

SOUTH AFRICA / JUDGMENT

Gauteng Enterprise Propeller v Amahlo Consulting Services CC (22/13270) [2023]

ZAGPJHC 1476 (28 December 2023)

[2023] ZAGPJHC 1476

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Yacoob

CASE / FILE NUMBER

22/13270

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG
CASE
NO: 22/13270

In the matter between:

GAUTENG
ENTERPRISE PROPELLER
Applicant
and
AMAHLO
CONSULTING SERVICES
CC
Respondent

JUDGMENT

YACOOB J:

INTRODUCTION

1. The applicant, Gauteng Enterprise Propeller (“GEP”) is a provincial public entity. It provides financial support and development services to small, micro and medium businesses and co-operatives, hence “propelling” enterprise in the province.

2. GEP seeks the review and setting aside of three of its own decisions, all of which it contends were made unlawfully, and all of which deal with the appointment of the respondent, Amahlo Consulting Services CC (Amahlo), as project co-ordinator in a job-creation project to have lasted three years. GEP also seeks an order that Amahlo pay back an amount of R59 762 578.46.
3. The first decision is the decision to appoint Amahlo, the second is the conclusion of a Memorandum of Understanding (“MOU”) and the third is the conclusion of an addendum to the MOU. I detail the particulars of these decisions later.
4. Amahlo opposes the review and setting aside of the decisions on the basis that GEP has delayed unreasonably in bringing the application, that GEP should not benefit from its own delay and that Amahlo should be allowed to proceed and perform (and benefit) from the decisions. Amahlo’s only factual submission relevant to lawfulness is that it was not involved in the decision making. It sets out circumstances which it contends support a conclusion that GEP’s delay was unreasonable and therefore that the decisions should not be reviewed. It also sets out reasons why it contends that the review of the decisions would not be just and equitable. These are also related to delay and alleged performance.
5. The review is premised on the principles of legality, in accordance with the dictum of the Constitutional Court in *State Information Technology Agency v Gijima Holdings*.^[1]

FACTUAL

BACKGROUND

6. The facts giving rise to this application are, in the main, common cause.
7. GEP initiated a job creation project called Project Vuthela in 2016. The purpose of the project was to create about 75 000 job opportunities in Gauteng, thereby reducing youth unemployment. The value of the project was approximately R65 million.
8. GEP being listed in Schedule 3C of the Public Finance Management Act (“the PFMA”),^[2] it had to follow prescribed procurement procedures when appointing service providers. Amahlo’s sole member, Mr Tshauambea, who is the deponent to its answering affidavit, alleges that he was not aware of this. He also alleges that he has provided services for a number of other government entities, so this allegation must be taken with a pinch of salt.
9. In March 2016, a resolution by GEP’s Business Development Committee (“BDC”) appointed Amahlo project coordinator of the pilot project, and approved an initial grant of R2 400 000. No tender process was followed. This is the first decision that is sought to be reviewed.

10. On 30 March 2016 a memorandum of agreement (“MOA”) was signed by Ms Leah Manenzhe, the then acting Chief Executive Officer of GEP, and Mr Tshauambea. Ms Manenze signed the agreement without obtaining board approval, even though GEP’s delegation of authority document required board approval for agreements worth R2 500 000 or more. This is the second impugned decision.
11. In terms of the MOA, Amahlo would create 75 000 job opportunities for which it would be paid R65 million. In 2016, Ms Manenzhe and Mr Tshauambea signed an addendum to the MOA, reducing the number of job opportunities to be created to only 5 000, but keeping the “financial implications” at R65 million. The date on the header of the addendum is 05 December 2016, but the date handwritten at Ms Manenzhe’s signature is 26 May 2016. There is no date at Mr Tshauambea’s signature, although he alleges that the date on which he signed was 26 May 2016. GEP alleges that the addendum without board approval was unauthorized and that

reducing the number of jobs to be created so drastically while retaining the amount “implicated” is irrational. This is the third impugned decision.

