this Notice of Motion, the Framework Agreement entered into between the First and Second Respondent ('the Framework Agreement'), effective 1 November 2017 and any agreement arsing therefrom are hereby suspended."

[8] In Part B of the main application, the applicant sought an order with three broad grounds of relief:

(a) that the SITA, Fulfilment Agent and Partner agreements be reviewed, declared invalid and be set aside to the extent that they violate

the Constitution and frustrate the achievement of the Broad-Based Black Economic Empowerment Act[2] (B-BBEE Act);

(b) that the second respondent's decision to terminate the Fulfilment Agent agreement be reviewed, declared invalid and set aside to the extent that it contravenes the Constitution, frustrates the achievement of the B-BBEE Act and constitutes collusive behaviour or abuse of dominance; and

(c) that the applicant be compensated for the revenue it would have derived had the Fulfilment Agent agreement not been terminated (damages claim).

[9] In response to the main application, the second respondent gave the applicant written notice that the applicant comply with rule 30(2) and rule 30A(1). The causes of complaint against the application are summarised as follows:[3]

(a) The relief sought by the applicant is contradictory and mutually destructive.

(b) The applicant's challenge to the validity of the first respondent's procurement mandate is baseless.

(c) The relief sought by the applicant under rule 53 of the Rules is not competent under the circumstances.

(d) The declaratory relief that the applicant seeks is incompetent.

(e) The applicant's claim for damages is irregular.

[10] Rule 30, headed "Irregular proceedings", provides as follows:

"(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to *set it aside*.

[2] 53 of 2003.

[3] *Afrocentrics Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency (SITA) SOC Ltd*, unreported judgment of the Gauteng High Court, Pretoria, Case No 81609/19 (High Court judgment) at para 13.

(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if—

(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;

(b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;

(c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).

(3) If at the hearing of such application the court is of the opinion that the proceeding or step is irregular or improper, *it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.*

(4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order." (Emphasis added.)

[11] The applicant failed to remove the causes of complaint and the second respondent consequently brought interlocutory applications in terms of rules 30(1), 30A and 6(11) to have these aspects of the applicant's main application set aside for allegedly being irregular and non-compliant with the Rules.

[12] In its judgment, the High Court dealt with most of these issues, and made a number of conclusions, which included that:

(a) The applicant had failed to comply with the formal requirements under rule 53.

(b) It could not utilise the review proceedings envisaged in rule 53 as the agreements entered into between the applicant and the second respondent were private agreements and therefore did not fall within the ambit of administrative action.

(c) The declaratory relief sought by the applicant was not competent.

(d) The prayers for relief sought by the applicant were mutually destructive, contradictory, and inconsistent.

(e) The second respondent was prejudiced in its further conduct of the litigation, because the relief sought in the main application was impossible to understand and properly respond to.

[13] The High Court made the following order on 29 January 2021:

> "1. The applicant's main application is irregular and improper.
>
> 2. The applicant to pay the costs of the application inclusive of the costs of two counsel."

[14] The applicant applied to the High Court for leave to appeal against the whole judgment and order. The application was dismissed with costs. The High Court held that the grounds of appeal were, in essence, the same issues raised in the main application and had been sufficiently canvassed. It held that it was therefore unnecessary to address each and every ground raised in the application for leave to appeal. The High Court also took the view that the order in the rule 30 application did not bring finality to the matter at hand and was not definitive of the rights of the parties. It went on to indicate that the applicant was at liberty to remove the irregularities found to exist and to supplement its papers in the main application.

[15] The applicant's application for special leave to appeal to the Supreme Court of Appeal was dismissed with costs on the grounds that it was not in the interests of justice to entertain an appeal at that stage.

Before this Court

[16] The applicant before this Court argued that the following conclusions of the High Court have a final and definitive effect on the applicant's main application, namely that:

(a) The termination of the agreement by the second respondent does not amount to administrative action.[4]

(b) The applicant cannot utilise rule 53 to review and set aside the decision of the second respondent to terminate the applicant's appointment.[5]

(c) The applicant's review application is not one brought in terms of the Promotion of Administrative Justice Act.[6]

(d) The applicant's claim for damages is in fact based on the notion of what it would have earned had its appointment not been terminated.[7]

(e) The applicant does not satisfy the requirements for the declaratory relief it seeks in the main application.[8]

(f) There is no basis for the contention that the termination of the Fulfilment Agent agreement entered into between the parties violates section 217 of the Constitution and undermines the B-BBEE Act.[9]

(g) There is no basis for the contention that the second respondent's conduct amounts to collusive behaviour and abuse of dominance, and that the collusive conduct allegation is best suited for the Competition Commission.[10]

[17] On that basis, the applicant took the stance that the High Court had indeed set aside the review application and thus argued that the setting aside was irregular. It argued that the High Court had misdirected itself in that it had set aside a substantial portion of the application, and in particular the question whether review proceedings were competent as against the second respondent.

[4] Id at para 58.

[5] Id.

[6] 3 of 2000. High Court judgment above n 2 at para 59.

[7] Id at para 60.

[8] Id at para 67.

[9] Id.

[10] Id.

[18] The applicant therefore argued that the High Court had impermissibly adjudicated matters of substance in the course of dealing with the rule 30 application. It argued that the purpose of rule 30 is to deal with alleged irregularities in proceedings and not to deal with matters of substance.

Directions issued by this Court

[19] This Court issued directions to the parties for the delivery of submissions addressing the following issues:

(a) Did the High Court, in its order of 29 January 2021, set aside the main application or can it be said that it failed to decide the rule 30 application by not explicitly ordering whether and to what extent the alleged irregular proceeding was set aside?

