THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case no: 180/2014

In the matter between:

KWA SANI MUNICIPALITY **APPELLANT**

and

UNDERBERG/HIMEVILLE COMMUNITY WATCH ASSOCIATION **FIRST RESPONDENT**

AUBREY NGCOBO NO **SECOND RESPONDENT**

Neutral citation: *Kwa Sani Municipality v Underberg/Himeville Community Watch Association* (180/2014) **[**2015] ZASCA 24 (20 March 2015)

Coram: Mpati P, Lewis, Willis and Mbha JJA and Gorven AJA

Heard: **25 February 2015**
Delivered: **20 March 2015**

Summary: Application to declare agreement invalid ─ Municipality alleging non-compliance with legislation and consequent invalidity ─ invalidity not made out ─ agreement endured for some four years before declaration sought ─

unexplained delay in approaching court ─ not necessary to deal with delay in light of finding of validity.

ORDER

On appeal from KwaZulu-Natal High Court, Pietermaritzburg (Koen J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Gorven AJA (Mpati P, Lewis, Willis and Mbha JJA concurring):

[1] Kwa Sani Municipality (the municipality) approached the KwaZulu-Natal High Court, Pietermaritzburg for an order declaring invalid and setting aside an agreement. The agreement was for the provision of disaster management services to the municipality by the first respondent (the association). It also sought consequential relief. The municipality contended that the agreement was invalid for want of compliance with s 217 of the Constitution,[1] the provisions of the Local Government: Municipal Finance Management Act (the MFMA)[2] and the regulations promulgated under that Act.[3] This was disputed by the association. It denied any invalidity. It also raised an unexplained and undue delay on the part of the municipality in approaching the court for such relief.

[2] The court below (Koen J) dealt primarily with two issues. The first issue was whether the agreement was invalid for want of compliance with s 217 of

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[1]The Constitution of the Republic of South Africa, 1996.
[2]The Local Government: Municipal Finance Management Act 56 of 2003.
[3] The Municipal Supply Chain Management Regulations, GN 868, *GG* 27636, 30 May 2005, which came into effect on 1 July 2005.

the Constitution. The court held that, on the evidence, it was '. . . by no means persuaded that the process adopted was necessarily not in compliance with the Constitutional injunction'. The second issue was whether the delay of the municipality in challenging the agreement non-suited it. The court below also found for the respondent on that issue. The application was dismissed with costs and leave to appeal was refused with costs. The appeal is with the leave of this court.

[3] The factual background to the conclusion of the agreement is of some moment. The association was formed in 1998. It grew out of a Farm Watch which had been established in conjunction with the South African Police Services (SAPS), from which two members were assigned. Later, the association was established in consultation with the SAPS, the South African National Defence Force (SANDF), residents in Himeville and Underberg, and the farming community. A 24 hour emergency service was set up for the benefit of the whole community. Twenty one security cells were established with volunteer members from the community, a volunteer cell leader and constant radio communication with each cell. The association was funded by contributions from the community.

[4] The role of the association was extended over the ensuing years. In addition to the initial focus, it fulfilled the following functions:

- the supply of a 24 hour emergency service to the entire community within the magisterial district of Underberg;
- the supervision and co-ordination of the 21 security cells within the district to be called upon by the association from time to time to respond to any emergency within the cell area;

- from 2001 onwards, close co-operation with the SANDF, which was at that time deployed to the district to fulfil duties on the Lesotho border, primarily relating to the theft of livestock;
- the inauguration of and participation in the Southern Berg Fire Protection Association;
- the provision of radios in various vehicles in order to improve and maintain communications throughout the municipal area; and
- from 2008 onwards, the supervision and management of a Working on Fire team.

[5] During 2004 the municipality invited the association to base itself in the newly constructed municipal offices in Himeville. It was not required to pay rent or service charges. This situation was terminated approximately five years later. At some stage the municipality collected R20 per household per month on behalf of the association. However, when it was realised that the municipality was not entitled to act as a cash collection agent for other parties, this practice was terminated. During this period, the association became a member of the Disaster Management Institute of Southern Africa and remains such. Over the years, the association has established a sophisticated communications network which enables it to maintain communications with members of the community, SAPS, neighbouring farmers, the 21 cells and Ezemvelo KZN Wildlife. No comparable network systems exist or existed within the municipality.

