



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable
Case no: 60/2021

In the matter between:

SEKOKO MAMETJA INCORPORATED ATTORNEYS

APPELLANT

and

FETAKGOMO TUBATSE LOCAL MUNICIPALITY

RESPONDENT

Neutral citation: *Sekoko Mametja Incorporated Attorneys v Fetakgomo Tubatse Local Municipality* (Case No. 60/2021) [2022] ZASCA 28 (18 March 2022)

Coram: PETSE DP, VAN DER MERWE, DLODLO, MBATHA and GORVEN JJA

Heard: 23 February 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the website of the Supreme Court of Appeal and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 18 March 2022.

Summary: Local Government – administrative law – tender – review – legality – tender set aside as unlawful – discretionary remedy under s 172(1)(b) of the

Constitution – services rendered to the respondent prior to successful legality review – money award to the appellant appropriate.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Semenya J sitting as court of first instance):

1 The appeal is upheld with no order as to costs.

2 Paragraph (iv) of the order of the court a quo is set aside and replaced with the following:

‘(iv) The applicant (the municipality) is ordered to pay the respondent an amount of R436 250.30 plus interest of 10.25% per annum calculated as from 26 November 2019 to date of payment. No order is made in respect of the costs of the counter-application.’

JUDGMENT

Dlodlo JA: (Petse DP, Van der Merwe, Mbatha and Gorven JJA concurring):

[1] Fetakgomo Tubatse Local Municipality (the municipality) brought a review based on legality in which it sought to review and set aside its own decision to award a tender to Sekoko Mametja Incorporated Attorneys (Sekoko Attorneys) on the grounds set out hereunder. Sekoko Attorneys opposed the review application and also counter applied for payment of the outstanding amount in respect of the invoices already delivered to the municipality covering the period January 2018 to May 2018 for services rendered.

[2] The municipality published an invitation to tender for ‘the provision of debt collection services for a period of three years as and when required’ (the tender). Sekoko Attorneys submitted a tender in response. The Municipality’s Bid Evaluation Committee and Adjudication Committee awarded the tender to Sekoko Attorneys and

four other applicants. The municipality required the collection of debts owed to it. Accordingly, it gave Sekoko Attorneys a list of debtors from which it was to recover money. Sekoko Attorneys collected sums of money owed to the municipality and issued invoices for payment in accordance with the tender.

[3] In April 2018, the municipality realised that Sekoko attorneys had submitted a non-responsive bid in contravention of clause 43 of the Municipality's Supply Chain Management Policy which inter alia reads:

'No award above R15 000 may be made in terms of this policy to a person whose tax matters have not been declared by South African Revenue Services to be in order.'

According to the municipality, Sekoko Attorneys had failed to provide any such proof. This was the basis of the legality revue.

[4] On 15 May 2018, the municipality addressed a letter to Sekoko Attorneys and sought to cancel the appointment with immediate effect citing the two reasons, namely, (a) failure to provide an original valid Tax Certificate; (b) failure to provide proof of a valid CSD report. The letter referred to above categorically stated that the above constituted 'non-compliance with material terms of the bid'. Sekoko Attorneys, however, did not accept the termination of its appointment. It delivered an answering affidavit which also covered a counter application in which it sought payment of the outstanding amount in respect of the invoices delivered to the municipality during the period January 2018 to May 2018. These invoices totalled R438 260.30.

[5] The municipality did not oppose the counter application. It did not file any answering affidavit to the counter application. The municipality accepted that the invoiced work had been performed by Sekoko Attorneys. However, there was no attempt made by it to motivate why Sekoko Attorneys was not entitled to payment for services already rendered other than to say that the award of the tender was void *ab initio*.

[6] The application was brought in the Limpopo Division of the High Court, Polokwane (the high court) before Semanya J. The high court considered whether or not the municipality was entitled to an order in terms of s 172(1)(a) of the Constitution.¹ Section 172(1)(a) of the Constitution provides:

‘When deciding a constitutional matter within its powers, a court –

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

[7] Having found that the tender award was inconsistent with the Constitution and was therefore unlawful and invalid, the high court also proceeded to dismiss Sekoko Attorneys’ counterclaim with costs. The high court made a finding that Sekoko Attorneys had performed the tasks in accordance with the terms of the agreement to the satisfaction of the municipality. It reasoned that even though the municipality failed to dispute the counter application, Sekoko Attorneys ‘cannot be allowed to derive a benefit out of an unlawful contract’.

[8] In this Court, Sekoko Attorneys is not appealing the correctness of the declaration of invalidity of the tender awarded to it by the municipality. The appeal, which is before us with the leave of the high court, deals exclusively with the dismissal of its counter application for payment for the services rendered by it to the municipality prior to the review and cancellation of the tender. It is correct that Sekoko Attorneys initially disputed that the municipality was entitled to a declarator based on s 172 (1)(a) of the Constitution. That much is clear from the answering affidavit. Its argument before this Court is simply that an order declaring the decision to award the tender to it having been sought and obtained, it was still entitled to payment based on the provisions of s 172(1)(b) of the Constitution. This provides that a court, having declared conduct such as the award of a tender invalid:

‘ . . . may make any order that is just and equitable, including –

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

¹ Section 172 of the Constitution of the Republic of South Africa, 1996.

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

[9] The criticism of the dismissal by the high court of the counterclaim is that it failed to consider whether, despite correctly holding that the tender was void *ab initio*, an order should have been made under these provisions. This is not novel. It is incumbent on a court making an order of invalidity under s 172(1)(a) to then invoke the provisions of s 172(1)(b) in considering whether or not to make an order which is just and equitable. This the high court did not do. It clearly could not enforce payment under a void tender but it could consider whether an amount should be paid on the basis that it was just and equitable for the municipality to do so.