(b) If the High Court failed to decide the rule 30 application, can it be said that it acted outside its powers, with the consequence that its order of 29 January 2021 falls to be set aside? If so, does this Court have jurisdiction to intervene?

(c) If the High Court set aside the main application, did it do so on grounds going to the merits of the main application? If so, what were those grounds and was it permissible for the High Court to determine those grounds in proceedings in terms of rule 30? If it was not permissible to do so in proceedings in terms of rule 30, does this Court have jurisdiction to intervene?

[20] This matter is being decided without an oral hearing.

[21] In the submissions filed in response to the directions that were issued, the applicant argued that when one has regard to the effect of the order on the substance of the dispute and the reasoning of the High Court, the intention of the Court was clearly to set aside the main application by way of the rule 30 order. It argued that it is trite that when interpreting a court's judgment or order, the court's intention is to be

ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules of interpretation.[11]

[22] The second respondent conceded that the High Court did not properly deal with the rule 30 application in that, despite having found that the second respondent had proved it would be prejudiced in the further conduct of litigation if the irregularities in the main application were not removed, it failed to set aside the application. The second respondent requested that the matter be remitted to the High Court for the sole purpose of the High Court dealing with the rule 30 application and making an appropriate order. It urged this Court not to deal with the merits of the application, as that would be premature. It said that the rule 30 proceedings had to be brought to finality, which it submits was not the case in terms of the ineffective order that the High Court had made.

Analysis

Jurisdiction and leave to appeal

[23] This Court's jurisdiction is engaged if a matter raises a constitutional issue or raises an arguable point of law of general public importance which ought to be considered by this Court.[12] Section 34 of the Constitution guarantees everyone "the right to have any dispute that can be resolved by the application of law *decided* in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".[13] The issue for determination is whether the High Court had made a competent order. Indeed, this was the limited issue that was the subject of the directions that the Chief Justice issued to the parties.[14]

[11] *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304E.

[12] Section 167(3)(b) of the Constitution.

[13] Emphasis added.

[14] Reference has already been made to these in [19].

[24] The proper exercise by courts of their powers impacts on the efficacy of courts, the administration of justice and the rights of litigants to have justiciable disputes decided.

[25] These are all constitutional issues which engage our jurisdiction. In addition, there are reasonable prospects of success, and the interests of justice would benefit from this Court providing the necessary clarity relating to the proper adjudication of rule 30 applications. Leave to appeal ought to be granted.

Merits

[26] Rule 30(3) contemplates a two-stage process. A court must first satisfy itself that the proceeding or step is irregular or improper. If it is so satisfied, it has the wide power to set the proceeding aside in its entirety or in part, grant leave to amend or make any order as it deems fit. These are, no doubt, wide powers. Following its conclusion that a step or proceeding is irregular or improper, a court however, is required to make an order.

[27] Court orders are required to bring a level of certainty to the proceedings and directions issued by a court must not be contained in the judgment but in the concluding order.[15] In *Ntshwaqela* the Appellate Division held that the order with which the judgment concludes is—

> "the executive part of the judgment which defines what the Court requires to be done or not done, so that the defendant or respondent, or in some cases the world, may know it."[16]

[28] A court must effectively dispose of the dispute that has come before it, and in doing so, it must act in accordance with its powers relative to the matter at hand. This

[15] *Administrator, Cape v Ntshwaqela* [1989] ZASCA 167; 1990 (1) SA 705 (A) (*Ntshwaqela*) at 716B-C.

[16] Id at 716B.

is after all what provides the certainty and finality that parties seek when they bring a dispute to a court.

[29] The right of access to courts found in section 34 of the Constitution is a right to have a justiciable dispute *decided* by a court. A judgment gives insight into the reasoning of the Court, how it dealt with the different and often competing submissions before it, and why it came to a particular conclusion. However, it is ultimately the order of the court that brings finality to the proceedings and says to the parties what is required of them or declares what their rights are.

[30] What does the High Court order in these proceedings say to the parties? It is ambiguous and incomplete. It simply says the proceedings are irregular. But having done so, fails to say whether they are set aside, whether the party in default is given leave to amend or what is meant to happen following the finding of irregularity. The parties are left in a state of uncertainty regarding the status of the matter. Therefore, it is clear that the High Court did not make an order in the terms that rule 30 contemplates. A proper determination of the rule 30 application is required and, in the circumstances the proper remedy is to refer the matter to the High Court for it to consider the rule 30 application *de novo*.

[31] Leave to appeal should therefore be granted and the rule 30 order of the High Court falls to be set aside. The matter must be remitted to the High Court with a view to bringing the rule 30 proceedings to finality.

[32] On the question of costs, while the applicant is on the right side of the order made by this Court, it never advanced the case this judgment engages with, nor sought the relief that I intend to grant. It has not established any entitlement to costs. The second respondent, to its credit, conceded the incorrectness of the High Court order. The difficulty in this case was not caused by the action of one or other of the parties, but by the High Court. I consider that it is just and equitable that there should be no order as to costs, both in this Court and in the Supreme Court of Appeal.

Order

[33] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside.
4. The High Court order of 29 January 2021 is set aside.
5. The matter is remitted to the High Court for the determination of the rule 30 application.
6. There is no order as to costs, both in the Supreme Court of Appeal and in this Court.

For the Applicant:	V Ngalwana SC and F Karachi instructed by Gwina Attorneys Incorporated
For the Second Respondent:	M M Le Roux SC and K Hardy instructed by Werksmans Attorneys