[6] In 2008 the association expressed its dissatisfaction with the existing arrangements for funding its activities. It called upon the municipality to conclude an agreement formalising the provision of the services it was rendering. The parties negotiated and concluded an agreement which the municipality undertook to reduce to writing. When it failed to do so, the association produced a draft. This was lost on two occasions, but was finally

signed by both parties on 2 November 2010. The municipal manager signed on behalf of the municipality. He was authorised to do so by council resolution 117, taken on 28 October 2010.[4] It is this agreement which formed the focus of the application.

[7] The agreement provided for a contract period of three years with effect from 1 July 2008. It also provided for an extension, absent notice to the contrary, for a further three years. After that, it was to be terminable on six months' notice by either party. Neither party terminated it prior to 1 July 2011, when the agreement was automatically renewed. The second three year period was thus to elapse on 30 June 2014. On 23 May 2012, however, the council of the municipality resolved to terminate the agreement. Pursuant to that resolution, the municipal manager wrote to the association. The material part of the letter reads as follows:

'This letter serves as official termination of services by the Kwa Sani Municipality. This notice is given in terms of the contract (section 4.2) held between yourselves and the Kwa Sani Municipality.'

[8] The association responded to this letter. It pointed out that the municipality had not terminated the agreement before it was extended for the further three year period. Therefore, it said, the letter could only serve as notice that the agreement would terminate on 30 June 2014. This is what paragraph 4.2 of the agreement, on which the municipality said it relied, provided. It was clear that the basis for termination relied upon by the municipality in the letter was ill-founded. The municipality did not seek in the court below or on appeal to contend otherwise. When the municipality later claimed that it could and did terminate the agreement forthwith, the association responded again. It pointed out that the purported termination amounted to a repudiation of the agreement,

[4]The resolution read as follows: 'Council RESOLVED NO. 117, OCTOBER 2010 to authorise the Municipal Manager to sign the service level agreement with Community Watch.'

that the association did not accept the repudiation and that it elected to abide by the agreement. On the papers it was common cause that the association continued to provide the services under the agreement and there is no indication that this ceased prior to 30 June 2014. The municipality has refused to pay the association for any services beyond June 2012.

[9] The reason which was given in the founding affidavit for the decision to cancel is instructive:

'. . . [D]uring 2012, the [municipality's] circumstances began to change such that it did not require the services which the [association] was to provide under the agreement. The monthly repayment under the agreement became an unnecessary expense and placed undue strain on the [municipality's] financial resources. The [municipality] had in place a permanent staff base allocated to disaster management and hence the service which the [association] was to provide under the agreement was not required and could be performed by the [municipality]. The [municipality] was also in financial distress and was required to implement cost cutting measures for the 2012/2013 financial year.'

This provoked a response from the association to the effect that the expense had been budgeted for, that only one staff member was employed as the disaster management official and that he had been so employed since 2004. The response of the municipality in turn claimed that this official had been employed in that capacity since 2012. It then stated that the disaster management service was a district function, not one for which the municipality was responsible. In the next breath, however, it mentioned that the municipality had contracted for the provision of those services with KZN Rural Metro Emergency Management Services (Pty) Ltd.

[10] The net effect of all of this is that the municipality claimed that it could perform the services itself. In addition it supposedly could not afford to contract them out. It then claimed that the services were not its responsibility. It finally said that it had contracted another body to perform the services. Accordingly,

the claims that the municipality could itself provide the requisite services and that there were financial reasons for terminating the agreement were, on its own version, shown to amount to sheer sophistry.

[11] The refusal of the municipality to continue paying for the services led to the association claiming payment in arbitration proceedings. The second respondent was appointed the arbitrator. Thereafter the municipality took the view that it was necessary for it to approach the court since its contention was that the agreement was invalid and the arbitration, based as it was upon the agreement, was therefore not appropriate. This was the first time that the municipality had claimed that the agreement was invalid. The second respondent has taken no part in the court proceedings.