12. On 28 March 2019, two days before the MOA was due to expire, a memorandum was prepared requesting board approval for a three month extension of the MOA, on the basis that tender processes had to be followed to appoint a new service provider. The memorandum included the information that about R60 million had been spent already on the project, and that the extension would cost around R3.725 million. The extension did not happen.
 13. In October 2019 GEP received a complaint that some 366 students who claimed to be part of Project Vuthela, who were being trained at Ekurhuleni East College and who were entitled to be paid stipends, were not being paid those stipends. The complaint was first directed to the Public Protector. Amahlo was responsible for the payment of monthly stipends.
 14. The students were requesting that GEP pay them directly because they were not being paid by Amahlo. This led to a forensic investigation.
 15. The investigation revealed various anomalies and irregularity, including payments being made without compliance checks being made, and occasional double invoices and payments in a month. Amahlo also paid out far less to each student than it apparently retained. Amahlo did not cooperate with the investigation.
 16. The forensic report was commissioned in
2020. Apparently there were some delays in getting the required information because of the interruption caused by the Covid-19 health emergency. The report was received in January 2022. The application was launched on 4 April 2022.

17. Amahlo denies that the student who made the complaint was part of Project Vuthela. However, it has not provided lists of students and what they have been paid. It does allege that all funds received from GEP were used for the intended purpose, although the amounts it discloses do not come close to what it received from GEP.
18. Amahlo chooses not to provide a response to the details of the forensic report, which sets out the basis on which the amount now claimed back by GEP, on the basis that it was hearsay. Mr Tshauambea claims that he had not had an opportunity to respond to the report, although he does not deny the allegation that he declined to co-operate with the investigation. He annexes financial statements to the answering affidavit, although not for all the years it was appointed to the project. No invoices from alleged service providers are annexed, nor any details of how the project was run and money spent. No list of students is attached.
19. Mr Tshauambea alleges that Amahlo was unable to perform in terms of the MOA and that is why the addendum is signed. There is no explanation of why, being unable to perform already, two months into the contract period, Amahlo should have been given such an advantageous amendment to the terms, particularly that the amount being paid by should remain the same.
20. Mr Tshauambea alleges that “some” students were enrolled for a 3 month cycle, being paid a R1 500 per month stipend, an undisclosed amount for transport and food, and training fees of R4 500 per month. He does not disclose the invoices for these payments, particularly the training fees. An examination of the financial statement for the year ending February 2018 shows that

on the income statement, income from “sales” for 2018 is listed as almost R25 million, while “cost of sales” is over R5 million. Gross profit is listed as over R19 million. For the year ending February 2017, listed on the income statement as a comparator, “sales” is over R48 million, while “cost of sales” is just over R23 million. Gross profit is listed as over R25 million. The biggest expenditure in each of those years is “salaries and wages”. However the names of employees and what they were paid is not disclosed.

21. The financial statements for 2018 and 2019 show similar patterns. Prima facie Amahlo has retained far more than it has expended, even taking into account that it may have received money from more sources than GEP. It certainly does not show that it has expended the amounts it ought to have done in pursuance of Project Vuthela, had it properly carried it out.
22. The only “evidence” of students who were trained is contained in two verification reports from GEP confirming that in April and June 2018 142 students had signed attendance registers.
23. Amahlo was also not able to produce a number of documents requested by GEP in a Rule 35(12) notice. These include GEP’s advertisement of Project Vuthela, which Amahlo alleges it responded to after finding it on GEP’s website and which GEP denies having published on its

website; contracts with one of the two service providers to whom large amounts were allegedly paid, A and D Catering, and proof of payment of those amounts; contracts entered with any learning institutions attended by participants, and lists of students, courses and institutions which were part of the Project.