[10] Moseneke DCJ had given guidance in this regard. In *Steenkamp NO v Provincial Tender Board of the Eastern Cape*,² he said the following regarding the appropriate remedy:

‘It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public law remedies and not private law remedies. The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.’ (Footnote omitted.)

If properly examined and considered, the facts of each matter will often reveal whether an appropriate remedy is necessary. Once that has been established, the remedy must be crafted to ameliorate the injustice of suffering a loss that can be avoided.

² *Steenkamp NO v Provincial Tender Board of the Eastern Cape* (CCT71/05) [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR CC para 29.

[11] In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*,³ Froneman J stated:

'The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented – direct or collateral; the interests involved and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case.' (Footnotes omitted.)

[12] The situation in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*⁴ was worse compared to what transpired in the present appeal. At least in the matter at hand, an agreement was concluded between the parties following a competitive bidding process. In *Gijima*, SITA concluded an agreement without any competitive process being followed. Despite this, the Constitutional Court dealt with the appropriate remedy as follows:

'[53] However, under section 172(1)(b) of the Constitution, a court deciding a constitutional matter has a wide remedial power. It is empowered to make "any order that is just and equitable". So wide is that power that it is bounded only by considerations of justice and equity. Here it must count for quite a lot that SITA has delayed for just under 22 months before seeking to have the decision reviewed. Also, from the outset, *Gijima* was concerned whether the award of the contract complied with legal prescripts. As a result, it raised the issue with SITA repeatedly. SITA assured it that a proper procurement process had been followed.

[54] Overall, it seems to us that justice and equity dictate that, despite the invalidity of the award of the DoD agreement, SITA must not benefit from having given *Gijima* false assurances and from its own undue delay in instituting proceedings. *Gijima* may well have performed in terms of

³ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) para 85.

⁴ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) paras 53 and 54 (Footnote omitted).

the contract, while SITA sat idly by and only raised the question of the invalidity of the contract when Gijima instituted arbitration proceedings. *In the circumstances, a just and equitable remedy is that the award of the contract and the subsequent decisions to extend it be declared invalid, with a rider that the declaration of invalidity must not have the effect of divesting Gijima of rights to which – but for the declaration of invalidity – it might have been entitled.* Whether any such rights did accrue remains a contested issue in the arbitration, the merits of which were never determined because of the arbitrator's holding on jurisdiction.' (Emphasis added.)

[13] Lastly, in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*,⁵ the Constitutional Court (CC) had to consider an appropriate remedy again in the context of a legality review. In this regard, the CC said the following:

'[104] When the Municipality took the view that the Reeston contract was invalid, the implementation of the contract had commenced and was continuing. The Municipality was content for the respondent to complete the contract (building low-cost houses) to the benefit of the municipality and residents of Reeston. It was common cause that the work has been practically completed.

[105] In these circumstances, justice and equity dictate that the Municipality should not benefit from its own undue delay and in allowing the respondent to proceed to perform in terms of the contract. I therefore make an order declaring the Reeston contract invalid, but not setting it aside so as to preserve the rights to that the respondent might have been entitled. It should be noted that such an award preserves rights which have already accrued but does not permit a party to obtain further rights under the invalid agreement.'

[14] It is common cause that the municipality 'has never complained about the effectiveness of the respondent's services'. Undoubtedly, the municipality received the full benefit of such services. Most certainly, Sekoko Attorneys incurred expenses to enable it to render the services to the municipality. The municipality did not dispute Sekoko Attorneys' entitlement to be paid for services rendered. It did not even participate in this appeal. On the contrary, it served a notice that it will abide by the appeal outcome.

⁵ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) paras 104 and 105.

[15] Unlike some of the matters referred to above, no further services have been rendered by Sekoko Attorneys since delivering their last invoice in May 2018. There is thus no need for any order that the rights of Sekoko Attorneys under the void tender be preserved. It is appropriate, however, that where no fault lies at the door of Sekoko Attorneys and it rendered services which redounded to the benefit of the municipality, an order is granted for payment. In those circumstances, it is just and equitable to order that the municipality pay to Sekoko Attorneys an amount equivalent to that to which it would have been entitled under the void tender. The municipality advanced no considerations against such an order. In the result, the counter application for payment should have been upheld by the high court on this basis.

[16] It is necessary to say something about the issue of costs. As already indicated, the appeal was not opposed. And, what is more, the issue for decision was fairly straightforward. There was therefore no need for the appellant to brief senior counsel for purposes of arguing the appeal. This is a matter that could easily and should have been disposed of without the hearing of oral argument in terms of s 19(a)⁶ of the Superior Courts Act.⁷ Accordingly, the interests of justice dictate that there should be no order as to costs both in the court a quo and this Court.

[17] The following order is made:

- 1 The appeal is upheld with no order as to costs.
- 2 Paragraph (iv) of the order of the court a quo is set aside and replaced with the following:

‘(iv) The applicant (the municipality) is ordered to pay the respondent an amount of R436 250.30 plus interest of 10.25% per annum calculated as from 26 November 2019 to date of payment. No order is made in respect of the costs of the counter-application.’

⁶ Section 19(a) in relevant part reads:

‘The Supreme Court of Appeal . . . may, in addition to any power as may specifically be provide for in any other law–

(a) dispose of an appeal without the hearing of oral argument.’

⁷ Superior Courts Act 10 of 2013.

DV DLODLO
JUDGE OF APPEAL

APPEARANCES:

For the appellant:

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Instructed by:

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For the respondent:

No appearance