[12] On appeal, it was accepted that the decision to conclude the agreement amounted to administrative action. As Professor Hoexter points out: '. . . public bodies use contract as a method for exercising their powers and performing their duties'.[5] The starting point as to how to act if one contends that administrative action is invalid is found in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others*.[6] This court there held that, because administrative action often forms the basis for subsequent acts, it must be treated as valid until it is set aside even if it was actually invalid. This was explained as follows:

'Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked.'[7]

This does not mean that the administrative act is valid, only that it must be treated as such. There is only one circumstance in which it can be ignored without being set aside. Thus:

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[5]Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 444.
[6]*Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA).
[7]Paragraph 26.

'It is in those cases - where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act - that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a "defensive" or a "collateral" challenge to the validity of the administrative act.'[8]

[13] On appeal, the municipality submitted that the launch of the application was akin to its having raised a collateral challenge. It claimed that, because the association had attempted to enforce the agreement by way of the arbitration, the municipality was therefore in a position where it was entitled to resist that enforcement. The municipality sought to place itself in the position of the applicants referred to in a dictum of this court in *Kouga Municipality v Bellingan & others*:[9]

'In my view, the correct approach to the relief sought by the applicants would have been to recognise that the application was in form a direct challenge, but in substance a defensive or collateral challenge, to the validity of the by-law. The two are different'.

In *Kouga*, the respondents on appeal were the applicants in the court below. The municipality had sought to prosecute them under a by-law. They brought a review application to declare the by-law invalid. This court held they should not have done so since, in a review application, a court has a discretion to grant or refuse the relief. As it happened, the court *a quo* declared the by-law invalid but, applying s 172(1)(*b*) of the Constitution, suspended the invalidity for a certain period to afford the municipality the opportunity to rectify matters. As this court pointed out, there was no bar to the respondents being prosecuted during the period of suspension and said:

'The problems associated with the relief sought by the applicants in their notice of motion and the order granted by the court a quo would be avoided if a declaratory order were to be granted that the by-law in question is invalid for the purposes of a prosecution of any of them based thereon. A collateral challenge to the validity of a piece of legislation can be mounted at any time and a court has no discretion to disallow such a challenge'.[10]

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[8] *Oudekraal* para 32.
[9] *Kouga Municipality v Bellingan & others* 2012 (2) SA 95 (SCA) para 12.
[10] *Kouga* para 18.

[14] In the present matter, it is the municipality which is the public authority, and not the association. The municipality is also not in the position of a subject being coerced by a public authority whose underlying administrative act is invalid. No collateral challenge is raised by way of the application. The application concerned a public authority claiming that its own administrative action was invalid. This submission of the municipality thus falls far wide of the mark.

[15] When a public authority takes that view, it is obliged to approach a court to set it aside. This has been made clear by decisions of this court and the Constitutional Court, a few of which I shall briefly discuss.

[16] In *Municipal Manager: Qaukeni Local Municipality & another v FV General Trading CC*,[11] this court approved of this course of action, saying:

'If the second appellant's procurement of municipal services through its contract with the respondent was unlawful, it is invalid and this is a case in which the appellants were duty-bound not to submit to an unlawful contract, but to oppose the respondent's attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application.'[12]

In *MEC for Health, Eastern Cape, & another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute*,[13] Plasket AJA, in rejecting an argument that what was claimed to be invalid administrative action can be ignored without an application to set it aside, said the following:

'The answer to their dilemma lies in the hands of the MEC and the superintendent-general: if they want Diliza's decisions to be set aside, they must bring a proper application for that relief, and in all likelihood, their standing to do so will not be open to challenge.'[14]

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[11] *Municipal Manager: Qaukeni Local Municipality & another v FV General Trading CC* 2010 (1) SA 356 (SCA) para 26.
[12] References omitted.
[13] *MEC for Health, Eastern Cape, & another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 219 (SCA) (*Kirland* SCA).
[14] Paragraph 33, references omitted.

The dilemma referred to was that, if the court did not set aside the two impugned administrative decisions, this would 'clothe the invalid approvals with the cloak of validity'.[15] This approach was upheld by the majority in the Constitutional Court in an appeal from *Kirland* SCA.[16] Cameron J explained the position as follows:

'When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government should not be allowed to take shortcuts. Generally, this means that government must apply formally to set aside the decision. Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in which all factors for and against are properly weighed.'[17]

The Constitutional Court agreed with this court that, because the MEC had not formally applied to set aside the impugned decision, the administrative act in question could not be set aside.