24. Amahlo has disclosed that it invoiced and was paid for duplicate amounts within a month, which is consistent with the findings of the report. Dates of invoicing and payment also show that verification procedures were usually not carried out before Amahlo was paid.

THE ISSUES

25. Amahlo does not contest the unlawfulness of the decisions, nor does it contest the factual basis on which the unlawfulness is premised. It is clear on the papers that the decisions were unlawful. Amahlo contends that the decisions should not be reviewed and set aside because GEP delayed unreasonably in bringing the review application.
26. Amahlo's main contention is that because GEP allowed Amahlo to perform in terms of the agreement, GEP should not "benefit" by setting aside the agreement. Amahlo wishes to have its rights preserved and contends that an order that it pay back any money would be unfair. The argument appears to be that because the application was only brought after performance had taken place, it was unreasonably delayed and should be dismissed.
27. I must therefore decide, firstly, whether the delay was unreasonable, and secondly, if I do declare the decisions unlawful, what relief would be just and equitable. In considering relief, I must also consider whether GEP has established its entitlement to the repayment of the amount it claims.

DELAY

28. GEP requested the forensic report in August
2020. It was unable to institute proceedings against Amahlo until the report was complete. That would have been premature.
29. It appears that there was some delay between the receipt of the complaints in October 2019 and the request for the investigation, which was ten months later. GEP does not explain why it waited so long, and in fact denies that the delay was undue. It was submitted by counsel that part of the problem was the confusion caused by the State of Emergency declared in March 2020 in response to the Covid-19 pandemic, which caused inconvenience and a need to find new ways to work.
30. The forensic report appears to have taken some 16 months to produce. There is no detailed explanation of why it took that length of time.

31. Amahlo claims in its response to GEP's rule 35(12) notice that it is unable to produce supporting documents because of effluxion of time. Of course this claim cannot apply to the period when the forensic report was being produced. It is also doubtful at the time when the answering affidavit was being produced. Documents dating back to 2016 ought to have been available, as the Income Tax Act 58 of 1962 requires such documents to be retained for five years after a return is submitted.
32. Amahlo contends that the effective date from which to evaluate whether there was an unreasonable delay is the date on which the decisions are taken. It therefore contends that the application is six years too late and therefore that the delay is unreasonable.
33. This is clearly not the case. The effective date is the date on which GEP became aware that the decision may be problematic. This is at the earliest October 2019.
34. GEP contended that the effective date is the date on which the report was produced. My view is that it must have been earlier, at some point between the receipt of the complaint and the decision to commission the report. For purposes of this judgment it is not necessary to decide the exact date.
35. Both parties rely on the decision of the Constitutional Court in *Buffalo City Metropolitan Municipality v ASLA Construction (Pty) Limited*[3] ("Buffalo City") in support of their argument regarding delay.
36. The test set out in *Buffalo City* is a two-stage enquiry, in which a court first determines whether the delay was undue and secondly whether the court should nevertheless entertain the application.[4]
37. An applicant must provide an explanation for the whole of the delay.[5] A court may exercise its discretion to overlook even an unreasonable delay, and in doing this must consider factors including prejudice to the parties, the consequences of setting the decision aside, the merits of the challenge and the extent of the alleged illegality. The approach is flexible and requires an evaluation of all relevant factors.[6]
38. The Constitutional Court in *Buffalo City* also intimates that clear unlawfulness of the decision may well be an overriding factor.[7] The objectives of the delay rule are to be balanced with the purpose of declaring unlawful conduct unlawful.[8]
39. The purpose of the delay rule is to provide certainty. It also includes an element of fairness to those affected by the impugned decision. The purpose of declaring unlawful conduct unlawful is to uphold the rule of law and ensure that public power is exercised lawfully. Procedural defects should not, without more, permit unlawful conduct by public decision makers remain intact.
40. As Skweyiya J stated in *Khumalo and Another v MEC for Education, KwaZulu-Natal*,[9]

In the previous section it was explained that the rule of law is a founding value of the Constitution, and that the state functionaries are enjoined to uphold and protect it, inter alia, by seeking the redress of their departments' unlawful decisions. Because of these fundamental commitments, a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power.