[17] Having arrived at the view that the agreement was invalid, the municipality was therefore obliged to approach the court to have the agreement declared invalid and set aside. Absent such a successful challenge, or another basis on which it was entitled to avoid its obligations thereunder, it was obliged to give effect to the agreement. The first question to resolve, therefore, is whether it made out a case that the agreement was invalid. In this, as the association correctly submitted, the municipality bore the onus. At the outset, the court below pertinently posed the question whether the municipality was prepared to argue the matter on the papers since certain factual disputes were apparent. The municipality elected to do so.

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[15] Paragraph 31.
[16] *MEC for Health, Eastern Cape, & another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 481 (CC) (*Kirland* CC).
[17] Paragraph 65.

[18] In application proceedings, the affidavits both define the issues between the parties and embody the evidence on which the issues must be adjudicated.[18] The municipality relied on three grounds to found its assertion of invalidity. First, that because the municipality failed to prepare and implement a supply chain management policy as it was obliged to do under the MFMA, the agreement was invalid. Second, that the conclusion of the agreement did not meet the prescripts of s 217 of the Constitution which, the municipality contended, in this instance required a public process. Third, that certain processes and formalities provided for in the MFMA were not complied with.

[19] With reference to the first ground, it is common cause that, in breach of its obligations, the municipality failed to adopt a supply chain management policy as was required by the MFMA. It only did so in 2011. This means that, at the time the agreement was concluded, whether initially or when reduced to writing, no supply chain management policy was in place. Section 111 of the MFMA reads:

'Each municipality and each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of this Part'.

There is no indication that any failure on the part of a municipality to do so would visit with invalidity agreements which would otherwise fall within the ambit of such a policy. The touchstone of validity remains s 217 of the Constitution and compliance with the provisions of the MFMA and regulations. Contrary to what was submitted in this first ground, therefore, this failure did not, in and of itself, render the agreement invalid.

[20] The second ground was based on s 217 of the Constitution, which provides as follows:

'(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

[18] *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) para 28.

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

(2) Subsection (1) does not prevent the organs 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 the policy referred to in subsection (2) must be implemented.'

The MFMA was promulgated, inter alia, to give effect to s 217(3) of the Constitution. The regulations set out more detailed requirements based on the MFMA.

[21] The primary point of attack by the municipality on this ground was that a public bidding process was necessary. The association submitted that, although a public bidding process admittedly did not take place, this did not necessarily mean that s 217 of the Constitution and the provisions of the MFMA and regulations had not been complied with. It pointed out that regulation 36 of the regulations clearly demonstrates that a public bidding process is not always necessary. In its material parts, this regulation provides as follows:

'(1) A supply chain management policy may allow the accounting officer-

(a) to dispense with the official procurement processes established by the policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only-

. . .

(ii) if such goods or services are produced or available from a single provider only;

. . . or

(v) in any other exceptional case where it is impractical or impossible to follow the official procurement processes'.

[22] The association submitted that it was a single provider of unique services at the time. As such, the association submitted, even if there had been a supply chain policy in place, this would have allowed the agreement to be concluded without a competitive bidding process. If this was the case, it could therefore not be said that the conclusion of the agreement transgressed the statutory precepts. There was no challenge that the provisions of regulation 36 fell foul of s 217 of the Constitution or the provisions of the MFMA. On the face of it, it is appropriate to provide an exception to a public bidding process where there is a single service provider offering a unique service. The factual situation is therefore determinative of the point.

[23] The municipality averred in its founding affidavit that it was 'unaware of the precise facts and circumstances in which the agreement was concluded.' The strong case made out by the association, by way of affidavits of people involved in the association and the provision of services in the area at the time, was that the association provided a unique service and that the services outlined in the agreement could not be provided by any other person or entity at the time. The only counter to this was a bald assertion, without any admissible evidence to support it, that two other service providers could have done so. Why I say that it was a bald assertion is because no affidavits were forthcoming from any persons who claimed to know of the capabilities of those two entities at the time, least of all from the service providers themselves. This was not admissible evidence of the fact contended for. Even if it was admissible, this raised a factual dispute which had to be resolved in favour of the association since the version of the association was not so clearly untenable that it could be rejected out of hand.[19]

[24] A remark made by Cameron J in *Kirland* CC applies with equal force to the present matter. That case, like this, was not a matter where there was any hint that the conclusion of the agreement could be '. . . impeached by political

[19] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635D.

shenanigans.'[20] A resolution taken at a council meeting authorised the municipal manager to sign the agreement. The meeting was an ordinary one and was thus open to the public. The association was known in the area to have provided these services since 1998, initially on a voluntary basis funded by donations of time and money from the community it was serving. It continued to rely on the community to carry out its functions. During a certain period, contributions were collected on behalf of the association by the municipality. The services were provided for a period of time from a base within the municipal offices. The association was deeply embedded within the community. It had built up and maintained clear voluntary structures which enhanced the services provided by it as well as good working relationships with other entities involved in various aspects of disaster management. There was no evidence that anyone challenged either the conclusion of the agreement or the service rendered by the association until the municipality purported to cancel it without legal cause.

[25] In support of its submission that s 217 of the Constitution had not been complied with, the municipality relied on *Qaukeni*.[21] The facts in that matter were as follows. No supply chain management policy had been adopted. The respondent submitted a tender to collect refuse in both Lusikisiki and Flagstaff. This tender gave rise to an oral agreement for the period November 2005 to 30 June 2006. The validity of that agreement was not challenged. Thereafter, that municipality invited the respondent to present its budget for the following 12 month period. Instead of doing so, it submitted a quotation for its services amounting to in excess of R350 000 per month. The council resolved to contract on that basis without obtaining other tenders and an agreement was drawn up and signed. Amongst other things, the agreement provided for a 20 percent annual increase in remuneration for the respondent and provided for the possibility that the agreement could endure for a number of years. Far from

[20] *Kirland* CC para 79.
[21] Footnote 11, para 12.

being a unique service, it related to refuse collection. There was also no evidence that other persons could not provide the same service. The terms of the agreement were clearly onerous as to annual escalation, even if the initial monthly remuneration of R350 000 was appropriate.

[26] *Qaukeni* must be understood within the context in which it was decided. In addition, attention must be given to what was decided. This court did not hold that the consequence of a failure to adopt a supply chain management policy was to invalidate all agreements to which it would normally apply but said:[22]

'. . . [T]he second appellant's failure to implement a supply chain management policy cannot relieve it of its statutory obligation to act in a manner as summarised above, and it would be untenable to suggest that the second appellant was therefore not obliged to act openly, transparently and without following a fair, equitable, competitive and cost-effective process when contracting with an external service supplier to render a municipal service.'

It went on to find that there had been a 'failure to comply with these statutory precepts'. In such circumstances, it held, a court has no discretion to enforce such a contract because the question is one of legality.[23] It should be noted that the exceptions to a competitive bidding process provided by regulation 36 did not arise in *Qaukeni* and therefore did not excite comment from this court in that matter.

[27] The facts in *Qaukeni* are clearly distinguishable from those in the matter at hand. That related to a routine contract for refuse disposal, not a multi-faceted operation requiring the co-operation and co-ordination of a number of entities and volunteers within a number of theatres of operation. There were multiple service providers rather than a single one which was integrated into the community after years of initiating and providing the service informally.

[22]Paragraph 13.
[23]Paragraph 14.

Qaukeni is therefore not authority for the proposition that, in all instances where a municipality concludes an agreement with an outside body for the provision of services, a public bidding process is required.

[28] I can find no basis for concluding that the agreement did not comply with 'the statutory precepts'. The substantive challenge to the validity of the agreement was therefore correctly found wanting by the court below, albeit that this finding was couched in somewhat diffident terms.

[29] Turning to the third ground, the municipality submitted that s 116 of the MFMA was not complied with. This required agreements to be reduced to writing and that, if an agreement endured for longer than three years, it must be subject to review at least once every three years. The first aspect was satisfied. Even though the initial agreement was concluded verbally in 2008, it was subsequently reduced to writing and signed after the municipality so resolved in a council meeting. The association denied the assertion of the municipality that the agreement was given effect in 2008 and said that it was only complied with by the municipality after signature. Once again, it seems strange that, when the municipality disclaimed any knowledge of the circumstances at the time, it made such an assertion. At best, again, the assertion gives rise to a factual dispute which must be resolved in favour of the association.[24]

[30] As for the need to review the agreement, either party was entitled to terminate it after the initial three year period. Despite this provision, the municipality failed to do so. It was silent as to whether it in fact reviewed the agreement but the mechanism for this was clear and available to it. The third ground, based on a failure to comply with s 116 of the MFMA is accordingly found wanting.