41. In addition, functionaries who act unlawfully, and service providers who benefit from unlawful actions, should not be rewarded with impunity simply by the fact that the unlawfulness has not been detected for a period of time.
42. In this case, GEP has not provided a full explanation of the entire period between receiving a complaint in October 2019 and instituting proceedings in April 2022. However, although GEP did not act as if the issue was urgent, it is clear that it did not sit on its hands and do nothing. I am satisfied that the delay was not unreasonable.
43. Even if I had found that the delay was unreasonable, I consider that the patent unlawfulness of the decisions requires me to condone the delay and to deal with the merits of the review.

JUST AND EQUITABLE RELIEF

44. I have already found that GEP has demonstrated that the decisions are unlawful and therefore unconstitutional. In terms of section

172(1)(a) of the Constitution^[10] I must therefore declare them invalid. The question then is what consequential relief is just and equitable.

45. GEP contends that it is just and equitable to order the repayment of R59 762 578.46, which is the amount, according to the forensic report, that Amahlo was paid. Alternatively, it submits that the surplus paid to Amahlo on its calculations based on Amahlo paying 142 students per month a stipend of R1 500 per month, is R52 343 964, which should be recovered.
46. Amahlo simply contends that there is no surplus and that it has performed, without being able to substantiate these allegations. If Amahlo is an innocent party, it still may not benefit from the unlawful contract.^[11] The default position on a finding that a decision is invalid is that the consequences must be corrected.^[12]
47. In this case the correction of the consequences of the invalid contract would require that GEP would be refunded the money it has unlawfully paid in terms of the contract. Amahlo has not shown any reason why that relief should not be granted. It has not taken the court into its confidence at all about what its profits from the project were, what it actually expended and to whom. It simply submits that ordering repayment would not be just and equitable. Without any factual support for that submission, I am unable to agree.

48. I see no reason then to make any order other than that Amahlo must repay the money it received, less the stipends paid. The calculation in Amahlo's favour is that this was paid every month to 142 students, and that is the basis on which the amount to be repaid will be determined.

CONCLUSION

49. There was no submission that any unusual costs order is called for. I therefore find that costs must follow the results.
50. I make the following order:
1. The following decisions are declared unlawful and invalid, and are set aside:
 - 1.1. GEP's decision to appoint Amahlo as co-ordinator of Project Vuthela and approve an initial grant of R2,400,000;
 - 1.2. the conclusion of the Memorandum of Agreement, and the resultant appointment of Amahlo as the co-ordinator of Project Vuthela, and
 - 1.3. the decision to change Amahlo's scope of obligations through the conclusion of an addendum to the Memorandum of Agreement by reducing the number of job opportunities that Amahlo had to deliver.
 2. Amahlo is ordered to pay back to GEP the amount of R52 343 964.
 3. Amahlo shall pay the costs of this application, including two counsel where so employed.

S. YACOOB

JUDGE OF THE HIGH COURT

Appearances

Counsel for the appellant: L Haskins

Instructed by:

Edward Nathan Sonnenbergs

For the respondent:

J W Kloek

Instructed by:

Scalco Attorneys Incorporated

Date of hearing:

02 October 2023

Date of judgment:

28 December 2023

[1] 2018

(2) SA 23 (CC)

[2] Act 1 of 1999

[3] 2019

(4) SA 331 (CC)

[4] At [48]

[5] At [52]

[6] At [54]

[7] At [66]

[8] At [68]

[9] 2014

(5) SA 579 (CC) at [45]

[10] Constitution of the Republic of South Africa, 1996

[11] Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others 2022 (5) SA 56 (SCA) at [42]

[12] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014

(4) SA 179 at [30]

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