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[24] *Plascon-Evans Paints Ltd* above.

[31] The second defence raised by the association was that there had been an undue delay. The court below upheld this defence. It held that the award of a contract for services by an organ of state amounts to administrative action.[25] It went on to hold that the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) applied to the agreement in question. Therefore s 7 of the PAJA, requiring an application to be brought within 180 days of the impugned administrative act, meant that the application, which was tantamount to a review, was brought out of time. The court below went on to hold that, if the PAJA did not apply, the application amounted to a common law review and that there had been an undue delay. Because the parties had changed their positions to comply with its terms, it held that it would be highly prejudicial to review and set aside the agreement and that to do so would undermine the finality of administrative decisions.[26]

[32] For present purposes, the nature of such an application need not detain us. In *Kirland* CC, the process by which a public body would seek to have its own administrative decision set aside was characterised as a review.[27] Cameron J motivated this on the basis that the public authority must explain '. . . the history of the decision, its shifting attitudes towards it and its delay in dealing with it.'[28] The party resisting such an application must then be entitled to '. . . be heard on whether it has been prejudiced and why it would be unfair to it to set the decision aside now.'[29] In *Qaukeni*, this court left open the precise nature of the application to be brought, saying that a public body may not need to proceed by review 'when a municipality seeks to avoid a contract it has concluded in

[25] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 90.
[26] In this regard the court below relied on the dictum of this court in *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) para 28 where potential prejudice and finality of administrative decisions were said to be the reason for the discretion to refuse a review application where there had been an unreasonable delay in bringing the review.
[27] Paragraphs 64, 97 and 106.
[28] Paragraph 67.
[29] Ibid.

respect of which no other party has an interest.'[30] Regardless of the precise nature of such an application, which need not be decided here, what is clear is that, if any undue delay is not adequately explained, an invalid administrative act may be 'insulated' against being set aside on that basis.[31]

[33] Of course, if the impugned administrative action is not so insulated and does not pass muster, a court is obliged to declare it invalid.[32] However, s 172(1)(*b*)(ii) grants a discretion to the court which is obliged to make such a declaration to use '. . . its just and equitable remedial powers, [to] make an order "suspending the invalidity for any period and on any conditions"'.[33] But this discretion only arises after, and does not precede, a declaration of invalidity.[34] In the present matter the issue of delay does not require decision since it has been found that the municipality failed to show that the agreement was invalid.

[34] In summary, the following is the position. If a public body believes one of its administrative acts is invalid, it may not simply ignore it. This is because even invalid administrative acts are treated as valid until they are set aside. The public body contending for invalidity is thus duty bound to approach the court to have it set aside. Since it is administrative action which must be set aside, the delay rule applies. If there has been an undue delay, it must provide an acceptable and adequate explanation. If this is not done, the invalid administrative act may be insulated against being set aside. In such a case, the administrative act will continue to have effect and be treated as valid, despite its invalidity. If the public body has not delayed unduly and shows that the act is invalid, a court is bound to make a declaration of invalidity. There is no

[30]Paragraph 26.
[31]*Kirland* CC para 97; *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 380B-381A; *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 29H-30G.
[32]Section 172(1)(a) of the Constitution; *Kirland* CC (minority decision) para 46.
[33]*Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* 2014 (4) SA 179 (CC) para 63.
[34]*Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others* 2011 (4) SA 113 (CC) para 84.

discretion afforded a court not to do so. If a declaration of invalidity is made, a court is then granted a discretion under its just and equitable powers to suspend the invalidity for any period and on any conditions. In the present matter, the municipality did not even surmount the first hurdle of showing invalidity.

[35] In the result, the appeal is dismissed with costs.

T R Gorven
Acting Judge of Appeal

Appearances

For Appellant:	K J Kemp SC (with him H Gani) Instructed by: Matthew Francis Inc. Attorneys, Pietermaritzburg Rossouws Attorneys, Bloemfontein

For Respondent:	A de Wet SC
	Instructed by:
	McCarthy & Associates Attorneys, Mount West Matsepes, Bloemfontein